Trinity Term
[2014] UKSC 37
On appeal from: [2012] EWHC 1186 (Admin)

JUDGMENT

R (on the application of Nunn) (Appellant) *v* Chief Constable of Suffolk Constabulary and another (Respondents)

before

Lord Neuberger, President
Lord Clarke
Lord Reed
Lord Carnwath
Lord Hughes

JUDGMENT GIVEN ON

18 June 2014

Heard on 13 March 2014

Appellant
Hugh Southey QC
Adam Straw
(Instructed by Saunders Law Ltd)

1st Respondent
Fiona Barton QC

(Instructed by Legal Services, Suffolk County Council)

2nd Respondent
Julian Knowles QC
Paul Lodato
(Instructed by Crown Prosecution Service Appeals Unit)

Intervener (Innocence Network UK; Justice; The Criminal Appeals Lawyers Association)
Henry Blaxland QC
David Emanuel
(Instructed by White & Case LLP)

LORD HUGHES (with whom Lord Neuberger, Lord Clarke, Lord Reed and Lord Carnwath agree)

1. The claimant Kevin Nunn was convicted in November 2006 of the murder of his girlfriend following the ending of their relationship. His application for leave to appeal to the Court of Appeal (Criminal Division) was refused after hearing counsel's written and oral representations on his behalf. He continues to protest that his conviction was wrong. The present proceedings for judicial review raise the question of the extent of any continuing duty of the police and the Crown Prosecution Service to assist him in gathering and examining evidence with a view to a further challenge to his conviction, which he asserts was a miscarriage of justice.

2. It is common ground, and well understood, that while his trial was pending the Crown owed him the statutory duties of disclosure which are set out in sections 3 and 7A of the Criminal Procedure and Investigations Act 1996. That meant that it was the Crown's duty to disclose to him anything which had become known to it and which might reasonably be considered capable either of undermining the prosecution case or of assisting his own. At the heart of the submissions of Mr Southey QC for the claimant is the contention that this duty remains in existence in exactly the same form after as well as before his trial ended with his conviction. Whilst the statutory duties of disclosure are expressly framed as continuing only until the end of the trial, Mr Southey contends that those duties are only statutory enactments of the common law duty which pre-existed the 1996 Act, and that accordingly this common law duty remains binding on the Crown indefinitely. The basis for it, he argues, lies in the necessity of detecting and correcting any miscarriage of justice which may have occurred.

3. Kevin Nunn had been the boyfriend of the deceased, Dawn Walker, for about two years prior to February 2005. They did not live together and she may have had other boyfriends during this period. It was agreed that on the evening of Wednesday 2 February their relationship was brought to an end in the course of a discussion between them at her home. The Crown case was that there was a noisy argument, overheard by the neighbours and seen by one, and that Dawn had ended the affair against Nunn's wishes. His case by contrast was that it had been a matter of amicable agreement; there had been no argument and he had left well before the time spoken of by the neighbours. After that evening Dawn was not seen alive again. Her body was found by a river two days later on Friday 4 February. Attempts had been made to set fire to it at a different place near the river and at some stage it had been immersed in water. It had then been disposed in a sexually degrading position, unclothed except for a fleece over a sweatshirt pulled up above her breasts, which garments had been put on after death and burning in other clothes. The exact cause

of death could not be determined. Her head and pubic hair had been shaved off, her ankles and Achilles tendon had been lacerated, and a length of reed had been inserted into her anus. The body must have been somewhere else during Wednesday night and Thursday, for it would have been seen if then by the river.

4. In barest outline, the Crown case against the claimant relied upon (i) the motive afforded by Dawn's rejection of him, (ii) evidence that he was of a jealous disposition and had stalked both Dawn and a previous partner, (iii) his admitted presence with her on the evening of her disappearance, (iv) the argument which the neighbours said that they had heard that night, (v) his having provided himself with a key to her home without her knowledge, which would have afforded access both to items found where the body had been burned and to a petrol can apparently removed from her shed for use in the burning, (vi) his having told her employers the next day that she was not at work because unwell, and (vii) the evidence of a neighbour who knew him and who said that she had seen him, with an accomplice, removing a large wrapped object, consistent with a body, from Dawn's house in the small hours of the night before she was found.

