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The Supreme Court, post-conviction disclosure and ‘fishing expeditions’: *R (Nunn) v Chief Constable of Suffolk Constabulary & Anor* [2014] UKSC 37

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Background

In 2006, Kevin Nunn was convicted of the murder of Dawn Walker, his former girlfriend. Her burnt body was found by the River Lark on 4 February 2005. A witness, PD, claimed to have seen two men removing a heavy-looking object from the victim's house, and identified Nunn as one of these men. Nunn argued that LM, another of the victim's former boyfriends, was the true perpetrator. LM had previously described how to commit a ‘perfect’ murder to PD, a crime which bore notable similarities to Walker's killing. However, LM had an alibi provided by his new girlfriend. Forensic analysis of the scene did not recover any physical evidence that linked to a suspect and while four sperm cells were found on the victim, these did not yield any DNA profiles. Further, the sperm could have been a result of secondary transfer from a towel or other means (Walker had recently used a male changing room at a sports centre). The sperm cells, however, were retained for possible further testing if technology were to advance.

Nunn was refused leave to appeal his conviction in 2007 on the basis that there were no arguable grounds that could render the conviction unsafe.¹ Nunn subsequently sought to make an application to the Criminal Cases Review Commission (CCRC). They approached a former Forensic Science

1. [2007] EWCA Crim 2663.

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Service (FSS) expert seeking to discover whether any further testing on evidence could be undertaken using procedures that were more advanced than those used during the original investigation. Further details were also sought about the victim's financial situation and inquiries made as to whether the forensic files could be released. The FSS refused disclosure without the express consent of the Crown Prosecution Service (CPS).

The CPS released some of the victim's financial information but stated that the Suffolk Constabulary, who held the case materials, would have to grant access to samples for further DNA testing. The Suffolk Constabulary declined, stating that there was no statutory duty of disclosure post-conviction, and that under common law, the Attorney-General's guidelines only covered previously undiscovered material not known about at trial, and such material would only be disclosed in the event that it 'might' cast doubt on the safety of a conviction.² These guidelines were intended to strike a balance between both the public interest in the finality of litigation and the correction of possible miscarriages of justice.

The judicial review

In April 2011, Nunn's solicitors sought a judicial review of the Suffolk Police's refusal to grant access.³ They argued that disclosure was necessary to enable the examination of unused material, and to ascertain whether there might be anything contained therein that could strengthen an application to the CCRC. While Nunn's forensic expert had found no faults in the forensic work undertaken prior to trial, he did not have access to all of the relevant files and so his conclusions were provisional. The expert was of the view that additional testing could now be carried out to try to obtain a DNA profile from the retained sperm cells. It was also argued that Articles 5 and 6 of the European Convention on Human Rights imposed a duty to disclose the material, as did s. 7 of the Data Protection Act 1998 with regard to the personal material contained within the files. Furthermore, the CCRC was not bound to seek disclosure of such materials and thus the CCRC did not constitute a safeguard for this purpose and, even if it did, it could take years and expend scarce CCRC resources.

At issue in the judicial review proceedings was whether a prisoner is entitled to the disclosure, post-conviction, of material gathered during the police investigation, but not used as evidence at trial. Nunn's legal representatives argued that the rationale of preventing wrongful conviction, which underpins the duties of pre-conviction disclosure, subsists post-conviction. The Criminal Procedures and Investigation Act 1996, as amended by the Criminal Justice Act 2003, abolished the concept of 'primary' and 'secondary' disclosure, and introduced an amalgamated test for disclosure of material. Section 3 of the CPIA provides that: 'The prosecutor must disclose any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.' However, s. 7a of the CPIA makes the statutory duty of continuing disclosure cease upon conviction, acquittal or discontinuance of the prosecution.

