Michaelmas Term
[2015] UKSC 77
On appeal from: [2013] HCJAC 80

JUDGMENT

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

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Sumption
Lord Reed
Lord Hughes
Lord Toulson
Lord Gill (Scotland)

JUDGMENT GIVEN ON

16 December 2015

Heard on 4 November 2015

Appellant
Gordon Jackson QC
Gerard Considine
(Instructed by Fitzpatrick & Co)

Respondent
Andrew Brown QC
Angela Gray
(Instructed by Appeals Unit, Crown Office)

LORD REED: (with whom Lord Neuberger, Lady Hale, Lord Sumption, Lord Hughes and Lord Toulson agree)

The background to this appeal

1. The appellant, Paul Macklin, was convicted after trial on 26 September 2003 of a charge of possession of a handgun in contravention of section 17 of the Firearms Act 1968, and a further charge of assaulting two police officers by repeatedly presenting the handgun at them. The only issue in dispute at his trial was whether he was the person who had been pursued by the officers after an incident to which they had been called, and during that pursuit had turned repeatedly and pointed the gun at them. At the trial, the appellant was identified by both of the officers. One gave evidence implying that he recognised the appellant at the time of the incident. The other had identified the appellant from a selection of photographs shown to him after the incident. Their evidence was challenged at the trial in cross-examination by counsel for the appellant, and in counsel's address to the jury. In his directions to the jury, the judge warned them about the risk that visual identification evidence might be unreliable. In accordance with the practice at the time, he gave no directions specifically concerning the risks which might be associated with the identification of an accused person in court.

2. Some years later, following developments in practice in relation to the disclosure of unused material, the Crown disclosed to the appellant a quantity of material which had not been disclosed at the time of the trial. This included statements given to the police by a number of witnesses who had seen part of the pursuit of the gunman by the officers, or had seen the car in which he escaped. One of those witnesses was recorded as giving a description of the gunman which was inconsistent with the appearance of the appellant. Two other witnesses were recorded as having failed to identify the appellant when shown his photograph. It was also disclosed that the police had found fingerprints belonging to someone other than the appellant inside the car, and that the person identified by the fingerprints had a criminal record.

3. In the light of these disclosures, in 2012 the appellant was granted leave to appeal against his conviction on three grounds. The first ground was based on the Crown's failure to disclose material evidence to the defence. The second ground was based on the Crown's leading and relying on the evidence of dock identifications by the police officers, without the other material evidence having been disclosed, and without the officers having previously participated in an identification parade. The third ground was based on a contention that the judge had misdirected the jury in

relation to the identification evidence, in that he had failed to warn the jury in relation to the dangers of dock identification evidence, particularly where no identification parade had been held. The first and second of these grounds of appeal raised devolution issues, as defined in paragraph 1 of Schedule 6 to the Scotland Act 1998 ("the 1998 Act"). In other words, it was contended that, in the respects identified in those grounds of appeal, the Lord Advocate, who was a member of the Scottish Government and the person responsible for the conduct of the prosecution, had acted in a manner which was incompatible with the appellant's Convention rights under article 6(1) of the European Convention on Human Rights.

4. On 11 September 2013 the High Court of Justiciary refused the appeal, for reasons which were explained in an opinion delivered by Lord Mackay of Drumadoon: [2013] HCJAC 80; 2013 SCCR 616. The appellant was subsequently granted permission to appeal to this court under section 288AA of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"), inserted by section 36 of the Scotland Act 2012 ("the 2012 Act").

The jurisdiction of this court

5. It is important to understand the nature of the jurisdiction exercised by this court under section 288AA of the 1995 Act. The court does not sit as a criminal appeal court exercising a general power of review.

6. Subject to a small number of specified exceptions, every interlocutor and sentence pronounced by the High Court in appeals in solemn proceedings is, by statute, final and conclusive and not subject to review by any court whatsoever: 1995 Act, section 124(2). One exception enables the High Court to review its own decisions on references by the Scottish Criminal Cases Review Commission. The other exceptions enable this court to determine compatibility issues (an expression which I shall explain shortly) on references under section 288ZB of the 1995 Act (inserted by section 35 of the 2012 Act) and appeals under section 288AA, and to determine devolution issues on appeals under paragraph 13(a) of Schedule 6 to the 1998 Act.

