

Chapter 5: The Appeals

Operations Paleface and Escapade

- 5.1 In the light of the statements made by Alf Allington and Ed Allington on 18 October 2000 to the effect that HMCE were aware of the fraud and encouraged London City Bond to let it happen, Villiers, and later Ford, Sewell, Hutchinson and Patel applied for and were granted leave to appeal against conviction, either by the Single Judge or by the Full Court. All the appellants complained of what they said was extensive non-disclosure by the Crown both before and during the trial and submitted that such non-disclosure vitiated the fairness of the proceedings.
- 5.2 The alleged non-disclosure was in relation to six separate matters:
- a. The status of the Allingtons as participating informants who were not registered or handled in accordance with the relevant Home Office guidelines.
 - b. HMCE had at all material times known that fraud was occurring at London City Bond and had encouraged the Allingtons to allow goods to leave the warehouse without duty being paid in order to enable them to detect and prosecute those further up the chain of fraud.
 - c. The receipt by Alf Allington of substantial inducements from HMCE to act as an informant.
 - d. The fact that Alf Allington had lied on oath in previous proceedings when he asserted that he did not know that fraud was going on at London City Bond and that he was an innocent dupe of those committing that fraud.
 - e. The fact that Alf Allington was known by HMCE to have received substantial bribes from his customers.
 - f. The fact that the Allingtons had lied in their prosecution witness statements about the provenance of the forged AADs.
- 5.3 The hearing of the appeals took place before the Court of Appeal Criminal Division (CACD) [Longmore LJ, Hunt J and HHJ Mellor (sitting as an additional judge of the Court of Appeal Criminal Division)] over 10 days in October 2001. With the leave of the court the appellants called Ed Allington and Ray Buckledee to give evidence at the appeal.

- 5.4 Ed Allington gave evidence about his co-operation with Customs officers and in particular Mr Small, whom he would telephone ten to twelve times a day in relation to consignments on which no duty had been paid. The fraud, he said, could not have operated without his knowing input. With the knowledge of HMCE he would sign an AAD on behalf of the warehouse knowing that the goods were never going to be delivered to their purported destination. Fraud had become so widespread by 1997 that London City Bond opened a new warehouse for the express purpose of dealing with goods which were to be fraudulently diverted: sometimes as many as 30 – 40 trailers would leave in one day with such goods. Mr Small would sometimes indicate that particular trailers, in whom his surveillance teams were interested, should be loaded first so that his teams would not have to wait around the warehouse.
- 5.5 In a later statement, adopted by him in evidence, Ed Allington said:
- In signing the AAD for a bogus load we were aware that the load would leave our bond and was going to be diverted. The fact that Customs through Bernie Small had full knowledge of each company and load meant that I had no concerns about releasing the duty suspended goods. If it had not been for this neither Alf nor I would ever have done what we did because the role we played would have made us a central figure in the fraud. We still were essential to the fraud but neither of us acted dishonestly because Customs knew what we did.
- 5.6 Mr Buckledee also gave evidence on behalf of the appellants. Bernie Small was present at the appeal and available to give evidence on behalf of the respondents but in the event was not called; nor were any other witnesses. In particular Alf Allington did not give evidence: the Court expressly had no regard to the content of his statements.
- 5.7 Judgment was handed down on 9th November 2001. The Court made a number of findings of fact on the basis of the evidence adduced in the course of the appeal, the transcripts of the PII hearings and the large volume of disclosed documents. The Court found:
- a. From August 1996 Ed Allington was a participating informant whose status was not revealed to the judge at trial as it should have been.
 - b. From August 1996 Alf Allington was a participating informant whose status as such was not revealed to the trial judge as it should have been together with the facts

that:

- i. He was not registered.
 - ii. No controller had been appointed to supervise Bernie Small in his dealings with Alf Allington.
 - iii. No proper records were kept of Alf Allington's dealings with either his customers or with HMCE and not all his dealings with Bernie Small, including information he gave, were recorded.
- c. It was distinctly misleading for Bob Snuggs and Bernie Small to describe Alf Allington as a "trade source" in the documents prepared for Maureen Dunn in January 1999.
 - d. HMCE actively encouraged senior personnel at London City Bond to allow goods to leave the warehouse without duty being paid and HMCE knew that Ed Allington and Alf Allington were facilitating that fraud.
 - e. Alf Allington had an understanding from October 1996 that he would not be called upon to indemnify HMCE in the event of duty not being paid on goods when they left London City Bond. London City Bond was immune from any risk of the bond being called upon.
 - f. Alf Allington gave two false answers in the course of his evidence at the trial of Operation Fallover when he stated that:
 - i. If a stamped AAD was returned he could not know if there had been a fraud.
 - ii. He had no discussion about an indemnity with Bernie Small.

Customs personnel must have known that these answers were false.

- g. Alf Allington gave at least four false answers in the course of his evidence at the trial of Operation Fusion when he stated that:
 - i. He was not an HMCE informant.
 - ii. He was not aware when goods left the Bond that some of them were being fraudulently diverted, although he had suspicions.

- iii. He did not allow frauds to run with HMCE's connivance nor was he a party to any deals with HMCE.
- iv. He did not know that he would not be called on to pay the lost duty.

Again, HMCE personnel must have known that these answers were false.

- h. Neither those falsehoods nor the truth that showed them to be falsehoods were known by prosecuting counsel at the trial of Operation Paleface.
- i. No evidence was offered in the trial of Operation Fajita because HMCE wished to protect Alf Allington from exposure as an informant following a ruling by the trial judge that Alf Allington had been an informant, had traded with customers he knew to be fraudulent, had given untruthful evidence in earlier proceedings and had been paid £100,000 by a customer.
- j. When prosecuting counsel explained the position to HHJ Hammond in the PII application on 3rd and 6th March 2000 he did not know the extent of the participation of Alf Allington or Ed Allington in the diversion fraud, the co-operation by Ed Allington in filling in false AADs, the encouragement given by Bernie Small to inform on fraudulent companies or anything of substance about the London City Bond immunity.

5.8 In the light of those findings the Court concluded that, through no fault of counsel, the position in relation to the Allington brothers was not laid fully or fairly before the judge. Even if HMCE did not think that Alf Allington was a participating informant they should, at the very least, have appreciated that his status was debatable and that it was not for them to determine the matter without putting their own counsel or the court fully in the picture for the matter to be properly determined.

5.9 The Court observed:

If a witness who is called at a trial is a participating informant in the very instance with which the trial is concerned, there would have to be a very strong countervailing interest for his status not to be revealed; if it is not revealed there is a serious danger that the jury will be misled and, indeed, a serious danger that the witness will give misleading answers in evidence as Mr Allington did at the Southwark trial and the Hutchinson trial in Manchester.

...For those reasons the status of a witness if he is a true participating informant will, almost inevitably, have to be disclosed unless the countervailing public interest is extraordinarily strong. We think it should and would have been disclosed, by order of the judge in the present case if the full facts had been known.

- 5.10 In the judgement of the court there was a serious failure on the part of the Crown to disclose the true status of both Allington brothers as participating informants and the extent of their participation in the offences with the encouragement of HMCE. Had the status of the Allington brothers as participating informants together with their encouragement by HMCE and the consequent London City Bond immunity been disclosed to the defence, the jury would not have been bound to return verdicts of guilty. The appeals were allowed, including the appeal of Sewell, who had pleaded guilty. Upon the application of the prosecution retrials were ordered in respect of all defendants.