5. By contrast, the claimant's case was that he had left Dawn in good health and had thereafter been elsewhere. He pointed to a telephone record of her mobile telephone calling his at 04.55 on the night of 2/3 February; he denied that he had made the call himself to lay a false trail, and he explained the absence on his own phone of the voicemail message which he said she had left by saying that he had accidentally deleted it. He said that footprints consistent with his boots near the riverbank burning site were there because he had gone looking for Dawn the day after she disappeared; he had walked the river bank but had not seen various items connected with her which others had seen there. He advanced the positive case that Dawn had been murdered by one, or perhaps another, of her previous boyfriends, to one of whom she was perhaps hoping to return. Both were called and cross examined on his behalf before the jury, as was the girlfriend of one of those men, who provided that alleged murderer with an alibi. The claimant pointed to the presence of traces of sperm (four cells) on Dawn's inner thigh and pubic area (but not in her vagina) which, since he had had a vasectomy, were unlikely to derive from him; unless they had got there by secondary or tertiary transfer or unknown past sexual contact via clothing these, he suggested, were an indication of a killer other than him. These and other issues were all fully investigated at a trial which lasted some six weeks. In the course of it the jury heard and was able to judge the evidence of the claimant and of the identifying neighbour, as well as of the two men whom the claimant accused.

6. The jury's verdict of guilty was returned on 20 November 2006. The Court of Appeal refused the application for leave to appeal against conviction on 17 October 2007. The claimant continued to protest his innocence. Beginning in January 2008, he made a series of written applications to the police for supply of all

their records of the investigation. These will, for an investigation such as this, have been very voluminous; they were logged in detail under the normal police computerised system for major enquiries ("HOLMES"). He sought everything, including officers' notebooks, computer files, incident logs, CID journals and the like, together with all photographs and forensic science records. The applications were framed under either the Freedom of Information Act 2000 or the Data Protection Act 1998. Whether or not the claimant fully appreciated the law, even if there was anything which could be obtained under these two statutes, these blanket applications were misconceived (see, inter alia, section 30 of the former and section 29 of the latter), quite apart from the fact that there is no suggestion that anything relevant had not been disclosed to the defendant, through his trial solicitors, before the trial.

7. By February 2010, however, the claimant had instructed fresh solicitors, who had not represented him at his trial. He will have been entitled to call for the case papers, including unused prosecution material, from his trial solicitors to give to his new representatives. On 8 February 2010 the new solicitors wrote the first of a number of letters to the police seeking information. They said:

> "We should be most obliged if you could serve upon us some relevant and as yet undisclosed material in relation to the finances of the deceased, Dawn Walker.
>
> The purpose of this enquiry is to ascertain whether Ms Walker had any undisclosed source of income which might indicate any form of economic activity which was not disclosed to the defence.
>
> This enquiry is necessitated in part by the conclusion drawn from the available facts that Ms Walker was living at a standard way beyond the income which she earned at [her employers].
>
> …..
>
> We should also like to know whether the keys to the shed at Dawn Walker's home and her mobile phone can be made accessible to our expert, probably at the forensic science laboratory for the purpose of DNA testing."

8. There is no sign that Ms Walker's finances had been thought by anybody to have any relevance at all to the trial or to the question of who had murdered her. The enquiry clearly indicated a wish to start afresh investigating the case. Nor was

the request for anything specific; it was a request for the police to exhume all the investigation records, a little over three years after the end of the trial, and to review anything bearing on this new topic. By now the investigation documents were all in storage and some officers concerned had moved on to other postings. In the event, some research was undertaken and a positively worded letter from the CPS responded that the author had ascertained that the deceased had certainly not been living beyond her means. Nothing more seems to have been heard of this line of enquiry.

9. Other requests, however, followed, some specific and some not. They included a request for sight of the notes of any forensic scientist who had worked on the case so that an independent expert could "check their adequacy", and they sought access to various exhibits for further testing as and when their expert so advised. The solicitors made it clear that they were undertaking "a full review of the case to determine what lines of enquiry may turn up fresh evidence." They referred to wanting to review material relating to DNA, pathology, soil composition, pollens and diatoms. In November 2010 an itemised list of requests for information was sent to the police. It asked a variety of questions which would have entailed a detailed review of the investigation documents. It included the question, described as relating to an "obvious" possibility, whether the murder of Dawn Walker had been linked to a series of high profile murders of prostitutes in Ipswich. The several letters made it clear that other requests would be likely to follow as the general review of the case proceeded. On 1 February 2011 the police replied formally, repeating what had already been said in correspondence, to the effect an obligation was accepted to disclose any material which came to light after the conviction and which might cast doubt on the safety of the conviction, but not to facilitate a general trawl through a finished case.

10. The claimant's application for judicial review followed. It sought:

> "(a) A declaration that the defendant's 1 February 2011 refusal to grant the claimant access to prosecution evidence is unlawful being in breach of his rights under domestic common law, under articles 5 and 6 of the ECHR and/or under section 7 of the Data Protection Act 1998; and
>
> (b) a mandatory order requiring the Chief Constable to grant the claimant access to the prosecution evidence,"

together with such other declaratory relief as might be appropriate. The Divisional Court (Sir John Thomas P and Haddon-Cave J) refused the application. This is the claimant's appeal from that refusal.