7. The concept of a compatibility issue was introduced by section 34 of the 2012 Act, which inserted a new section 288ZA into the 1995 Act. That section defines a compatibility issue as a question arising in criminal proceedings as to whether a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) of the Human Rights Act 1998, or in a way which is incompatible with EU law, or whether an Act of the Scottish Parliament or any provision of such an Act is incompatible with any of the Convention rights or with EU law. Section 36(4)

of the 2012 Act amended the definition of devolution issues in paragraph 1 of Schedule 6 to the 1998 Act so as to exclude compatibility issues from its scope.

8. One consequence of these provisions is that some questions which fell within the definition of devolution issues before the 2012 Act came into force no longer fall within that definition, but fall instead within the definition of compatibility issues. Another consequence is that some questions which, before the 2012 Act came into force, did not fall within the definition of devolution issues, now fall within the definition of compatibility issues.

9. The present case illustrates the point. As I have explained, the first and second grounds of appeal before the High Court raised questions as to the compatibility of the conduct of the prosecution with the appellant's Convention rights. Under the 1998 Act as it stood prior to amendment by the 2012 Act, those questions constituted devolution issues. Under section 288ZA of the 1995 Act, on the other hand, those questions would be classified as compatibility issues. The appellant's third ground of appeal, concerning an alleged misdirection by the trial judge, did not raise a devolution issue, since the trial judge was not a member of the Scottish Government. Under the provisions introduced by the 2012 Act, on the other hand, a direction by a judge may raise a compatibility issue, if there is a question whether the judge has acted in a way which was incompatible with the appellant's Convention rights.

10. In order to address potential problems arising from the differences between the system operating before the 2012 Act came into force and the system operating afterwards, transitional provisions were introduced by the Scotland Act 2012 (Transitional and Consequential Provisions) Order 2013 (SSI 2013/7). Article 2 of the Order introduced the concept of a convertible devolution issue, defined as a question arising in criminal proceedings before the relevant date which (a) is a devolution issue, (b) would have been a compatibility issue had it arisen on or after that date and (c) had not been finally determined before the relevant date. The relevant date was 22 April 2013, when the relevant provisions of the 2012 Act came into force. As at that date, the devolution issues raised by the appellant's first and second grounds of appeal had not been finally determined. As I have explained, those issues would have been compatibility issues had they arisen on or after that date. It follows that those questions are convertible devolution issues. By virtue of article 3 of the order, convertible devolution issue became compatibility issues on the relevant date (subject to exceptions which do not apply in the present case). The questions raised by the appellant as to the compatibility of the conduct of the prosecution with his Convention rights are therefore compatibility issues. No compatibility issue arises, however, in relation to the directions given by the trial judge, since his directions did not give rise to a devolution issue, and therefore did not give rise to a convertible devolution issue.

11. Finally, in relation to jurisdiction, it is important to understand the limited nature of this court's powers on an appeal for the purpose of determining a compatibility issue. In terms of section 288AA(2) of the 1995 Act, the powers of the Supreme Court are exercisable only for the purpose of determining the compatibility issue, that is to say, in the present case, the question whether the Lord Advocate has acted in a way which is made unlawful by section 6(1) of the Human Rights Act. When it has determined the compatibility issue, the Supreme Court must remit the proceedings to the High Court: section 288AA(3).

The present appeal

12. The compatibility issue raised in the present appeal concerns the question whether the Crown acted incompatibly with the appellant's Convention rights under article 6(1) by failing to disclose material evidence to the defence and by leading and relying on the evidence of identification by the police officers, without the other material evidence having been disclosed, and without the officers having previously participated in an identification parade. Counsel for the appellant emphasised in his submissions that these were not two separate complaints, about non-disclosure on the one hand, and dock identification on the other hand. He was not arguing that the appellant's Convention rights had been violated by the dock identification or the judge's directions. His submission was that these aspects of the proceedings had cumulatively resulted in a violation by the prosecution of article 6(1). The Crown's reliance on identification of the appellant in court, without an earlier identification parade, formed part of the context in which the significance of the non-disclosure of the other material bearing on identification had to be assessed.