Operation Techo

- 5.11 The defence teams concerned with Operation Techo learned of the statements made in October 2000 by the Allingtons. All but one of the defendants appealed against conviction by leave of the Full Court. One of those had died since the trial but the Court approved his widow as his personal representative under section 44A of the Criminal Appeal Act 1968 to continue with his appeal. Leave was given solely on what the court described as the "Allington allegations".
- 5.12 Those allegations were essentially a repetition of the matters raised in the Villiers appeal. There was, it was said, extensive non-disclosure by the Crown before and during the trial. The status of Alf Allington and Ed Allington as participating informants should have been disclosed to the judge and defence. Alf Allington was not registered as an informant and no controller was appointed to supervise his handling. Customs officers actively encouraged senior personnel at London City Bond to allow goods to leave the warehouse without duty being paid and knew that the Allington brothers were facilitating the fraud. Alf Allington was offered inducements to act as an informant in that in return for his assistance London City Bond would not be called on to meet the loss of duty. Alf Allington had given false answers in evidence. His position was misrepresented before the jury because prosecuting counsel and the judge were unaware of the true position.
- 5.13 On 31st January 2002 the Full Court [The Vice President of CACD (Rose LJ) Morland & Jackson JJ] when granting leave to appeal against conviction required the prosecution to consider its response to the appeals. In the course of doing so further

material came to light which was not available to the defence at trial. The prosecution concluded that the emergence of further undisclosed material was of sufficient potential significance, when taken together with the cumulative effect of the failures in respect of the Allington disclosure, to render it inappropriate to continue to seek to argue that the convictions were safe. The prosecution conceded that the appeals would have to be allowed but indicated they proposed to ask the Court to order a retrial.

5.14 The case came back before the Court on 28th February 2002. At that hearing the Court quashed the convictions of all the appellants, including the seven who had pleaded guilty, without hearing submissions. The Court further ordered retrials in respect of those whose sentences were longer than six years.

5.15 Those appellants affected by the orders for retrials indicated that they would be making an abuse of process application at the commencement of their trial. The prosecution applied for the abuse of process hearing in Operation Techo to be joined to the conjoined applications to be heard before Mr Justice Grigson in Operations Manpower, Chamfer, Paleface and Escapade. However, in April 2002 Mr Justice Grigson declined to permit still further defendants to be added to the 15 defendants already involved, concluding that the result of the proceedings before him would be determinative of any abuse arguments advanced by Operation Techo defendants. So indeed has it proved to be. The prosecution have no offered no evidence against the defendants in respect of whom a retrial was ordered.

5.16 As a matter of history, there was one defendant in Operation Techo who had pleaded guilty and had not appealed. However, he has now done so, the prosecution did not oppose the appeal and it was allowed on 6th June 2003.

Operations Fallover, Fusion and Fajita

5.17 The appeals against conviction in respect of Operations Fallover, Fusion and Fajita were heard together in July 2002 in the CACD [The Vice President of the Court of Appeal Criminal Division (Rose LJ) and Colman & Roderick Evans JJ]. Judgment was given on 26th July 2002. Although heard together, the prosecution was represented separately in respect of each appeal. Disclosure continued to be a problem even during the appeals. On the fourth day of the hearings Counsel for the prosecution in the Fallover appeal suffered the embarrassment of having to interrupt proceedings to disclose yet further documentation which had come to light.

Operation Fallover

5.18 The defence team representing MM Patel learned of the Allington statements and following the decision of the CACD in

Villiers the Single Judge granted him leave to appeal against conviction on similar grounds. The remaining defendants in Operation Fallover did not at that stage appeal.

5.19 For the purposes of the appeal the Crown admitted that, by 13th August 1996, Alf Allington was a participating informant with an implied indemnity against liability for excise duty on goods diverted from London City Bond. He was not registered as an informant. He had no controller and not all his dealings with Small were recorded. It was incorrect to describe him to the trial judge as a trade source. He lied to the trial judge in saying that he could not know if there had been a fraud if a stamped AAD was returned and that he had had no discussion with Small about an indemnity. It was further admitted that Small was a frequent visitor to London City Bond and often took away returned AADs. HMCE actively encouraged London City Bond to allow goods to leave without duty being paid and knew the Allingtons were facilitating that fraud. In 1996 London City Bond informed HMCE as a matter of course when a new account was opened. The admissions avoided the need for any evidence in the appeal, and the Court heard none.