The CPIA therefore does not provide clear provision for post-conviction disclosure. Thus the need for reference to the Attorney-General's guidelines, and CPS guidance. The former states that, 'where material comes to light after the conclusion of the proceedings, which might cast doubt upon the safety of the conviction, there is a duty to *consider* disclosure'.⁴ The CPS guidance simply states, 'a review *may* be required as a consequence of a *subsequent trigger*, which requires the reconsideration . . . and an assessment whether justice is served by allowing such convictions, or decisions, to stand'.⁵ One of the non-exhaustive, indicative list of 'broadly-defined triggers' includes: 'Where a new scientific breakthrough raises questions over the safety of earlier convictions'. The Attorney-General's guidelines thus create a duty to consider disclosure when material emerges that might cast doubt on the safety of a conviction, and this duty, it was argued, could

2. CPS (2005) at para. 24.

3. *Nunn v Suffolk Constabulary & Anor* [2012] EWHC 1186 (Admin).

4. CPS (2005) at para. 59.

5. CPS (2015) at para. 1.

not be time-restricted, given that provisions state that material should be kept for future testing in light of scientific advancements. This is also expressly provided for as a ‘trigger’ in the CPS guidelines, and in many criminal appeals scientific advancements have led directly to the overturning of convictions.

Counsel for the Suffolk Constabulary and the DPP, however, argued that there was no duty of disclosure post-conviction unless new material cast doubt upon the safety of the conviction, and that convicted persons had no right to conduct a ‘fishing expedition’. Further DNA testing may still not yield results, and even if a profile was produced, this would not necessarily render Nunn’s conviction unsafe. Nunn had previously undergone a vasectomy, making it highly unlikely that he produced sperm, a fact that was known at trial. The jury had considered this evidence and convicted Nunn. Discovery that the sperm cells belonged to another male would not automatically point to his innocence as any sperm cells on the victim, even if not from Nunn, may also not be from her murderer.

The Divisional Court found that the disclosure duties were clearly set out in statute and common law. The trial procedure is ‘specifically designed to give the defendant the fullest opportunity to receive disclosure’, which itself is subject to review upon appeal. It stated that the possibility of criminal appeal and CCRC applications provided key safeguards post-conviction. Emphasis was placed on the primacy of the trial and the principle of finality; ‘the claimant [sought] access to material to enable the case to be re-investigated and re-examined. The time for that investigation and examination was the trial.’ Before the duty to disclose post-conviction arose, it must be demonstrated that there is evidence that ‘materially may cast doubt upon the safety of the conviction’.⁶ It was found that there was no material presented in Nunn’s case that, if tested, might cast doubt on the safety of the conviction. Consequently, there was ‘nothing which [gave] rise to a duty to make disclosure of the files of the Forensic Science Service or to enable material to be re-tested’. The Data Protection Act was irrelevant given that Nunn was not seeking disclosure of his own material from the files.

At the Supreme Court

Nunn was permitted to appeal the ruling to the Supreme Court. The certified question was, ‘whether the disclosure obligations of the Crown following conviction extended beyond a duty to disclose something that materially may cast doubt upon the safety of a conviction so that the Defendant was obliged to disclose material sought by the Claimant in these proceedings?’ Nunn’s legal team asserted that there was, in fact, a common law obligation on police to grant access to original forensic testing undertaken pre-trial, and to request testing of previously untested exhibits and the re-testing of material. JUSTICE,⁷ the Criminal Appeals Lawyers Association and Innocence Network UK submitted a joint third party intervention to the appeal. They argued, *inter alia*, that there was a continuing duty of disclosure post-conviction, ‘to ensure that the defence is provided with material, which may undermine the prosecution or assist the defence’ for the purposes of correcting miscarriages of justice.⁸ They submitted that the test for a duty of disclosure should be whether ‘there is material that could have been disclosed or tested at the time of trial, which would assist in the preparation of an appeal’.⁹ It was also argued that the CCRC is an inappropriate safeguard, given that its discretion regarding whether or not to seek disclosure correlates with whether applicants have legal representation. Furthermore, there were many examples of new evidence being discovered by the applicant’s representative, rather than by the CCRC.¹⁰

6. *R (Nunn) v Chief Constable of Suffolk Constabulary & Anor* [2014] Intervener’s case, for criticism of the inclusion of ‘materially’, as part of the TPI before the Supreme Court. Available at: http://www.justice.org.uk/data/files/Nunn_Interveners_Case_FINAL.pdf (accessed 13 November 2014) at para. 20.