13. As the European Court of Human Rights explained in *Edwards v United Kingdom* (1992) 15 EHRR 417, the question whether a failure of disclosure has resulted in a breach of article 6(1) has to be considered in the light of the proceedings as a whole, including the decisions of appellate courts. This means that the question has to be approached in two stages. First, it is necessary to decide whether the prosecution authorities failed to disclose to the defence all material evidence for or against the accused, in circumstances in which a failure to do so would result in a violation of article 6(1). If so, the question which then arises is whether the defect in the trial proceedings was remedied by the subsequent procedure before the appellate court. That was held to have occurred in *Edwards,* where the Court of Appeal had considered in detail the impact of the new information on the conviction. The European court observed that it was not within its province to substitute its own assessment of the facts for that of the domestic courts, and, as a general rule, that it was for those courts to assess the evidence before them. Those observations were repeated in *Mansell v United Kingdom* (2003) 36 EHRR CD 221, where the non-disclosure of material evidence in the trial proceedings was again held to have been remedied by the Court of Appeal's examination of the impact of the non-disclosure upon the safety of the conviction.

14. That approach was translated into a domestic context in the case of *McInnes v HM Advocate* [2010] UKSC 7; 2010 SC (UKSC) 28. As Lord Hope explained at paras 19 and 20, two questions arise in a case of this kind to which a test must be applied. 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. If that test is satisfied, the question then arises as to the consequences of the non-disclosure. The test here 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.

15. In the present case, it was conceded by the Crown before the High Court that the statement given by the witness who had given a description inconsistent with the appellant's appearance, and the statements given by the two witnesses who had failed to identify the appellant from a photograph, ought to have been disclosed. In concluding that the Crown had not been under a duty to disclose the remainder of the undisclosed statements, the court stated that, in their opinion, there was nothing in any of the statements in question that would either have weakened the Crown case or strengthened the defence case. Similarly, in concluding that the Crown had not been under a duty to disclose the fingerprint evidence, the court stated that, in their opinion, it did not constitute evidence which materially weakened the Crown case or materially strengthened the defence case. Those conclusions reflected the terms of the first test in *McInnes.* The court explained in detail their reasons for reaching those conclusions on the facts of the case.

16. The High Court then considered the significance of the failure to disclose the statements which should have been disclosed. In relation to the statement given by the witness whose description of the gunman was inconsistent with the appellant's appearance, they stated that they were not persuaded that leading the evidence of that witness would have given rise to a real possibility that the jury would have returned a different verdict. In relation to the statements given by the two witnesses who had failed to identify the appellant from a photograph, they concluded that, in the context of the evidence as whole, there was no real possibility that the evidence of the witnesses in question would have caused the jury to come to a different view as to the identity of the gunman. Those conclusion reflected the terms of the second test in *McInnes.* Detailed reasons were given for reaching those conclusions. They were based on a review of the entirety of the evidence, including the identification evidence given in court by the police officers.

17. The court also considered separately the question whether the Crown's leading of the identification evidence from the police officers had in itself resulted in the Lord Advocate's acting incompatibly with article 6(1), that question having been raised before them as a distinct ground of appeal. After reviewing the relevant

circumstances, the court concluded that the leading of the evidence had not been a violation of article 6(1).

18. Before this court, counsel for the appellant challenged the High Court's conclusion that some of the undisclosed material did not require to be disclosed under article 6(1). In that connection, he submitted that, under current Crown practice, all of the material would have been disclosed. The practice of the Crown, whether past or present, is not however the measure of the requirements of article 6(1). To say, as counsel submitted, that if material would be disclosed now, it should have been disclosed then, is a non sequitur. The question is to be determined by applying the first test laid down in *McInnes*. The High Court applied that test.

19. Counsel also challenged the High Court's conclusion as to the significance of the admitted failures in disclosure. He submitted that, although the High Court had framed their analysis and their conclusions in terms of the second test laid down in *McInnes*, their conclusions were so manifestly wrong that they had not in reality applied that test. Counsel accepted, as a general proposition, that this court had no jurisdiction to review how the High Court applied the test, but submitted that the position was otherwise where the High Court had merely paid lip-service to the test, and had reached so absurd a conclusion that the test could not in reality have been applied. In that connection, he submitted that, comparing the facts of the present case with those of the case of *Holland v HM Advocate* [2005] UKPC D 1; 2005 SC (PC) 3, the non-disclosure had been of less significance in *Holland*, but a violation of article 6(1) had nevertheless been found by the Judicial Committee in that case.