5.20 It was submitted on behalf of MM Patel that the prosecution's failure to disclose Alf Allington's role as a participating informant, the failure to register him, the failure to provide him with a controller and the failure to maintain proper records of meetings between Alf Allington and Small, were all in clear breach of the Home Office Guidelines in relation to informants. As those breaches were not disclosed to the trial judge, the abuse hearing before HHJ Hucker was necessarily unfair. Counsel for MM Patel went on to submit that the judge exercised his discretion on the basis of false evidence, so it was necessarily flawed. The judge, so it was asserted, was positively misled into accepting that Alf Allington's role was merely that of a trade source. The case for MM Patel was put on the basis that the non-disclosure by HMCE and the cover-up by dishonest evidence to conceal Alf Allington's true status was so unworthy or shameful as to amount to an affront to public justice.

5.21 For their part the prosecution did not accept that the Allingtons were participating informants in the case of MM Patel. The Crown accepted that the judge was misled by lies that Alfred Allington was merely a trade source. But, it was submitted, if the judge had known the truth he still would not have stayed the proceedings or concluded that a fair trial was not possible. All that the judge was effectively deprived of was "the icing on the cake," namely that Allington had an indemnity and knew what was happening.. There could have been a fair trial because all the issues had been canvassed and Alf Allington's credibility could have been put under the spotlight in cross-examination. If

there had been full disclosure to the judge he could not have come to any different conclusion than he did.

5.22 The Court concluded on the material placed before it that:

- a. Lies were told to HHJ Hucker by prosecution witnesses in the course of PII hearings and on the *voir dire*.
- b. Those lies were told by reason of a deliberate decision on the part of HMCE to conceal from the judge the true status of Alf Allington and the real nature of the relationship between HMCE and London City Bond.
- c. The judge, in giving his rulings as to disclosure and as to whether there should be a stay for abuse, was materially misled by those lies in reaching conclusions, now known to be wrong, that Alf Allington was merely acting as a trade source and that there was no collusion between London City Bond and HMCE to facilitate the frauds, including that in which MM Patel was said to be involved.
- d. Had the judge known the true position it may be that his decision in refusing a stay would have been different.
- e. The appellant pleaded guilty only after the abuse submission had failed.

5.23 MM Patel's appeal was allowed. His conviction, notwithstanding his plea of guilty, was held to be unsafe and was quashed, as was the confiscation order made against him. In the ordinary way the Court 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 had already served his sentence and it was then nearly 6 years since the offence is alleged to have taken place, the Court made no such order, as it would not be in the interests of justice to do so.

5.24 As a matter of history, after the success of MM Patel two other defendants in Operation Fallover lodged grounds of appeal. The prosecution did not oppose the appeals, which were allowed on 6th June 2003.

Operation Fusion

5.25 As in the Operation Fallover appeal the defence learned of the statements made in October 2000 by the Allingtons. Rahul Patel, Nilam Patel and Percy lodged grounds of appeal. The Registrar referred their applications for leave to appeal against conviction to the Full Court. The Full Court granted them leave

on the ground that, before they entered their pleas, the Crown had failed to make material disclosure of matters relating to London City Bond.

5.26 In addition to the admissions made for the purpose of the Operation Fallover appeal, on which these appellants also relied, the Crown admitted that there was a failure prior to, during and beyond the end of the Operation Fusion trial to disclose to the defence the true status of the Allington brothers. It was further admitted that Alf Allington's evidence, served before the trial, about producing AADs gave a misleading impression. It was also admitted that the evidence of the relationship between the NIS and London City Bond, particularly from Small, was "at the very least incomplete or misleading". As in Operation Fallover, the admissions avoided the need for any evidence in the appeal, and the Court heard none.

5.27 It was submitted on behalf of the appellants that in the light of the admissions made, the exercise of discretion by the judge in refusing a stay was fatally flawed, particularly in the light of the false evidence given to him by Alf Allington as identified in the CACD judgment in Villiers and the findings made by that Court. Those facts must, had he known about them, have made a difference to the ruling by HHJ Mota Singh that no stay should be ordered.

