CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 28231/02
by Delroy DENTON
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 4 March 2003 as a Chamber composed of

Mr M. PELLONPÄÄ, *President*,
Sir Nicolas BRATZA,
Mrs E. PALM,
Mr M. FISCHBACH,
Mr J. CASADEVALL,
Mr S. PAVLOVSCHI,
Mr J. BORREGO BORREGO, *judges*,

and Ms F. ELENS-PASSOS, *Deputy Section Registrar*,

Having regard to the above application lodged on 15 July 2002,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Delroy Denton, is a Jamaican national, who was born in 1960 and is curently detained in HM Prison Full Sutton. He is represented before the Court by Mr D. O'Connell, a lawyer practising in Godalming, Surrey.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant is a Jamaican national, who came to the United Kingdom in April 1993 using his brother's passport and was granted permission to remain for six months. On 12 May 1994, the applicant was arrested in a public house in Brixton, on suspicion of drug dealing and possession of an offensive weapon. Upon arrest he gave the name Clive Lloyd Johnson. After being interviewed by the police, he was arrested and interviewed again by an Immigration Officer called Fotheringham as a suspected 'overstayer'. Fotheringham knew the applicant's true identity and in a report dated 13 May 1994, described the applicant as 'extremely violent' and indicated that he should be detained. However, over the following few days, Fotheringham, together with PC Barker from "SO11", (a special operations unit of the Metropolitan police), recruited the applicant as a police informer. With the assistance of Fotheringham the applicant completed an application for political asylum and was released on temporary admission to the United Kingdom on 15 May 1994.

The applicant was not charged with any drugs offences despite the fact that a substance later proved to be cocaine had been found on him when he was arrested in May 1994. In June 1994 he appeared before the Magistrates' Court in respect of the offence of possession of an offensive weapon and was fined, having pleaded guilty in the name of Clive Lloyd Johnson. Immigration Officer Fotheringham was at court. The same month, the applicant had his first official meeting with his handlers and began to supply information about the activities of Jamaican 'Yardie' gangs operating in the United Kingdom.

In December 1994 the applicant was arrested for an offence of rape and was detained in custody. Whilst detained he was visited by Fotheringham and another officer and on 9 January 1995 PC Barker and a DS Bayes attended the Magistrates' Court in an attempt to persuade the prosecutor not to object to bail. On 1 February 1995 the rape proceedings were discontinued and, although they would later deny it, the applicant believed this was as a result of intervention by his 'handlers'.

Between September 1994 and February 1995 the applicant gave information to police about the alleged criminal activities of Shirley

Graham, known as ‘Miss V’, involving drug dealing and false passports. On 23 March 1995, the applicant gave information to PC Barker about Miss V’s son, Wayne Graham. Graham was arrested the same day in possession of a handgun and ammunition and was subsequently sentenced to three years’ imprisonment.

1. The Murder

On or about 19 April 1995, a Wednesday, Marcia Lawes (known as ‘Zena’) was murdered. She had been stabbed some twenty times and the prosecution case was that she had been raped before being killed. Her body was not found until the evening of Friday, 21 April 1995. The door to her flat was unlocked and the telephone had been left off the hook. On 9 May 1995 the applicant was interviewed as a potential witness. His former girlfriend, Samantha Thompson, with whom he was still living, was a friend of Zena and his fingerprint had been found on a glass in the deceased’s flat. The applicant said he knew of her, but had not actually met her before the afternoon of 18 April 1995, when he went to her house with a mutual friend, Mark Williams, to buy cannabis. He did not disclose that he had had a sexual relationship with the deceased.

In June 1995 the applicant’s DNA profile was matched with semen samples taken from the deceased’s vagina and he was arrested for her murder. When interviewed in June he said that he had been having a sexual relationship with the deceased for some time and had returned to her house on Tuesday, 18 April 1995 to have sex with her, but she had been alive when he left and she must have been murdered some time after he last saw her.

The fact that the applicant was an informant became known to the officer in charge of the murder investigation, DCS Cook, who informed the Crown Prosecution Service (CPS) in July 1995. Cook was told by a colleague about a telephone call the applicant made from prison to PC Barker, in which he had asked if something could be ‘sorted out’. (He later confronted PC Barker about the call, who denied any knowledge of it). DCS Cook visited SO11 and looked at the applicant’s Informant file but did not see anything of relevance to the murder investigation and took no further action. Senior officers at SO11 gave instructions that there was to be no further contact with the applicant. In October 1995 the murder proceedings against the applicant were discontinued, counsel having advised that there was insufficient evidence to proceed, and he was released from custody.

