COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF EDWARDS v. THE UNITED KINGDOM

(Application no. 13071/87)

JUDGMENT

STRASBOURG

16 December 1992

In the case of Edwards v. the United Kingdom[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")[**] and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr Thór VILHJÁLMSSON,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr C. RUSSO,
Mr J. DE MEYER,
Mr I. FOIGHEL,
Mr F. BIGI,
Sir John FREELAND,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 29 June and 25 November 1992,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court on 13 September 1991 by the European Commission of Human Rights ("the Commission") within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 13071/87) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) on 29 September 1986 by Derek Edwards, a British citizen.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision from the Court as to whether the facts of the case disclosed a breach by the respondent State of its obligations under

[*] The case is numbered 79/1991/331/404. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[**] As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

Article 6 paras. 1 and 3 (d) and Article 13 (art. 6-1, art. 6-3-d, art. 13) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 28 September 1991, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr J. Cremona, Mr Thór Vilhjálmsson, Mr F. Matscher, Mr R. Macdonald, Mr C. Russo, Mr I. Foighel and Mr F. Bigi (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr L.-E. Pettiti and Mr J. De Meyer, substitute judges, replaced Mr Cremona whose term of office had expired and whose successor had taken up his duties before the hearing and Mr Macdonald who was unable to take part in the further consideration of the case (Rules 2 para. 3, 22 para. 1 and 24 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government of the United Kingdom ("the Government"), the Delegate of the Commission and the applicant's representative on the organisation of the procedure (Rules 37 para. 1 and 38). In accordance with the President's orders, the Registrar received, on 7 February 1992, the applicant's and the Government's memorials, and, on 10 June 1992, the applicant's claims under Article 50 (art. 50). By letter of 8 April 1992 the Secretary to the Commission informed him that the Delegate would submit his observations at the hearing.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 June 1992. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government
  Mrs D. BROOKS, Foreign and Commonwealth Office, *Agent*,
  Mr D. PANNICK, Q.C., *Counsel*,
  Mr R. HEATON, *Adviser*;
- for the Commission
  Mr F. ERMACORA, *Delegate*;
- for the applicant
  Mr G. CLARKE, *Counsel*,
  Mr J.K. CAMPBELL (Freeman Johnson), Solicitor.

The Court heard addresses by Mr Pannick for the Government, by Mr Ermacora for the Commission and by Mr Clarke and Mr Campbell for the applicant, as well as replies to questions put by the Court and by two of its

members individually. Various documents were filed by the applicant in the course of the hearing.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

A. The trial and appeal proceedings

6. On 9 November 1984 the applicant was convicted at Sheffield Crown Court, inter alia, of one count of robbery and two counts of burglary. The jury's decision was by a majority verdict of ten to two. He received a sentence of imprisonment of ten years for the robbery, and two sentences of eight years each for the burglary offences. All three sentences were to be served concurrently.

The evidence against the applicant consisted of detailed oral admissions that he had allegedly made to the police concerning his involvement in the three offences. According to the police he was questioned on three separate occasions and contemporaneous notes were taken of his statements. However, he had declined to sign them.

His defence during the trial was to maintain that these statements had been concocted by the police. He protested his innocence pointing out that he had not denied his numerous misdeeds in the past. The only witnesses called by the defence during the trial were the two police officers who had interviewed him.

7. Leave to appeal against the sentence but not the conviction was granted by a single judge of the Court of Appeal (Criminal Division) on 5 February 1985. On 21 May 1985 the substantive appeal against sentence was dismissed by the full court.

8. The victim of the robbery (Miss Sizer) which took place on 14 April 1984 was a lady of 82 years of age who was awakened from her sleep to find a man standing over her. Before having her hands tied behind her back and being blindfolded she was able to take a quick glance at him. She remained tied up until she was freed the next morning. In a statement to the police she gave a description of the man which corresponded with the applicant and stated that she thought she would recognise him again. She was not called as a witness during the trial but her written statement was read to the jury.

