**Hilary Term**
**[2010] UKSC 7**
*On appeal from: 2008 HCJAC 53*

# JUDGMENT

# McInnes (Appellant) *v* Her Majesty's Advocate (Respondent) (Scotland)

**before**

**Lord Hope, Deputy President**
**Lord Rodger**
**Lord Walker**
**Lord Brown**
**Lord Kerr**

## JUDGMENT GIVEN ON

## 10 February 2010

**Heard on 8 and 9 December 2009**

*Appellant*
John Carroll
Moira MacKenzie
(Instructed by McClure Collins Solicitors)

*Respondent*
Paul McBride QC
Gordon Balfour
(Instructed by Crown Office and Procurator Fiscal Service)

*2nd Respondent & Intervener*
The Baron Davidson of Glen Clova QC
Mark Lindsay
(Instructed by Office of the Solicitor to the Advocate General for Scotland)

**LORD HOPE**

1. The law as to the duty of disclosure is now reasonably well settled. The Lord Advocate accepts that article 6(1) of the European Convention on Human Rights requires that the Crown disclose to the defence any material of which it is aware which would tend either to materially weaken the Crown case or materially strengthen the case for the defence: *McLeod v HM Advocate (No. 2)* 1998 JC 67, 79F-G, 80E-F; *Holland v HM Advocate* [2005] UKPC D1, 2005 1 SC (PC) 3, para 64; *Sinclair v HM Advocate* [2005] UKPC D2, 2005 1 SC (PC) 28, paras 28, 33; *McDonald v HM Advocate* [2008] UKPC 46, 2008 SLT 993, para 50; *Allison v HM Advocate* [2010] UKSC 6, para 25. It follows, applying this principle, that all police statements as a class must be disclosed to the accused: *HM Advocate v Murtagh* [2009] UKPC 36, 2009 SLT 1060 para 17.

2. The appellant, Paul McInnes, went to trial in December 2001 and was convicted before it had become the practice of the Crown Office to make police statements available to the defence. Statements made to the police by a Crown witness named Brian Pearce, including statements which he made after attending two identification parades, were not disclosed. In the light of what was decided in the cases of *Holland* and *Sinclair* the Scottish Criminal Cases Review Commission decided to refer this case to the High Court of Justiciary under section 194B of the Criminal Procedure (Scotland) Act 1995. The appellant then lodged grounds of appeal in which he submitted that his conviction amounted to a miscarriage of justice. One of his grounds of appeal was that there had been a misdirection by the trial judge, but it was not insisted upon at the hearing of the appeal. The other, which was insisted upon, was directed to the issue of disclosure. A minute was also lodged in which it was contended that the reference gave rise to a devolution issue, in that there had been a failure by the Crown to disclose information that would have been of material assistance to the defence.

3. The appeal court held that the failure to disclose Pearce's police statements did not give rise to the appellant being denied a fair trial or, in so far as the question might be different, mean that there had been a miscarriage of justice: [2008] HCJAC 53, 2009 JC 6, para 22. For the appellant it had been submitted that the proper question was not whether disclosure of the police statements would have made a difference to the outcome of the trial but whether it *might* have made a difference: para 15. The appeal court rejected this argument. The test which it applied was whether there was a real risk of prejudice: para 20. The appellant applied for leave to appeal against the determination of the devolution issue to the Judicial Committee of the Privy Council. The question which he sought to raise was whether the appeal court had applied the correct test. On 29 January 2009 the

appeal court granted leave to appeal. On 1 October 2009 the devolution jurisdiction of the Judicial Committee was transferred to this Court by section 40 of and Schedule 9 to the Constitutional Reform Act 2005.

4. At first sight it might appear that the question whether the High Court of Justiciary applied the correct test when disposing of an appeal does not give rise to a devolution issue at all. Devolution issues as defined in para 1 of Schedule 6 to the Scotland Act 1998 mean questions about the legislative competence of the Scottish Parliament and the exercise or non-exercise of functions by members of the Scottish Executive. They do not extend to things that are done or not done by the courts. As I said in *Robertson v Higson* [2006] UKPC D2, 2006 SC(PC) 22, para 5, however, it can be taken to be well settled that it is open to the Supreme Court to determine under para 13 of Schedule 6 to the Scotland Act 1998 not only the devolution issue itself but also questions which are preliminary to and consequential upon the determination of that issue: see also *Mills v HM Advocate* [2002] UKPC D2, 2003 SC (PC) 1, para 34. The question of remedy forms part of the devolution issue. So too does the test that is to be applied in determining whether the appellant is entitled to that remedy.