As far back as December 1994 the decision had been taken to refuse the applicant’s application for asylum, but the letter of refusal was not served on him and no steps were taken to deport him. At some point after the October 1995 decision to discontinue the murder proceedings, contact was resumed between the applicant and PC Barker.

DCS Cook obtained authority to resume the murder investigation and on 24 November 1995 Dionne White made a witness statement in which she said that she had been with the applicant on an occasion in May 1995 when he appeared worried about police questions and asked her what 'forensic' meant. He had a bag in which she saw a pair of bloodstained trousers, which he then took to be dry cleaned. Dionne White was the niece of Wayne Graham and the granddaughter of Miss V. She had not made a statement to the police during the initial investigation. The police also then obtained further evidence from a mobile telephone company tending to show that the applicant was near or at Zena's flat on Wednesday morning, when the prosecution believed her to have been murdered and when the applicant claimed to have been at home. The applicant was re-arrested on 23 December 1995.

2. The trial

At the start of the trial, on 1 July 1996, the prosecution made an application for public interest immunity (PII) in respect of the fact that the applicant was an informant. The applicant had not told his own legal representatives and the defence team were not aware of his status as an informant. Prosecuting counsel told the trial judge that the applicant was an informant and that he had had involvement with the police and with Fotheringham. Counsel had not been told that the applicant had informed on the relatives of the prosecution witness Dionne White and both prosecuting counsel and the judge were unaware of any possible relevance to the trial of the fact that the applicant was an informant. Prosecuting counsel made it clear to the judge that he did not know whether the applicant had told his own solicitors or counsel that he was an informant. The judge ruled that there should be no order for disclosure.

After the PII hearing, DCS Cook was approached by a journalist who said that he knew the applicant was an informant and asked if the officer knew anything about the discontinuance of the proceedings in October 1995 being as a result of an approach to the CPS by SO11. DCS Cook brought the conversation to the attention of prosecuting counsel. Counsel took the view that the conversation had no relevance to the trial and it was not brought to the attention of the judge. During the trial, the same journalist discussed his knowledge of the applicant's informant activities with members of the deceased's family and others in the public gallery, some of whom were friends of prosecution witnesses. One of the group told the journalist that he knew the applicant was an informant and he wanted him to be convicted of the murder. The deceased's sister discussed the conversations with DCS Cook, who did not confirm or deny that the applicant was an informant.

The prosecution evidence at trial included details of when, where and to whom the applicant had made telephone calls, revealing inconsistencies in

his account, the telephone evidence that he was near to the flat on Wednesday morning, evidence from Samantha Thompson and Mark Williams about the applicant's movements and the account of Dionne White. In addition, the clothing found on the deceased, stained with the applicant's semen, was not the same as the clothing she had last been seen in by Samantha Thompson in the early hours of Wednesday, tending to suggest that the applicant had had sexual intercourse with her after, rather than as he said, before that time. In cross examination Dionne White's credibility was to some extent damaged when she claimed that on 19 April 1995 the applicant told her the police were harassing him about a murder, that is, before the body had been discovered.

The applicant disputed the alleged time of death and relied on the evidence of a pathologist to the effect that the murder was more likely to have taken place on Thursday, 20 April 1995. He maintained that he had not seen the deceased after they had consensual sexual intercourse on Tuesday, 18 April 1995. He called alibi evidence for the Thursday evening, including evidence from a Leon Lynn, (against whom it later transpired he had informed).

On 19 July 1996 the applicant was convicted of the murder by a majority of ten to two. On the evening of the applicant's conviction, a story on the television news referred to the applicant as a police informant. Subsequently, information about the applicant's activities as an informant appeared in newspaper articles, a television programme and a book. In December 1995 the applicant was served with the letter written in December 1994, confirming that his application for asylum had been refused.

3. Police Inquiry and Appeal

Following a complaint by the deceased's relatives, a police inquiry was held (the Hoddinott Inquiry). From about June 1997 a large volume of material was collated. Those who made statements in the course of the inquiry included Dionne White and Miss V. It was clear from the statements that they and many others had suspected or known before the murder that the applicant was an informer and that he had given information leading to the arrest and imprisonment of Wayne Graham. It was also suspected that he had informed on a relative of another prosecution witness (who had not in the event been called to give evidence at the trial). It was not clear whether they had said this to the police when they initially gave their statements in the murder investigation. DCS Cook gave evidence to the inquiry and confirmed that he was unaware of any connection between the information given by the applicant and the murder investigation until after the trial.

