Michaelmas Term
[2010] UKSC 48
On appeal from: [2009] EWCA 2552

JUDGMENT

R *v* Maxwell (Appellant)

before

Lord Rodger
Lord Brown
Lord Mance
Lord Collins
Lord Dyson

DECISION GIVEN ON
17 November 2010

JUDGMENT GIVEN ON
20 JULY 2011

Heard on 19 and 20 July 2010

Appellant	*Respondent*
Patrick O’Connor QC Mathew Sherratt (Instructed by Harrison Bundey)	David Perry QC Louis Mably (Instructed by Crown Prosecution Service)

LORD DYSON

Introduction

1. The appellant and his brother, Daniel Mansell, were convicted of murder and two robberies at Leeds Crown Court on 27 February 1998. The appellant's tariff in respect of his life sentence for murder was set at 18 years. On 1 December 2009, the Court of Appeal (Criminal Division) (Hooper LJ, Cooke and Swift JJ) quashed the convictions following a reference on 25 November 2008 by the Criminal Cases Review Commission ("CCRC") on the ground that the convictions had been procured by gross prosecutorial misconduct on the part of the police.

2. The Court of Appeal then had to decide whether to order a retrial. Section 7(1) of the Criminal Appeal Act 1968 as amended by the Criminal Justice Act 1988 provides:

> "Where the Court of Appeal allow an appeal against conviction and it appears to the Court that the interests of justice so require, they may order the appellant to be retried"

3. After balancing the public interest in convicting those guilty of murder against the public interest in maintaining the integrity of the criminal justice system, the court decided to order a retrial. The question that arises on this appeal is whether they were right to do so.

Outline of the facts

4. What follows is the barest outline of the facts. A fuller account appears at paras 65 to 90 of the judgment of Lord Brown. The main prosecution witness at the trial was Karl Chapman. He is a professional criminal and a supergrass. In late 1995 and early 1996, Chapman and the appellant were together in prison. The appellant was serving an 8 year sentence for a series of robberies and Chapman was awaiting sentence, having pleaded guilty to more than 200 offences of robbery. On 3 June 1996, the appellant was released from prison. On 11 June 1996, a robbery took place at the home of two elderly brothers, Bert Smales aged 67 and Joe Smales aged 85. The incident was not reported to the police, but it was later established that the robbers were masked, used violence to extract money from the Smales brothers and stole more than £1,000.

5. On 13 October 1996, the Smales brothers were the victims of a second robbery committed in similar circumstances to the first. Both brothers were subjected to physical violence. Joe Smales sustained injuries to the head which resulted in a fractured jaw, internal bleeding and a fracture of the cervical spine. He died in hospital on 7 November 1996 from pneumonia and deep vein thrombosis which were the direct consequence of the attack.

6. Between December 1996 and April 1997, Chapman provided the police with information and witness statements implicating the appellant and Mansell. The appellant and Mansell were charged with the robberies of both of the Smales brothers and the murder of Joe Smales.

7. At the trial, Chapman's evidence (which occupied one week) was central to the prosecution case. The defence sought to discredit him by suggesting that he was expecting benefits of some kind from the police and that he therefore had an interest in securing the convictions of the appellant and Mansell. Chapman vigorously denied these suggestions.

8. Following the convictions, there were allegations in the local press that the police were planning to pay Chapman a large sum of money upon his release from prison. On the basis of these allegations, the appellant and Mansell applied for leave to appeal their convictions. Leave was refused by a single judge on 30 July 1998. The applications for leave to appeal were renewed in early February 1999 and adjourned on two occasions to allow the CPS to supply further information. On 5 November 1999, an *ex parte* hearing was held on a public interest immunity application by the prosecution. In the course of the hearing, senior police officers gave evidence to the effect that a reward of £10,000 had been set aside for Chapman, but that he was not aware of it. The Court of Appeal accepted this evidence and on 13 December 1999 dismissed the renewed applications for leave to appeal.

9. The next significant event was the decision by the CCRC to investigate the case. The North Yorkshire Police carried out detailed investigations into the activities of the police. Their report formed the basis of the CCRC report in November 2008. The findings of the report, which have not been challenged, reveal that the police systematically misled the court, the CPS and counsel by concealing and lying about a variety of benefits received by Chapman and his family. These included not only financial reward, but, *inter alia*, visits to brothels and permission to consume drugs in police company. Furthermore, allegations of violent attacks by Chapman were not investigated, still less the subject of prosecutions. The clear conclusion of the investigation by North Yorkshire Police was that a number of senior police officers involved in the Smales investigation had conspired to pervert the course of justice. They had deliberately concealed

information from the court; they had colluded in Chapman's perjury at trial; they had lied in response to enquiries following conviction; and they had perjured themselves in the *ex parte* leave hearing in the Court of Appeal. It was in the light of its findings that on 25 November 2008 the CCRC referred the case back to the Court of Appeal.

10. The appellant had meanwhile made a series of important admissions of guilt to different persons between October 1998 and September 2004. These are summarised by Lord Brown at paras 85 to 90 of his judgment. The Court of Appeal said that these admissions provided "clear and compelling" evidence of the appellant's guilt of the murder and the robberies. That assessment has not been challenged in the present appeal.

11. As I have said, the Court of Appeal allowed the appellant's appeal against conviction. They concluded that, if during the trial it had become clear that the trial court had been deliberately deceived about the circumstances relating to Chapman, the trial judge might well have stayed the prosecution as an abuse of process. Alternatively, the judge might have applied section 78 of the Police and Criminal Evidence Act 1984, and excluded the evidence of Chapman altogether, in which case the appellant and Mansell would have been acquitted. In these circumstances, the decision to quash the convictions was inevitable. More difficult was the question whether or not to order a retrial.

12. The question for the Court of Appeal was whether, in the light of the unchallenged findings of the CCRC and the clear and compelling evidence of the appellant's guilt of a shocking murder, the interests of justice required a retrial. In particular, the Court of Appeal had to decide whether the police misconduct so tainted the criminal process that it would on that account not be in the interests of justice to order a retrial. The arguments before us proceeded on the basis that, in substance, the issue for the Court of Appeal was whether a retrial would be an abuse of process analogous to the question whether a trial at first instance should be stayed on the grounds of abuse of process.

Retrials following prosecutorial misconduct

13. It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity

of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will "offend the court's sense of justice and propriety" (per Lord Lowry in *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, 74G) or will "undermine public confidence in the criminal justice system and bring it into disrepute" (per Lord Steyn in *R v Latif and Shahzad* [1996] 1 WLR 104, 112F).

14. In *Latif* at page 112H, Lord Steyn said that the law in relation to the second category of case was "settled". As he put it:

> "The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: *Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 A.C. 42 *Ex parte Bennett* was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in *Ex parte Bennett* conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."

15. The same principles have also been applied by the Court of Appeal when quashing a conviction on the grounds that it considers the conviction to have been unlawful by reason of an abuse of process. An example of such a case is *R v Mullen* [2000] QB 520 where the defendant was tried and convicted following his illegal deportation to England.

16. There has been some debate in academic literature about the scope and true rationale for the second category of abuse of process. I refer, for example, to the writings of distinguished commentators such as Professor Ashworth ("*Exploring the Integrity Principle in Evidence and Procedure"* in Essays for Colin Tapper, 2003) and Professor L-T Choo ("*Abuse of Process and Judicial Stays of Proceedings*", 2nd edition, 2008). Moreover, Mr Perry QC urged the court to adopt

the approach taken by the majority of the Canadian Supreme Court to abuse of process applications in *R v Regan* [2002] 1 SCR 297. Like Lord Brown, I see no reason to depart from the settled law as expounded by Lord Steyn in *Latif*.

17. The present case is not, however, an appeal against a refusal to stay criminal proceedings for abuse of process nor is it an appeal against the dismissal by the Court of Appeal of an appeal against conviction on the grounds that the conviction was unlawful by reason of an abuse of process. The Court of Appeal quite rightly allowed the appellant's appeal. The appeal to this court is against the decision to order a retrial.

18. The use of the words "may order" in section 7 of the 1968 Act shows that the Court of Appeal has a discretion to order a retrial following the quashing of a conviction on appeal if it appears to the court that the interests of justice so require. It is noteworthy that Parliament has not specified any of the factors that the Court of Appeal may (or indeed may not) take into account when deciding whether or not to order a retrial. Instead, Parliament has propounded a broad and uncomplicated test and has entrusted to the good sense of the Court of Appeal the task of deciding whether the interests of justice require a retrial, having regard to all the circumstances of the particular case. That is hardly surprising since the Criminal Division of the Court of Appeal is a specialist criminal court whose judges have considerable experience and expertise in criminal procedural and substantive law. All of them have had experience of conducting criminal trials and of making rulings in accordance with the law, fairness and justice.

19. The interests of justice is not a hard-edged concept. A decision as to what the interests of justice requires calls for an exercise of judgment in which a number of relevant factors have to be taken into account and weighed in the balance. In difficult borderline cases, there may be scope for legitimate differences of opinion. I do not believe it to be controversial that a decision under section 7 of the 1968 Act as to whether the interests of justice require a retrial calls for an exercise of judgment which should only be upset on appeal if it was plainly wrong in the sense that it is one which no reasonable court could have made or if the court took into account immaterial factors or failed to take into account material factors. It seems very likely that the reason why there has been no other appeal to the House of Lords or Supreme Court from a decision under section 7 is because of the expertise that the Court of Appeal has in deciding questions such as whether the interests of justice require a retrial and the difficulty of challenging such decisions on appeal.

20. Most appeals to the Court of Appeal where the court has to decide whether the interests of justice require a retrial do not raise any issue of prosecutorial misconduct. Typically, the court considers questions which include (but are not limited to) whether the alleged offence is sufficiently serious to justify a retrial;

whether, if re-convicted, the appellant would be likely to serve a significant period or further period in custody; the appellant's age and health; and the wishes of the victim of the alleged offence. I do not believe it to be controversial that the gravity of the alleged offence is an important relevant factor for the court to take into account when deciding whether to order a retrial in a case which is not complicated by prosecutorial misconduct.