5. In some cases these questions will give rise to no special features of Scots criminal law or practice. In others, as in this case, the reverse will be true. That does not mean that it is not open to this Court to determine the question. But we must be careful to bear in mind the fact that the High Court of Justiciary is the court of last resort in all criminal matters in Scotland, and that when we are dealing with questions of this kind it is the law of Scotland that must be applied: see *Montgomery v HM Advocate* [2000] UKPC D2, 2001 SC (PC) 1, pp 12, 13; *Robertson v Higson*, paras 5, 6. In *Spiers v Ruddy* [2007] UKPC D2, 2009 SC (PC) 1, para 16 Lord Bingham of Cornhill referred to the need for reticence, given the Board's restricted role in deciding devolution issues. It is not for this Court to comment on the test that is applied in fresh evidence appeals which do not raise a devolution issue. Its task is to identify the test where the complaint is of non-disclosure in violation of the article 6(1) right to a fair trial. It is for this purpose, if I may respectfully say so, that Lord Brown's helpful references to the position in English law fall to be read.

6. To set the question before this court into its proper context I must now describe the facts of the case in more detail.

*The statements*

7. The appellant, with two others, was convicted after trial in the High Court of Justiciary at Glasgow of assaulting Brian James Sweeney to his severe injury,

permanent impairment and the danger of his life and of his attempted murder. He was sentenced to eight years imprisonment. The incident that gave rise to his conviction took place outside a hotel in Duntocher, Dunbartonshire. A fight broke out on the dance floor and stewards ejected various persons, including the appellant, his two co-accused and the complainer, from the premises. As soon as he was outside the hotel the complainer was struck on the head and brought to the ground, where he was set upon by a number of individuals. The crucial issue at the trial was the identity of those individuals.

8. The complainer had no recollection of the events which led to the assault upon him. The case against the appellant rested on the evidence of two stewards, Craig McKernan and Brian Pearce. The argument for the appellant was directed solely to the non-disclosure of police statements relevant to Pearce's evidence. Pearce gave a statement to the police within a few hours of the incident. In that statement he identified one of the co-accused as an assailant. He also described another man by his appearance and clothing, neither of which fitted the appellant. In a further statement later that same day he said that he saw one of the group kick the complainer on the head. He gave a description of that person in which he said, among other things, that he was wearing a black leather jacket, jeans and a T shirt. He made further statements to the police after viewing two identification parades. It is those statements that lie at the heart of this appeal.

9. At a relatively early stage in the police inquiry after the incident attention had focused upon, among others, a man named Gary Esdale. Pearce was asked to attend an identification parade on 17 January 2001, where Esdale was placed at position four. Pearce was unable to identify positively any person on that parade as having been involved in the incident. But when he was asked whether any of those present resembled any such person he replied "four or six". He said that the basis for the resemblance was the shape of his face. The person at position six was a stand-in. In a statement which he then gave to the police Pearce said:

> "…I identified the men standing at positions four and six as being similar to the persons to whom I referred to [sic] in my earlier statement to the police. Numbers 4 and 6 looked very familiar and I would say that one of them was the guy that kicked Mr Sweeney on the face that night that resulted in him being knocked to the ground. I am unsure of this identification."

10. Pearce having been precognosced, suspicion then centred upon the appellant. On 2 August 2001 he was put on an identification parade. He was placed at position three. Pearce, having viewed the parade, was again unable positively to identify anyone. When he was asked if there was anyone who resembled anyone who had been involved in the incident, he said "number three". He said that this

was because of his facial features. He was again interviewed by the police after this parade. In the statement that he gave on this occasion he said:

> "I identified the person at position number three as similar to the person I described to the police in my statement. This person had the same facial features as I described in my original police statement.
>
> I cannot be sure if it was the same person as on the night who [sic] I have partially indentified."