11. It should be recorded that after the lodging of the claim for judicial review, and again between the hearing before the Divisional Court and that in this court, the apparent target of the claimant's present requests has been narrowed. It seems that nothing is now made of the suggested "obvious" possibility that this murder was linked to the murders of prostitutes in Ipswich; the several important differences between the two cases which have been explained may have been taken on board. The focus is now upon (i) access to the working papers of the forensic scientists who advised the Crown and/or gave evidence and (ii) requests for re-testing, or first testing, of various exhibits recovered in the course of the investigation.

12. At the trial, the scientific evidence was, in most respects, inconclusive as to the identity of the killer. The Crown did not rely on it to support the case against the claimant, as the trial judge carefully reminded the jury early in her summing up. There were the footprints near the river which were consistent with boots which the claimant wore, but they were not uniquely so, and he admitted walking there at the material time. DNA testing of various items found either on the body or where it had been burned provided nothing to associate them either with the claimant or with any of the other males who figured in the case. The scientific evidence of the presence of traces of sperm on the deceased was not disputed, and evidence was given about the possible ways in which, by secondary or tertiary transfer, such material might arrive where it was found. The claimant called expert evidence relating to the consequences of his vasectomy. What other scientific advice he had cannot, in the absence of waiver of privilege, be known. No forensic science report available to him at trial has ever been disclosed by him; there is of course no obligation upon a defendant to disclose such a report unless he proposes to rely upon it. A great many defendants decide, on advice, that there is nothing in the reports obtained for them which will help them or that the best use to which they can be put is to inform cross-examination of the Crown scientists without exposing points on which the reporting expert agrees.

13. Some time *after* the claim for judicial review was lodged, the claimant provided the police and CPS with a full report from an independent forensic scientist who had clearly been instructed by the new solicitors some while beforehand, though long after the trial. While appeal to this court was pending, a further statement from a different forensic scientist has also been lodged, dealing with advances in DNA testing techniques over the period since the trial; this was admitted without objection before this court.

14. Nevertheless, whilst the focus of the now current application to the police has narrowed, it is plain from the sequence of the requests made that what the claimant seeks is a full re-investigation, and access from time to time to whatever he thinks necessary to review any point which he wishes. Consistently with this, the appeal has been argued before this court at the general level of the extent of the duty, after conviction and exhaustion of appeal, to which the Crown and the police remain

subject in relation to the products of the police enquiry. The question of law of general public importance which the Divisional Court certified at Mr Southey's request is:

> "Whether the disclosure obligations of the Crown following conviction extend beyond a duty to disclose something which materially may cast doubt upon the safety of a conviction, so that the [Chief Constable] was obliged to disclose material sought by the claimant in these proceedings ?"

15. As is apparent from the summarised history of applications set out above, what this claimant chiefly seeks is not disclosure of something which has been withheld from him, but inspection of material which was fully and properly disclosed during the trial process. Disclosure and inspection are related, and governed by similar principles, but it does not at all follow that the exact content of the Crown's duty in a particular case can be understood without adverting where necessary to the difference between them.

16. As Mr Southey rightly submits, the Crown's duty of disclosure and inspection was formulated by the common law in the second half of the twentieth century. There were parallel developments of rules of disclosure in other common law jurisdictions: see for example *Brady v Maryland* 373 US 83 (1963) in the United States of America. The precise extent of the duty in England and Wales before and during trial is not in issue in the present case and calls for no more than a summary. Early decisions, such as *R v Bryant and Dickson* (1946) 31 Cr App R 146 and *Dallison v Caffery* [1965] 1 QB 348 recognised the Crown's duty to disclose to a defendant the existence of a witness who can give material evidence. Later decisions expanded the rule into a general duty to disclose evidence of any kind which might reasonably be thought capable of assisting a defendant, in large part in response to a few notorious cases in which trials went wrong because defendants were unaware of such material although it was in the hands of the prosecution. *R v Ward* [1993] 1 WLR 619 is a well-known example, where wholesale failure to disclose scientific material bearing on the reliability of scientific evidence at the centre of the Crown case made it necessary to quash convictions for bomb-setting some twenty years after the event.

17. A defendant's right to have disclosed evidential material inspected on his behalf will generally go with the duty of disclosure. For example, *R v Mills* [1998] AC 382 held that a material witness statement should be provided for inspection as well as the existence of the witness disclosed. There are, however, inevitably additional considerations associated with inspection of evidential material other than witness statements. Occasionally, material may have had to be destroyed for reasons of safety, or may unavoidably have been used up in a testing process. If it remains

available, inspection must be on terms that it is properly preserved and, if scientific, not exposed to risk of contamination. Particular issues may arise in relation to the cost of handling or preserving some kinds of material. There are special rules for material falling within the Sexual Offences (Protected Material) Act 1997 designed to prevent it from being put into the possession of individual defendants. In practice, in many cases, inspection is likely reasonably to be restricted to nominated and trusted professional or expert persons. What will be reasonable will vary from case to case.