The applicant lodged grounds of appeal in March 1997, and his application was referred directly to the Full Court of the Court of Appeal,

who granted leave to appeal. The court ordered disclosure of statements and documents from the Hoddinott Inquiry and part of the applicant's Informant file. It was only as a result of the disclosure that the applicant's representatives became aware of the information the applicant had given about the relatives of Dionne White and others and of the discussion between the journalist and DCS Cook during the trial. They also became aware that a senior officer from SO11 had attempted to see the applicant in the cells during his trial to inform him that his status as an informant had become known, but that this was no fault of SO11. The CPS representative at court had refused the officer permission to visit the applicant. The applicant lodged more detailed grounds of appeal in May 2001 following the disclosure ordered by the court.

In January 2002, the applicant argued before the Court of Appeal that, (a) the Crown should have disclosed to the applicant's representatives the fact that he was an informer and the nature of the information he had given, (b) the Crown should have made the same disclosure to the trial judge, (c) the judge was wrong to make no order for disclosure on the PII hearing, (d) the restricted information given to the trial judge meant that he was unable properly to fulfil his functions and discretion as to disclosure, (e) the Crown should have disclosed to the applicant and/or his lawyers and the trial judge the fact that some prosecution witnesses knew he was an informant, (f) when it became known, the Crown should have disclosed to the judge, the applicant and/or his lawyers that press and members of the public knew of the applicant's status, and (g) the reason the applicant had not told his lawyers of his informant status was because his handlers had put pressure on him not to.

The Court of Appeal heard evidence from the applicant, his handlers and DCS Cook. The court noted that the information given by the applicant (in particular that relating to the relatives of Dionne White) was relevant to an issue in the case, but there was no duty on the Crown to disclose it as it was known to the applicant, who chose not to disclose it. The judge had been correct to make no order for disclosure. There were good public policy reasons why information given confidentially to the Crown by the applicant should not be disclosed to his lawyers without his permission. The court did not accept the applicant's argument that pressure had been put on him by his handlers not to reveal his status to his lawyers. Having heard evidence from the applicant on the point the court found him to be untruthful.

As to the submission that the applicant and/or his lawyers should have been told when it became apparent that the knowledge of his informant status had become public, Lord Justice Mantell said:

> "It is a matter of some concern that not even the judge was told of this development. Had it come to the knowledge of the appellant it may very well be that it would have worked a change of heart with regard to telling his counsel about his informant status.... There was no longer any good reason for keeping the information to himself

> and counsel would have been free to cross-examine Dionne White as to motive. We say 'free to cross-examine' advisedly. It would have been a matter requiring careful thought. After all ... cross-examination on the lines suggested could have had a serious down side, namely the loss of the alibi witness, Leon Lynn, against whom the appellant had informed and the introduction of the risk of character being put in issue."

The Court of Appeal considered that DCS Cook was an accurate and truthful witness and accepted that neither he nor prosecuting counsel had any reason to know the relevance of the applicant's informant status to the issues in the trial. The court went on to conclude that the possible advantage to which the applicant could have put the information was not without risk, and in any event the Crown's case did not depend on Dionne White's evidence. Evidence of the applicant's guilt was overwhelming. On 15 February 2002 the appeal was dismissed.

B. Relevant domestic law

The procedure to be applied when determining questions of disclosure was governed at the time by common law. At common law, the prosecution has a duty to disclose any material which has or might have some bearing on the offence charged.

In December 1981 the Attorney-General issued Guidelines, which did not have the force of law, concerning exceptions to the common law duty to disclose to the defence evidence of potential assistance to it ((1982) 74 Cr.App.R. 302 ("the Guidelines")). According to the Guidelines, the duty to disclose was subject to a discretionary power for prosecuting counsel to withhold relevant evidence if it fell within one of the categories set out in paragraph 6. One of these categories (6(iv)) was "sensitive material" which, because of its sensitivity, it would not be in the public interest to disclose. "Sensitive material" was defined as including:

> "... (b) it is by, or discloses the identity of an informant and there are reasons for fearing that the disclosure of his identity would put him or his family in danger;..."

According to paragraph 8,

> "...in deciding whether or not statements containing sensitive material should be disclosed, a balance should be struck between the degree of sensitivity and the extent to which the information might assist the defence."

The decision as to whether or not the balance in a particular case required disclosure of sensitive material was one for the prosecution, although any doubt should be resolved in favour of disclosure.