11. No proceedings were taken against Esdale. After the appellant and his co-accused had been indicted the appellant's solicitor, in preparation for his defence, attended the offices of the procurator fiscal. In accordance with the then practice, Crown precognitions were read out to him in a way which allowed him to take a detailed note of what the witnesses were expected to say at the trial. The note which the solicitor took of what Pearce was expected to say included this passage:

> "He later attended an identification parade for Paul McInnes and he indicated that he was similar to the man in the leather jacket. He appeared to him to be familiar. Facially he was different because he had a goatee beard which the person at the dancing had not had, he was therefore unsure about this identification at that time but indicated that without the beard he was certainly more like to one in the leather jacket than the person he identified at the Gary Easedale [sic] parade."

*The proceedings in the courts below*

12. At the trial Pearce identified all three accused as persons who were inside the hotel on the night of the incident. He identified the appellant as the person whom he had seen delivering the kick to the complainer's head which caused him to fall to the ground. In the course of his evidence in chief he was asked to explain his reference to the facial features of the person he said that he recognised when he viewed the identification parade on 2 August 2001. He gave this explanation:

> "It was because I told to the police at the time he never had a goatee beard but on the line up he had a goatee beard and I couldn't identify him positively and I told that to the police."

13. In his submission to the appeal court the appellant's solicitor advocate, Mr Carroll, emphasised that counsel conducting the appellant's defence had not had available to him the various statements that Pearce had given to the police. He drew attention to inconsistencies in these statements. On exiting the Esdale parade, which the appellant did not attend, Pearce said that one of the persons on that parade was the guy who had kicked the complainer on the face. In his exit statement after viewing the parade which the appellant did attend he did not refer to the appellant as doing anything, nor did he withdraw the identification that he had made at the Esdale parade. The explanation that he later gave for his uncertainty at the appellant's parade, attributing this to the goatee beard, was not given in his exit statement. Mr Carroll said that, if he had had these statements, counsel would have been able to put to Pearce the precise words that had been recorded in these statements. This would have enabled him to undermine Pearce's more confident identification at the trial of the appellant as the person who had administered the kick on the head.

14. The appellant's solicitor advocate accepted that the issue was whether, the police statements not having been made available to the defence prior to or at the trial, the appellant had been denied a fair trial. In developing that submission however he said that the proper question was not whether disclosure of those statements *would* have made a difference to the outcome of the trial but whether it *could* have made a difference. He based this part of his argument on the following passage from Lord Rodger of Earlsferry's judgment in *Holland v HM Advocate*, para 82:

> "Information about the outstanding charges might therefore have played a useful part in the defence effort to undermine the credibility of the Crown's principal witness on charge 2. At least, that possibility cannot be excluded. One cannot tell, for sure, what the effect of such cross-examination would have been. But applying the test suggested by Lord Justice General Clyde in *Hogg v Clark* 1959 JC 7, 10, I cannot say that the fact that counsel was unable to cross-examine in this way might not possibly have affected the jury's (majority) verdict on charge 2 – and hence their verdict on charge 3."

15. The appeal court, as I have said, did not accept this argument. Delivering the opinion of the court, the Lord Justice General (Hamilton) said in para 20 that the critical issue was whether the principle of equality of arms had been breached, and that it would be if access to the statement in question would have been of material assistance to the defence or, viewing the matter realistically, the denial of access might have prejudiced the defence. Whether that was so would be a matter for assessment by the appeal court in the circumstances of each case. It was not entitled in effect to avoid that task by adopting a test which depended simply on whether the denial of access 'might not possibly have affected' the outcome.

16. The Lord Justice General then added these words at the end of that paragraph:

> "Lord Rodger's test has been used (or abused) in argument in this jurisdiction to suggest that the threshold for reversing the verdict of a jury in non-disclosure and analogous cases is low. This may be a misreading of Lord Rodger's words. In the context of determining whether there has been a miscarriage of justice (or, we venture to think, an unfair trial) a robust test is required. The test of a real risk of prejudice to the defence was, rightly in our view, adopted in *Kelly v HM Advocate* [2005] HCJAC 126, 2006 SCCR 9."