The two counts of burglary related to separate incidents which occurred on 19 April and 10 June 1984 also involving the home of an elderly woman.

On the latter occasion the police arrested the applicant's co-defendant in the vicinity. It was his statement to the police which led to the applicant's arrest.

9. On 16 May 1985, the applicant petitioned the Secretary of State for the Home Department with complaints against police officers who had investigated his case and given evidence at his trial. An independent police investigation was ordered in the course of which certain facts came to the applicant's attention (see paragraphs 11-13 below). On 3 December 1985, the applicant applied for leave to appeal against conviction out of time. The police report (the Carmichael report), dated 5 December 1985, was delivered to the Police Complaints Authority which directed it to the Director of Public Prosecutions. The report was requested by the applicant's advisers but its disclosure was refused on the grounds of public interest immunity.

In February 1986, the Director of Public Prosecutions decided that there was insufficient evidence to support criminal charges against the police officers, but recommended that disciplinary charges be brought against three police officers. At the disciplinary hearing, on 13 to 15 June 1988, the tribunal decided that there was no case to answer and dismissed the charges.

B. Reference by the Secretary of State to the Court of Appeal

10. On 21 March 1986, the Secretary of State for the Home Department referred the applicant's case to the Court of Appeal (Criminal Division) under section 17 (1)(a) of the Criminal Appeal Act 1968 ("the 1968 Act"; see paragraphs 19 and 20 below). The reference was heard on 18 July 1986 and judgment delivered on the same date.

11. The applicant submitted to the Court of Appeal that the verdict should be set aside as unsafe and unsatisfactory because of certain shortcomings in the prosecution case, in particular, that certain information had been withheld by the police. At the trial one of the police witnesses had stated under cross-examination that no fingerprints were found at the scene of the crime. In fact two fingerprints had been found which later turned out to be those of the next door neighbour who was a regular visitor to the house. The applicant had not been informed of this by the prosecution before his trial.

It was argued by the applicant that the police officer had told lies and that his veracity as regards the admission statements was thus called into question.

The Court of Appeal rejected this submission as follows:

> "We do not accept that interpretation of Detective Sergeant Hoyland's evidence. We think quite plainly what he was indicating there and intended to indicate was that no fingerprints relating to either of the two alleged burglars were discovered at the scene: neither the fingerprint of Rose nor the fingerprint of Edwards, the present appellant.

> We do not think, had the matter been carried further, it would have been demonstrated that Hoyland was a person who to that extent could not be believed on his own."

12. A further shortcoming complained of by the applicant related to the fact that the police had shown two volumes of photographs of possible burglars (including a photograph of the applicant) to the elderly victim of the robbery who said that she had caught a fleeting glimpse of the burglar. Her statement, read to the jury, said that she thought she would be able to recognise her assailant. Yet she did not pick out the applicant from the photographs.

This fact was not, however, mentioned by one of the police witnesses who had made a written statement which was read out to the jury and had not been indicated to the applicant before or during his trial. Counsel for the applicant submitted to the Court of Appeal that this omission cast such doubt on the evidence of the prosecution that it might have led the jury to believe that the confession statements had indeed been "manufactured" by the police as the applicant alleged.

The Court of Appeal also rejected this argument:

> "The fact that Miss Sizer had a fleeting glimpse of her assailant, and the fact that such identification as she did make was largely directed to other matters of identification rather than his features, leads us to believe that the jury would not have been influenced to act other than they did if they had the full story of the photographs and of Police Constable Esdon's activities with regard to that."

13. The Court of Appeal examined other impugned shortcomings which it did not consider to cast any doubt on the verdict. It was of the opinion that, even if these matters had been investigated, it would have made no difference to the outcome.

