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. 60590/00
by Daniel Joseph MANSELL
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 21 January 2003 as a Chamber composed of

Mr M. PELLONPÄÄ, *President*,
Sir Nicolas BRATZA,
Mr A. PASTOR RIDRUEJO,
Mrs V. STRÁŽNICKÁ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI, *judges*,

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

Having regard to the above application lodged on 4 May 2000,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Daniel Mansell, is a United Kingdom national. He was born in 1969 and is in prison in HMP Gartree. He is represented before the Court by a firm of solicitors, Birnberg Peirce & Partners, London.

A. The circumstances of the case

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

1. The trial

In early June 1996 two elderly brothers living in Leeds were the victims of a violent robbery. On 13 October 1996 assailants again entered their house and the brothers were seriously injured, the eldest brother later dying of his injuries.

In April 1997 the applicant and his own brother, PM, were arrested and charged with robbery of the elderly brothers in early June and on 13 October 1996 and with murder on 13 October 1996.

The prosecution's case was that the applicant and PM had targeted elderly victims following discussions between PM and KC at a time when PM and KC both were in custody. KC specialised in robberies of elderly and vulnerable persons and had been indicted for a number of such offences to which he had pleaded guilty and in respect of which he had given evidence against his own accomplice. While in custody, KC discussed his offences with PM and gave PM the addresses of victims known not to contact the police. KC also discussed such offences with the applicant, the latter of whom had expressed some interest in committing such crimes himself.

The prosecution relied on the following elements:

(a) KC's evidence about the applicant's and PM's interest in his offences on the elderly and about confessions made to him by PM.

The trial judge referred to KC's motivation in giving evidence in his summing up as follows:

> "I must also give you a warning in relation to [KC]. I have already said something about him. He is an important cog in the prosecution's wheel. It is alleged that he has something, much to gain. He says not. But you must consider very carefully his evidence and whether he has any motive for untruthfully saying what he is saying in this case. It is not alleged that he has any grudge against [PM] or [the applicant] or any reason adverse to them for shopping them. It is said, well, all supergrasses are strange people: they have motives of their own. It is the sort of argument that can be addressed in any case in which a supergrass does give evidence. There are particular criticisms of [KC] made, as you know, I have rehearsed some of them, by counsel already. You must consider his evidence with very considerable care."

(b) Ms A's identification evidence. Ms A, a neighbour of the elderly brothers, had seen two men near her home on 13 October 1996. In her first statement (16 October 1996), she made no reference to the colour of the eyes of either of the men. The surviving elderly brother later described one of the men as having "piercing blue eyes". In her second statement (20 November 1996), she said that one of the men had "piercing blue eyes".

Ms A had also attended three identity parades. At the first parade (10 November 1996) a suspect (one J. Foley) was included in the line-up. At the second (5 December 1996) PM was the suspect included in the line-up. At the third (1 May 1997) the applicant was the suspect included in a line-up and he was identified by Ms A.

The defence had been furnished prior to the trial with material including the results of the second and third identity parade. During the trial (at the latest) the parties also knew that there had been three identity parades in total, that material concerning the first of those parades had not been furnished, that Ms A had not formally identified anyone at the second parade and that she had identified the applicant during the third parade. The applicant's counsel questioned Ms A in detail about the identity parades, but focussed his questioning on the second and third parades. The extract from the transcript is as follows:

> "Counsel. Do your remember indicating that a man number eight looked like the person you had seen in the lane?
>
> A. I can't remember if I picked someone out 'cause I didn't think I'd pulled anyone out.
>
> Counsel. This was not the first parade which I think was in the November, from recollection, this is the second parade which is December.
>
> A. No.
>
> Trial Judge. Ah, I think she was under the mistaken impression that you were talking about the first parade. ...
>
> A. No, I didn't pull anyone out.
>
> Counsel. Not on the first parade this is the second parade.
>
> A. No. I didn't tell them, no. ...
>
> Trial Judge. You did not pick anyone out?
>
> A. No."