In *Kelly v HM Advocate*, where a statement to the police by the complainer was not made available to the defence, counsel for the appellant based his submission on the test that had been suggested in *Hogg v Clark*, which he said had been approved by Lord Rodger in *Holland v HM* Advocate, at para 82. Delivering the opinion of the court in *Kelly*, Lady Cosgrove did not adopt that approach. She rejected the submission that non-disclosure of the statement might have made a difference to the outcome, saying that it did not give rise to "any real risk of prejudice to the appellant": para 33. She said that in all the circumstances the court was of the opinion that the appellant was not denied a fair trial, and that as a consequence there was no miscarriage of justice: para 35.

*The issue before this court*

17. The Crown maintained in the appeal court that it had performed its duty of disclosure by reading to the appellant's solicitor the terms of Pearce's precognition in circumstances where the solicitor had been able to take, and had taken, full and accurate notes. The appeal court rejected that argument on the ground that the Crown was obliged to disclose all police statements of witnesses who were to be led at the trial, and it has not been renewed in this court. The Crown now accepts that there was a failure in the duty of disclosure. So this point is no longer in issue.

18. The question for this court, given that there was a failure in the duty of disclosure, is what the correct test is for the determination of the appeal. It does not extend to the question whether the test, once it has been identified, was applied correctly. This is because section 124(2) of the Criminal Procedure (Scotland) Act 1995, as amended by the Scotland Act 1998 (Consequential Modifications) (No 1) Order 1999 (SI 1999/1042), provides that every interlocutor and sentence pronounced under Part VIII of the Act, which deals with solemn appeals, shall be final and conclusive and not subject to review in any court whatsoever except for the purposes of an appeal under para 13 (a) of Schedule 6 to the Scotland Act

1998. The application of the test to the facts of the case was a matter that lay exclusively within the jurisdiction of the appeal court. But, as the appeal court itself recognised when it gave leave in this case, the question as to what the correct test is forms part of the devolution issue. It is properly the subject of an appeal under para 13(a) of Schedule 6 and is open to review by the Supreme Court.

*The test*

19. Two questions arise in a case of this kind to which a test must be applied. The tests in each case are different, and they must be considered and applied separately. The first question is whether the material which has been withheld from the defence was material which ought to have been disclosed. The test here is whether the material might have materially weakened the Crown case or materially strengthened the case for the defence: *HM Advocate v Murtagh*, para 11. The Lord Advocate's failure to disclose material that satisfies this test is incompatible with the accused's article 6 Convention rights. In the case of police statements, the position is clear. Applying the materiality test, all police statements of any witnesses on the Crown list must be disclosed to the defence before the trial: *McDonald v HM Advocate*, para 51.

20. The second question is directed to the consequences of the violation. This is the question that arises at the stage of an appeal when consideration is given to the appropriate remedy: see *Spiers v Ruddy* 2009 SC (PC) 1. In that case it was the reasonable time guarantee that was in issue, but I think that the ratio of that case applies generally. As Lord Bingham of Cornhill put it in para 17, the Lord Advocate does not act incompatibly with a person's Convention right by continuing to prosecute after the breach has occurred. A trial is not to be taken to have been unfair just because of the non-disclosure. The significance and consequences of the non-disclosure must be assessed. The question at the stage of an appeal is whether, given that there was a failure to disclose and having regard to what actually happened at the trial, the trial was nevertheless fair and, as Lady Cosgrove said in *Kelly v HM Advocate*, para 35, as a consequence there was no miscarriage of justice: see section 106(3) of the Criminal Procedure (Scotland) Act 1995. The test that should be applied is whether, taking all the circumstances of the trial into account, there is a real possibility that the jury would have arrived at a different verdict.

21. It has been suggested that Lord Rodger's observations in *Holland v HM Advocate*, para 82, indicate that it is for the Crown to show that the non-disclosure could not possibly have affected the jury's verdict: *Holland v HM Advocate* 2005 SCCR 417, commentary by Sir Gerald Gordon, para. 5. If so, the effect would be to set a relatively low threshold. In my opinion, however, his observations must be read in their proper context. In para 43 Lord Rodger said that the ultimate question

was whether the trial as a whole was fair. He then dealt with the Crown's obligation of disclosure in para 64, where he referred to the accepted test as to whether the information was material. Having done this, he returned to the issue of fairness. In para 77 he said:

> "It is now necessary to consider whether, taken as a whole, the appellant's trial was fair in terms of article 6(1)."