14. The court concluded as follows:

> "It is clear that there was some slipshod police work in the present case, no doubt because they took the view that here was a man who had admitted these crimes fully, and consequently there was very little need for them to indulge in a further verification of whether what he said was true. Although this is a matter which perhaps casts the police in a somewhat lazy or idle light, we do not think in the circumstances there was anything unsafe or unsatisfactory in the end about these convictions. Consequently, treating this matter as we have to according to section 17 of the Act, we think this appeal fails and must be dismissed."

15. Counsel for the applicant did not request the Court of Appeal to exercise its discretionary power to rehear evidence under section 23 of the 1968 Act (see paragraph 23 below) with a view, for example, to cross-examining the police officers who gave evidence at the applicant's trial. He considered that there was little prospect of such a request being granted. Nor did he request the court to order the production of the Carmichael report (see paragraph 9 above).

16. The applicant took advice concerning the possibility of appealing to the House of Lords but was informed, in an opinion of counsel dated 8

September 1986, that there were no grounds on which an appeal could successfully be pursued before the House of Lords.

He petitioned the Secretary of State for the Home Department on 3 June 1987 without success. He is currently serving a sentence of two years' imprisonment following his conviction on 26 March 1992 at Sheffield Crown Court on three counts of burglary.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Duty of prosecution to disclose certain information to the defence

17. Under the Attorney General's Guidelines issued in December 1981, the prosecution is obliged (subject to specified discretionary exceptions) to disclose to the defence "unused material", which includes all witness statements not enclosed in the bundle of statements served on the defence at the stage of committal of the case by the Magistrates' Court to the Crown Court.

The prosecution is also under a duty to inform the defence of any earlier written or oral statement of a prosecution witness which is inconsistent with evidence given by that witness at the trial (R. v. Clarke [1930] 22 Criminal Appeal Reports 58). Consequently where evidence of a prosecution witness is given before the court stating that the witness would recognise the accused again, and the prosecution knows that when shown a photograph of the accused the witness in fact failed to identify him, it is required to inform the defence of that fact.

For the purpose, among others, of ensuring compliance with this duty, the Court of Appeal has stated that all the statements which have been taken by the police should be put before counsel for the Crown, and that it should not be left to the police to decide which statements he is to receive (R. v. Fellowes, 12 July 1985).

B. Jury verdicts

18. A jury's verdict may be either unanimous or by a majority. It must be unanimous unless the trial judge, in accordance with section 17 of the Juries Act 1974, has directed, after at least two hours of unsuccessful jury deliberations, that a majority verdict will be accepted. A majority verdict will be effective if, where there are not less than eleven jurors, ten of them agree on the verdict, or, where there are ten jurors, nine of them agree. If the jury do not agree on either a unanimous or majority verdict, they may, at the discretion of the trial judge, be discharged, but such a discharge does not amount to acquittal and the accused may be tried again by a second jury. In

the event of a second jury disagreeing, it is common practice for the prosecution formally to offer no evidence.

C. Reference to the Court of Appeal by the Home Secretary

19. Section 17(1)(a) of the 1968 Act provides as follows:

> "Where a person has been convicted on indictment, or been tried on indictment ... the Secretary of State may, if he thinks fit, at any time either:
>
> (a) refer the whole case to the Court of Appeal and the case shall then be treated for all purposes as an appeal to the Court by that person;
>
> ..."

D. Powers of the Court of Appeal

20. The scope of the Court of Appeal's powers is set out in section 2 of the 1968 Act which provides:

> "(1) Except as provided by this Act, the Court of Appeal shall allow an appeal against conviction if they think:
>
> (a) that the conviction should be set aside on the ground that under all circumstances of the case it is unsafe or unsatisfactory;
>
> (b) that the judgment of the court of trial should be set aside on the ground of a wrong decision of any question of law; or
>
> (c) that there was a material irregularity in the course of the trial,
>
> and in any other case shall dismiss the appeal.
>
> Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred.
>
> (2) In the case of an appeal against conviction the Court shall, if they allow the appeal, quash the conviction.
>
> (3) An order of the Court of Appeal quashing a conviction shall, except when under section 7 below the appellant is ordered to be retried, operate as a direction to the court of trial to enter, instead of the record of conviction, a judgment and verdict of acquittal."