7. An all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom.

8. *R (Nunn)*, above n. 6 at paras 3 and 13.

9. *Ibid.* at para. 24.

10. *Ibid.* at paras 37, 41. See also Hodgson and Horne (2008) on the impact of legal representation on applications to the CCRC.

The appeal was unanimously dismissed by the Supreme Court, stating that the disclosure duties created by the CPIA¹¹ were specifically limited after the conclusion of the criminal trial (or the cessation of proceedings).¹² The common law duty of disclosure exists alongside the statutory provisions, and although both underpinned by the objective of ‘fairness’, the demands of fairness differ according to the stages of the process at which disclosure is sought.¹³ The justification for this is that defendants are presumed innocent up to the point of conviction, but post-conviction that presumption is no longer warranted.¹⁴

While there is a clear public interest in exposing flaws in the criminal process and correcting wrongful convictions, there is also strong public interest in finality of proceedings. These competing interests are balanced by having strong duties to disclose pre-trial and during the trial process, to safeguard against miscarriages of justice, but relaxing the duty to disclose post-conviction, protecting the primacy of the trial, and the finality of the trial verdict.¹⁵ If the disclosure provisions were to remain the same throughout a prisoner’s lifetime (and perhaps beyond in the case of posthumous appeals), the indeterminate nature of the trial verdict would also have negative implications on police resources – there is a strong public interest in ensuring that finite criminal justice resources are expended on current investigations, unless there is a good reason for revisiting a criminal investigation that has been concluded.¹⁶

The Supreme Court ruled that the Attorney-General’s guidelines correctly set out the extent of the common law duty to disclose post-conviction. The police and prosecuting authorities should disclose any material coming to light that *prima facie* might cast doubt on the safety of the conviction. The material in Nunn’s case did not meet this ‘*prima facie*’ requirement.¹⁷ For applicants in Nunn’s position, where it is alleged that material *may* exist, which *may* lead to a reasonable prospect of a conviction being quashed, police and prosecutors are obliged to exercise sensible judgment over requests. If there appears to be a real prospect that further enquiry will uncover something of real value, there should be co-operation in making those further enquiries.¹⁸ Failing that, the CCRC can request disclosure and re-testing where appropriate.¹⁹

Analysis

The miscarriages of justice of the 1980s prompted the Court of Appeal to lay down a disclosure regime that, it was hoped, would protect from further miscarriages. All ‘material’ evidence tending either to weaken the prosecution case or to strengthen the defence case was to be disclosed. As Lord Bingham pointed out in *R v H and C*,²⁰ ‘[b]itter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.’ This ‘golden rule’ is mirrored in the Attorney-General’s guidelines the foreword to which states: ‘[t]he “golden rule” is that fairness requires full disclosure should be made of all material held by the prosecution that weakens its case or strengthens the defence.’²¹ In *Keane*,²² the Court of Appeal adopted a test for disclosure formulated at first instance by Jowitt J in the case of *Melvin*:

I would judge to be material in the realm of disclosure that which can 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

11. Modifying the test laid out in *R v Ward* [1993] 1 WLR 619 and *R v Keane* [1994] 1 WLR 746, 752.

12. *R (Nunn) v Chief Constable of Suffolk Constabulary & Anor* [2014] UKSC 37, per Lord Hughes at [18]–[20].

13. *Ibid.* at 25: ‘what fairness requires varies according to the stage of the proceedings under consideration’.

14. *Ibid.* at [19]–[20].

15. *Ibid.* at [32].

16. *Ibid.* at [22]–[25] and [30]–[33].

17. *Ibid.* at [34]–[38]. See also [43].

18. *Ibid.* at [41].

19. *Ibid.* at [20] and [39].

20. [2004] 2 AC 134, [13].

21. CPS (2005) at Foreword.

22. [1994] 1 WLR 746.

issue whose existence is not apparent from the evidence 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).