21. In a case where the issue of prosecutorial misconduct is raised by an appellant as a reason for refusing a retrial, the Court of Appeal may treat the case as to some extent analogous to a second category application to stay a case. But the analogy should not be pressed too far. The question whether the interests of justice require a retrial is broader than the question whether it is an abuse of process to allow a prosecution to proceed (whether or not by retrial). I do not, therefore, agree with Lord Brown (para 98) that in each case the question is the same: what do the interests of justice require?

22. The gravity of the alleged offence is plainly a factor of considerable weight for the court to weigh in the balance when deciding whether to stay proceedings on the grounds of abuse of process. At page 534D in *Mullen*, giving the judgment of the court Rose LJ said: "As a primary consideration, it is necessary for the court to take into account the gravity of the offence in question". It is unnecessary to engage with the academic criticism of this approach: see, for example, Professor Ashworth's article already cited at page 120. That is because, whatever the position may be in relation to an application to stay proceedings for abuse of process, it seems to me beyond argument that, when the court is deciding whether the interests of justice require a retrial, the gravity of the alleged offence must be a relevant factor. Society has a greater interest in having an accused retried for a grave offence than for a relatively minor one.

23. No case has been cited to us where the court has had to consider the relevance of prosecutorial misconduct in the original proceedings to the question whether the interests of justice require a retrial. It goes without saying that, when allowing the appeal in the present case essentially on the grounds of prosecutorial misconduct, the Court of Appeal could not rationally have concluded that the interests of justice required a retrial if the retrial would be substantially based on evidence which was the product of that very misconduct. But the prosecution say that their case at the retrial would not be based on that evidence at all. They rely on the admissions made on various occasions by the appellant and contend that this evidence is not tainted by the prosecutorial misconduct.

24. It is helpful to start by asking whether the interests of justice would require a retrial in circumstances where the prosecution evidence at the new trial would be incontestably free of taint. Let us suppose DNA evidence comes to light after the

appellant has been convicted which strongly points to his guilt; or an apparently credible independent witness comes forward and makes a statement implicating the appellant. Let us further suppose that the prosecution say that, if there were a retrial, they would only rely on the fresh evidence and would not adduce the tainted evidence. In deciding whether or not the interests of justice require a retrial, it is surely clear that the Court of Appeal would be entitled to disregard the earlier misconduct since it would have no effect at the retrial. The only justification for refusing a retrial on the grounds of the misconduct in such a case would be to mark the court's disapproval of that historical misconduct and to discipline the police. But that is not the function of the criminal courts. Thus, for example, in relation to a stay on the grounds of abuse of process where there has been prosecutorial misconduct, in *Bennett* at page 74H Lord Lowry said:

> "The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Accordingly, if the prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings merely "pour encourager les autres".

25. The same approach was recommended by the majority of ten (of twelve) members of the Royal Commission on Criminal Justice chaired by Viscount Runciman (July 1993). At paras 47 to 50 of chapter 10, there is a section headed "Appeals based on pre-trial malpractice or procedural irregularity". They said:

> "48. We are not unanimous on what should happen in cases of malpractice, ranging from serious breaches of PACE to fabricating a confession, where there is nevertheless other strong evidence of the defendant's guilt. Two of us think that if the pre-trial irregularity or defect is sufficiently serious materially to affect the trial but not to render the conviction unsafe, the Court of Appeal should retain the power to order a retrial or to quash the conviction depending on its view of the gravity of the defect. The rest of us believe that the Court of Appeal should not quash convictions on the grounds of pre-trial malpractice unless the court thinks that the conviction is or may be unsafe.
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> 49. In the view of the majority, even if they believed that quashing the convictions of criminals was an appropriate way of punishing police malpractice, it would be naïve to suppose that this would have any practical effect on police behaviour. In any case it cannot in their view be morally right that a person who has been convicted on abundant other evidence and may be a danger to the public should

> walk free because of what may be a criminal offence by someone else. Such an offence should be separately prosecuted within the system. It is also essential, if confidence in the criminal justice system is to be maintained, that police officers involved in malpractice should be disciplined….."

26. Does it make a material difference that (as in the present case) the evidence without which there would be no order for a retrial consists of admissions which the appellant would not have made but for the original misconduct which led to his conviction and failed appeal? The Court of Appeal considered that the fact that the admissions would not have been made but for the conviction which had been obtained by prosecutorial misconduct was a factor militating against a retrial; but it was no more than one of a number of relevant factors to be taken into account in the overall decision of whether the interests of justice required a retrial. In my view, the court was right to consider that the "but for" factor was no more than a relevant factor and that it was not determinative of the question whether a retrial was required in the interests of justice. It should not be overlooked that the appellant made the admissions entirely voluntarily, no doubt because he considered that it was in his interests to do so. As the court said, there were several relevant factors which had to be weighed in the balance before a final decision could be reached on the question of whether or not the interests of justice required a retrial. The weighing of the balance is fact-sensitive and ultimately calls for an exercise of judgement.

Appellant's criticisms of the Court of Appeal's decision

27. I now turn to the criticisms that Mr O'Connor makes of the approach of the Court of Appeal. I accept that a criticism can properly be made of para 62 where the court said:

> "62. *Grant* is not a case in which, to use Lord Brown's words in *Basdeo Panday*, 'but for an abuse of executive power, he would never have been before the court at all.' Putting the misconduct to one side, the appellant could have a fair trial (and probably did). Whilst helpful to the appellants, it should be remembered that *Grant* involved, as Laws LJ said a deliberate violation of 'a fundamental condition on which the administration of justice as a whole rests'.

28. The statement in para 62 in relation to *R v Grant* [2006] QB 60, [2005] 2 Cr App R 28 that it involved "a deliberate violation of 'a fundamental condition on which the administration of justice as a whole rests'" (ie legal professional privilege) suggests that the Court of Appeal considered that the present case

involved no deliberate violation of such a fundamental condition. If that is what the Court of Appeal meant, they were wrong. The conduct of the police in the present case was a gross violation of the appellant's right to a fair trial and a far worse case than *Grant* (like Lord Brown, I have considerable reservations as to whether that case was correctly decided).

29. But the real complaint in this case is that the court failed to take properly into account the fact that the proposed retrial evidence was the product of the misconduct. As Mr O'Connor QC he puts it in his written case, "the court would therefore be acting upon the fruit of the very misconduct at the heart of the case, which would be unconscionable and incompatible with the integrity of the court process". He also submits that the decision reached by the Court of Appeal was plainly wrong and should therefore be set aside by this court.

30. As one would expect, this experienced court carried out the balancing exercise precisely and with great care. At para 66, they identified the reasons why a retrial should not be ordered in the following terms:

> "There a good reasons why a retrial should not be ordered. They are:
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> (i) the nature and scale of the prosecutorial misconduct;
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> (ii) the fact that the misconduct infected both the trial and the first appeal;
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> (iii) the fact that the prosecution case was based more or less entirely on the evidence of Chapman and the appellants would not have been charged or tried in its absence;
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> (iv) the strong possibility that the trial would not have proceeded (being either aborted by the prosecution or stayed by the judge) if the circumstances of Chapman's treatment by the police had been made known to the prosecuting team;
>
> (v) the circumstances in which Maxwell's admissions were made, namely:
>
> (a) the first admission (to his solicitor) would not have been made had it not been for the conviction obtained by prosecutorial

misconduct. Having been made, it would never have come to light had it not been for the fact that, due to prosecutorial misconduct, the appeal failed and a subsequent investigation by the CCRC was necessary, in the course of which Maxwell waived privilege;

(b) the admissions made subsequently would not have been made had it not been for the unsuccessful appeal and (in the case of admissions to the North Yorkshire Police) the CCRC investigation necessitated by the prosecutorial misconduct;

(vi) both appellants have served 12.5 years in prison, a longer term than they would receive if they were found guilty of manslaughter, the offence which Maxwell is admitting."

31. At para 67, they said that they accepted the strength of these reasons. In other words, they were not merely reasons militating against a retrial, but they were strong reasons. But in carrying out the balancing exercise that they were required to carry out, they concluded that the public interest in convicting those guilty of murder outweighed the public interest in maintaining the integrity of the criminal justice system on the facts of this case. They acknowledged that the balancing exercise was difficult. That was because on the one hand, as Lord Brown has described in graphic detail, there had been appalling misconduct by the police. Had it been known at the time of the trial, it is almost certain that the appellant would not have been convicted. On the other hand, the court said, (i) the alleged offence, involving as it did the beating to death of an innocent and defenceless 85 year old man at his home in the course of a planned robbery, was particularly shocking and fully merited the minimum term of 18 years that was imposed by the trial judge and (ii) there was new and compelling evidence untainted by the prosecutorial misconduct. It is (rightly) accepted by Mr O'Connor that the proposed retrial evidence, if accepted, amounts to clear *prima facie* evidence of the appellant's guilt of the murder. He also accepts that the evidence is untainted by the misconduct except in the sense that the admissions would probably not have been made but for the misconduct.

32. Mr O'Connor suggests that (ii) indicates that the court lost sight of the fact that the new and compelling evidence would not have come into being but for the misconduct of the police. But I cannot accept this. In the immediately preceding paragraph, the court had carefully set out in para 66(v) the circumstances in which the admissions had come into being. In using the phrase "untainted by the prosecutorial misconduct" in para 67, what the court meant was that the evidence was not the product of the misconduct and it was not the intended result of that conduct. It is obvious that it could not have been in the contemplation of the police

that the appellant would make the admissions that he made. He made the admissions of his own free will for his own purposes. It is in that sense that the evidence was "untainted".

33. It is important to note the limited scope of the criticisms that Mr O'Connor makes of the court's approach. He accepts that the court was right to carry out a balancing exercise and that all of the factors set out in para 66 of the judgment of the court were relevant factors to be set in the scale against ordering a retrial. He does not contend that there were other relevant factors which the court left out of account. He also accepts that the public interest in convicting those guilty of grave crimes such as murder was an important factor in favour of a retrial. Apart from the point which I have dealt with at para 32 above, his sole criticisms are that the case against a retrial was so strong that no reasonable court could have ordered a retrial and that the court did not properly take into account that the admissions to be relied on at the retrial were the product of the misconduct.