Section 7 of the 1968 Act enabled the Court of Appeal to order a retrial only where the conviction was quashed by reason of evidence received or available to be received under section 23 of the Act. In relation to appeals subsequent to 31 July 1989, section 7 has been amended to confer on the Court of Appeal a broader basis to order a retrial.

E. New evidence on appeal

21. Section 23 of the 1968 Act provides, inter alia, as follows:

> "(1) For purposes of this part of the Act, the Court of Appeal may, if they think it necessary or expedient in the interests of justice -
>
> (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case;
>
> (b) order any witness who would have been a compellable witness in the proceedings from which the appeal lies to attend for examination and be examined before the Court, whether or not he was called in those proceedings; and
>
> (c) ...
>
> (2) Without prejudice to subsection (1) above, where evidence is tendered to the Court of Appeal thereunder the Court shall, unless they are satisfied that the evidence, if received, would not afford ground for allowing the appeal, exercise their power of receiving it if -
>
> (a) it appears to them that the evidence is likely to be credible and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
>
> (b) they are satisfied that it was not adduced in those proceedings but there is a reasonable explanation for the failure to adduce it.
>
> (3) ..."

It falls to the court to determine, if necessary, claims by the Crown that documents should not be disclosed on the grounds of public interest immunity (see, inter alia, R. v. Judith Ward, judgment of the Court of Appeal (Criminal Division) of 8 June 1992).

22. The approach to be adopted by the Court of Appeal when considering under section 2(1)(a) of the 1968 Act whether a trial verdict was unsafe or unsatisfactory was discussed by the Appellate Committee of the House of Lords in the context of a section 17 reference in Stafford v. Director of Public Prosecutions [1974] Appeal Cases 878. Viscount Dilhorne, with whom the other members of the Appellate Committee agreed, stated:

> "I do not suggest that in determining whether a verdict is unsafe or unsatisfactory, it is a wrong approach for the court to pose the question - 'Might this new evidence have led to the jury returning a verdict of not guilty?' If the court thinks that it would or might, the court will no doubt conclude that the verdict was unsafe or unsatisfactory ... It would, in my opinion, be wrong for the court to say: 'In our view this evidence does not give rise to any reasonable doubt about the guilt of the accused. We do not ourselves consider that an unsafe or unsatisfactory verdict was returned but as the jury who heard the case might conceivably have taken a different view from ours, we quash the conviction' for Parliament has, in terms, said that the court should only quash a conviction if, there being no error of law or material irregularity at the trial,

> 'they think' the verdict was unsafe or unsatisfactory. They have to decide and Parliament has not required them or given them power to quash a verdict if they think that a jury might conceivably reach a different conclusion from that to which they have come. If the court has no reasonable doubt about the verdict, it follows that the court does not think that the jury could have one; and, conversely, if the court says that a jury might in the light of the new evidence have a reasonable doubt, that means that the court has a reasonable doubt."

23. The Court of Appeal has held that the powers under section 23 of the 1968 Act extend to rehearing evidence which has already been given at the trial, if this is necessary or expedient in the interests of justice. The court has also held that it has a general power under section 23 (1) to admit further evidence, not restricted to the circumstances set out in section 23 (2) (R. v. Lattimore and others [1976] 62 Criminal Appeal Reports 53). However it is unusual for the Court of Appeal to exercise that power since it is reluctant to substitute its own findings of fact for those of the jury which has already seen and heard the relevant witness. In practice, the exercise of the power to receive evidence is thus mainly confined to fresh evidence which has arisen since the trial and which the jury did not have the benefit of hearing. No statistics are available on the frequency with which the power to rehear evidence is exercised.