18. The Criminal Procedure and Investigations Act 1996 put the common law prosecution duty of disclosure into statutory form. It recognised a two-stage process of disclosure, initially under section 3 and continuing under what is now section 7A. It also inaugurated a duty of defence disclosure, which, although one of imperfect obligation, is connected to the prosecution duty since the defence statement required by section 5 and the advance notices required by sections 6C and 6D help to define the issues and thus to identify material which may be relevant to the duty of continuing disclosure. The Act somewhat modified the test for disclosure from that variously articulated in *R v Ward* and in *R v Keane* [1994] 1 WLR 746 at 752, whilst maintaining its purpose. Both the initial duty under section 3 and the continuing duty under section 7A are couched in the same terms. They apply to any material which the prosecution has or has inspected 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."

19. The Act dealt specifically with the timing of the duties which it created. In this and generally it gave effect to the recommendation of the Royal Commission on Criminal Justice (the Runciman Commission) (1993) (Cm 2263) which had expressed concern that the common law risked requiring detailed disclosure of "matters whose potential relevance is speculative in the extreme" and about the impracticability of the sheer bulk of disclosure which might be within the principle (chapter 6, p 95, at para 49). The Act met those concerns firstly by providing the test for disclosure set out above. By section 21, where the statutory duties created by the Act apply, they displace the former common law duties which cease to operate. The Act then recognised the two-stage disclosure procedure described above and it defined the period during which its statutory duties of disclosure are imposed. For trials on indictment, the duty begins with the arrival of the case (by whatever route) in the Crown Court: section 1(2). It ends with the end of the trial, whether by conviction, acquittal or the Crown discontinuing proceedings: section 7A(1)(b). It follows that the duty of disclosure created by the Act does not apply to the present claimant.

20. The end of the trial is, however, not always the end of the criminal process. Any convicted defendant has the right to appeal to the Court of Appeal (Criminal Division) if he can show an arguable case that his conviction is not safe. If that fails, a defendant cannot mount a second appeal, because the court is functus officio. But, again in response to the recommendations of the Runciman Commission, the law of England and Wales (and also of Northern Ireland and Scotland) has put in place a separate body, the Criminal Cases Review Commission ("CCRC"), which has the power to review any conviction and which is charged, if it thinks that there is a real possibility that the Court of Appeal might quash the conviction, with the power to refer the case back to that court for, exceptionally, the hearing of a second appeal – and on any grounds, whether the same as before or different. Such a referral by-passes the requirement for leave to appeal. An arguable case is assumed. The Court thereupon has the duty to investigate the safety of the conviction and must quash it if it is unsafe. The CCRC's extensive investigative powers include the power to require the production to it of any material in the hands of the police or any other public body, to appoint an investigator with all the powers of a police officer, and to assemble fresh evidence not before the court of trial.

21. As summarised above, Mr Southey's essential submission is that the common law duty of disclosure was developed with the purpose of preventing miscarriages of justice. Whilst the common law duty is displaced where the Act applies, it remains in force, he submits, for periods before and after the Crown Court trial. In particular, it remains in force after conviction for the purpose of exposing and correcting any miscarriage of justice which may have occurred. Hence, he contends, the duty of the Crown in the present case is exactly the same now as it was while the claimant's case was pending in the Crown Court. It follows, he says, that the police, as the custodians of the exhibits and the other products of the investigation, must afford the claimant such access as he seeks so that he can, if material emerges which supports him, challenge his conviction. Mr Southey accepts, as he must, that any such challenge can now only be brought to court if the CCRC decides to refer the conviction to the Court of Appeal (Criminal Division). But he contends that in order to demonstrate to the CCRC that this is a proper case in which it should launch a review, the claimant needs, via his solicitors, to re-investigate the several matters which they have identified and perhaps more.

22. The principled origin of the duty of disclosure is fairness. Lord Bingham put it in this way in *R v H* [2004] UKHL 3; [2004] 2 AC 134, at para 14, speaking in the context of the proper procedure for handling claims to withhold disclosure on public interest grounds:

> "Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that

> miscarriages of justice may occur where such material is withheld from disclosure."

There is no doubt that this principle of fairness informs the duty of disclosure at all stages of the criminal process. It does not, however, follow, that fairness requires the same level of disclosure at every stage. The terms of section 7A of the statute plainly suggest otherwise. So, on inspection, does the jurisprudence.