As Lord Bingham made clear in *H & C*, '[f]airness is a constantly evolving concept... it is important to recognise that standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another.'²³ In deferring to the Attorney-General's guidelines and CPS guidance, this judgment may be viewed as an opportunity to develop the notion of 'fairness' in respect of duties of post-conviction disclosure.

While it has long been understood that pre-trial non-disclosure is 'a potent source of injustice',²⁴ this ruling makes it clear that the Supreme Court does not consider post-conviction non-disclosure as posing equal risk, because the prisoner has already had the benefit of a full trial (and often, appeal). Yet this stance sits uncomfortably with recent experience where post-conviction disclosure of materials has seen thousands of wrongfully convicted prisoners, both domestically and internationally, freed from their incarceration. In many instances, this has involved undertaking further investigations or inspections of materials that were available at trial in light of developing techniques and technologies, most commonly the use of forensic DNA science. The rapid development of 'post-conviction' DNA access statutes in the US reflects the recognition that many exonerations depend upon access to original trial evidence and exhibits, and prisoners must be able to access these to demonstrate their innocence. Without such access, justice is postponed or denied altogether.

The Supreme Court did recognise in *Nunn* that what was being requested was not disclosure *per se*, but access to original exhibits to undertake further testing. Yet ongoing (or renewed/wider) access to case materials is crucial if a prisoner is to launch an appeal, or make an application to the CCRC. The Interveners' core submission was that there should remain an ongoing duty of disclosure following a conviction in order that miscarriages of justice can be discovered and remedied. (Re)testing exhibits might reveal new evidence that may cast doubt on the safety of a conviction – if a person is unable to do the former, they cannot show the latter. Given that since the closure of the Forensic Science Service in 2012, the police are required to retain all exhibits post-trial, pursuant to the Code of Practice under s. 23(1) of the CPIA,²⁵ the police are the gatekeepers to all investigation and trial materials.

Yet having established that the state is not obliged to disclose materials post-conviction – they must only *consider* the disclosure request – this judgment has the potential to be cited as authority by the police and CPS when refusing to disclose material that may affect the safety of a conviction. Anecdotally, it has been said that the Divisional Court's ruling from which this appeal was made has already been used as justification for non-disclosure decisions. Of course, this is what prompted *Nunn*'s original recourse to the courts, and therefore claims that this further ruling will now create a barrier to justice should be qualified, given that this 'barrier' was already in effect. Yet there is a fear among the miscarriage of justice campaign community that the police and CPS may now feel they can refuse disclosure requests with greater confidence. It may also be important to remember that disclosure should still occur where something new comes to light that might have a bearing upon a conviction.²⁶ While there may be occasions where an otherwise wavering police may deny disclosure post-*Nunn*, such a decision should remain judicially reviewable. Being legitimately denied access to materials is distinct from being *illegitimately* denied access, or not being *able* to request access.

An optimist might conclude that this judgment will have no impact, and could bring extra scrutiny to bear on police decisions as to whether or not to disclose material. Indeed, dissuading 'fishing expeditions' may save valuable police and court time and resources that would be better spent securing fuller disclosure pre-trial, and the avoidance of miscarriages of justice in the first instance. The judgment does,

23. *R v H & C* [2004] 2 AC 134 at para. 11.

24. *R v Ward* [1993] 1 WLR 619 at 642.

25. Paras 5.7–5.10.

26. CPS (2005) at para. 72.

however, place greater emphasis on the role of the resource-stretched CCRC as final safety net, citing the availability of the CCRC as ‘a very powerful consideration in limiting the duty of the police and CPS’.²⁷ Yet the CCRC has already demonstrated a clear reluctance to seek further testing of materials (to save time and money and prevent ‘fishing expeditions’) and will ordinarily only seek disclosure of unused material when it may serve to demonstrate an applicant’s innocence.²⁸ The Divisional Court took the view that compelling the police and the CPS to disclose material that bore little or no relevance to the safety of a conviction would create a flurry of fishing expeditions and subsequent litigation. As Kerrigan and Jackson put it, ‘the state’s duty in relation to the risk of miscarriage of justice is extensive but not unlimited’.²⁹ Given the risk of injustice, however, and the vital role the CCRC plays, one would hope that the Attorney-General’s guidelines on post-conviction disclosure will be interpreted widely by the CCRC.