24. In March 1991 the Secretary of State for the Home Department announced the appointment of a Royal Commission on Criminal Justice which is expected to consider, inter alia, the general application of the 1968 Act.

PROCEEDINGS BEFORE THE COMMISSION

25. In his application before the Commission (no. 13071/87) lodged on 29 September 1986, the applicant complained that he had not received a fair trial, in breach of Article 6 para. 1 (art. 6-1) of the Convention and, in particular, that he was denied the right to cross-examine police witnesses on the basis of the new evidence which had come to light, contrary to Article 6 para. 3(d) (art. 6-3-d). He further complained that he was denied an effective remedy in respect of his complaints in breach of Article 13 (art. 13).

26. The application was rejected by the Commission on 7 December 1987 for failure to comply with the six months' rule contained in Article 26 (art. 26). On 13 July 1988 the President of the Commission restored the case to the list when the applicant showed that he had sent a letter to the Secretariat which had been registered by the prison authorities as having been posted but was not received.

27. On 9 October 1990 the Commission declared the application admissible. In its report of 10 July 1991 (Article 31) (art. 31) it concluded:

- by eight votes to six, that there had been no violation of paragraph 1, read in conjunction with paragraph 3 (d) of Article 6 (art. 6-1, art. 6-3-d);

- by twelve votes to two, that no separate issue arose under Article 13 (art. 13) in the present case.

The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

28. At the hearing on 24 June 1992 the Government invited the Court to conclude that there was no breach of the Convention in the applicant's case.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 (art. 6)

29. The applicant complained that he did not receive a fair trial, in breach of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d), the relevant parts of which read:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ...
>
> 2. ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

30. He submitted that the trial proceedings were unfair because of the failure of the police to disclose to the defence (1) the fact that one of the victims, who had made a statement that she thought she would be able to

[*] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 247-B) of Series A of the Publications of the Court, but a copy of the Commission's report is available from the registry.

recognise her assailant, had failed to identify the applicant from a police photograph album (see paragraph 12 above) and (2) the existence of fingerprints which had been found at the scene of the crime (see paragraph 11 above). If his counsel had been aware of these facts he would have been able to attack the credibility of police testimony. Bearing in mind that this was the main evidence against him there existed a possibility that one more juror might have been persuaded that he was innocent which would have led to his acquittal (see paragraphs 6 and 18 above). As a result, the defence was denied an adequate opportunity to examine the police witnesses and was not on an equal footing with the prosecution as required by paragraph 3 (d) of Article 6 (art. 6-3-d).

In the applicant's view the proceedings before the Court of Appeal did not remedy the defects at the trial since it neither heard the police witnesses nor called for the production of the report of the independent police investigation (the Carmichael report) which had not been disclosed to his legal advisers (see paragraph 9 above). In consequence, he had two incomplete hearings before two separate courts.

31. The Government maintained that, in determining whether there had been unfairness, the proceedings must be considered as a whole including those before the Court of Appeal. The applicant who had been provided with all the relevant information concerning the undisclosed facts had every opportunity, through his lawyer, to submit to the Court of Appeal that his conviction should be quashed. Moreover that court had examined his conviction in the light of the new evidence thoroughly and conscientiously but had concluded that it should be upheld. It was not open to the European Court to substitute its judgment on the facts for that of the Court of Appeal. Finally the Government contended that Article 6 para. 3 (d) (art. 6-3-d) was not relevant to the issue of the non-disclosure of evidence to the defence which fell more appropriately to be considered under paragraph 1 of Article 6 (art. 6-1).

32. The Commission was of the view that paragraph 3 (d) (art. 6-3-d) was relevant to the applicant's complaint but concluded that, having regard to the proceedings as a whole, there had been no breach of Article 6 para. 1 read in conjunction with this provision (art. 6-1, art. 6-3-d).