34. I do not accept that the conclusion that was reached by the Court of Appeal was plainly wrong. They were faced with a difficult balancing exercise. In deciding what the interests of justice required, the Court of Appeal were right to respect the strength of the public interest in seeing that that those against whom there is *prima facie* admissible evidence that they are guilty of crimes, especially very serious crimes, are tried. This public interest is all the greater where, as in the present case, there is compelling evidence of guilt.

35. As regards the criticism that the court did not properly take into account the fact that the admissions were the product of the misconduct, in substance this is a complaint that the court did not place sufficient weight on this fact. But the court did identify it as a separate factor at para 66(v) of the judgment. This court, like any appellate court, is always slow to allow an appeal on the ground that the decision-maker failed to place sufficient weight on a relevant fact which it rightly took into account. It must be a rare case where this court would interfere with the exercise by the Court of Appeal of its power to order a retrial.

36. It is possible that a differently constituted Court of Appeal would have arrived at a different conclusion from that reached by the court in the present case. Different courts can legitimately differ as to the weight they accord to relevant factors. But this court should not interfere with the Court of Appeal's decision to order a retrial in this case on the grounds that they failed to accord sufficient weight to the "but for" factor unless we are satisfied that their decision was plainly wrong. This was a difficult case because on the one hand the police misconduct was so egregious and on the other hand the alleged offence was so shocking. I am in no doubt that this court should not interfere with the way the balance was struck by the court in this case. The decision was not plainly wrong.

37. There was a strong case for concluding that the interests of justice would be served on the facts of this case by requiring the appellant to face trial for the most serious of crimes and requiring the offending police officers to face disciplinary and possibly criminal proceedings. On the face of it, there is a strong case of conspiracy to pervert the course of justice and forgery. No explanation has been provided to the court as to why there have been no such disciplinary or criminal proceedings. I cannot help but think that, if the offending police officers had been disciplined and indeed prosecuted, the argument that a retrial based on the appellant's admissions would have been offensive to the court's sense of justice and propriety would have lost much of its force. In that way, the interests of justice would have been served. Society would have signalled its intense disapproval of the behaviour of the police. But the interests of society in having a fair trial of those against whom there is new and compelling evidence untainted by the misconduct would have been served by a retrial. To put it at its lowest, this was a tenable view to hold as to what the interests of justice required on the facts of this case. I do not consider that the question of whether the interests of justice required a retrial of this appellant should depend on the fortuity of whether the offending police officers were disciplined and/or prosecuted for their appalling misconduct.

38. In my view, the Court of Appeal were right to say that the balancing exercise in this case was difficult. But for the reasons that I have given, there was a strong case for ordering a retrial. More importantly, however, it has not been shown that that they erred in law in deciding to order a retrial. I would dismiss this appeal.

LORD RODGER

39. At the end of the hearing I inclined to the view that the appeal should be allowed. Having considered the matter further, I now agree with Lord Dyson that, for the reasons he gives, the appeal should be dismissed. I put the matter briefly in my own words only because the Court is divided.

40. Lord Brown and Lord Dyson have outlined the appalling history of misconduct by officers of West Yorkshire Police when the witness Karl Chapman was a resident informant of that force and right up until Mr Maxwell's first appeal to the Court of Appeal. That misconduct can be described as "prosecutorial misconduct", but it is important to notice that the Crown Prosecution Service and prosecuting counsel were lied to and duped just as much as the defence, the trial court and the Court of Appeal at the hearing of Mr Maxwell's first appeal. So this is not a case where the Crown Prosecution Service or prosecuting counsel abused their power, or indeed were in any way at fault in conducting the prosecution.

41. Given the catalogue of events, it is at first sight surprising that none of the police officers involved has been prosecuted or disciplined for his or her part in these events. The true position was uncovered only as a result of an investigation which was set in motion by the CCRC acting under section 19 of the Criminal Appeal Act 1995. The investigating officer carried out a parallel criminal and disciplinary investigation, the results of which were submitted to the Crown Prosecution Service and to the relevant police disciplinary authority. No proceedings of either kind were taken. The Court does not know the reasons for this, but it would be quite wrong to assume that they were anything other than entirely proper.

42. The investigating officer had to penetrate a closed world where police officers had been prepared to conceal the true position from the prosecuting authorities and the courts and where they had every incentive to conceal it from the CCRC investigation. Not surprisingly, therefore, at various points the Statement of Reasons indicates that evidence was obtained only in exchange for a waiver of any potential disciplinary action based on what the witness told the investigating officer. Waivers of disciplinary and prosecution proceedings as a result of statements made to the inquiry are a familiar feature of public inquiries into disasters of various kinds. They are the price that has to be paid for finding out what happened and learning the lessons for the future. Here such waivers may well have been necessary if the investigating officer was to achieve the purpose for which he had been appointed, viz, to discover whether there had been misconduct on the part of the police which would be a basis for referring Mr Maxwell's conviction to the Court of Appeal. In other words, Mr Maxwell's appeal may well have been made possible only because the investigating officer gave those waivers. So it would not be surprising if, as a result of the investigation, there were grounds for the Commission making the reference to the Court of Appeal, but there was no proper basis for the prosecuting or disciplinary authorities taking action against individual police officers.

43. Assuming – as the Court surely must – that the prosecuting and disciplinary authorities have acted properly, I am satisfied that the lack of action against the police officers concerned was not a relevant factor for the Court of Appeal to take into account in deciding whether to direct that Mr Maxwell should be retried.

44. As Lord Dyson emphasises, this appeal is only against the decision of the Court of Appeal to order a retrial. Lord Brown quotes the language of section 7(1) of the Criminal Appeal Act 1968 at para 62 of his judgment. Comparable language is to be found in section 6(1) of the Criminal Appeal (Northern Ireland) Act 1980 – but nowhere else. The language has been very carefully chosen to make it clear that the whole matter is one for the determination of the Court of Appeal. For my part, I would not gloss the crucial words of the test ("and the interests of justice so require"): the Court of Appeal is to ask itself whether it appears that the interests

of justice require it to order a retrial. As Lord Dyson observes, the assumption must be that Parliament left the question of a retrial to be decided on this broad basis by members of the Court of Appeal who could be expected to have knowledge and experience in these matters – and who, moreover, could be expected to be familiar with the relevant facts of the particular case from the proceedings which had led them to allow the appeal. Of course, if the Court of Appeal reached a decision on retrial which no reasonable Court of Appeal could have reached, then doubtless this Court could intervene to put matters right. But that is not the position in this case.

45. The Court of Appeal admitted that it had found the decision difficult. In para 66 it set out the factors against ordering a retrial and then went on, in paras 67 to 83, to describe what it saw as "the new and compelling" evidence against Mr Maxwell. Having done so, the Court of Appeal did not explicitly weigh the competing considerations. Initially, I was inclined to think that this was a flaw in the court's approach. But, on reflection, I am satisfied that it would be quite unfair to impute such a failure to the experienced members of the court when they have carefully alluded to the rival considerations. In the absence of any indication to the contrary, it must be assumed that the Court of Appeal duly weighed them and so reached the view that it should order that Mr Maxwell should be retried, even though no retrial was to be ordered in Mr Mansell's case.

46. Of course, if differently constituted, the Court of Appeal might have come to a different conclusion. And, clearly, Lord Brown would have done so – on the narrow ground that the present case falls within what he describes as the "but for" category of cases: "but for" executive misconduct, the defendant would not have been brought to this country and placed before the court; "but for" executive misconduct, the defendant would not have committed the crime for which he was to stand trial. Here, "but for" the misconduct of the police officers, the chances are that Chapman would not have given evidence against Mr Maxwell or that, if he had, he would have been discredited. So, "but for" their misconduct, Mr Maxwell would not have been convicted and so would not have made the statements on which the prosecution intends to rely in any retrial. In my view, however, that would be to take this line of reasoning too far. The statements were made by Mr Maxwell voluntarily and for his own purposes. Indeed, one of them was made for the purposes of the very investigation by the CCRC which led to his appeal being allowed. The use of those statements by the prosecution would involve no abuse of the trial court. The fact that the statements would not have been made but for the antecedent misconduct of the police is not enough to taint them – any more than it would taint, say, DNA evidence which was now available only by reason of advances made in research since Mr Maxwell was charged, or evidence of a witness who had come forward as a result of reading reports of the investigation into the misconduct of the West Yorkshire Police.

47. The fact that the statements would not have been made but for the police misconduct was a factor to be taken into account by the Court of Appeal in deciding whether the interests of justice required that it should order a retrial. That is precisely how the Court of Appeal treated it in para 66. Having taken that factor into account, it still appeared to the Court that the interests of justice required it to order a retrial. That was a decision which the Court of Appeal was entitled to reach and with which, accordingly, this Court is not entitled to interfere.

LORD MANCE

48. There was in this case the gravest police misconduct both before and at trial, and it was persisted in during the first set of appellate proceedings. Once revealed, it was inevitable that the appellant's conviction should be set aside on a further reference to the Court of Appeal. That does not resolve the question whether, having allowed the appeal, the Court of Appeal was justified in ordering a retrial.

49. Under Criminal Appeal Act 1968, section 7, it was for the Court of Appeal to decide as a matter of discretion whether there should be a retrial. The Court of Appeal, when allowing a conviction, has the power to order a trial, if "it appears to the Court that the interests of justice so require".

50. It is common ground that the exercise of discretion involved a balancing exercise. It is also common ground that the Court in its full and clear judgment on the point identified all relevant factors. Lord Dyson sets out the court's reasoning in paras 30 to 35. Like him, I consider that it is clear (in particular from the language of para 67 of the court's judgment) that the court weighed all of these factors in reaching its decision.

51. Essentially, the criticisms made of the Court's decision focus on (a) the seriousness of the police misconduct, (b) the fact that, but for such misconduct, there would have been no original trial and so the context in which the appellant made the admissions on which reliance is now placed would never have existed and (c) the submission that the Crown in proceeding against the appellant on the basis of those admissions is and would be, or be seen as, condoning or taking advantage of the police's misconduct.

52. On behalf of the appellant, it is argued that the Court of Appeal must either have failed to take such considerations sufficiently into account when performing the relevant balancing exercise or for some other reason simply reached a decision not open to it in their light. The latter (and as I see it probably also the former)

submission amounts to saying that the court's exercise of its discretion was one which no reasonable court could reach in the circumstances.