5.28 It was not suggested that Mr Gompertz QC, counsel for the prosecution, had deliberately misled the defence. But defence counsel's advice as to plea was on the basis that what prosecution counsel said was correct, whereas Rahul Patel's plea was clearly not based on true information. By the date of the appeals the prosecution had disclosed material previously withheld as being subject to legal professional privilege. One document was a memo of 2nd February 1999 from Maureen Dunn, the solicitor responsible for the cases against all these appellants, to her senior John Flood.

5.29 The memo was written following a conference with counsel in which Mr Small's informant logs were scrutinised and was one of the documents before the CACD. The memo speaks of Alf Allington being regarded as a "trade source" but having gradually become more than this. It continues:

There are instances I now know whereby he gives his handler general information concerning individuals /companies which are not reflected in his statements in the relevant cases....As (Counsel) read the logs through the discrepancy between what AA has told Customs and what is in his statement became apparent. Clearly this is relevant to

many cases...There may well be all sorts of similar cross links and comments made which are potentially disclosable.

5.30 Three options were discussed as to the way ahead. The note continues by describing one of them thus:

Alf Allington's role is made known, with his consent, and he is able to give full and frank evidence...Thus, if for example, he has been at an "innocent" meeting with a person but has had several where fraudulent activities/conversations are apparent, the full disclosure would not harm the prosecution. This is not an attractive proposition to the NIS officers (understandably) since this would be tantamount to putting his head in the frame and inviting someone to attack him ...From a policy point of view such risks to an informant are not generally accepted and from an individual point of view the officers feel that it is not a risk which Alf Allington is likely to be willing to accept. However, it must also be said that both Counsel have strongly advised that this is the best option....

5.31 The memo demonstrated, it was said, that it was clearly known to HMCE lawyers in February 1999 that Alf Allington was not a trade source. Yet full relevant disclosure in relation to this had not been made by the time Rahul pleaded guilty three months later, or during the PII hearings, or during the abuse of process submissions on the *voir dire*, or at any time before Nilam pleaded guilty on 22nd July 1999.

5.32 The Crown submitted that the failures on the part of the prosecution did not amount to misconduct justifying either a stay or interfering with freely entered, unequivocal, pleas of guilty, by legally advised defendants fit to plead, who knew what they were doing. They should not be permitted to resile from their pleas unless there had been a breach of process of considerable gravity. Even if the judge had known all the matters now raised he would still have ruled as he did.

5.33 In allowing the appeals in Operation Fusion the Court had regard to the conclusions in *Villiers* that, with the knowledge of customs personnel, Alf Allington lied to HHJ Mota Singh in four respects. Furthermore, on the basis of disclosure now made, Mr Small's evidence to HHJ Mota Singh was also dishonest. I make clear that I reach no conclusion on this finding. The honesty of Mr Small's evidence is a matter for others.

5.34 The Court continued that had the judge not been misled by those lies, his decisions in relation to disclosure and stay of proceedings might have been different. Accordingly, Nilam Patel was precluded from properly advancing an abuse

argument and pleaded guilty. Rahul Patel and Percy should be in no worse position.

- 5.35 The convictions of all three appellants were quashed. A retrial was not sought in relation to Nilam. As Rahul and Percy had both served their sentences and as their offences were alleged to have been committed more than 4 years ago, the court did not think it in the interest of justice that they should be retried. Sihota, Basram and Bothwell later lodged grounds of appeal; the prosecution did not oppose the appeals, which were heard together with those remaining in Operations Fallover and Techo and allowed on 6th June 2003. The remaining defendants who pleaded guilty have not as yet appealed.