33. The Court recalls that the guarantees in paragraph 3 of Article 6 (art. 6-3) are specific aspects of the right to a fair trial set forth in paragraph 1 (art. 6-1) (see, as the most recent authority, the T. v. Italy judgment of 12 October 1992, Series A no. 245-C, p. 41, para. 25). In the circumstances of the case it finds it unnecessary to examine the relevance of paragraph 3 (d) (art. 6-3-d) to the case since the applicant's allegations, in any event, amount to a complaint that the proceedings have been unfair. It will therefore confine its examination to this point.

34. In so doing, the Court must consider the proceedings as a whole including the decision of the appellate court (see, amongst other authorities,

the Helmers v. Sweden judgment of 29 October 1991, Series A no. 212, p. 15, para. 31). Moreover it is not within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (see, inter alia, the Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, para. 33).

35. The applicant's conviction was based mainly on police evidence, which he contested, that he had confessed to the offences. It subsequently came to light that certain facts (see paragraphs 11 and 12 above) had not been disclosed by the police to the defence which would have enabled it to attack the credibility and veracity of police testimony.

36. The Court considers that it is a requirement of fairness under paragraph 1 of Article 6 (art. 6-1), indeed one which is recognised under English law, that the prosecution authorities disclose to the defence all material evidence for or against the accused and that the failure to do so in the present case gave rise to a defect in the trial proceedings.

However, when this was discovered, the Secretary of State, following an independent police investigation, referred the case to the Court of Appeal which examined the transcript of the trial including the applicant's alleged confession and considered in detail the impact of the new information on the conviction (see paragraphs 11-14 above).

37. In the proceedings before the Court of Appeal the applicant was represented by senior and junior counsel who had every opportunity to seek to persuade the court that the conviction should not stand in view of the evidence of non-disclosure. Admittedly the police officers who had given evidence at the trial were not heard by the Court of Appeal. It was, none the less, open to counsel for the applicant to make an application to the Court - which they chose not to do - that the police officers be called as witnesses (see paragraph 15 above).

38. In the course of the hearing before the European Court the applicant claimed, for the first time, that without the disclosure of the Carmichael report to the applicant or to the Court of Appeal the proceedings, considered as a whole, could not be fair (see paragraph 9 above). However it is not disputed that he could have applied to the Court of Appeal for the production of this report but did not do so. It is no answer to the failure to make such an application that the Crown might have resisted by claiming public interest immunity since such a claim would have been for the court to determine (see paragraph 21 above).

39. Having regard to the above, the Court concludes that the defects of the original trial were remedied by the subsequent procedure before the Court of Appeal (see, in this respect, the Adolf v. Austria judgment of 26 March 1982, Series A no. 49, pp. 17-18, paras. 38-41 and, mutatis mutandis,

the De Cubber v. Belgium judgment of 26 October 1984, Series A no. 86, p. 19, para. 33). Moreover, there is no indication that the proceedings before the Court of Appeal were in any respect unfair.

Accordingly there has been no breach of Article 6 (art. 6).

II. ALLEGED VIOLATION OF ARTICLE 13 (art. 13)

40. Before the Court the applicant accepted the Commission's opinion that there had been no breach of Article 13 (art. 13) and abandoned this complaint. It is therefore not necessary for the Court to examine it.

FOR THESE REASONS, THE COURT

1. Holds by seven votes to two that there has been no violation of Article 6 (art. 6);

2. Holds unanimously that it is not necessary to examine the complaint under Article 13 (art. 13).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 December 1992.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mr Pettiti;

(b) dissenting opinion of Mr De Meyer.

R.R.
M.-A.E

DISSENTING OPINION OF JUDGE PETTITI

(Translation)

I did not join the majority in voting that there had not been a breach, as in my opinion there was an undeniable violation of Article 6 (art. 6) of the European Convention on Human Rights.