Having examined the significance of the Crown's failures in paras 78-85, he said that he had arrived at the conclusion that the failures to disclose and the Advocate Depute's reliance on dock identifications were incompatible with the Convention right since, taken together, they had resulted in an unfair trial.

22. The sentence in *Holland v HM Advocate*, para 82 on which Mr Carroll relies (quoted in para 14, above) was directed to the use that might have been made of the outstanding charges to undermine the appellant's credibility. The issue with which he was dealing here was the materiality of that information. This was a necessary step in the assessment of the question whether there had been a fair trial. The words "might not possibly have affected the jury's (majority) verdict" are used. But Lord Rodger does not say that this is the test to be applied in determining whether the trial as a whole was fair. In any event, I do not think that it would be the correct way of describing it.

23. Commenting on what Lord Rodger said in para 82, the Lord Justice General said in the passage which I have quoted from para 20 of his opinion (see para 16, above) that it would be a misreading of Lord Rodger's words to conclude that the threshold for reversing the verdict of the jury in non-disclosure and analogous cases is low. I would endorse this assessment. The threshold which must be crossed is the same as that which applies in any case where it is maintained that, because there was a violation of article 6(1) that affected the way the trial was conducted, there has been a miscarriage of justice. I also agree that, in a case of that kind, the question whether there has been a miscarriage of justice and the question whether the trial was unfair run together. It is axiomatic that the accused will have suffered a miscarriage of justice if his trial was unfair. The statutory ground for setting aside the jury's verdict under section 106(3) of the 1995 Act enables the appeal court to provide an effective remedy to the appellant for the breach of his Convention right. This is done when the appeal court makes its own assessment as to whether the trial as a whole was fair. It will allow the appeal on the ground that there was a miscarriage of justice if it concludes that it was not.

24. The Lord Justice General then said at the end of para 20 that a robust test was required. The test which he identified was whether there was a real risk of

prejudice to the defence. These remarks, I would respectfully suggest, need some explanation. They invite questions as to how robust the test must be and how the real risk is to be identified. They need to be taken just one step further to indicate more precisely the test that should be applied. The question which lies at the heart of it is one of fairness. The question which the appeal court must ask itself is whether after taking full account of all the circumstances of the trial, including the non-disclosure in breach of the appellant's Convention right, the jury's verdict should be allowed to stand. That question will be answered in the negative if there was a real possibility of a different outcome - if the jury might reasonably have come to a different view on the issue to which it directed its verdict if the withheld material had been disclosed to the defence.

*Conclusion*

25. Although I have suggested that the description of the test which the Lord Justice General gave at the end of para 20 was incomplete, it is clear from the discussion that follows that the test that the appeal court actually applied was the correct one. As I have already observed, it is not for this court to say whether the test was applied correctly. But it is open to it to examine the reasons given by the appeal court for concluding that there had not been a miscarriage of justice to see whether they show that it applied the correct test. Having considered what the Lord Justice General said in paras 21-22, I am entirely satisfied on this point. There was a thorough examination of all the relevant issues, and the conclusion that the appeal court came to was one which a court, applying the correct test, could be expected to have come to. I would dismiss the appeal.

**LORD RODGER**

26. I agree that the appeal should be dismissed. I make only two brief observations.

27. It is now settled that the Crown must disclose certain classes of material, including the police statements of witnesses on the Crown list. In this case, as Lord Hope has explained, the Crown failed to disclose certain statements which their witness, Pearce, made to the police. There was therefore an infringement of the appellant's article 6(1) Convention rights.