53. This is not an easy case. The egregious and persistent nature of the police misconduct involved invites a forceful response. But it is common ground that it is not the court's role to refuse a retrial under section 7 of the 1968 Act in order to discipline the Crown for the police's misconduct, and the fact that the police misconduct has not received the sanction it deserved is not a reason to depart from this stance. The court is however entitled to take into account the effects of ordering a re-trial, including any perception that might be created that the Crown condoned misconduct and any general discouragement of future misconduct that might be achieved.

54. It is not suggested that the admissions on which the Crown wishes to rely were made other than freely and voluntarily; and I do not myself see any basis for regarding the Crown, or for thinking that right-minded people would regard the Crown, in relying on them as condoning misconduct or as adopting "the approach that the end justifies any means" (see *R v Latif* [1996] 1 WLR 104, 113, per Lord Steyn). I also find unconvincing any suggestion that refusal to order a retrial in the present case would have any real incentive effect on police behaviour. Further, the court is entitled to bear in mind the effect on public confidence in the administration of justice if persons who have on their face of it admitted to very serious crimes (and who, if their admissions are true, perjured themselves at the original trial) are not retried (as they in fact said they wished when making the admissions) in order to establish the truth.

55. I have had the benefit of reading in draft all four of the judgments which my colleagues have prepared. Lord Brown in para 105 concludes that "Given, however, the 'but for' character of this case and the enormity of the unpunished police misconduct involved, it seems to me quite simply inappropriate that it should now be retried on fresh evidence" and that "Unless one is to say that in relation to serious crimes the 'but for' approach is to apply only in the context of wrongful extradition, it is difficult to think of any case where the stay principle would properly be invoked if not here".

56. However, I consider the present case to be significantly different from those involving extradition and entrapment to which Lord Brown refers. In *R v Horseferry Road Magistrates Court Ex p Bennett* [1994] 1 AC 42 and again *R v Mullen* [2000] QB 520, the government's wrongful act in bringing the relevant defendant within the jurisdiction was the very direct cause of his standing in the dock. In an entrapment case, the police act is one which leads directly to the commission of the alleged crime itself. In the present case, the alleged crime was

independent of any police act, and the admissions were made voluntarily of the appellant's own choice and for his own purposes.

57. It is true that the context in which the admissions were made would not have existed but for the police misconduct. But the voluntary element is important; it breaks the directness of the chain of causation and it relegates the police misconduct to the status of background. Indeed, in respect of one of the admissions, if the prior trial was part of the background at all, it appears to have been very remote background. The appellant's letter to Detective Inspector Steele of West Yorkshire Police dated 9 February 2000 making the admission describes how it came about:

> "Dear Mr Steele,
>
> We met some time ago at armley prison when you came to eliminate me from enquiries into the death of isabel grey.
>
> As you are no doubt aware I am currently serving a life sentence for the murder of Joe Smales and the robbery of Joe's brother Bert. I initially denied these offences, however I now fully admit my guilt.
>
> I watched you on television last night and decided to write and offer any help that I can give you, in your Quest to protect the old and vulnerable I have no ulterior motives for doing this and want nothing in return.
>
> If you could compile a detailed Questionaire I will willingly supply you with detailed answers.
>
> Best wishes
>
> Paul Maxwell"

58. I am not sure that I share Lord Brown's difficulty in conceiving of cases other than the wrongful extradition cases in which a 'but for' link with a proposed trial might require the court to refuse a fresh trial. Suppose in the present case that the police or prison authorities had improperly recorded conversations between the appellant and his solicitors after his original conviction, and had as a result discovered independent evidence (e.g. DNA evidence or another third party

witness) linking the appellant to the crime. In those circumstances, a re-trial could well be refused.

59. I would also reject any suggestion that the Supreme Court should treat the Court of Appeal as having reached a decision not reasonably open to any court on the present facts. On this aspect, as on others, I find compelling the judgment and conclusions of Lord Dyson. I also agree with Lord Rodger's supplementary observations.

60. For these reasons, I am unable to accept that the Court of Appeal erred in any way entitling the Supreme Court to interfere with its decision to order a re-trial.

LORD BROWN

61. Few of those urging upon the court a vindication of the rule of law could be less deserving of its benefits than this appellant. A professional criminal with a history of violent crime, he is almost certainly guilty of the murder and the two robberies of which he was convicted (together with his brother, Daniel Mansell) by the Crown Court at Leeds on 27 February 1998. These were shocking offences indeed, callous attacks upon elderly reclusive brothers in their own home, the second involving injuries of such severity as to occasion the elder brother's death within the month. The appellant's tariff (in respect of his life sentence for murder, imposed concurrently with twelve-year terms for the robberies) was set at eighteen years. It was not a day too long.

62. The 1998 convictions were, however, as later investigations by the North Yorkshire Police and the Criminal Cases Review Commission (CCRC) were all too clearly to demonstrate, procured by tainted evidence and prosecutorial misconduct of the gravest kind. Following a reference by the CCRC, the Court of Appeal (Criminal Division) (Hooper LJ, Cooke and Swift JJ) accordingly had no alternative but to quash them: [2009] EWCA Crim 2552, judgment of 1 December 2009. So much was by then undisputed. What *was* in dispute, however, and remains the central issue upon this further appeal, was whether or not the appellant should be retried pursuant to section 7(1) of the Criminal Appeal Act 1968. Section 7(1) provides:

> "Where the Court of Appeal allow an appeal against conviction and it appears to the Court that the interests of justice so require, they may order the appellant to be retried."

In the course of a thoughtful and thorough reserved judgment given by Hooper LJ the Court of Appeal:

> "reached the conclusion (not without difficulty) that the public interest in convicting those guilty of murder outweighs the public interest in maintaining the integrity of the criminal justice system. This was a shocking case and if there is new and compelling evidence untainted by the prosecutorial misconduct revealed by the findings of the North Yorkshire Police and the CCRC, we should order a new trial. In particular we bear in mind that the new and compelling evidence relied upon by the respondent as against Maxwell consists of admissions made to the North Yorkshire Police by Maxwell with the benefit of legal advice during the course of an investigation into the safety of his convictions and that Maxwell said to the police that he would like a retrial and that he would plead guilty to the robberies and manslaughter." (para 67)

The Court of Appeal accordingly ordered that the appellant be retried and meantime remain in custody. No such order was made in respect of Mansell (who had made no post-conviction admissions of guilt and against whom, therefore, there was no new and compelling evidence) and he was accordingly set free.

63. The point of law of general public importance subsequently certified by the Court of Appeal was this:

> "May the Court of Appeal order a retrial having quashed a conviction on the grounds of serious executive or prosecutorial misconduct, and, if so, in what circumstances?"

In reality what the Court must now decide is whether, having regard to all the circumstances of this case, the Court of Appeal could properly reach their conclusion that the interests of justice require this appellant's retrial based substantially upon his post-conviction admissions of guilt.

64. As the Court of Appeal recognised, plainly there is a public interest in convicting those guilty of murder. Plainly too there is a public interest in maintaining the integrity of the criminal justice system. No less plainly, each interest is of a high order. Where, as here, these interests appear to conflict, how should that conflict be resolved? This is by no means an easy area of the law. Obviously, however, it is an important one. With that brief introduction let me at

once turn to the facts, critical as ultimately these must be to the determination of this appeal.

The two robberies

65. The robberies took place respectively on 11 June 1996 and 13 October 1996, on each occasion at the Yorkshire home of two vulnerable and reclusive brothers, Bert Smales aged 67 and Joe Smales aged 85. They were known to keep substantial sums of money in the house and had more than once been burgled in the past although this had never been reported to the police (as similarly the June 1996 robbery went unreported). On both occasions the robbers were masked; on both they used violence in demanding to know where they brothers kept their money; on both they stole a few thousand pounds. It appears, however, that substantially greater violence was used in the October robbery. On that occasion Bert Smales suffered a fractured nose and forehead, his injuries leaving him with little recollection of the robbery beyond opening the door to his attackers. Joe Smales was punched in the face so severely that he suffered not only a fractured jaw and internal bleeding to the head but in addition a fracture of the cervical spine (broken neck); from his resultant prolonged immobility in hospital he developed pneumonia and a deep vein thrombosis from which on 7 November 1996 he died. Although it is unclear which of the robbers attacked which victim, the level of violence used in the October robbery and, indeed, the admissions that the appellant came to make in his post-conviction statements clearly supported a conviction for murder on the basis of joint enterprise and it is unsurprising that Mr O'Connor QC has never submitted on his behalf that any retrial should only be on a charge of manslaughter.

Karl Chapman

66. Chapman is a central figure in this case and it will be necessary to say more about him later. It is convenient, however, to introduce him briefly at this stage, he having been the main prosecution witness at the appellant's trial, without whose information and evidence, indeed, the appellant (and Mansell) would never have been indicted, tried or convicted at all. Chapman (like the appellant) is a professional criminal. In late 1995 and early 1996 both men were together in prison. The appellant was serving an eight-year sentence (from which he was finally released on 3 June 1996) for a series of robberies; Chapman was a remand prisoner having pleaded guilty on 31 July 1995 to no fewer than 267 offences (including 256 similar offences taken into consideration), mostly "bogus official" robberies targeting frail and elderly victims. Chapman eventually came to be sentenced on 23 December 1997 to a term of 9 years' imprisonment, a sentence to be contrasted with the 25-year term imposed for comparable offences committed by an erstwhile associate of his named Ford against whom Chapman had earlier (in

November 1996) given evidence, as indeed he was to give evidence (in February 1998) against the appellant and Mansell.

67. As already stated, the appellant was released from prison on 3 June 1996, just eight days before the first Smales robbery. It now seems clear that it was from Chapman that the appellant learned of the address and vulnerability of, amongst others, the Smales brothers and it is clear too that during the period when these robberies were committed the appellant and Chapman remained in touch.

68. In December 1996 Chapman began to provide the police with information pointing to the appellant's involvement in these robberies, a process leading in April 1997 to him making a series of witness statements, on the basis of which the appellant and Mansell were on 28 April 1997 arrested, charged and ultimately, on 27 February, 1998, convicted. As stated in the agreed statement of facts and issues: "without Chapman's evidence, there could have been no prosecution at all."