20. In *McInnes*, Lord Hope explained at para 18 that the question for the Supreme Court, where there has been a failure in the duty of disclosure, is to determine the correct test for the determination of the appeal. "It does not", he said, "extend to the question whether the test, once it has been identified, was applied correctly". Lord Hope explained that that followed from the statutory finality of the High Court's decision under section 124(2) of the 1995 Act, subject to an appeal against a determination of a devolution issue. The question as to what was the correct test formed part of the devolution issue, but "The application of the test to the facts of the case was a matter that lay exclusively within the jurisdiction of the appeal court". Lord Brown similarly stated at para 34 that this court could decide whether the High Court adopted the correct legal test but not whether it then applied that test correctly on the facts. The other members of the court agreed. Mutatis mutandis, those dicta apply equally to the determination of a compatibility issue.

21. In the present case, counsel for the appellant relied on an observation made by Lord Hope later in his judgment, at para 25:

> "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."

In that passage, Lord Hope was not qualifying what he had earlier said in para 18. As the earlier part of para 25 makes clear, he was addressing the fact that the High Court had not, in that case, purported to apply the test subsequently laid down in *McInnes*, but had instead applied the test, applicable generally in solemn appeals, of whether there had been a miscarriage of justice. In applying that test, the High Court had asked itself whether there was "a real risk of prejudice to the defence" (see *McInnes* at para 16). The question which Lord Hope was addressing in para 25 was whether, in formulating the test in that way, the High Court had asked itself the wrong question. Lord Hope answered the question by examining the High Court's reasoning, from which it appeared that, although the court's description of the test was incomplete, the test that it applied was the correct one.

22. Counsel for the Crown conceded that this court might have jurisdiction to intervene if the High Court merely purported to apply the *McInnes* test but did not actually apply it. Short of some exceptional case, however, it is difficult to envisage circumstances in which an argument that the High Court had identified the correct test, but had failed to apply it, would be distinguishable from an argument that the test had not been applied correctly. The latter argument is one that this court cannot entertain. It is important that that principle, which gives effect to the finality accorded to the High Court's decisions, should not be undermined by permitting challenges to the correctness of the High Court's application of the *McInnes* test to be dressed up in the guise of arguments that it identified the test but failed to apply it.

23. In the present case, it is clear from its reasoning that the High Court not only identified the correct test but also applied it to the circumstances of the case. The suggested comparison with the decision in *Holland* is of no assistance. In the first place, the Judicial Committee was not in that case performing the same exercise as this court in the present appeal. The High Court had not in that case applied the *McInnes* test: the case preceded *McInnes* by several years. Furthermore, the Judicial Committee proceeded in that case on the basis that the High Court, in considering the impact of non-disclosure and dock identification separately at different hearings before differently constituted courts, had failed to consider the cumulative impact of both aspects of the trial upon the fairness of the proceedings, and that that question must therefore be considered for the first time by the Committee itself: see para 43. The approach adopted by the Judicial Committee reflected those circumstances, neither of which is present in this appeal. Moreover, and in any event, contrasting the conclusions reached by different panels of judges as to the significance of

failures to disclose different evidence in the circumstances of different cases tells one nothing about the correctness of either decision, even if that were a matter which this court could properly assess.

24. I would dismiss the appeal.

LORD GILL: (with whom Lord Neuberger, Lady Hale, Lord Sumption, Lord Hughes and Lord Toulson agree)

The conviction

25. On 26 September 2003 the appellant was convicted at Aberdeen High Court of a contravention of section 17 of the Firearms Act 1968 and of assault on two police officers by repeatedly presenting a handgun at them.

The evidence of identification

26. The agreed facts were that the police officers, Sergeant Henry Ferguson and Constable Simon Reid, chased a suspect on foot from Printfield Terrace to Hilton Terrace, Aberdeen. Three times during the chase the suspect confronted them and pointed a handgun at them. The incident occurred in broad daylight just after midday in the month of May. The suspect had not disguised his face in any way. The suspect escaped in a black Ford Sierra. It was abandoned nearby.