In *R. v. Ward* ([1993] vol. 1 Weekly Law Reports p. 619) the Court of Appeal stressed that the court and not the prosecution was to decide whether or not relevant evidence should be retained on grounds of public interest immunity. It explained that:

> "... a judge is balancing on the one hand the desirability of preserving the public interest in the absence of disclosure against, on the other hand, the interests of justice. Where the interests of justice arise in a criminal case touching and concerning liberty or conceivably on occasion life, the weight to be attached to the interests of justice is plainly very great indeed."

The Court of Appeal's judgment in *R. v. Davis, Johnson and Rowe* ((1993) vol. 97 Cr.App.R. 110) set out the procedures to be followed if the prosecution wished to withhold unused material from disclosure on grounds of public interest immunity including, where appropriate, making an application to the court *ex parte*. It referred to the important role performed by the trial judge in monitoring the views of the prosecution as to the proper balance to be struck and remarked that even in cases in which the sensitivity of the information required an *ex parte* hearing, the defence had "as much protection as can be given without pre-empting the issue". Finally, it emphasised that it was for the trial judge to continue to monitor the position as the trial progressed. Issues might emerge during the trial which affected the balance and required disclosure "in the interests of securing fairness to the defendant". For this reason it was important for the same judge who heard any disclosure application also to conduct the trial.

In *R. v. Keane* ([1994] vol. 1 Weekly Law Reports p. 746), the Lord Chief Justice, giving the judgment of the Court of Appeal, held that the prosecution should put before the judge only those documents which it regarded as material but wished to withhold on grounds of public interest immunity. "Material" evidence was defined as evidence which could be seen,

> "...on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence which the prosecution proposes to use; (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2)".

Once the judge was seized of the material, he or she had to perform the balancing exercise between the public interest in non-disclosure and the importance of the documents to the issues of interest, or likely to be of interest, to the accused. In that respect, the more full and specific the indications given of the issues the defence were likely to raise, the more accurately the prosecution and judge would be able to assess the value to the defence of the material. If the disputed material might prove the defendant's innocence or avoid a miscarriage of justice, the balance came down firmly in favour of disclosing it. Where, on the other hand, the material in question would not be of assistance to the accused, but would in fact assist the prosecution, the balance was likely to be in favour of non-disclosure.

In *R. v. Winston Brown* ([1994] Cr.App.R. 191), the Court of Appeal referred to the duty of the trial judge to keep material under review and to the duty of prosecuting counsel to inform himself fully about the content of

any "disputed material", so that he was in a position to invite the judge to reassess the situation if appropriate. The court recognised that there was a limit to the scope of discovery required of the Crown however, and for example, there was no legal duty on the Crown to disclose material which was only relevant to the credibility of a defence witness. The House of Lords ([1998] A.C. 369), confirming the Court of Appeal decision, observed that:

> "...the common law rules are concerned essentially with the disclosure of material which has been gathered by the police and the prosecution in the course of the investigation process for use in the case to be made for the Crown."

COMPLAINTS

The applicant complains under Article 6 §§ 1 and 3(b) and (d) of the Convention that he did not have a fair trial because of the failure of the Crown to make full disclosure. In particular, the failure of the prosecution and the trial judge to disclose to the applicant's lawyers the fact that he was an informant denied the applicant equality of arms. The trial judge misdirected himself at law and/or was misled in finding that there was no duty to disclose the applicant's status to his lawyers. The information was 'relevant' and 'material' and there was no legitimate interest requiring the protection of the court. The applicant was unable to take advice from his lawyers as to the possible use that could be made of the information available. He complains that an unfair burden was placed on him to decide whether to disclose his status and as a result he was deprived of the opportunity *inter alia* to deploy real motives for prosecution witnesses to lie.

Furthermore, the applicant complains that the failure of the police to give full details of the information he had provided to the prosecution meant that the prosecution lawyers were unable to comply with their duty as to disclosure and consequently the trial judge was unable to exercise his functions properly in safeguarding the interests of the applicant. The defence was deprived of relevant material for the purposes of cross-examination and investigation because of the failure to disclose the informant file to the applicant and his lawyers.

The applicant also complains that the failure to inform the trial judge, the applicant and/or his lawyers that his status as an informant was in the public domain deprived him of a fair trial in that the judge was unable to exercise his judicial role and properly weigh the applicant's interest in disclosure. The applicant was also deprived of advice from his lawyers as to the relevance of the information and the use to which it could be put.