The February 1998 trial and conviction

69. The trial lasted three weeks, Chapman's evidence occupying five days: 5, 6, 9, 10 and 11 February 1998. Not surprisingly, his evidence was fiercely challenged by both defendants. As the judge later put it in his summing up, it was the defence case that Chapman was "bent as a fourteen pound note". More particularly the defendants were alleging that by giving incriminating evidence against them, Chapman, notwithstanding that he had already been sentenced the previous December, was still expecting benefits of one sort or another, whether by way of earlier release on parole or otherwise. All this Chapman resolutely and persistently denied as appears from a number of passages in the summing up, for example:

> "Now, he knows what date he is due to be released and that that will happen whether or not he gives evidence in this case. He has got his date in the year 2000. That cannot be delayed beyond that time. He says he has nothing to gain by giving false evidence against the defendants." (Chapman was, in fact, released in August 1999.)

> "The what's-in-it-for-him line was pursued and I will remind you again of it briefly . . . He says, 'There's nothing. I am putting myself at risk for the rest of my life.'

> "He was then taken through the privileges that he had enjoyed as a supergrass, and what the wing was like. Well, there is no suggestion

> that he was accorded privileges that were any greater than those accorded to other supergrasses."

70. Chapman's evidence was, there can be no doubt, damning against both defendants. It did not, however, stand entirely alone. Rather, as the (263 page) CCRC report was later to say, it "was supported by a 'jigsaw' of other pieces of evidence". In particular there was evidence (i) of telephone calls between Chapman and the appellant on key dates, (ii) of Mansell's arrest for a driving offence on his way back to Lancashire from Yorkshire on the day of the June robbery, (iii) of the appellant having reconnoitred the home of another of Chapman's previous victims, Miss Bell, (iv) of the appellant being in Leeds and attempting to contact Chapman on the day of the October robbery, (v) of an A-Z map given to the police by Chapman bearing the appellant's fingerprints and containing various markings seemingly connecting the appellant to the addresses of other Chapman victims in the Yorkshire area, (vi) of a letter from the appellant to Chapman in July 1996 referring to "coming over to Leeds for a day's work", apparently alluding to the burglary of another of Chapman's previous victims, (vii) of Mansell's identification by a neighbour of the Smale brothers as one of two men she had observed hurrying by on the afternoon of the October robbery, (viii) of a footwear mark found at the scene of the October robbery consistent with the size and brand of Mansell's boots, (ix) of lies told by the appellant and Mansell about their movements on the days of the robberies in the course of police interviews, and (x) of the appellant's creation of a false alibi for the time of the October robbery (as he was later to admit).

71. In the event both defendants were convicted by majority verdicts of 10:2 some 9 hours and 40 minutes after the jury first retired.

The 1999 appeal

72. Within days of the appellant's conviction press reports in the Yorkshire Evening Post suggested that £100,000 had been set aside to provide Chapman with assistance on his release from prison. Those then acting for the appellant and Mansell immediately sought clarification of this from the CPS but made little headway, their initial application for leave to appeal against conviction being refused by the single judge on 30 July 1998. In February 1999, however, fresh solicitors and counsel were instructed and extensive further enquiries were then made of the CPS both as to any payment promised to Chapman and more generally as to his treatment by the police. The appellant's and Mansell's renewed leave applications to the Court of Appeal were adjourned on account of these enquiries first from 30 April 1999 and then again from 8 July 1999, on each occasion for the CPS to supply the further information being sought.

73. Finally, following a detailed series of questions from Birnberg Peirce & Partners dated 15 October 1999 and letters in response dated 3 November 1999 respectively from Detective Superintendent Rennison (Director of Intelligence responsible for the management and use of informants in West Yorkshire) and Detective Chief Superintendent Taylor (Senior Investigating Officer on the Chapman operation), the Court of Appeal (Otton LJ, Potts J and the Recorder of Liverpool) on 5 November 1999 held first an *ex parte* hearing on a PII application by the prosecution and then an *inter-partes* hearing on other grounds of appeal unrelated to the handling of Chapman. During the *ex parte* hearing evidence was given by Detective Sergeant Grey (an officer of the Major Crime Unit attached to the Chapman operation) and Chief Superintendent Holt (the Senior Investigating Officer on the appellant's case), in particular with regard to a statement in Mr Rennison's letter of 3 November that: "a reward of £10,000 was agreed by the West Yorkshire Police Command Team without discussion with Chapman, to be paid after completion of his sentence."

74. In the course of his evidence D S Grey said that "the agreement was reached possibly three or four months before the end of [Chapman's] sentence [August 1999]" and that when Chapman had given his evidence "he [was not] told at all that he was to receive any form of reward". Chief Superintendent Holt similarly confirmed that before Chapman gave his evidence there was no discussion or agreement with him whatever "in relation to any reward or any benefit for his involvement in this particular case". The Court of Appeal thereupon expressed themselves "satisfied that when the informant, Chapman, came to give evidence nothing had been done or said to give him any expectation of reward for his evidence in this murder trial. . . .any arrangements for reward or change of identity to Chapman were made a long time after the [appellant's] conviction was recorded."

75. In the result, in a judgment given on 13 December 1999 dismissing the appellant's and Mansell's renewed leave application, the Court of Appeal noted in respect of "Ground 1 – The financial reward of the supergrass": "At the outset of the hearing before us we considered the public interest immunity application by the Crown. As a result of our ruling this ground was not pursued on behalf of the applicants."

76. There matters lay until, some nine years later, on 25 November 2008, the CCRC referred the case back to the Court of Appeal following an investigation by the North Yorkshire Police under section 19 of the Criminal Appeal Act 1995, an investigation which had painstakingly examined the integrity of Chapman's treatment as a prosecution witness.

The CCRC Report

77. The unchallenged findings of this report are not just disturbing but quite frankly astonishing. They reveal that, as a result of his cooperation with the police, Chapman and other members of his family received a variety of benefits which were not merely undisclosed to the CPS or counsel but were from first to last carefully concealed from them. They were benefits which both contravened the controls designed to preserve the integrity of Chapman's evidence and were in addition inherently improper. Amongst the more surprising were that whilst in police custody Chapman was at various times permitted to visit a brothel, to engage in sexual relations with a woman police constable, to visit public houses, to consume not merely alcohol but also cannabis and even heroin, to socialise at police officers' homes, to enjoy unsupervised periods of freedom, and indeed, throughout the actual period of the appellant's trial, whilst threatening not to give evidence after all, he was permitted long periods of leisure (hours at a time) in places of his choice, ostensibly as "exercise", and in addition phone calls and visits from his own solicitor.

78. Without suggesting that it typifies Chapman's relations with every police officer involved in this operation, some colour is lent to all this by a letter written to him in prison by DC Dunham (one of Chapman's regular escorting officers) on 18 December 1996, shortly after Chapman had given evidence at the Ford trial and on the very day he made his first statement implicating the appellant and Mansell, an event celebrated by a visit to a brothel (shown in the custody record as an outing to "assist in the locations of crime"). DC Dunham wrote:

> ". . . really glad you enjoyed 'the night'. Truth to tell I quite enjoyed it myself. Little bit of this, little bit of that. Variety, they say, is the spice of life. What a spicey night! Let's hope there is a second leg in March. I am demob happy now and disinclined to dip out on any good times that may be up for grabs. . . . BT [another officer] told me to tell you that if you were serious about a literary venture at some time in the future he can put you in touch with some top class author types who can assist in ghost writing."

Sometime later, Dunham having mentioned the brothel outing to the female police officer with whom Chapman was enjoying sexual relations, Chapman wrote to her apologising: "I was drunk and stoned on weed, they paraded a dozen beautiful women in front of me and said take your pick."

79. As for financial benefits, the report states blandly:

> "North Yorkshire Police found that the information provided to the court at trial and appeal did not accurately reflect the financial

> benefits and rewards given to Mr Chapman by the police or his expectations when he gave evidence at the trial of Mr Maxwell and Mr Mansell."

The fact is that large sums had been expended on Chapman, far exceeding his entitlement under the rules governing the treatment of informants and prisoner witnesses. Luxury items had been purchased for him and substantial sums from time to time handed to him in cash (for example £475 on the occasion of the December 1996 brothel visit with DC Dunham, less than £7 remaining on Chapman's return to the police station at 1 a.m. the following morning). This expenditure, totalling several thousand pounds, was financed by claims on a variety of police funds, with no proper records, accounting, supervision or control and various steps taken to conceal the level of payments made. None of this was disclosed either at trial or on appeal.

80. With regard to the £10,000 reward itself, the report concluded, flatly contrary to the senior officers' evidence to the Court of Appeal, that the police's intention to reward Chapman had long since been communicated to him so that his "as yet unfulfilled expectation of reward may have been a factor affecting [his] cooperation and evidence" at the appellant's trial.

81. Nor were these favours and financial benefits the only advantages secured by Chapman as the price of his cooperation. He was not proceeded against in respect of a number of violent incidents which in the ordinary way would have been expected to result in prosecution: a vicious attack on a fellow prisoner called Jennings in March 1994, repeatedly stabbing him with a piece of broken glass bound with twine; an alleged rape of his cellmate (buggery whilst holding a razor to the victim's throat) in August 1994, reported sometime later; an assault in November 1999 on the WPC with whom by then Chapman had split up. Nor was action taken against him for various drug offences. Similarly a caution received by Chapman's mother in July 1995 for handling stolen property was not properly recorded, nor were steps taken against her for attempting to supply heroin both to Chapman in prison in September 1996 and to Chapman's girlfriend (also a prisoner) in October 1996. Chapman's brother too was not arrested when he should have been.