The applicant's counsel went on to question her about the third parade. The Court of Appeal later outlined Ms A's evidence at trial as follows:

> "[Ms A] was a neighbour of the brothers and at about 3.00-3.30 p.m. on the day of the second robbery and the murder she went outside her house to check on her

> children who were walking the dog in the lane. She went to the back of the house when she heard quick heavy footsteps at the bottom of the road. She positioned herself so that she could see down the road. She saw two men walking quickly towards her. They looked odd. They were dressed in winter clothes, it was a warm and sunny day. The man nearest to her stared at her in a way that frightened her. From the moment she first saw them they were in full view. The vision conditions were perfect and she had an unobstructed view of them for the 50-60 yards distance as they walked towards her. She gave meticulous descriptions of the men. The man who had been nearest to her had very scruffy, long, brown hair, a pale complexion and sunken blue eyes. He wore a jumper, jacket and scruffy trainers and gloves. The other man was broader and older, he had dark brown long, straight, scruffy hair, but was not as pale. In evidence she described how she had attended an identification parade on the 1st May to see if she could identify the man with the blue eyes. She picked out [the applicant]. She had been on two parades previously, she said she had been very frightened on those. She had not identified anyone on those occasions."

The trial judge confirmed, in his summing up, that Ms A had been on two identity parades prior to the parade when she had identified the applicant, that she had been frightened, that there was someone on one of those parades that she thought might have been one of the men she had seen but that she was not sure about that and "so she did not identify anybody." The trial judge also stated that:

> "[Ms A's] evidence is obviously important, because on the correctness of her identification a lot in this case clearly rests ... you can see that the importance of [Ms A's] statement cannot be overstated. It is very important evidence indeed".

(c) The presence of a foot-print in blood in the elderly brothers' house made by the same make and the same size as the footwear found in the applicant's garden shed on the day he was arrested and the relevant supporting scientific evidence.

(d) A map of Leeds found in KC's possession (on it were hand-written notes of KC's offences and directions to the elderly brothers' home) together with the applicant's evasive answers when questioned about the map (which suggested that it was his handwriting). PM's fingerprints were on the map. A piece of paper upon which the word "Boris" was written had been found at PM's home: Boris had been a target of KC and his name had been marked in the above-mentioned map of Leeds.

(e) PM's admission that he had gone to visit another of KC's targets.

(f) The applicant and PM had given differing accounts in interviews and evidence of their movements on the 11 June and 13 October 1996.

The applicant denied the offences and submitted that the evidence was flawed. He stated that he had never met KC, although he had visited PM in prison. He asserted that KC was unreliable as a man of bad character who had committed a large number of offences himself and who had a self-serving motive having done a deal with the prosecution to obtain early parole. Covert tapes had shown KC to be a liar and the applicant questioned why, if KC was feeding information to the police, the police did not listen into and tape telephone calls. He denied that it was his hand-writing on the

map of Leeds and submitted that the addresses of the victims would have been known to other criminals too. There was no forensic evidence pointing to him: his boots were too worn to have left the footprint found. He lied about his movements during police interviews as he did not want to be associated with PM who was being accused of murder. However, he had then quickly given a correct account of his movements on 13 October 1996 to the police which was consistent with his later evidence and the later evidence of PM.

He also took issue with Ms A's evidence: he had short hair, was tanned after a holiday at the relevant time and had a distinctive tattoo on his neck whereas she had said that he had long hair and was pale-skinned and she had failed to remark a tattoo on his neck although her evidence was that he was wearing a low-necked pullover at the time.

On 27 February 1998, following a trial of 20 days, the applicant and PM were convicted by a majority verdict (of 10-2) of robbery on or about 11 June 1996 and of murder on 13 October 1996 and by a majority verdict (11-1) of robbery on 13 October 1996. The applicant was sentenced to life imprisonment for murder and to 10 years' imprisonment for the robbery offences, the latter sentence to run concurrently.