23. The common law of England and Wales has proved capable of adapting the duty of disclosure to the different stages of the criminal process. In *R v Director of Public Prosecutions, Ex p Lee* [1999] 1 WLR 1950 the Divisional Court dealt with the position before committal to the Crown Court, and thus before the statutory duties under the Criminal Proceedings and Investigations Act apply. It held that some disclosure was indeed required at that early stage but not what Kennedy LJ described, at p 1963, as the "full blown" version applicable under the Act once Crown Court proceedings are under way. Examples of material which ought to be disclosed before committal would include evidence which bears on a bail application, or which is relevant to an application to stay for abuse, or which relates to unused eye witnesses whose evidence might be less effective unless promptly proofed. That illustrates the proposition that the common law duty did not remain the same throughout. Rather, it was tailored to the needs of the stage of the proceedings in question.

24. Similarly, although the duties laid down by the Act cease on conviction, some continuing common law duty is recognised to apply pending sentence, but only in relation to material relevant to that stage. The Attorney-General has issued guidelines on disclosure for prosecutors. They recognise at para 58 that prosecutors must consider disclosing in the interests of justice any material relevant to sentence, such as information not known to the defendant which might assist him in placing his role in the offence in the correct context vis-à-vis other offenders. That correctly gives effect to the common law duty which at this point is limited to material not known to the defendant which might assist him in relation to sentence.

25. In the same way, while an appeal is pending, a limited common law duty of disclosure remains. Its extent has not been analysed in English cases, but plainly it extends in principle to any material which is relevant to an identified ground of appeal and which might assist the appellant. Ordinarily this will arise only in relation to material which comes into the possession of the Crown after trial, for anything else relevant should have been disclosed beforehand under the Act. But if there has been a failure, for whatever reason, of disclosure at trial then the duty after trial will extend to pre-existing material which is relevant to the appeal. This was the case, for example in *R v Makin* [2004] EWCA Crim 1607, to which Mr Southey referred the court, where the complaint was of a failure of disclosure at trial, and disclosure

pending appeal was necessary to enable the complaint to be investigated by the court, albeit on examination the court rejected it. A similar result was reached in *McDonald v HM Advocate* [2008] UKPC 46; 2010 SC (PC) 1 in relation to Scottish law (where the content of the duty of disclosure was then in a transitional state). The Judicial Committee of the Privy Council accepted that if there had been a failure of disclosure at trial, the duty on appeal was to make available what should have been provided at trial as well as material relevant to existing grounds of appeal. However, it roundly rejected the contention that at the appellate stage there arose a duty on the prosecution to re-perform the entire disclosure exercise, so that the appellant could see whether anything might emerge which could be used to devise some additional ground of appeal. Lord Rodger observed at para 71 that that was "an extravagant proposition". He went on to explain why, at para 74:

> "Not only would such an obligation be unduly burdensome, but it would often be quite inappropriate at the appeal stage. By then, the real issues in contention between the parties will have been focused at the trial. In this new situation material which might have seemed to be of potential significance for the defence before the trial (for instance as weakening the identification evidence of a witness to a murder) may now be seen to have actually been irrelevant (because for instance the accused admitted that he killed the deceased but pleaded self-defence).

In other words, what fairness requires varies according to the stage of the proceedings under consideration.

26. This conclusion is consistent with that reached in other common law jurisdictions. In the New Zealand case of *The Queen v Nepia* (unreported) 3 October 2000, the Court of Appeal found the source of the disclosure rule at the pre-appeal stage in the power of that court under section 389(a) of the Crimes Act to order production of any document exhibit or thing which appears to be necessary for the determination of the case (a provision equivalent to section 23 of the England and Wales Criminal Appeal Act 1968). It held that this jurisdiction, exercisable on appeal, is not part of an investigatory procedure and should not be used as part of a general fishing expedition. It held that "a realistic evidential foundation" will in general have to be laid before it is used. In the recent case of *Cant v The Queen* [2013] NZCA 321, again a pending appeal, the Court of Appeal similarly held that questions of the Crown were not appropriate, and that requests for disclosure must have a material bearing on an articulated ground of appeal.

27. A similar approach was adopted in the Court of Appeal of Ontario in *The Queen v Trotta* [2004] CanLII 600114 (ON CA). Canadian law recognises a duty of disclosure for the purposes of trial which is equivalent to that imposed in England

and Wales: *R v Stinchcombe* [1991] 3 SCR 326. *Trotta* held that in principle disclosure obligations continued into the appellate process. The court observed that the protection of the innocent is as important on appeal as it is prior to conviction. But it drew attention to the fundamental differences between the two stages when it comes to the content of the duty. The convicted person is no longer to be presumed innocent. He has exhausted his right to make full answer and defence. The duty of disclosure at this stage was held to extend to any information in the possession of the Crown where the accused can show that there is "a reasonable possibility" that it could assist him in the prosecution of his appeal. In that case, there had arisen since the trial some suggestions of lack of balance in the evidence given in other cases by the Crown pathologist. The Court held that there would be a duty to disclose this material to the appellant if there were any reason suggested to doubt the evidence which the pathologist had given in the instant case. Since there was not, the material was irrelevant and the request for it speculative. This is a good illustration of the difference between the two stages. There can be no doubt that, if it had then been in existence, the material affecting the pathologist would have been disclosable pre-trial, for at that stage it would not have been known whether there was or was not any challenge to his findings.