27. At the trial the stark issue was the identification of the gunman. Sergeant Ferguson identified the appellant in the dock. He said that at the time of the incident he thought that the suspect's face was familiar, but he could not say who he was. When he returned to Police Headquarters he made enquiries about the suspect's identity. He had a conversation with a colleague to prod his memory. In cross-examination he was asked if he had any doubt about his identification. He replied "No doubt whatsoever". Constable Reid too made a dock identification. He confirmed that about two hours after the incident at Police Headquarters he had been shown photographs and had identified the person that he thought had been the gunman. In cross-examination he was asked if there was any possibility that he had identified the wrong person in court. He replied "No". He was asked if he was sure about that. He replied "Yes".

28. Two witnesses said that the man in the dock was not the gunman. The first, Michael Reid, was said by the trial judge in his report to have been nervous. The second, John Ronald, was a criminal with a serious record of crimes of dishonesty.

He prevaricated in evidence as to whether he knew the appellant. There were various discrepancies in his three police statements. The appellant himself said that at the material tine he had been at the home of Adrian Martin and his mother, neither of whom were cited by the defence. He agreed that on the morning after the incident he had checked in at a hotel in Aberdeen under a false name and was arrested there on the following day. One witness, Ian Whyte, supported the alibi. His credibility was undermined by his criminal record and by his having visited the appellant in prison twice before he gave his evidence.

Subsequent disclosure

29. In 2005 the Judicial Committee of the Privy Council allowed two appeals from the High Court in which the question of non-disclosure of evidence by the Crown was a material issue (*Holland v HM Advocate* 2005 SC (PC) 3; *Sinclair v HM Advocate* 2005 SC (PC) 28. In consequence of those decisions and the change in Crown practice to which they led, the Crown disclosed the fact that a fingerprint of Thomas Pirie, a criminal with a serious record, had been found on the internal rear-view mirror of the abandoned Sierra. The Crown also disclosed the statements of six individuals who had seen the incident or the abandonment of the car.

The decision of the High Court

30. The appellant appealed on the grounds *inter alia* that the Crown had failed to disclose material evidence; and that by leading and relying on the evidence of the dock identifications without having disclosed that evidence and without having held an identification parade, the Lord Advocate had infringed the appellant's rights under article 6.

31. The High Court held that the fingerprint evidence and three of the now disclosed statements neither materially weakened the Crown case nor materially strengthened the defence case. It accepted that the other three statements should have been disclosed, but held that disclosure of them would not have given rise to a real possibility of a different verdict. It concluded that the act of the Lord Advocate in leading dock identifications from the two police officers without there having been an identification parade did not infringe article 6.

The present appeal

32. The issues raised in this appeal were raised before the High Court as devolution issues (Scotland Act 1998, section 57(2); Schedule 6, paragraph 13(a)). On 22 April 2013 when the relevant provisions of the Scotland Act 2012 came into

force, those issues were still unresolved. They therefore became convertible devolution issues (Scotland Act 2012 (Transitional and Consequential Provisions) Order 2013 (SSI 2013/7)) and by virtue of section 36(6) of the 2012 Act, which added section 288AA to the Criminal Procedure (Scotland) Act 1995 (the 1995 Act), fell to be dealt with as compatibility issues as defined in section 288ZA of the 1995 Act (1995 Act, sections 288AA(1), (2) and (4)). As such, they are within the jurisdiction of this court, which can be exercised only on compatibility issues (1995 Act, section 288AA).

Non-disclosure

33. It was for the High Court to assess whether all or any of the undisclosed evidence might materially have weakened the Crown case or materially have strengthened the defence case (*McDonald v HM Advocate* 2010 SC (PC) 1, at para 50). The High Court held, as the Crown had conceded, that the evidence in three of the statements met that test.

34. The next question was whether the effect of the non-disclosure of those statements had been to deprive the appellant of a fair trial. It was for the High Court to decide, on a consideration of all of the circumstances of the trial, whether there was a real possibility that the jury would have arrived at a different verdict if the undisclosed evidence had been before it. It decided that there was no such possibility. On the face of it, therefore the High Court applied both parts of the test set by this court in *McInnes v HM Advocate* 2010 SC (UKSC) 28.

35. On the first part of the *McInnes* test counsel for the appellant submitted that since in current Crown Office practice all of the undisclosed evidence would be disclosed, that was proof that the appellant's article 6 rights had been infringed. That argument is specious. The current practice of the Crown is to make an extensive disclosure of evidence, some of which may be of little assistance to either prosecution or defence. The fact that any piece of evidence is disclosed does not mean that its non-disclosure would be a breach of article 6.

