IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEAL (CRIMINAL DIVISION)
IN THE MATTER OF CO-JOINED APPEALS A & B and DS RAYNER

BETWEEN
(1st Ground):

A. and B.	**Appellants**
and	
REGINA	**Respondent**

AND BETWEEN
(2nd Ground):

REGINA	**Appellant**
and	
DS RAYNER	**Respondent**

SKELETON ARGUMENT ON BEHALF OF THE APPELLANTS

Introduction

1. These co-joined appeals arise from the same incident: the terrorist bombing of the Westfield Shopping Centre in London. Although the appeals are to be heard together, each raises very distinct issues.

2. A and B were at the material time members of the Security Service (MI5) who were responsible for the interrogation of Mohamed Al-Basir. In the course of their interrogation they inflicted upon him a serious physical assault. The information procured as a result enabled the police to evacuate the shopping centre before the explosion and no casualties resulted from the bombing although significant physical damage was caused.

3. DS Rayner was present at the interrogation and released details of it to the press, in return for payment, believing that the method of interrogation should be disclosed in the public interest.

4. In the courts below, A and B were convicted of torture, contrary to s. 134 of the Criminal Justice Act 1988. Rickshaw J ruled the defence of necessity could not apply to the charge of torture and they were convicted. Their convictions were upheld by the Court of Appeal who agreed with Rickshaw J that the defence of necessity could not apply. (Although the Court strongly disapproved of the leniency of the sentence imposed at first instance). The ground of their appeal is as follows:

> That the defence of necessity did apply, or potentially applied, and their convictions should be quashed or a retrial ordered with the issue of necessity left to the jury properly directed.

5. DS Rayner was convicted of misconduct in a public office. The Court of Appeal quashed his conviction because his disclosure was an act of public service and his conviction was therefore unsafe. The Crown appeals on the following ground:

> That accepting payment meant that the offence was committed notwithstanding any other considerations and his conviction should be restored (even if a custodial sentence was inappropriate)

6. Submissions regarding each ground are made in paragraphs 7-16 and 17-27 respectively.

The First Ground – the Torture Charge

7. s. 134 of the Criminal Justice Act 1988 ("the CJA") provides that:

> "(1) A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties."

8. Both the Crown Court and the Court of Appeal held that there is no defence at law to a charge of torture. It is submitted that both courts were in error in making this finding. The CJA provides a statutory defence as follows:

> "(4) It shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct."

9. In a wide-ranging review of the relevant authorities in *R. v Shayler [2001] EWCA Crim 1977; [2001] 1 W.L.R. 2206* Lord Woolf CJ concluded that the common law defence of necessity, whether characterised as a stand-alone defence or as a subset of duress, is

available as a defence to any substantive crime other than murder, attempted murder and treason (*Shayler* at [70]).

10. The substance of the defence was summarised by Lord Woolf in the following way:

> "So in our judgment the way to reconcile the authorities to which we have referred is to regard the defence as being available when a defendant commits an otherwise criminal act to avoid an imminent peril of danger to life or serious injury to himself or towards somebody for whom he reasonably regards himself as being responsible. That person may not be ascertained and may not be identifiable. However, if it is not possible to name the individuals beforehand, it has at least to be possible to describe the individuals by reference to the action which is threatened would be taken which would make them victims absent avoiding action being taken by the defendant. The defendant has responsibility for them because he is placed in a position where he is required to make a choice whether to take or not to take the action which it is said will avoid them being injured." (*Shayler* at [63])

11. In the instant case, A and B had compelling evidence that a bomb had been, or was about to be, planted by Mohamed Al-Basir. They reasonably considered themselves to have a responsibility towards the members of the public who would become victims were an explosion to occur. In taking the actions that they did, albeit ostensibly criminal, they sought to avoid an imminent peril of danger to life. It is submitted, therefore, that this situation falls squarely within the common law defence of necessity as characterised by Lord Woolf.

12. Whether necessity is defined as a defence of justification or excuse (the academic debate on the possible distinctions is referred to in *Shayler* at [54]), it is submitted that it was the intention of Parliament in passing the CJA that it should be available as a defence to a charge of torture under s. 134.

13. Whether the actions of A and B were reasonable, proportionate and ultimately justified (or excused) under the defence of necessity is a matter for a jury. It is submitted that their convictions are therefore unsafe and must be quashed or remitted for re-trial with the defence of necessity under s. 134 (4) of the Criminal Justice Act 1988 left to the jury properly directed.