82. All these various benefits and indulgences were conferred on Chapman to ensure his continuing cooperation with the police and not least to persuade him to give evidence as he did at the February 1998 trial of the appellant and Mansell. To quote just four short passages from the CCRC report:

> "In the Commission's view those benefits may have acted as an inducement … and their non-disclosure denied the defence the opportunity to explore their possible impact on the credibility of Mr Chapman and also on the fairness of the trial.
>
> The omission of [certain of these benefits] from Mr Chapman's custody records ensured that those records offered no hint of the reality of his treatment whilst in police custody. The circumstances in which Mr Chapman provided information to the police in the murder investigation were therefore obscured.
>
> The failure to reveal what could reasonably have been considered inducements surrounding Mr Chapman's evidence left the prosecution unable to assess his reliability as a witness and precluded appropriate disclosure to the court and the defence. It also caused the trials involving Mr Chapman as a prosecution witness to proceed on the incorrect basis that he had not been the recipient of favours or privileges.
>
> In contrast to the appearance of legitimacy in his treatment, the undisclosed information would have supported an argument that Mr Chapman's evidence against Mr Maxwell and Mr Mansell was tainted by a sustained catalogue of improper inducements and an ongoing expectation that he would be favourably treated in every aspect of his relationship with the police. Those representing Mr Maxwell and Mr Mansell were denied the opportunity to deploy this material in support of a tenable argument that the proceedings against them were an abuse of process and to have this issue determined by the court."

83. In the light of these various findings it is now possible to summarise the position really quite shortly. A large number of police officers involved in the investigation and prosecution of the Smales robbery and murder case, including several of very high rank, engaged in a prolonged, persistent and pervasive conspiracy to pervert the course of justice. They colluded in conferring on Chapman a variety of wholly inappropriate benefits to secure his continuing cooperation in the appellant's prosecution and trial. They then colluded in Chapman's perjury at that trial, intending him throughout his evidence to lie as to how he had been treated and as to what promises he had received. They ensured that Chapman's police custody records and various other official documents presented a false picture of the facts, on one occasion actually forging a custody record when its enforced disclosure to the defence would otherwise have revealed the truth. They lied in their responses to enquiries made of the CPS after the

appellant's conviction and, in the case of the two senior officers who gave evidence to the Court of Appeal, perjured themselves so as to ensure that the appellant's application for leave to appeal against his conviction got nowhere. To describe police misconduct on this scale merely as shocking and disgraceful is to understate the gravity of its impact upon the integrity of the prosecution process. It is hard to imagine a worse case of sustained prosecutorial dishonesty designed to secure and hold a conviction at all costs.

84. Scarcely less remarkable and deplorable than this catalogue of misconduct, moreover, is the fact that, notwithstanding its emergence through the subsequent investigation, not a single one of the many police officers involved has since been disciplined or prosecuted for what he did.

The appellant's post-conviction admissions

85. For my part I have no doubt that the series of admissions which the appellant came to make to various bodies following his conviction constitutes compelling evidence upon which, certainly when taken together with the supporting evidence already summarised (para 70 above), a jury would be highly likely to find him guilty both of the two robberies and of Joe Smales's murder (although just possibly the verdict on that count could be one of manslaughter). I must nevertheless briefly summarise this evidence to indicate the circumstances in which these admissions came to be made. An altogether fuller account of all this can be found at paragraphs 68-81 of the Court of Appeal's judgment below.

86. The appellant's first recorded admission was made on 12 October 1998 to his then solicitor, retained to advise him on the appeal against conviction. The solicitor's file note records:

> "To my great surprise Paul confessed that he and his brother did do the murder . . . He explained that at no stage did he ever anticipate any injury would be caused to Mr Smales. At the time of the murder, he was in fact inside the house, whilst his brother carried it out in the garden. . . . I told Paul that on the basis of what he had told me, I felt that he could have a possible appeal on the authority of *R v English* and *R v Powell*."

87. Told by his solicitor that he would have to prepare a detailed and persuasive confession for there to be any chance of a successful appeal, the appellant wrote a lengthy statement on 21 February 1999 detailing his involvement in both robberies and asking that the statement be placed on his prison file. A Local Prison

Assessment (Life Sentence Plan) Report noted on 24 February 1999 that the appellant:

> "accepts the guilty part he played but states the deceased did not die at his hands and indeed admits that he used as much violence on the victim who survived as his brother did on the victim who died."

In February and March 2000 the Home Office sponsored a research project into offences committed against the old and vulnerable by offenders pretending to be officials. In the course of this research, whilst Detective Chief Superintendent Steele of West Yorkshire Police was interviewing a number of convicted offenders, the appellant wrote to him on 9 February 2000 offering to assist the project and stating:

> "As you are no doubt aware I am currently serving a life sentence for the murder of Joe Smales and the robbery of Joe's brother Bert. I initially denied these offences, however I now fully admit my guilt."

When the appellant was interviewed by Mr Steele and other officers on 2 March 2000, he admitted his involvement and explained how in relation to the October robbery he had used violence against Bert Smales whilst his brother had used violence against Joe.

88. An Initial Sentence Plan Summary prepared by the prison on 1 August 2000 included a note from the Sentence Management Unit stating:

> "Maxwell admitted, for the first time outside confidential counselling, that he admitted the offence openly and despite finding it difficult to talk about, accepted culpability for the death of the victim. He claims that he did not attack the victim who died, but in no way tried to minimise his role in the offence saying that he planned the robbery and was co-perpetrator, so that made him just as guilty of the murder as his co-accused. This was a violent attack and Maxwell finally admits he attacked the surviving victim, probably more viciously than his co-defendant attacked the murder victim."

A prison report dated 23 May 2001 noted that the appellant continued to accept "responsibility for his crimes".

89. A prison probation officer reported on 11 January 2002:

> "Mr Maxwell told me he is ashamed of what he did and although he claims not to have assaulted Joe Smales he admits to assaulting his brother. He does not deny that his actions were instrumental in the death of Mr Smales and admits to planning the burglary and involving his brother in the crime. Mr Maxwell told me he is appealing the conviction, not because he does not accept responsibility for the death of Mr Smales but because he does not think he and his brother were given a fair trial. It is his hope he will be able to enter a guilty plea to manslaughter at a re-trial."

90. In the course of the investigation by the North Yorkshire Police the appellant was interviewed on a number of occasions in relation to his admissions, several times maintaining that he had made false admissions of guilt out of expediency. However, in a statement dated 14 September 2004 he said this:

> "I now admit the robberies of the Smales brothers in June and October of 1996. My brother was with me on both occasions. No one else was present. I was not involved in the death of Joe Smales and had no intention to cause serious injury to either of the brothers."

In a statement dated 23 September 2004 the appellant said: "I would like a retrial and I would plead guilty to robbery and manslaughter."

The Law

91. The power of a criminal court to stay proceedings as an abuse of process in order to safeguard an accused person from injustice and oppression has long been recognised – see, for example, *Connelly v Director of Public Prosecutions* [1964] AC 1254 and *R v Humphrys* [1977] AC1. The more recent decision of the House of Lords in *R v Horseferry Road Magistrates' Court Ex p Bennett* [1994] 1 AC 42, however, can be seen as the foundation of much of the modern law regarding the Court's approach to abuse of process applications, more particularly in cases where, as here, no question arises of the defendant being unable to receive a fair trial were the case against him to proceed. *Bennett* concerned an appellant unlawfully brought to this country as a result of collusion between the South African and British police and on arrival here arrested and brought before magistrates to be committed for trial. The House held by a majority of four to one that in those circumstances the English court should refuse to try the defendant. For present purposes the following brief citations from the speeches will suffice:

> "In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. " (Lord Griffiths at pp 61-62)

> "[T]he court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused." (Lord Lowry at p76 C-D)

> "It may be said that a guilty accused finding himself in the circumstances predicated is not deserving of much sympathy, but the principle involved goes beyond the scope of such a pragmatic observation and even beyond the rights of those victims who are or may be innocent. It affects the proper administration of justice according to the rule of law and with respect to international law." (Lord Lowry at p76 G)

92. *Bennett* was directly applied by the Court of Appeal (Criminal Division) in *R v Mullen* [2000] QB 520 where it was held that the British authorities, in securing Mullen's deportation from Zimbabwe, had been guilty of "a blatant and extremely serious failure to adhere to the rule of law with regard to the production of a defendant for prosecution in the English courts" (p.535H) so that when, some eight years later, this came to light, his conviction fell to be quashed. This was so, moreover, notwithstanding Mullen's concession that he had been properly convicted by the jury and that, as Rose LJ giving the Court's judgment observed, "The sentence of 30 years' imprisonment reflects the gravity of the offence" (involvement in an IRA conspiracy to cause explosions). The principle which the court there derived from *Bennett* was that "certainty of guilt cannot displace the essential feature of this kind of abuse of process, namely the degradation of the lawful administration of justice." (p534 C).

93. The *Bennett* principle was similarly applied in the context of entrapment in *R v Latif* [1996] 1 WLR 104 where, at pp112-113, Lord Steyn put it thus:

> "The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed . . . The speeches in *ex parte Bennett* conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. . . . in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."

Just how that approach should apply in any particular entrapment case was further considered by the House of Lords in *R v Looseley* [2001] 1 WLR 2060 which decided that to lure, incite or pressurise a defendant into committing a crime which he would not otherwise have committed would be unfair and an abuse of process but not so if the law enforcement officer, behaving as an ordinary member of the public would behave, had merely given the defendant an unexceptional opportunity to commit a crime of which he had freely taken advantage. Although sometimes in such circumstances a stay is said to be on abuse of process grounds, Lord Hoffmann thought with Lord Griffiths in *Bennett* that the jurisdiction was more broadly and accurately described as "a jurisdiction to prevent abuse of executive power". (p2073E)

94. This line of authority has since been followed in two much publicised Court of Appeal decisions: *R v Early* [2003] 1 Crim App. R.288 (judgment of Rose LJ) and *R v Grant* [2006] QB 60 (judgment of Laws LJ). Although both cases were cited and discussed at some length by the court below, I propose to consider them comparatively briefly. *Early* concerned a number of appellants charged with fraud offences arising out of the improper diversion to the UK market of large quantities of duty-suspended alcohol from bonded warehouses, some of 30 or 40 separate such scams involving the Inland Revenue in an overall loss of some £300m. The defendants' case was essentially that they had been encouraged and facilitated in their offending by customs officers working in collusion with the warehouse manager (one Allington, a registered informant), a defence therefore somewhat akin to entrapment. Put very shortly, having failed in abuse of process applications following *voir dire* evidence from various customs officers and from Allington and others during lengthy PII and disclosure hearings, the defendants on advice pleaded guilty. Subsequently Allington admitted having lied, lies which he said had been approved by Customs and for which he had received benefits. Allowing the appeals, Rose LJ said (para 18):

> "It is a matter of crucial importance to the administration of justice that prosecution authorities make full relevant disclosure prior to trial and that prosecuting authorities should not be encouraged to make inadequate disclosure with a view to defendants pleading guilty. . . . When inadequate disclosure is sought to be supported by dishonest prosecution evidence to a trial judge, this Court is unlikely to be slow to set aside pleas of guilty following such events, however strong the prosecution case might appear to be."