2. The appeal

The applicant applied for leave to appeal to the Court of Appeal. The matter came before the Court of Appeal on 30 April 1999 when it was adjourned to enable further investigations to be made about the applicant's first ground of appeal: he alleged that approximately 100,000 pounds sterling (GBP) had been spent by the prosecution or the police in providing a new identity to KC and that that information had not been disclosed during the trial. The allegation had been included in a newspaper article published the day after the applicant had been sentenced and he submitted that this constituted evidence relevant to the credibility of KC which should have been disclosed.

The Court of Appeal considered *ex parte* a public interest immunity application of the prosecution on this matter. The prosecution was represented by counsel, but the applicant and his representatives were excluded from the hearing. The applicant's solicitor's notes of the decision of the Court of Appeal, it appears of December 1999, record as follows:

> "We have considered *ex parte* application on part of Crown [regarding the evidence] given by [KC]. [We have] read letter 3.11.99 from West Yorkshire police and [heard] evidence of 2 policemen, one of very senior rank. We are satisfied that when [KC] came to give evidence in the trial of [PM and the applicant], he had no expectation of reward. Consequently his evidence was not tainted in that regard. [We are] also satisfied having considered letter of 21.4.99 [regarding the] newspaper reports and read [the] newspaper, ... that there is no substance in that account. Arrangements were made long after conviction in February."

The applicant did not therefore pursue this ground of appeal and the Court of Appeal proceeded to hear the remaining grounds of appeal in the leave application.

The second ground of appeal concerned three items of information which had not been disclosed by the prosecution prior to or during the trial and which had come into the applicant's possession thereafter. He considered the information highly relevant to the reliability Ms A's evidence and that it should have been disclosed at trial. The three items were as follows:

(a) A pro-forma information sheet attached to the E-Fit image of one of the men Ms A said she had seen. The E-Fit image had been produced at trial but not the information sheet. The latter document read as follows:

> "From Cognitive Interview.
>
> Witness only able to give 60% mark. Treat image with CAUTION – the E-Fit [image] is the best the witness could produce being very vague on facial features – only really saw from a distance."

The Court of Appeal described the relevant defence submissions as follows:

> "There is considerable uncertainty concerning the E-Fit pro-forma [information sheet]. It is far from clear that this document was served on the defence. It is true that there is a reference in the 9th schedule of the unused material dated 29th January 1998 to a "force intelligence report" although on its face the schedule does not specify that this is a separate document in addition to the E-Fit. For the purposes of this application we are prepared to accept that this document did not find its way into the possession of leading counsel then appearing on behalf of this applicant. There is no record of service of this material on the file of the applicant's solicitor at trial. Moreover, we have little doubt that if the document had been in leading counsel's possession he would have referred to it in cross-examination.
>
> The significance of this document is that it appears directly to contradict the evidence of [Ms A] that she observed the face of the man she later identified as [the applicant] at close quarters."

(b) A document called a CID7 was also made by the author of the E-Fit image. The Court of Appeal described the defence submissions on this document as follows:

> "There is some doubt as to whether the CPS received the document CID7 and this would explain why it was not served on the defence. It appears to be accepted therefore that there was non-disclosure of this document. The significance of this form [is] that the reference to the eyes of the suspect records a description of "oval light" and: "the witness somewhat vague on facial features and having only had a limited look at suspects faces".
>
> In [Ms A's] original statement of 16th October there was no reference to the colour of the suspects eyes. In her statement of 20th November she made specific reference for the first time [to] "piercing blue eyes". This description proved to be of considerable importance in the prosecution's case, because of the reference in [the surviving brother's] statement to the "very piercing blue eyes" of one of his attackers

on the earlier occasion in June [1996]. [Defence counsel] submits that no reference was made in cross examination of [Ms A] to the fact that it was only in her later statement that the blue eyes description first emerged. However, he contends, without any material to show that she had previously been asked to describe the eyes, the defence ran the risk of underlining a damaging feature of the case against the applicant. The fact disclosed in the CID7 that, when first asked about the eyes she made no mention of the supposedly striking feature, throws substantial doubt on this important aspect of her evidence. Had it been explored in cross examination at trial it could have formed the basis for a suggestion that she had heard of the reference to blue eyes from another source."