Whilst appreciative of the need to avoid wasting time or resources, it is actually rare for applicants to go on ‘fishing expeditions’ in the full knowledge that this will not result in anything of use to their application. This is doubly true of solicitors, who have to protect their time and resources, and will not countenance investigations or inquiries that clearly have no merit. Conceiving of an inquiry as a ‘fishing expedition’ might be thought by some to betray a prejudicial attitude. The reason authorities sometimes label inquiries ‘fishing expeditions’ might be fear that fish will be discovered.

Making the CCRC the final arbiter on disclosure requests means that applicants need access to materials to demonstrate that they need the CCRC to do further testing, yet the CCRC won’t countenance disclosure requests until the applicant has demonstrated that the testing will support their claims of innocence. The CCRC discretion, in other words, places applicants in a catch-22 situation. The CCRC has historically taken the position that until test results have been provided, any new scientific tests are ‘speculative’.³⁰ Prisoners who have insufficient grounds for appeal may thus be denied access to the material that could provide those grounds. As JUSTICE argues, ‘[CCRC] resources and review powers are limited, and it does not act on behalf of the convicted person as an instructed solicitor does’.³¹

It may be right that the CCRC does not ‘indulge the merely speculative’,³² but in effect, the judgment effectively removes the ultimate decision from police and the CPS, and places it instead in the hands of the CCRC. The Supreme Court exhorted a generous interpretation when exercising the discretion:

The safety net in the case of disputed requests for review lies in the CCRC. That body does not, and should not, make enquiries only when reasonable prospect of a conviction being quashed is already demonstrated. It can and does in appropriate cases make enquiry to see whether such prospect can be shown. It has ample power, for example, to direct that a newly available scientific test be undertaken.³²

Yet the CCRC have faced criticism for refusing testing in previous applications, explaining in response that they would order re-testing if there was:

... a reasonable prospect of yielding a result, and if the possible results, considered at their highest, could be meaningful in the relation to the safety of the conviction then, quite simply, we will get the work done. What we tend to resist are proposals for purely speculative testing where it is a finger in the wind with no rationale based on the likely probative value of the work. We make no apology for that.³³

27. *R (Nunn) v Chief Constable of Suffolk Constabulary & Anor* [2014] UKSC 37, per Lord Hughes at [39].

28. See CCRC Formal Memorandum on s. 17. Available at: <http://www.justice.gov.uk/downloads/about/criminal-cases-review/policies-and-procedures/casework/section17-criminal-appeal-act-95.pdf> (accessed 15 November 2014).

29. Kerrigan and Jackson (2012).

30. Saunders and Robbins (2014).

31. *R (Nunn) v Chief Constable of Suffolk Constabulary & Anor* [2014] Intervener’s case. Available at: http://www.justice.org.uk/data/files/Nunn_Interveners_Case_FINAL.pdf (accessed 13 November 2014).

32. *R (Nunn) v Chief Constable of Suffolk Constabulary & Anor* [2014] UKSC 37, per Lord Hughes at [39].

33. Justin Hawkins, quoted in Robbins (2014).

The Supreme Court had an opportunity to lay down a regime that found a 'balance' between the rights of the convicted to have their claims of innocence investigated, at the same time as respecting the public interest in the finality of the verdict and the preservation of scarce resources. The judgment shifts that burden now onto the CCRC. The judgment also failed to factor in a victim's right to ensure, post-conviction, that the correct verdict was reached. A victim or their family and supporters must also have a vested interest in further disclosures that may reveal the true perpetrator. In order to establish where such injustices may have occurred, the duty to disclose must continue after trial. The CCRC must now find that elusive balance between the rights of prisoners, victims and the public without detailed guidance from the Supreme Court.

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