28. Sometimes, it is possible to say that certain material does actually weaken the Crown case. For example, where identity is an issue, the Crown case is weakened by the failure of the principal eyewitness, when viewing an identity parade, to pick out the accused as one of those involved in an assault. So, evidence

of that failure would have to be disclosed. But the obligation to disclose is not so limited. As Lord Macfadyen held in *Maan v HM Advocate* 2001 SLT 408, 416, at para 27, in a passage adopted in the Privy Council in *Holland v HM Advocate* 2005 1 SC (PC) 3, 24, at para 72, the accused's "right is to have disclosed to him material necessary for the proper preparation as well as the proper presentation of his defence." And, quite often, even the accused's advisers will not know whether material will actually prove useful until they see it. Nevertheless, as Lord Brown indicates at para 39 of his judgment, police statements of Crown witnesses must be disclosed because there is always the possibility that, in the hands of the defence, they may materially weaken the Crown case or materially strengthen the defence case. The same approach is appropriate when the Crown have to decide whether to disclose a particular piece of material. It must be disclosed to the accused's representatives if, in their hands, it might materially weaken the Crown case or materially strengthen the defence case. How, if at all, they actually use the material when preparing or presenting the defence is, of course, entirely a matter for them.

29. I accordingly agree with Lord Brown's observations in para 39 of his judgment and with Lord Hope's observations to similar effect in *Allison v HM Advocate.*

30. The significance of any infringement of an accused's article 6(1) Convention rights will depend on the circumstances. As has been said on many occasions, not every infringement of a particular right will mean that the accused's trial as a whole has been unfair. Obviously, for example, failure to disclose a police statement of a Crown witness who is not called to give evidence will usually have no effect on the fairness of the trial. And, even in a case like the present where the witness, Pearce, gave evidence, an appellate court will have to assess how the failure by the Crown to disclose various statements which he made to the police actually affected the trial. Of course, an appellant can always argue that, if his advocate had been armed with the statements, it is *possible* that he could have persuaded the jury to come to a different conclusion. But the law deals in real, not in merely fanciful, possibilities. So, in cases like the present, an appellate court will only hold that a trial has been unfair and quash the jury's verdict as a miscarriage of justice if there is a real possibility that, if the statements had been disclosed, a jury might reasonably have come to a different verdict. Mutatis mutandis, this is the same as the test in *Stirland v DPP* [1944] AC 315, 321, which has often been applied by the appeal court.

31. I therefore agree with what Lord Hope says in para 24 of his judgment and with what Lord Brown says in para 35 of his.

**LORD WALKER**

32. I agree that this appeal should be dismissed for the reasons given by Lord Hope and Lord Rodger in their judgments, with which I agree.

**LORD BROWN**

33. The central question raised in this devolution appeal is whether the appeal court applied the right test in deciding that the Crown's failure to disclose a particular prosecution witness's statement to the police did not result in a miscarriage of justice.

34. Lord Hope has set out the relevant facts of the case and none of these need I repeat. Lord Hope also most helpfully explains, first, that it is the law of Scotland that must be applied in this case and, secondly, the limits of a devolution appeal to this court, namely that we should decide whether the court below adopted the correct legal test but not whether (assuming it did) it then applied that test correctly on the facts. I also share what I understand to be Lord Hope's view that there will have been a miscarriage of justice if, but only if, the trial as a whole was unfair and, in turn, that it is only if the trial as a whole was unfair that the Crown can properly be held to have acted in breach of article 6 of the Convention so as to require that the appellant's conviction be set aside. The question, therefore, is whether the non-disclosure of Pearce's statement made the appellant's trial unfair.

35. What, then, in the context of an undisclosed statement, makes a trial unfair? This, ultimately, is the determinative question in the case. I would answer it as follows. The trial will be adjudged unfair if, but only if, the appeal court concludes that the non-disclosure gave rise to a real risk of prejudice to the defence. This in turn depends upon whether the appeal court regards the non-disclosure as having denied the defence the real possibility of securing a different outcome. In short, in a case such as this, the appeal should be allowed if the court decides that, had defence counsel been in a position to make use of the undisclosed statement, the jury might reasonably have come to a different conclusion, otherwise not. It is that which must decide whether the jury's verdict should be allowed to stand. I understand Lord Hope's approach in para 22 to be entirely consistent with this formulation.

36. This, I apprehend, would be the position in English law (both as to the test to be applied – in England as to whether the conviction under appeal is unsafe – and as to the decision being one for the appeal court itself) and I can see no good reason why it should be any different under Scottish law. In *Bain v The Queen* 72

JCL 34, BC ([2007] UKPC 33) (cited at para 7-51 of Archbold 2009) Lord Bingham of Cornhill, giving the opinion of the Privy Council, put the matter thus (at para 103):

> "A substantial miscarriage of justice will actually occur if fresh, admissible and apparently credible evidence is admitted which the jury convicting a defendant had no opportunity to consider but which might have led it, acting reasonably, to reach a different verdict if it had had the opportunity to consider it."