(c) Documents relating to an identity parade on 10 November 1996. The applicant had discovered after the trial that Ms A had identified a decoy during the first parade on 10 November 1996. The Court of Appeal described the relevant defence submission on this point as follows:

"[Defence counsel] attaches even more significance to the non-disclosure of the [first] identity parade material. The CPS served some of the documentation in relation to the 10th November parade. In their bundle of material served at this hearing the Crown have included additional material from the 10th November parade. From this it appears that from that parade [Ms A] wrongly identified one of the "decoys". The material part reveals:

"Q: Is the person you saw on Sunday 13 October 1996 on the parade? Note reply A: Yes Number 3.

(i)Q: Was J. Foley identified? A: No.

[Defence counsel] points out that the first identification parades were referred to in evidence but the full significance of the [first] parade could not have been appreciated in the absence of the full documentary evidence. In cross examination, [Ms A] stated: "I didn't think I had pulled anyone out". It was then clarified that she was being asked the questions about the December [1996] parade. She then reaffirmed that she had not identified anyone. In the summing up the learned judge directed the jury that [Ms A's] evidence was that she had not picked anyone out.

It is difficult for this court to determine whether or not counsel at trial were aware of the identification of a decoy. However, we are satisfied that if defence counsel had been aware of this information it would have been of obvious importance. We are prepared to assume for the purposes of this application that this information was not imparted to the defence."

A photograph of the identification parade on 10 November 1996 was also disclosed to the Court of Appeal and the defence submitted that the man picked out by Ms A looked nothing like the applicant.

In its judgment of 13 December 1999 the Court of Appeal found as follows as regards the failure to disclose these three classes of document concerning Mrs A's evidence:

"We consider it most unfortunate that these three classes of document were not revealed to the defence, or if they were then that they did not find their way into the possession of counsel. We are equally satisfied that if counsel had had access to this information it would have been deployed in cross examination. We doubt whether the

> manuscript endorsement on the E-Fit pro-forma would have materially dented [Ms A's] credibility in the light of the evidence she gave as to the opportunity of observing the men over a distance of some 50–60 yards. This evidence was not inconsistent with her previous statements. Counsel would have had more success with endorsement on the CID7 of the description of the eyes as "oval light". This may have caused [Ms A] to reflect upon her evidence and whether she wished to retract her testimony. We take a more serious view of the non-disclosure of the [first] identity parade material which clearly shows on its face that far from not identifying anybody [Ms A] made a positive identification of a decoy. This might well have cast considerable doubt on [Ms A's] positive identification of [the applicant] on the 1st May 1997."
>
> Even so, we do not consider that these irregularities, on their own, would be such as to render the convictions unsafe if leave to appeal were granted."

The Court of Appeal then rejected the remaining grounds of appeal which challenged the trial judge's direction to the jury concerning separate verdicts against PM and the applicant, his alleged failure to warn the jury of the danger of concluding guilt from a rejection of the applicant's defence, his direction concerning PM's previous convictions and his direction as to whether the two men whom Ms A had seen were the two robbers. The appeal court also rejected the appellant's challenge to the trial judge's failure to discharge the jury following threats made to jurors by third parties. Finally, the Court of Appeal reviewed the case against the appellants as a whole in order to determine whether the matters complained of collectively rendered their convictions unsafe. It noted as follows:

> "We are satisfied that they do not and that there was evidence which, if the jury accepted it fully justified each of the convictions. Suffice it to say that the evidence of [KC] was corroborated in several respects. The relevant telephone conversation[s] with [KC] were all proved. [PM] admitted in interview that he had [visited another of KC's targets]. A piece of paper was found at PM's home upon which was written the name "Boris". The [map] had [PM's] fingerprints upon it [and] the addresses of the brothers and Boris were noted or ringed. Both defendants lied in interview about being with each other in [the applicant's] car on the afternoon of 13 October. PM set up a false alibi in relation to the 13 October and involved his wife ... and sister-in-law .. in making false statements supporting his false alibi. The identification evidence of [Ms A] including her positive identification of [the applicant] on 1 May 1997. The finding of a boot print in blood which corresponded to a size 8 "Kicker" boot. [The applicant] had such a boot and wore it at about the material time. In evidence both defendants accepted that they had been together on 11 June 1996 and on 13 October 1996".

The Court of Appeal concluded therefore that, in light of the strength of the case against PM and the applicant, there was no realistic prospect of a successful appeal. Their applications for leave to appeal were rejected.

B. Relevant domestic law and practice

The Court refers to the outline of the domestic law and practice concerning the prosecution's duty of disclosure of material to the defence

contained in *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, ECHR 2000-II.

COMPLAINTS

The applicant complains under Article 6 §§ 1 and 3(b) and (d) of the Convention about the failure by the prosecution to disclose during the trial material relating to KC's and Ms A's evidence.

THE LAW

The applicant complains under Article 6 §§ 1 and 3(b) and (d) that he did not have a fair hearing due to the failure by the prosecution to disclose material during his trial. Article 6, in so far as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ...
>
> 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 forth in paragraph 1. In the circumstances of the case it finds it 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. It will therefore confine its examination to the question whether the proceedings in their entirety were fair (*Edwards v. the United Kingdom*, judgment of 16 December 1992, Series A no. 247-B, § 33-35).

In so assessing, the Court must consider the proceedings as a whole including the decision of the appellate court. Moreover it is not within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the

proceedings in their entirety, including the way in which evidence was taken, were fair (the above-cited *Edwards* judgment, § 34).

It is also recalled that 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 right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In addition Article 6 § 1 requires that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused.

However, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or to keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (*Fitt v. the United Kingdom* [GC], no. 29777/96, §§ 44-45, ECHR 2000-II).

Moreover, in cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them. In any event, where the evidence in question has never been revealed, it would not be possible for the Court to attempt to weigh the public interest in non-disclosure against that of the accused in having sight of the material. It must therefore scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused (the above-cited *Fitt* case, at § 46).

1. The applicant complains, in the first place, about the failure to disclose material relevant to KC's evidence and credibility.

He believes that the prosecution failed to place before the trial court material about the funding by the police or prosecution of a new identity for KC. He submits that the trial judge should have been invited to rule on whether this material should have been disclosed to the defence. The defect was not remedied by the Court of Appeal as that court did not see KC and

could not therefore assess the relevance of this material to KC's credibility and because his representatives could not participate in the *ex parte p*ublic interest immunity hearing and so were unable to question the police witnesses heard by the Court of Appeal or make submissions on the significance of the material. He contends that relevant material existed as otherwise there would have been no need to hold an *ex parte* hearing.

The Court recalls that it has found that an *ex parte* public interest immunity hearing before a trial judge who had examined the undisclosed material and did not order its disclosure did not violate Article 6 (the above-cited *Fitt* judgment and *Jasper v. the United Kingdom* [GC], judgment of 16 February 2000, n° 27052/95, §§ 54-58).

On the same day the Court found (the above-cited *Rowe and Davis* judgment at §§ 63-67) that Article 6 had been violated when the Court of Appeal, during an *ex parte* public interest immunity hearing before it, had examined and refused to order disclosure of material which had not been disclosed during the trial. In the latter case, the Court decided that the appeal court review was not sufficient to remedy the unfairness caused by the lack of scrutiny of the undisclosed material by the trial judge and it so decided having contrasted the position of a trial judge and an appeal court.