36. As to the consequences of non-disclosure, counsel submitted that the High Court had failed to apply the second part of the *McInnes* test. I do not agree. The Crown's submission to the High Court on this point was founded expressly on the *McInnes* test (*Macklin v HM Advocate* 2013 SCCR 616, at paras 24 and 25). The High Court considered the case in that context and, reciting the words of the test, made clear that it had applied it (at paras 33, 36 and 37).

37. We therefore have to consider the scope of this court's jurisdiction in this appeal. Every interlocutor and sentence pronounced by the High Court under Part VIII of the Criminal Procedure (Scotland) Act 1995 is final and conclusive and is not subject to review in any court whatsoever, save for certain exceptional cases, one of which is the taking of an appeal of this nature (1995 Act, section 124(2)).

38. The question whether the High Court applied the correct test is a proper question for the consideration of this court, being a compatibility issue; but the question whether the High Court applied the test correctly is not. That is now settled law (*McInnes*, at paras 18 and 25).

39. Nevertheless, counsel for the appellant submitted that in *McInnes* Lord Hope of Craighead had qualified his general statement of the law to that effect by the following words:

> "… 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." (para 25)

40. Counsel wrested these words from Lord Hope's opinion to support the proposition that even if the High Court says that it has applied the *McInnes* test, this court can examine exactly how it did so and may decide that it paid only lip service to it if its conclusions on the evidence are manifestly wrong.

41. I do not accept that proposition. The meaning of Lord Hope's *dictum*, to my mind, is perfectly clear. Lord Hope was referring only to this court's exercise of its limited jurisdiction in a question under paragraph 13(a); that is to say its decision, from an examination of the High Court's reasons, whether the High Court identified and applied the correct test.

42. In this case I am in no doubt that it did. On that view, the High Court's conclusions on the significance of the non-disclosure in relation to the verdict do not arise for our consideration.

43. Counsel for the Crown conceded that this court would have jurisdiction if the High Court had failed to apply the *McInnes* test despite having said that it had applied it. That concession, in my view, does not open the door to appeals based on the contention that the High Court failed to apply the *McInnes* test correctly. I agree with Lord Reed (para 22) that the finality of the decisions of the High Court would

be undermined if challenges to the correctness of its application of the *McInnes* test were to be dressed up in the guise of arguments that it had identified the test but failed to apply it.

Dock identification

44. Counsel accepted that dock identification is not *per se* incompatible with article 6. He did not put dock identification forward as a free-standing compatibility issue. He submitted that the fact that the police officers had not taken part in an identification parade, taken together with the undisclosed evidence, led to the inevitable conclusion that, looked at as a whole, the trial was unfair. For this submission counsel for the appellant took as his template the exercise in evidential review carried out by Lord Rodger of Earlsferry in *Holland v HM Advocate* (*supra*). In *Holland* both non-disclosure and dock identification were in issue. There were two points on which the Crown had withheld disclosure of material evidence.

45. In *Holland* the two issues in the case had been dealt with in separate hearings by differently constituted divisions of the High Court. In Lord Rodger's view the question was whether, looked at as a whole, the appellant's trial was fair in terms of article 6 (at para 77). On that view, he considered that it was necessary for the Judicial Committee to assess the evidence overall. In the result, the Judicial Committee held that there had been a breach of article 6.

46. Counsel compared the evidence in *Holland* with the evidence in this case and, taking Lord Rodger's approach, submitted that we too should look at the entirety of the evidence and should conclude from it that the appellant had not had a fair trial.

47. In considering two specific aspects of the evidence in *Holland* Lord Rodger said that since counsel for the defence had been unaware of the undisclosed evidence, he could not say that counsel's inability to refer to it in cross-examination "might not possibly have affected" the jury's verdict (paras 82 and 83).

48. Views differ on the interpretation of those words. They seem clear to me. But that point is now history. Whatever the Judicial Committee considered to be the test in *Holland*, this court has drawn a line under the matter by fixing the test of "real possibility", a test with which Lord Rodger himself came to agree (*McInnes*, at para 30). I conclude therefore that counsel's reliance on *Holland* is misconceived. I reject the case for the appellant on this issue.

Conclusion

49. I agree that the appeal should be refused.