Firstly, because the Court of Appeal prejudged what the jury's decision would have been if they had had to decide and, secondly, because the essential question raised by the Edwards case was that of the principle of public interest immunity, which in English law allows the prosecution, in the public interest, not to disclose or communicate to the defence all the documents in its possession and to "reserve" some of them. Such non-disclosure took place in the Crown Court. The European Court made no express statement of its views on this point and its silence might be understood as approval of this principle, which is not the case. The Court had regard primarily to the failure by the defence to rely on this ground of appeal.

To be sure, it is understandable that the plea of "defence secrets" or "state secrets" should be invoked at the stage of duly authorised telephone taps (see the European Court's judgments in the Klass, Malone, Huvig and Kruslin cases). But once there are criminal proceedings and an indictment, the whole of the evidence, favourable or unfavourable to the defendant, must be communicated to the defence in order to be the subject of adversarial argument in accordance with Article 6 (art. 6) of the Convention. It is conceivable that a hearing may be held in camera so as to protect defence secrets or state secrets. In the Edwards case such a secret was not even involved; it was simply a question of documents and items of criminal evidence in an ordinary case to the effect that Miss Sizer had not recognised the applicant and that the police had neglected to investigate the fingerprints.

In his memorial the applicant made the following pertinent observations:

> "At present the law of England and Wales permits the use in evidence of uncorroborated and disputed confession statements provided that the trial judge gives a suitably worded warning to the jury in relation to the confession. A conviction can be founded on such a confession. The law in relation to this matter is presently under review by a Royal Commission.
>
> Even if the jury did not accept such a submission, the fact of Miss Sizer's failure to identify the applicant could itself have raised a reasonable doubt as to the identification of the applicant as the offender and accordingly a reasonable doubt as to his guilt.
>
> The applicant asks the Court to note that the jury convicted him by a majority of ten to two, which indicates that two of the jurors entertained reasonable doubts as to the applicant's guilt. Under domestic law, the applicant could not have been convicted if

three or more jurors had entertained such doubt. It would have required only one more juror to entertain reasonable doubt in order for the applicant to be acquitted. The evidence which was withheld from the applicant and the jury might have produced such doubt in the mind of one more juror.

The fact that Miss Sizer had not identified the applicant was material obtained by the prosecution but not used by it in its presentation of the case. As such, it should have been disclosed to the applicant under the Attorney General's Guidelines and applying the principles of domestic law stated in R. v. Bryant and Dickson [1946] 31 Criminal Appeal Reports 146 and R. v. Clarke [1930] 22 Criminal Appeal Reports 58.

The fact that Miss Sizer had failed to identify the applicant, which fact was known to the police before the trial, was unfairly, and in breach of paragraphs 1 and 3 (d) of Article 6 (art. 6-1, art. 6-3-d), withheld from the applicant.

...

In English criminal proceedings, the prosecution is required to disclose information of the kind referred to above to the defence. It cannot be denied that such information was not disclosed to the applicant in this case. The United Kingdom has failed to put forward any explanation or justification for this failure to adhere to principles of domestic law which ought, if adhered to, to secure compliance with Article 6 (art. 6)."

The concealment of exonerating evidence and in other cases the fabrication of evidence have plagued police investigations (remember the Birmingham Six and the Ward case).

This shows the importance of the assessment of such a situation in criminal proceedings, and the reservations called for by the decision of the Court of Appeal.

As the defence submitted, the essential point was the credibility of the police officers. Before this Court it argued as follows:

"In those circumstances, it was vital for Mr Edwards to know that, when shown a photograph of the various persons including himself (Mr Edwards), Miss Sizer had failed to pick out Mr Edwards as the offender ...

... If I may leave the trial at this stage and move to the Court of Appeal procedure, the applicant accepts the well- established principle in the case-law of this Court that in considering the fairness of trial procedure under Article 6 (art. 6), the criminal proceedings taken as a whole must be examined. It is also, however, clear that Article 6 (art. 6) requires a tribunal to carry out a fair and public hearing. In this case no one tribunal considered the case fully and with reference to all of the available material.