The applicant relies on these cases pointing out that the trial judge never saw the undisclosed material concerning KC's evidence.

However, the Court recalls that in the above-cited judgments in the *Jasper, Fitt* and *Rowe and Davies* cases it was not disputed that there was undisclosed material in existence and the debate concerned the question whether that material should be disclosed during the trial.

In the present case, it has not been established that such material existed. The applicant made an allegation to the Court of Appeal, based on a newspaper article published after his conviction, that the prosecution had spent a significant sum of money in providing KC with a new identity in exchange for KC's evidence against the applicant and had not divulged this to the defence during trial. The Court of Appeal heard submissions from the prosecution and evidence from two police officers (one of senior rank) and found that there was no substance in the allegation. In particular, it found that KC had no expectation of a reward when giving evidence and that the allegation in the newspaper article was unfounded. The indication by the appeal court that "arrangements" had been made some time after the applicant's conviction must be read, given that court's earlier findings, as an indication that any agreement with KC had been entered into long after the applicant's trial. The Court does not accept that the mere fact that the prosecution applied for a public interest immunity hearing establishes, as the applicant contends, that relevant and undisclosed material existed. It was inevitable, given that the allegation raised issues of prosecution agreements with informants, that the prosecution would have made such an application pending further clarification during the *ex parte* hearing itself.

Accordingly, if the allegation of a pre-trial deal was unfounded, so too is the suggestion that material existed in relation to this allegation. The Court considers therefore that the applicant has not established that any undisclosed material existed relating to a pre-trial agreement between the prosecution and KC concerning a new identity in exchange for his evidence against the applicant (see the above-cited *Jasper* case, § 57).

It is true that the defence was excluded from the appeal court's assessment of the well-foundedness of the applicant's allegation and, in particular, could not cross-examination the police officers in question.

However, the Court notes that the applicant was represented by solicitors and counsel throughout the proceedings. During his trial, he relied on broad allegations about KC's self interest in giving evidence against him and, in particular, emphasised allegations that KC had concluded a deal with the prosecution (concerning his release from prison) in exchange for his evidence. Accordingly, the trial judge warned the jury to consider KC's evidence with considerable care. Although it was the defence that raised this issue, the applicant does not refer to any application by the defence during the trial to examine witnesses who could give evidence about an alleged agreement between KC and the prosecution.

Moreover, once the more specific allegation concerning KC's new identity had appeared in a particular newspaper article published after the trial, this constituted the defence's first ground of appeal to the Court of Appeal. This allegation prompted the *ex parte* hearing. The defence was therefore aware of the subject matter of the *ex parte* hearing and was free to make detailed written submissions as to the relevance of this allegation, if shown to be true, to KC's credibility and to the defence.

Accordingly, the Court does not consider that the applicant's inability to cross-examine the police officers during the *ex parte* hearing gives rise to any procedural unfairness affecting his ability to fully put his case concerning the allegation in relation to KC.

The Court therefore finds that the applicant's complaint concerning a failure by the prosecution to disclose material about an alleged pre-trial agreement with KC is manifestly ill-founded and inadmissible within the meaning of Article 35 §§ 3 and 4 of the Convention.

2. The applicant further complains that the prosecution failed to disclose during the trial material relevant to Ms A's identification testimony and that this deficiency was not remedied by the Court of Appeal.

He submits that the above-cited Edwards' case can be distinguished, as the appeal court in the Edwards' case gave a reasoned explanation for concluding that the undisclosed material would not have made a difference to the jury's verdict and because the undisclosed material in the Edwards' case was of marginal importance. He also argues that the Court should adopt the approach followed in its *Condron* judgment (*Condron v. the*

United Kingdom, no. 35718/97, ECHR 2000-V) where the Court found that the failure to properly direct the jury as regards adverse inferences to be drawn against the accused had not been cured on appeal.