28. The important differences between the pre-trial and post-conviction stages were similarly emphasised by the US Supreme Court in *District Attorney's Office (Third Judicial District) v Osborne* 557 US 52 (2009). The court divided 5:4 upon the jurisdictional question whether a complaint of denial of access to DNA testing post-conviction raised a constitutional issue, and thus on whether the issue was a proper one for the Supreme Court rather than for the federal or State courts. There was also disagreement on whether there was a right to such access in a case where it was agreed that the testing would be conclusive of guilt or innocence. But there was agreement that the position of a convicted person was not generally analogous to that of a person on trial. All the judges agreed that the disclosure rules applicable prior to and during trial, set out in *Brady v Maryland* 373 US 83, did not continue unaltered after conviction. Roberts CJ, giving the judgment of the majority, said this:

> "Osborne's right to due process is not parallel to a trial right, but rather must be analysed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief. *Brady* is the wrong framework."

The minority opinion, delivered by Justice Stevens, agreed on this. It included approval of Luttig J's statement in the earlier case of *Harvey v Horan* 285 F 3d (2002) 298 at 305 that:

> "…no-one would contend that fairness, in the constitutional sense, requires a post-conviction right of access or a right to disclosure anything approaching in scope that which is required pre-trial…"

Whilst the jurisdictional question was later resolved in favour of a different appellant in *Skinner v Switzer* 562 US (2011) nothing in that decision bears on the distinction between disclosure pending trial and disclosure post-conviction.

29. There is thus no basis for saying that the common law ever recognised a duty of disclosure/inspection after conviction which was identical to that prevailing prior to and during the trial, and no case, whether in this jurisdiction or any other, has been found to suggest it.

30. All the stages thus far considered are ones at which the criminal justice process remains afoot, with either trial or sentence or appeal to be catered for. When it comes to the position after the process is complete, the Attorney General's guidelines deal specifically with disclosure of something affecting the safety of that conviction. The relevant paragraph in the most recent edition (2013), echoing the same principle in earlier editions, says this:

> "Post conviction.
>
> 72. Where, after the conclusion of proceedings, material comes to light that might cast doubt upon the safety of the conviction, the prosecutor must consider disclosure of such material."

The guideline must mean that not only should disclosure of such material be considered, but that it should be made unless there is good reason why not. Thus read, it is entirely consistent with the principle reflected in the position set out in the paragraphs above in relation to the pre-Crown Court stage, to the pending sentence stage and to the pending appeal stage. Mr Southey's submission entails the argument that the guidelines greatly understate the duty in the circumstances of the present claimant. He is entitled, if Mr Southey is right, to the full extent of the duty which the Crown had had during his trial. That would mean a duty to give active consideration, presumably continuously, to the state of the evidence. And, as the requests made of the police in the present case illustrate, it would mean a duty to respond from time to time to any requests for information, or for access to material, which the convicted defendant makes. The argument appears to be that his right to the performance of that duty endures indefinitely, or certainly whilst he, or perhaps anyone else, asserts that the conviction was wrong.

31. The fallacy in this argument lies in the implicit assumption that the common law duty, as it evolved, was identical before and after conviction. As has been seen, it was not. Moreover, it does not at all follow from the fact that the common law developed the Crown's duty of disclosure with the object of minimising the risk of miscarriages of justice that a convicted defendant such as the claimant, who asserts that his conviction was wrong, is or ever was entitled to the same duty continuing indefinitely after that conviction. The common law developed the duty as an incident of the trial process, to ensure that that process was fair to defendants. It was designed to avoid trials creating miscarriages of justice, not as a means of investigating alleged miscarriages after a proper trial process has been completed. It was not devised in order to equip convicted persons such as the claimant with a continuing right to indefinite re-investigation of their cases, and the fact that some such persons assert that their convictions were miscarriages of justice does not mean that it was.

32. The position of a convicted defendant is different in kind from that of a defendant on trial. The latter is presumed innocent until he is proved guilty, as he may never be. The former has been proved guilty. He is presumed guilty, not innocent, unless and until it be demonstrated not necessarily that he is innocent, but that his conviction is unsafe. The defendant on trial must have the right to defend himself in any proper way he wishes, and to make full answer to the charge. The convicted defendant has had this opportunity. The public interest until conviction is in the trial process being as full and fair as it properly can be made to be. After conviction, there is of course an important public interest in exposing any flaw in the conviction which renders it unsafe and in quashing any unsafe conviction, but there is also a powerful public interest in finality of proceedings. All concerned, including witnesses, complainants, the relatives of the deceased and others, have a legitimate interest in knowing that the legal process is at an end, unless there be demonstrated to be good reason for re-opening it.