37. True, that was a case of fresh evidence rather than an undisclosed statement but, as a member of that Board, I did not regard the opinion there as inconsistent with an earlier opinion I myself had given in *Dial and Dottin v The State* [2005] UKPC 4, para 31, in the context of fresh evidence which showed the main prosecution witness to have lied during his evidence at trial:

> "In the Board's view the law is now clearly established and can be simply stated as follows. Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, assuming always that it accepts it, to evaluate its importance in the context of the remainder of the evidence in the case. If the Court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused it will dismiss the appeal. The primary question is for the Court itself and is not what effect the fresh evidence would have had on the mind of the jury. That said, if the Court regards the case as a difficult one, it may find it helpful to test its view 'by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict' (*Pendleton* at p83, para 19 [*R v Pendleton* [2002 1 WLR 72]). The guiding principle nevertheless remains that stated by Viscount Dilhorne in *Stafford* (at p906 [*Stafford v Director of Public Prosecutions* 1974 AC 878]) and affirmed by the House in *Pendleton*:
>
> 'While . . . the Court of Appeal and this House may find it a convenient approach to consider what a jury might have done if they had heard the fresh evidence, the ultimate responsibility rests with them and them alone for deciding the question [whether or not the verdict is unsafe].'"

38. That being the correct approach, is there any reason for concluding that the Lord Justice General adopted some different (and, from the appellant's point of view, less favourable) test in the present case? In my judgment there is not. The

test he adopted was that of "a real risk of prejudice to the defence". True, he did not spell out that what is meant by this is that the defence was denied the real possibility of securing a different outcome. But really that was implicit in his rejection of the argument that the question to be asked was merely whether the non-disclosure "might not possibly have affected" the outcome. There is a critical difference between asking whether disclosure "might not possibly" have led the jury to acquit and whether that was a "real possibility". The difference is between what is merely conceivable and what is realistic. The Lord Justice General rejected the former test as too "low", rightly preferring the latter as "robust". The judgment cannot be seriously criticised for speaking of "a robust test", a test immediately then explained as "the test of a real risk of prejudice to the defence". Nor is the Lord Justice General to be criticised for his subsequent comment that questioning based on the undisclosed statement here would "hardly have constituted a *coup de grâce*" – a throwaway expression from which it cannot possibly (still less realistically) be inferred that the appeal court was approaching the case on the footing that nothing short of this would suffice.

39. The one other matter I want to touch on is disclosure. The devolution case law now establishes that *all* police statements are disclosable, on the basis that, as a class, they are to be regarded as material "which either materially weakens the Crown case or materially strengthens the case for the defence" (para 11 of Lord Hope's judgment in *HM Advocate v Murtagh* [2009] UKPC 36). As, however, Lord Hope points out at para 18, it by no means follows that, because the statement should have been disclosed on this basis, a failure to disclose it involves a breach of the accused's article 6 Convention right to a fair trial. Statements as a class are routinely disclosable because there is always the possibility that they may prove to be harmful to the Crown or helpful to the defence. In the event of non-disclosure, however, the trial is only to be regarded as unfair if in fact disclosure might have harmed the Crown or helped the defence to such an extent that in retrospect the defence can be shown to have lost a real possibility of acquittal. To say that Pearce's statement here should have been disclosed because it materially weakened the Crown's case is not to say that realistically its disclosure would in fact have significantly weakened the Crown's case. Indeed, in retrospect it might have been better to formulate the test for disclosability in terms of material which *might* materially weaken the Crown's case or *might* materially strengthen the case of the defence. Certainly, a finding of materiality relative to the disclosability of a document is not to be confused with a finding that it would actually have been of value to the defence nor regarded as pre-empting the defendant's need on appeal to establish that, but for the non-disclosure, he would have had a realistic prospect of acquittal.

40. I too would dismiss this appeal.

**LORD KERR**

41. For the reasons given by Lord Hope and Lord Brown, with which I am in full agreement, I too would dismiss the appeal.