He then added, however, in the very next paragraph:

> "In the ordinary way we would have ordered a retrial so that a trial judge, on the basis of honest evidence, could have had the opportunity of deciding about disclosure and about whether or not a stay should be granted. However, as the appellant has already served his sentence and it is nearly six years since the offence is alleged to have taken place, we make no such order, as it would not be in the interests of justice to do so."

Those passages in the judgment related specifically to *Early's* appeal; the other appellants' appeals, however, were similarly disposed of.

95. In short, despite the court's understandably harsh condemnation of the misconduct there, but for the passage of time it would nevertheless have ordered a re-trial to see whether in truth the case was one of entrapment.

96. In *Grant* [2006] QB 60, the appellant had been convicted of conspiracy to murder, his wife's lover having been shot dead whilst answering a knock at the door. The appellant's case on appeal was that the trial judge should have allowed his abuse of process application and stayed the prosecution because of police misconduct: following the appellant's arrest the police had deliberately eavesdropped upon and tape-recorded privileged conversations between him and his solicitor in the police station exercise yard. Notwithstanding that this eavesdropping had in no way prejudiced the appellant's trial, his appeal was allowed and his conviction quashed. The Court of Appeal said this:

> "True it is that nothing gained from the interception of solicitors' communications was used as or (however indirectly) gave rise to evidence relied on by the Crown at the trial. Nor, as we understand it, did the intercepts yield any material which the Crown might deploy to undermine the defence case. But we are in no doubt but

> that in general unlawful acts of the kind done in this case, amounting to a deliberate violation of a suspected person's right to legal professional privilege, are so great an affront to the integrity of the justice system, and therefore the rule of law, that the associated prosecution is rendered abusive and ought not to be countenanced by the court." (para 54)
>
> "Where the court is faced with illegal conduct by police or State prosecutors which is so grave as to threaten or undermine the rule of law itself, the court may readily conclude that it will not tolerate, far less endorse, such a state of affairs and so hold that its duty is to stop the case." (para 56)
>
> "We are quite clear that the deliberate interference with a detained suspect's right to the confidence of privileged communications with his solicitor, such as we have found was done here, seriously undermines the rule of law and justifies a stay on grounds of abuse of process, notwithstanding the absence of prejudice consisting in evidence gathered by the Crown as the fruit of police officers' unlawful conduct." (para 57)

It may be noted that the Court of Appeal later certified the following point of law of general public importance in the case:

> "Where an accused person has been properly arrested and brought before the court but during the course of the investigation there is significant impropriety by some or all of the investigating officers in relation to the accused person, but the evidence that will be presented to the court is untainted by such impropriety so that the accused person can have a fair trial, when considering the interests of all parties, including the victim of the crime, is the greater public interest in having the accused person tried, it therefore being fair to try him, or in staying the indictment which is therefore a method of disciplining the investigating authority thereby overriding the rights of the victim?"

Whether the House of Lords then refused leave to appeal or the Crown chose not to pursue an appeal we have not been told. But I have to say that for my part I have the gravest doubts as to the correctness of the court's decision in *Grant*. True it is that Lord Taylor of Gosforth CJ had described legal professional privilege in *R v Derby Magistrates' Court, Ex p B* [1996] AC 487, 507 as "much more than an ordinary rule of evidence, limited in its application to the facts of a particular case.

It is a fundamental condition on which the administration of justice as a whole rests." But that is not to say that its every violation must result in a quashed conviction. The law against perjury may equally be described as fundamental to the whole administration of justice but no one has ever suggested that perjury by a prosecution witness (even a police officer) must in all circumstances, irrespective of whether it prejudices the defendant, necessarily preclude a defendant's conviction or, if discovered later, result in its quashing. Deeply regrettable though police perjury must always be, the law reports are replete with examples of convictions nonetheless being upheld on appeal on the basis that, the perjured evidence (sometimes in relation to purported confessions statements) aside, ample evidence remains to sustain the conviction's safety.

97. The Court of Appeal in the present case distinguished *Grant* on the basis that, "[w]hilst helpful to the appellants, it should be remembered that *Grant* involved, as Laws LJ said, a deliberate violation of 'a fundamental condition on which the administration of justice as a whole rests'": para 62. I too would distinguish *Grant* from the present case but on the very different basis that the police misconduct there constituted an altogether lesser, rather than a materially greater, threat to the administration of justice than the prolonged prosecutorial misconduct here – misconduct without which this appellant would never have been prosecuted or convicted in the first place.

98. All the cases I have been considering are cases where, whatever executive or prosecutorial misconduct may have occurred in the past, there is no impediment to a fair trial of the defendant in future. The central question for the Court in all these cases is as to where the balance lies between the competing public interests in play: the public interest in identifying criminal responsibility and convicting and punishing the guilty on the one hand and the public interest in the rule of law and the integrity of the criminal justice system on the other. Which of these interests is to prevail? It is, of course, as the cases show, a question which may arise in a number of different circumstances. It may arise before trial or in the course of trial, where the question for the court is whether or not to grant a stay and so halt the process short of verdict. Or it may arise on appeal against conviction when the question for the court is, first, should the conviction be quashed, and, if so, secondly, as in the present case, should a re-trial be ordered. In each case, as it seems to me, the question is the same: what do the interests of justice require (the interests of justice, of course, clearly encompassing both the conflicting public interests in play)?

99. As the court below noted, not long ago the Privy Council in *Panday v Virgil* [2008] 1 AC 1386 had occasion to consider this area of the law, including in particular what may be called the wrongful extradition and entrapment cases, in the context of a disputed order for a fresh trial following the quashing of the appellant's conviction by the Trinidad and Tobago Court of Appeal – the

conviction there having been quashed for apparent (although, for the purposes of the further appeal to the Board, assumed actual) bias.

100. In the course of giving the Board's judgment dismissing the appeal I said this (at para 28):

> "It will readily be seen that the factor common to all these cases, indeed the central consideration underlying the entire principle, is that the various situations in question all involved the defendant standing trial when, but for an abuse of executive power, he would never have been before the court at all. In the wrongful extradition cases the defendant ought properly not to have been within the jurisdiction; only a violation of the rule of law had brought him here. Similarly, in the entrapment cases, the defendant only committed the offence because the enforcement officer wrongly incited him to do so. True, in both situations, a fair trial could take place, but, given that there should have been no trial at all, the imperative consideration became the vindication of the rule of law."

In that case, however, there was no question of the appellant not having been properly before the court at all. As we said: "the quashing of his conviction restores the defendant to the position he was in before the unfair trial. Why should his success gain him immunity from what is conceded to be the position he now faces under the Court of Appeal's order: a fair trial upon charges properly brought?" We therefore upheld the order for a retrial.

101. In the great majority of cases – apart, of course, from those like the wrongful extradition and entrapment cases where the defendant would not have stood trial at all but for the violation of the rule of law which had brought him before the court in the first place – that would seem to me the appropriate outcome. The balance will ordinarily fall in favour of the fair trial of those rightly charged with serious crimes rather than in favour of the suspect's absolute discharge from the criminal justice system supposedly in the wider interests of the integrity of that system as a whole.

102. All that said, however, I have come to the conclusion that on the particular facts of the present case the balance falls the other way. In a real sense, indeed, this case can be seen to come within the same category of "but for" situations as the wrongful extradition and entrapment cases: but for the prosecutorial misconduct which initially secured the appellant's conviction and then ensured the failure of his appeal, he would never have made the series of admissions upon the basis of which it is now sought to prosecute him afresh. There can be little doubt that these

admission statements were made generally with a view to advancing the appellant's interests following conviction. For the most part it seems that he made them in the hope that his murder conviction would be replaced by a conviction for manslaughter, but perhaps also in the hope of appearing contrite and securing his earlier release on parole. Either way, the likelihood is that were a trial now to take place and a conviction to be obtained on the basis of these admissions, those responsible for corrupting the original process would still be seen thereby to have achieved their ends and in the long term to have engineered the appellant's conviction. That to my mind is the critical consideration in this case. The court should be astute to avoid giving the impression that it is prepared, even in this limited way, to condone such unforgivable executive misconduct as occurred here.

103. It is essentially on this narrow basis that for my part I would allow the appeal here. Had, say, the appellant unambiguously confessed his guilt, not before but after successfully overturning his original conviction, I would see no objection whatever to an order for his retrial on the basis of new and compelling evidence pursuant to Part 10 of the Criminal Justice Act 2003. In such circumstances it would obviously not then be open to the defence to suggest that realistically the confession was the product of the executive's misconduct.

104. In this context I should perhaps say a word about the emphasis given by the court below to their view that the appellant's post-conviction admissions here did indeed constitute "new and compelling" evidence within the meaning of the 2003 Act. As Mr Perry QC for the Crown rightly points out, that concept is not to be found in section 7(1) of the Criminal Appeal Act 1968 itself – the section specifically providing for the possibility of a retrial on the quashing of a conviction (see para 62 above). Indeed, it is plain that a retrial will often be appropriate without any of the evidence upon which it is proposed to base it being new and compelling. (In deciding whether a person should be retried, the so-called double jeopardy principle clearly carries altogether less weight when the decision arises on the same occasion as the conviction is being quashed than when it arises subsequently i.e. following acquittal either by the jury's verdict or by an earlier successful appeal.) To my mind, however, where, as here, the question whether the interests of justice require a retrial arises in the context of a conviction quashed because of serious executive misconduct, it will always be relevant and may on occasion be decisive to consider whether indeed new and compelling evidence of guilt exists. This will be so in cases where, despite the "but for" test not being satisfied (as I judge it to be satisfied here), a balance nevertheless has to be struck between the competing interests in play. In cases of this sort the nature and extent of the executive misconduct will obviously be highly relevant. But so too will a number of other considerations including not least the seriousness of the defendant's alleged criminality and the strength of the case against him – and that will be so no less when an abuse of process application is being made before or during trial than when the question arises on appeal.