33. A duty such as that suggested by Mr Southey should not be assumed to be straightforward of performance. The products of a major investigation are typically voluminous, far more so than the evidence adduced at trial, extensive though that often is. Whilst they are generally catalogued on computer, many will be paper material. In smaller cases, in which the same duty would apply, there may be very little retained. Generally, materials will often be archived after the appeal process is exhausted. To make an informed or useful search of them requires them to be mastered. Police officers move on to other appointments, or retire; it cannot be assumed that the investigating officers will remain in the same place where they formerly were, or that they will continue to have regular access to the material. If the material is actively to be managed and re-considered, officers will have to be diverted to the task from other investigations. The evidence of the detective inspector in the present case was, for example, that reviewing the stored evidence in order to deal with the claimant's subject access request under the Freedom of Information Act occupied approximately four man-days of police time. If there is

demonstrated to be a good reason for this kind of review of a finished case, then the resource implications must be accepted. There is, however, a clear public interest that in the contest for the finite resources of the police current investigations should be prioritised over the re-investigation of concluded cases, unless such good reason is established.

34. If, then, there is no basis for Mr Southey's principal submission, that the duty of disclosure remains the same after conviction as before, the question remains what the duty does entail at that stage.

35. There can be no doubt that if the police or prosecution come into possession, after the appellate process is exhausted, of something new which might afford arguable grounds for contending that the conviction was unsafe, it is their duty to disclose it to the convicted defendant. Simple examples might include a new (and credible) confession by someone else, or the discovery, incidentally to a different investigation, of a pattern, or of evidence, which throws doubt on the original conviction. Sometimes such material may appear unexpectedly and adventitiously; in other cases it may be the result of a re-opening by the police of the enquiry. In either case, the new material is likely to be unknown to the convicted defendant unless disclosed to him. In all such cases, there is a clear obligation to disclose it. Para 72 of the Attorney General's guidelines, quoted above, correctly recognises this. This is, however, plainly different from an obligation not to reveal something new, but to afford renewed access to something disclosed at time of trial, or to undertake further enquiries at the request of the convicted defendant.

36. Miscarriages of justice may occur, however full the disclosure at trial and however careful the trial process. A convicted defendant clearly has a legitimate interest, if continuing to assert his innocence, to such proper help as he can persuade others to give him: see *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, where a prisoner's right, for this purpose, to a visit by, and oral interview with, an investigative journalist was recognised. Quite apart from the defendant's interest, the public interest is in such miscarriages, if they occur, being corrected. There is no doubt that there have been conspicuous examples of apparently secure convictions which have been demonstrated to be erroneous through the efforts of investigative journalists, or of solicitors acting on behalf of convicted persons or, sometimes, of other concerned persons.

37. This court was referred to *R v Hodgson* [2009] EWCA Crim 490 as a particularly graphic illustration. There, the defendant's conviction for rape and murder, based essentially upon the apparently compelling detail of his own circumstantial confessions, was, some twenty seven years later, demonstrated to have been wrong by the advances in science, and despite no one concerned with the investigation or trial having done anything which could be criticised. This was

possible because samples of semen recovered from vaginal and anal swabs taken from the deceased could be analysed for DNA in a way which had not been possible at the time. A solicitor who was recently instructed on behalf of the defendant made the enquiry of the CPS and/or the police whether the samples remained in existence despite the passage of time. When it was found that they did, analysis of them by modern methods was immediately commissioned by the police and prosecution, with a view to immediate disclosure of the outcome. The semen could only have come from the rapist/murderer. The results excluded the defendant. A rapid joint submission to the CCRC followed, with an immediate reference by that body to the court. In quashing the conviction, the Court of Appeal, Criminal Division, gave appreciative recognition to the efforts of solicitor, police and prosecutor and to the level of co-operation between them.

38. It does not, however, follow from cases such as this that the law ought to impose a general duty on police forces holding archived investigation material to respond to every request for further enquiry which may be made of them on behalf of those who dispute the correctness of their convictions. Indeed, the potential for disruption and for waste of limited public resources would be enormous if that duty were to be accepted. The claimant's initial requests in the present case for investigation of the finances of the deceased, as well as his earlier applications for sight of the entire investigation files, afford good illustrations of the kind of speculative enquiry which such a rule would encourage. There is no such duty. If the duty of disclosure pending appeal is limited, as it plainly is, to material which can be demonstrated to be relevant to the safety of the conviction, it is all the clearer that after the appellate rights which the system affords are exhausted the continuing obligation cannot be greater than that stated in the Attorney General's guidelines, read as explained in para 30 above.