The submission of Mr Edwards is that the end result of the procedure, taking the trial and the appeal as one sequence of procedure, was a fragmentary procedure. Neither the individual elements of that procedure nor the procedure as a whole can be described as full and fair.

Mr Edwards had two incomplete hearings before two separate courts. The trial hearing was an incomplete hearing in that evidence available to the prosecution was not made available to Mr Edwards. The Court of Appeal was similarly an incomplete hearing. Mr Edwards disagrees with the submission of the United Kingdom that all

relevant material was before the Court of Appeal. Mr Edwards reminds the Court that the police conduct of the case against him was investigated by Detective Superintendent Robert Carmichael of the Humberside police force. That investigation followed upon complaints made by Mr Edwards himself about the conduct of the police.

Superintendent Carmichael concluded his report in December 1985. The Carmichael report was submitted to the Police Complaints Authority which in turn submitted the report to the Director of Public Prosecutions. The submission of the report led to the referral of the case to the Court of Appeal by the Secretary of State for Home Affairs."

The Carmichael report should not have been protected by any immunity, and should have been disclosed.

With respect to the failure by the defence to raise this ground of appeal in the Court of Appeal, this argument does not seem to me to be relevant. Such concealment is comparable to a ground of nullity for reasons of public policy in the continental system. Grounds of nullity can and must be raised by the court itself ex officio, even if the defence does not rely on them. In fact, one cannot leave to a possibly inexperienced defence alone the burden of ensuring respect for the fundamental procedural rule which prohibits the concealment of documents or evidence. In the continental system such a fault on the part of the police may lead to criminal proceedings for malfeasance in public office. Cases where evidence has been hidden from the trial court have left bitter memories in the history of justice.

It seems clear to me that the Court of Appeal should have raised this ground of nullity of the proceedings of its own motion and remitted the case to a jury without prejudging what that jury’s decision would have been, especially as the original jury had reached its decision by ten votes to two and one vote more would have meant an acquittal.

Under the European Convention an old doctrine such as that of "public interest" must be revised in accordance with Article 6 (art. 6).

The European Court has on numerous occasions stated that it is essential that proceedings are "adversarial" and the favourable and unfavourable evidence is subjected to adversarial examination (see inter alia the Kostovski, Cardot and Delta judgments). This means that the prosecution must communicate the evidence to the defence. For this reason I find that there was a violation of Article 6 (art. 6) in the present case.

DISSENTING OPINION OF JUDGE DE MEYER

It has not been disputed that, at the trial proceedings before the Sheffield Crown Court, the defence and the jury were not informed of the fact that fingerprints relating to a person other than the applicant and his co-defendant had been found at the scene of the robbery[1], nor of the fact that the victim of the robbery had not recognised the applicant from the photographs shown to her[2].

The failure of the police to disclose these facts to the defence and to the jury fundamentally vitiated the fairness of the trial. It was not remedied by the subsequent procedure before the Court of Appeal.

It is difficult to understand how the Court of Appeal could take it for granted that the jury would not have been influenced to act other than they did if they had had the full story[3]. There could of course be reasons to "believe" so, but there could also be reasons to believe that the jury might have taken another decision if they had known about the fingerprints and the photographs. It had moreover to be considered that, as was rightly observed by the minority of the Commission[4], the applicant would not have been convicted if only one more member of the jury had voted in his favour.

In these circumstances the Court of Appeal ought to have ordered a retrial[5].

For these reasons I am of the opinion that there has not been a fair trial in the present case.

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[1] Paragraph 11 of the judgment.
[2] Paragraph 12 of the judgment.
[3] Paragraphs 11-14 of the judgment.
[4] See the dissenting opinion of Mr Gözübüyük, Mr Weitzel, Mr Martinez and Mr Rozakis, Mrs Liddy and Mr Geus;
[5] See, on that point, the judgment of Lord Cross in Stafford v. the D.P.P., referred to at paragraph 42 of the Commission's report.