The applicant complains that the Court of Appeal failed to remedy the unfairness at trial by finding that there was no duty on the prosecution to disclose something to the applicant's lawyers which was known to the applicant. He complains that the Court of Appeal failed to consider the impact cross-examination of Dionne White, to the effect that she had a real motive to lie, might have had on the jury and substituted its own view for that of the jury and thereby deprived the applicant of a fair trial.

THE LAW

The applicant complains that his defence was hindered by the failure of the Crown to make complete disclosure of all relevant matters known to the police and immigration and that consequently he did not have a fair trial. He relies on Article 6 §§ 1 and 3(b) and (d) of the Convention, which provide as relevant:

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

The Court recalls that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set out in paragraph 1 (see *Edwards v. the United Kingdom*, judgment of 16 December 1992, Series A no. 247-B, § 33). In the circumstances of this case it is unnecessary to examine the applicant's allegations separately from the standpoint of paragraph 3(b) and (d), since they amount to a complaint that the applicant did not receive a fair trial. The question is whether the proceedings in their entirety were fair (*ibid*., § 34).

The Court notes that as a general rule, it is for the national courts to assess the evidence before them (see the *Edwards* judgment cited above, § 34). The Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused. Where information has been withheld from the trial judge, it is necessary to consider whether the procedure before the appeal court was sufficient to

remedy any unfairness caused by the absence of any scrutiny of the withheld information by the trial judge.

It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The Court recalls that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case in conditions that do not place him at a disadvantage vis-à-vis his opponent (see, for example, *Foucher v. France*, judgment of 18 March 1997, *Reports of Judgments and Decisions* 1997-II). In addition Article 6 § 1 requires, as indeed does English law, that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (see the above-mentioned *Edwards* judgment, § 36). The issue in the present case is whether the applicant was unable to prepare an adequate defence because the prosecution withheld material information.

The applicant submits that the requirement to disclose to 'the defence' means that the prosecution has a duty to disclose information to the defendant's representatives even if it is known to the defendant. The Court does not agree. Information within the knowledge of the defendant cannot be said to have been withheld from 'the defence'. Furthermore, it must be a matter for the defendant to decide what to reveal to his lawyers. There are clearly situations in which the applicant, for good reason, may decide to withhold from his solicitors information about assistance he has given to the authorities.

The Court also notes the Court of Appeal finding of fact, after hearing evidence, that the applicant was not pressurised by his handlers to keep the information from his lawyers. In the circumstances, there was no reason for him to keep the information from his representatives other than perhaps through an understandable desire to keep the matter as confidential as possible. Furthermore, the prosecution concerned with the trial had no means of knowing whether the applicant had revealed his status to his lawyers or not. There was no reason for the prosecution to believe that there was any information which was not available either to the applicant or his lawyers and if only to the former, the prosecution was entitled to take the view that it was a matter for the applicant whether to share that information with his lawyers. The applicant must have known that he had given information about Dionne White's uncle and grandmother, and had he not appreciated the potential significance of that for his defence, it was open to him to seek advice from his lawyers about this matter. The Court observes that it would arguably have been a breach of confidentiality for the prosecution to reveal the position to the applicant's lawyers and cannot agree with the submission that there was no legitimate interest requiring

protection by the court, or that the trial judge was wrong to make no order for disclosure on the PII application.

The revelation that a journalist and members of the victim's family believed that the applicant was an informant was the only matter which was not within the knowledge of the applicant and may have been a matter which ought to have been brought to the attention of the trial judge. Whilst the information was undoubtedly 'material' in fact, the prosecution can only make a decision about what it is necessary to disclose in light of the issues apparent in the trial. There was no reason for those concerned with the prosecution of the case (in particular, DCS Cook and prosecution counsel) to see any relevance to the trial of the fact that the applicant's status had become known to the press and some members of the public. To the extent that there was any disadvantage to the applicant in not being made aware of the development, the Court finds that it was not such as to render the proceedings unfair.

The Court recalls that in any event, in the applicant's case, as in *Edwards* (cited above), the material in question had been disclosed to the applicant's representatives by the time the appeal was heard. Accordingly, even if the Court found, which it does not, that the matters about which the applicant complains should have been disclosed at the trial, all the relevant information was aired before the Court of Appeal, which examined the conviction thoroughly in the light of all the relevant material. The applicant had every opportunity to seek to persuade the court that his conviction was unsafe and there is no indication that the proceedings before the Court of Appeal were unfair. The Court therefore finds that the applicant's complaints must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Françoise ELENS-PASSOS
Deputy Registrar

Matti PELLONPÄÄ
President