Operation Fajita

- 5.36 Bajwa and Early appealed against conviction by leave of the Single Judge, following the court's decision in *Villiers*. Applications for leave to appeal by Vickers and Dowell were referred to the Full Court, which granted leave.
- 5.37 The Court relied on the findings made in *Villiers*, directed to be binding in the Operation Fajita appeal at an earlier directions hearing. On behalf of the appellants it was submitted that there were many significant facts which were undisclosed relating to the role of Ed and Alf Allington and the involvement of the NIS in the operations at London City Bond. Further, the integrity of the important AAD documentation was questionable. Had the appellants been given the information which ought to have been disclosed, they might well have been advised that there was an arguable defence based on entrapment and abuse of process and that the prosecution case could be seriously undermined by its inability to prove that the AADs were stamped with bogus stamps.
- 5.38 On behalf of the prosecution, Mr Noel Lucas told the Court that, had he appreciated at any time before 24th February 2000 that Alf Allington had been a participating informant, he would have at once disclosed this to HHJ Maher as he did immediately he saw the NIS internal email dated 4 April 1998. The legal team had previously understood that Alf Allington had not been a participating informant, but merely a trade source - a bonded warehouseman who was volunteering information beyond his strict duty. Mr Lucas accepted that, overall, the one matter that should have been disclosed was that Alf Allington was a participating informant but the misrepresentation of his status went no further than to his credibility.
- 5.39 The Court concluded that disclosure of Alfred Allington's involvement as a participating informant and of the extent of the control exercised by NIS over the AADs was directly relevant to

the strength of the prosecution evidence of fraud based on the false AADs and it was further relevant to a possible abuse of process argument. So also was the fact that Alf Allington had, in February 1999, given false and misleading evidence at the PII hearing before HHJ Hucker in the Fallover proceedings. At the time when Bajwa was in the course of taking his decision to plead, none of those matters had been disclosed. His decision was therefore taken on the basis of information which was materially deficient by reason of the prosecution's failure to comply with its duty of disclosure.

5.40 Early and Dowell both pleaded guilty in May 1999, following the judge's decision against disclosure of information and documents at the PII hearing on 4th and 5th May 1999. The CACD decided that at that hearing the judge was seriously misled as to the role of Alf Allington by reason of the untruthful evidence of Bernie Small and by what he was told, quite innocently, by counsel on the basis of inaccurate instructions. This was therefore a seriously tainted hearing. If the judge had been given the full information to which he was entitled it was most improbable that he would have taken any other course than to order the same full disclosure to the defendants as he ordered following the hearing in February 2000, at which he was given a much fuller picture of the involvement of London City Bond with the fraud and with HMCE. Had he taken that course, it is probable that the prosecution would have dropped the case against Early and Dowell, as was done in March 2000 in relation to other defendants. Accordingly, the prosecution's failure to comply with its duties of disclosure and its abuse of the PII hearing in May 1999 have given rise to the conviction of Early and Dowell. Their convictions were accordingly unsafe and were quashed.

5.41 The Court concluded that it was not in the interests of justice that any of the defendants, all of whom had pleaded guilty, should be retried.

Generally

5.42 The Court observed that it is a matter of crucial importance to the administration of justice that prosecuting 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, the Court of Appeal is unlikely to be slow to set aside pleas of guilty following such events, however strong the prosecution case might appear to be.

5.43 Finally the Court had some trenchant general observations of considerable importance about the need for honesty and plain dealing in our criminal justice system. It observed:

The integrity of our system of criminal trial depends on judges being able to rely on what they are told by counsel and on counsel being able to rely on what they are told by each other. [*I would add: and on counsel being able to rely on what they are told by those instructing them*] This is particularly crucial in relation to disclosure and PII hearings.... A defendant who plead(s) guilty at an early stage should not, if adequate disclosure had not by then been made, be in a worse position than a defendant who, as the consequence of an argument to stay proceedings as an abuse, benefited from further orders for disclosure culminating in the abandonment of proceedings against him. Furthermore, in our judgment, if, in the course of a PII hearing or an abuse argument, whether on the voir dire or otherwise, prosecution witnesses lie in evidence to the judge, it is to be expected that, if the judge knows of this, or this court subsequently learns of it, an extremely serious view will be taken. It is likely that the prosecution case will be regarded as tainted beyond redemption, however strong the evidence against the defendant may otherwise be.

5.44 Those words of warning should be the beacon to light the road along which every investigator and prosecutor approaches his responsible and onerous task.