105. It therefore seems to me understandable that in the present case, the extent of police misconduct notwithstanding, the Court of Appeal placed very considerable weight not only upon the gravity of the appellant's offending but also upon the strength of the fresh evidence now available against him (although more countervailing importance might perhaps have been attached to the length of time he had already spent in prison – as in *Early* (see para 94 above) – and, indeed, to the disparity of outcome of the appeal as between the appellant and his brother). Certainly, had this not been what I regard as akin to a "but for" case, I would not myself have been inclined to overturn the judgment below merely by reference to the general question whether the appellant's retrial can now properly be regarded to be in the public interest. Given, however, the "but for" character of this case and the enormity of the unpunished police misconduct involved, it seems to me quite simply inappropriate that it should now be retried on fresh evidence. Of course the crime was a grave one. But so too was Mullen's crime. Unless one is to say that in relation to serious crimes the "but for" approach is to apply only in the context of wrongful extradition, it is difficult to think of any case where the stay principle would properly be invoked if not here. Exceptionally, therefore, I would in this case regard the Court of Appeal as having erred in law in their approach to the section 7 power.

106. I should at this stage note that in the course of argument counsel introduced the Court to a good deal of international jurisprudence and academic commentary on the whole question of abuse of process applications. I shall not, however, dwell on this: none of it seemed to me especially helpful. Take the line of Canadian authority, culminating in the Supreme Court's judgments (five justices in the majority, four dissenting) in *R v Regan* [2002] 1 SCR 297, urged upon us by Mr Perry for the Crown. I confess to sharing the view about *Regan* expressed by H A Kaiser in a 2002 article (49 Crim Reps (5th) 74, 85-86) – noted by Professor Andrew L-T Choo in the second edition (2008) of his work, *Abuse of Process and Judicial Stays of Criminal Proceedings*, at p132 – that: "Neither [the majority nor the minority] judgment advances the comprehensibility and predictability of abuse of process and stays of proceedings, especially with regard to the residual category of cases where trial fairness is not implicated." (Though it was perhaps a little harsh of Mr Kaiser at the outset of his article, p74, to describe the judgments in *Regan* as the Court's "recent meanderings".)

107. So far as this country's approach is concerned, Professor Choo's conclusion (p132) is that:

> "The courts would appear to have left the matter at a general level, requiring a determination to be made in particular cases of whether the continuation of the proceedings would compromise the moral integrity of the criminal justice system to an unacceptable degree. Implicitly at least, this determination involves performing a

> 'balancing' test that takes into account such factors as the seriousness of any violation of the defendant's (or even a third party's) rights; whether the police have acted in bad faith or maliciously, or with an improper motive; whether the misconduct was committed in circumstances of urgency, emergency or necessity; the availability or otherwise of a direct sanction against the person(s) responsible for the misconduct; and the seriousness of the offence with which the defendant is charged."

108. It is difficult to disagree. It may however be possible and helpful to summarise the position a little more specifically as follows. (1) Whenever, executive misconduct notwithstanding, it remains possible to ensure that the defendant can be fairly tried (or, as the case may be, retried), this ordinarily is the result for which the court should aim, making whatever orders short of a permanent stay are necessary to achieve it (or as the case may be, by ordering a retrial). (2) In certain particular kinds of case, however, the "but for" cases as I have sought to describe and categorise them, even though it would be possible to try (or retry) the defendant fairly, it will usually be inappropriate to do so. It will be inappropriate essentially because, but for the executive misconduct, either there would never have been a trial at all (as in the wrongful extradition and entrapment cases) or (as in the present case) because the situation would never have arisen whereby the all important incriminating evidence came into existence (which is not, of course, to say that the "fruit of the poison tree" is invariably inadmissible). Obviously this is not an exhaustive definition of the "but for" category of cases and, as the word "usually" is intended to denote, whether in any particular case a trial (or retrial) has in fact become inappropriate may still depend in part on other considerations too. Essentially, however, it is the executive misconduct involved in this category of cases which, I suggest, most obviously threatens the integrity of the criminal justice system and where a trial (or retrial) would be most likely to represent an affront to the public conscience. (3) Exceptionally, even in cases of executive misconduct not within the "but for" category, it may be that the balance will tip in favour of a stay (or, as the case may be, a quashed conviction with no order for retrial), notwithstanding that a fair trial (retrial) remains possible. With regard to cases of this sort, and as to whether (in Professor Choo's language) a trial (retrial) would unacceptably compromise the moral integrity of the criminal justice system, a whole host of considerations is likely to be relevant, including most obviously those which Professor Choo himself lists. I repeat, however, in my judgment only exceptionally will the court regard the system to be morally compromised by a fair trial (retrial) in a case which cannot be slotted into any "but for" categorisation. The risk of the court appearing to condone the misconduct (appearing to adopt the approach that the end justifies the means) prominent in the "but for" category of cases, is simply not present in the great majority of abuse cases. Rather, as the Board put it in *Panday v Virgil* [2008] 1 AC 1386, executive misconduct ought not generally to confer on a suspect immunity from a fair trial (or retrial).

109. Beyond this general statement of what I believe to be the governing principles in play it is not, I think, possible to go. For the reasons given earlier in this judgment, however, for my part I would allow this appeal and quash the Court of Appeal's order for the appellant's retrial.

LORD COLLINS

110. I agree with Lord Brown that the appeal should be allowed. Public confidence that the police will act properly and lawfully is one of the cornerstones of democracy. Without proper police conduct and without public confidence in the honesty of the police, the rule of law and the integrity of the criminal justice system would be seriously undermined.

111. The certified point of law is whether the Court of Appeal may order a re-trial having quashed a conviction on the grounds of serious executive or prosecutorial misconduct, and, if so, in what circumstances. There is no doubt about the answer to the first part of the question since section 7(1) of the Criminal Appeal Act 1968 gives a discretion to the Court of Appeal to order a re-trial "if it appears to the Court that the interests of justice so require." It is not suggested that in the present case the Court of Appeal took into account any irrelevant or impermissible factors, or failed to take into account relevant factors. The only question is whether in the light of all the circumstances the misconduct is such that the Court of Appeal could have been justified in deciding that the interests of justice required a re-trial.

112. At trial DC Daniels and DC Dunham perjured themselves. Each of them told the court that all payments to Chapman had been disclosed. Each of them told the court that Chapman had been quarantined from the case officers. In 1999 the full Court of Appeal (Criminal Division) adjourned the applications for leave to appeal against conviction to enable the Crown to respond to the grounds of appeal alleging non-disclosure, in particular that Chapman had been promised a substantial sum to establish a new identity as part of his reward for giving information and evidence against Maxwell and Mansell. On the day of the substantive hearing, after hearing evidence on an ex parte PII hearing, the court ruled that it was satisfied that when Chapman came to give evidence in the trial he had no expectation of reward, and consequently his evidence was not tainted in that regard. That ruling was procured by false evidence. Two letters were written to the Court of Appeal by senior police officers after consultation with the officers closely involved with the case. The first letter stated: "No discussions were ever made [sic] concerning any monies to be paid to [Chapman] for giving evidence in the Maxwell/Mansell trial." The second letter stated: "A reward of £10,000 was agreed by the West Yorkshire Police Command Team without discussion with

Chapman, to be paid after completion of his sentence …" The Crown's skeleton argument for the Court of Appeal stated: "Neither the Crown prosecution Service nor the Police Officers in the case were aware of any reward being paid to Mr Chapman for his evidence in this case."

113. Detective Sergeant Gray gave evidence that the decision to pay the £10,000 reward to Chapman had been reached without consultation with Chapman and more than a year after he had last given evidence at the trial; and that when Chapman had given his evidence he was not aware of any factor which might have affected the content or quality of his evidence. Chief Superintendent Holt confirmed that before Chapman gave his evidence there was no discussion or agreement with him in relation to any reward or any benefit for his involvement in this case. He also gave evidence that he had no idea when the agreement for a reward had been arrived at. In fact the police had communicated to Chapman their intention to make a substantial payment to him for his co-operation in the Yew II investigation (an operation in relation to his allegations against a man called Ford, Maxwell, Mansell, and others) once he had been released from prison.

114. In addition, as a result of the investigation by the North Yorkshire Police, it turned out that: (1) As a result of his co-operation with the police, Chapman and other members of his family received benefits which were concealed from the CPS and counsel. (2) Whilst in police custody Chapman was permitted to visit a brothel, to engage in sexual relations with a woman police constable, to visit public houses, to consume alcohol, cannabis and heroin, to socialise at police officers' homes, to enjoy unsupervised periods of freedom, and long periods of leisure in places of his choice as "exercise." (4) Luxury items were purchased for him and substantial sums handed to him in cash. (5) He was not proceeded against in respect of a number of violent incidents, including a vicious attack on a fellow prisoner; an alleged rape of his cellmate; an assault in November 1999 on the WPC from whom by then he had split up. (6) Police officers ensured that his police custody records presented a false picture of the facts, and forged a custody record when its enforced disclosure to the defence would otherwise have revealed the truth. (7) Police officers colluded in Chapman's perjury at that trial, intending him throughout his evidence to lie as to how he had been treated and as to what promises he had received, and they lied in their responses to enquiries made of the CPS after conviction.

115. Of course, the power not to order a re-trial should not be used as a form of discipline. But the "interests of justice" are not limited to the individual case. The police misconduct must be seen in the wider context of the preservation of the rule of law, and of public confidence in the criminal justice system. This is an extreme case. The murder was indeed a shocking crime. In my judgment, the level of misconduct is such that the interests of justice demand that, after a conviction procured by such misconduct, and after the accused has served a substantial

sentence, and would not have made the admissions but for the conviction so procured, there be no retrial. I would find that the interests of justice demand the application of the integrity principle. In this case it means that there should be no re-trial on evidence which would not have been available but for a conviction obtained (and upheld) as a result of conduct so fundamentally wrong that for the criminal process to act on that evidence would compromise its integrity.