39. 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. *R v Shirley* [2003] EWCA Crim 1976, a DNA case not unlike *Hodgson*, appears to be a case in which it did exactly that. What it ought not to do is to indulge the merely speculative. It is an independent body specifically skilled in examining the details of evidence and in determining when and if there is a real prospect of material emerging which affects the safety of a conviction. This exercise involves a detailed scrutiny of the other evidence in the case and a judgment on the likely impact of whatever it is suggested the fresh enquiries may generate. Whilst in principle the court retains control, via the remedy of judicial review, of the duty laid upon the police and prosecutors after the appeal process is exhausted, it is likely to determine, unless good reason for not doing so is provided, that relief by that route is inappropriate until the CCRC has had the opportunity to make a reasoned decision.

40. The advances of science mean that from time to time it will become possible to undertake tests which were not available earlier. This possibility presents just one example of the approach set out above. Sometimes such tests will be potentially determinative of guilt, as they were in *Hodgson*. In other cases they will be simply speculative, either because there is great uncertainty about whether any result can be obtained or because any result will be consistent both with guilt and innocence. The difference between the two cases has given rise in the USA to debate about the extent of any right to re-testing especially if it is likely to be conclusive. *Osborne*, referred to above, records some of the debate and the fact that a large number of US states have made legislative provision for such testing in defined circumstances. There is, however, no body such as the CCRC in the United States, which can decide in an appropriate case to require testing. Here, there is.

41. None of this means that the work of solicitors and others in the interests of convicted persons may not be of great value. There is no doubt that the CCRC is much assisted by informed legal analysis and presentation if an application for review is made to it, and not only because its funding is not unlimited, but also because accurate legal formulation focuses the mind correctly. Sometimes, such solicitors or others can usefully undertake enquiries of their own, respecting of course the interests of third parties. On other occasions they may well, by their arguments and presentations, enlist the co-operation of the police, or the prosecution, or both: *Hodgson* was just such a case. The police and prosecutors ought to exercise sensible judgment when representations of this kind are made on behalf of convicted persons. If there appears to be a real prospect that further enquiry will uncover something which may affect the safety of the conviction, then there should be co-operation in making it. It is in nobody's interests to resist all enquiry unless and until the CCRC directs it.

42. It is enough to determine the instant appeal that after conviction there is no indefinitely continuing duty on the police or prosecutor either in the same form as existed pre-trial or to respond to whatever enquiries the defendant may make for access to the case materials to allow re-investigation. The duty is properly stated at para 72 of the Attorney General's guidelines, read as explained in para 30 above, with the addition that if there exists a real prospect that further enquiry may reveal something affecting the safety of the conviction, that enquiry ought to be made.

43. The Divisional Court held that there was no basis for concluding that any of the enquiries made in the present case go beyond the simply speculative and satisfy this latter condition. This court has, rightly, been pressed with argument chiefly on the principled point of law rather than on the facts of this case. This appeal ought not, however, to be left without the observation that the fact that DNA testing is one of the things sought does not by itself answer the question whether the request has a real prospect of uncovering material affecting the safety of the conviction. The request for sight of all forensic science working papers so that the scientists' work

could be checked was plainly speculative. The report provided by the claimant states specifically that there is no reason to query any of the work done or conclusions arrived at. The report also makes it clear in some instances that the request for testing of items which were not previously tested is made simply because the claimant or his family would like it done; those requests have the plain appearance of being likewise speculative. In the case of some of the testing proposed it seems likely that some alteration of the samples would be involved, by consolidating them; if this kind of operation is in question, there is a further decision to be made whether re-testing would rule out any future use of the material. There may be a separate question concerning the new possibilities of undertaking modern, and better, DNA testing of certain swabs, especially those from the thigh and genital region. Even there, however, the forensic science report now relied upon concludes that even if a match were found to one of the men under discussion in the case, that would not necessarily exclude the claimant as the killer. The killer may or may not have deposited traceable DNA. Although it is suggested for the claimant that if DNA attributable to one of these men were to be found, that would provide good evidence that he *might* be the killer, it must also be the case that any DNA which is found need not be related to the killing, particularly if the deceased had an association with the man in question. It is plain that the presence of a very few unattributed spermatozoa was known at the trial and the possibilities for innocent transfer were fully investigated. On the limited information presently available it seems unclear that a real prospect is established of material emerging affecting the safety of the conviction. However, any further request for access to the sample should be tested on the principles explained above, in the first instance by the police and if necessary by the CCRC.

44. For these reasons, this appeal should be dismissed.