The Court notes at the outset that no explanation appears to have been proffered by the prosecution for the failure to disclose during the applicant's trial material concerning Ms A's identification evidence which existed prior to his trial, which was relevant to his defence and in respect of which no public interest in favour of non-disclosure is discernible or was claimed.

However, the applicant, who as noted above was represented by solicitors and counsel, had every opportunity to clarify the results of the first identity parade during the trial. He had been furnished prior to the trial with material concerning the second and third parades and the results of those parades were known during the trial. During the trial mention was clearly made of a further and earlier parade in respect of which it appears no documents had been disclosed. Nevertheless, there is no evidence that the applicant's counsel requested during the trial disclosure of material concerning the first parade including the results of the first identity parade. His counsel's cross-examination of Ms A during the trial concentrated on the second and third parades and no direct question was put to her by that representative as to the results of the first identity parade.

In addition, his representatives had every opportunity to seek to persuade the appeal court that the conviction should not stand in view of the non-disclosed material.

Moreover, the Court of Appeal examined in detail the prosecution and defence cases, the elements on which the prosecution relied, the transcript of the trial including the trial judge's summing up in respect of Ms A's identification evidence, the documents disclosed post-trial and the detailed submissions of the defence in those respects. The Court of Appeal concluded that the first category of undisclosed material was not inconsistent with Ms A's earlier statements. While it acknowledged that the material in the second and third categories may have had some impact on her evidence, it found that these irregularities would not, on their own, render the convictions unsafe. It then went on to consider whether all of the matters complained of viewed collectively rendered the conviction unsafe. The Court of Appeal concluded that they did not and, having reviewed the case against him, held that there was evidence which, if accepted by the jury, fully justified the applicant's conviction.

Having regard to the extent of the review conducted by the Court of Appeal, and the reasons given for upholding the conviction, the Court finds that the Edwards' case cannot be distinguished on the basis that the appeal court's conclusions were not sufficiently reasoned. In addition, the Court does not accept that the relative significance of the undisclosed evidence in the present and the Edwards' cases is sufficient to distinguish these cases.

As to the applicant's reliance on the above-mentioned *Condron* case, the Court recalls that the case concerned the different situation of a defective direction to the jury by a trial judge on the drawing of adverse inferences from a defendant's silence, in circumstances where the appeal court was not in a position to determine whether or not his silence had played a significant role in the jury's decision to convict. As was emphasised in the Court's judgment, the statutory provisions entrusted to the jury alone the decision whether to draw any, and if so, what, inference from the silence of the defendant, the right to silence being at the heart of the notion of a fair trial. Where a jury was not properly directed, the imperfection of the direction could not, as the Court found, be remedied on appeal.

The Court in its *Condron* judgment expressly distinguished the case from that of *Edwards*, where the Court of Appeal had been able to consider in detail the impact of the information withheld from the defence and where it was able to assess for itself the probative value of that information in the light of the arguments of the defence, which was by that stage in possession of the information, and to determine whether the availability of that information at trial would have affected the jury's verdict.

The Court considers that the circumstances of the present case are to be equated with those in the *Edwards* case and are distinguishable from those in the *Condron* case and that, as in the former case, the Court of Appeal was able to assess for itself the probative value of the undisclosed material and to determine whether its unavailability at trial affected the safety of the applicant's conviction.

In such circumstances, the Court concludes that the defects of the original trial were remedied by the subsequent procedure before the Court of Appeal. Moreover, there is no indication that the proceedings before the Court of Appeal concerning Ms A's identification evidence were in any respect unfair (the above-cited *Edwards* case, § 39).

In such circumstances, the applicant's complaint about the failure to disclose during the trial the material in question is manifestly ill-founded and inadmissible within the meaning of 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