14. The impact of the Human Rights Act 1998 ("the HRA") was raised by the Court of Appeal, although not at first instance. Whilst it is accepted that Article 3 of the HRA provides an outright prohibition of the use of torture it is submitted that it is not open to the courts to ignore the statutory provisions of the CJA.

15. Section 3 of the HRA requires the courts to read and give effect to legislation in a way which is compatible with Convention rights. Authorities are clear, however, that this does not provide an unrestricted power to revise legislation passed by Parliament. In *R. (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 A.C. 837, Lord Steyn characterised the limit of s. 3 as follows:

> "Section 3(1) is not available where the suggested interpretation is contrary to express statutory words or is by implication necessarily contradicted by statute." (*Anderson* 894 at [59])

16. In passing the CJA, Parliament provided that "justification" or "excuse", without further definition, provided a defence to the charge of torture. It is submitted that this must include necessary of circumstances. S. 3 of the HRA does not permit the courts to interpret s.134 (4) to exclude a defence which Parliament intended to be available, to do so would be to stray into the legislative position of Parliament. If the result is that the provisions of the CJA are incompatible with Article 3 the appropriate remedy is a declaration of incompatibility in accordance with s. 4 of the HRA. Such a declaration would not, however, have retrospective effect and thus the position regarding A. and B. would be unchanged.

The Second Ground – the Misconduct Charge

17. It is the Crown's submission that where a public officer wilfully neglects her duty or commits misconduct, in exchange for a payment from another party, that corruption taints the conduct in such a way as to leave no defence to the charge of Misconduct in Public Office. Rickshaw J correctly directed the jury that there was no defence.

18. To the extent that were any material irregularities in the trial, it is submitted that the conviction was nonetheless safe because, on a proper construction of the law, had those irregularities not occurred the only reasonable and proper verdict would have been one of guilty.

The elements of the Offence

19. Misconduct in a public office is a difficult common law offence that is rarely charged. The Court of Appeal (somewhat reluctantly) determined the elements of the offence in 2003 (see *AG's Ref (no.3 of 2003*) *[2004] EWCA Crim 868, [2005] QB 73.* The Court defined the four elements of the Offence as: (I) A public officer acting as such; (II)

wilfully neglects to perform his duty and/or wilfully misconducts himself; (III) to such a degree as to amount to an abuse of the public's trust in the office holder; and, (IV) without reasonable justification or excuse. *(*At paragraph 61. Pertinent discussion as to the third element is also at paragraphs 46 and 56-59*).*

20. The offence does not lend itself to universal classification and it is submitted that the Court of Appeal fell into error in defining the third element of the offence as being applicable to all cases.

    i. The third element reflects the unassailable contention that the misconduct must be serious (*see paragraphs 46 and 56-59 and the authorities there cited*).

    ii. However, it is submitted that in cases involving corruption and bribery it is not appropriate for the jury to ask whether the *degree* of seriousness amounts to abuse of the public's trust because the harm to the public is axiomatic as a result of the insidious damage done to the administration of government – even where corrupt payments are used for purportedly good purposes.

    iii. The appropriate question is whether

    iv. For an illustration of the inherent difficulties juries face in making this determination see *R v Chapman* [2015] EWCA 539, [2015] QB 883. In Chapman the Court of Appeal ruled that in cases where information is sold to the press it must be explained to the jury that it can be the "manner in which [the information] is provided or obtained [that] damages the public interest" *(R v Chapman* at paragraph 36*).*

21. It is submitted that in 'payment for misconduct' cases the 3rd element is not required. The 1st and 2nd element of the offence are made out where the jury find (or it is admitted) that the defendant willfully accepted payment, or other personal benefit, in consideration for her misconducting himself.

22. The prosecution must then show that there was no reasonable justification or excuse. Like other 'reasonable justification' defences, this raises an evidential burden that the defendant must meet before it can properly be put to the jury.

Application to DS Rayner's case

23. The Court of Appeal found that DS Rayner's conviction was unsafe because, following *AG's Reference No.3* and *R v Chapman*, they considered that he "performed a public service" which could not amount to an abuse of the public's trust. It is submitted, for the reasons set out in paragraphs 20-22 above, that this was incorrect.

24. The evidence against DS Rayner was overwhelming. It was clear that he would not have committed the misconduct but for the receipt of payment because he was initially offered £500 and refused to make the disclosure until he was offered more. While he may have had other public spirited justifications, it is submitted that his principle motivation was financial.

25. The desire to make a profit or advance a personal interest is not a reasonable justification for the disclosure of sensitive state secrets relating to the work of the security services.

26. DS Rayner therefore failed to meet the evidential burden to raise the defence of reasonable justification and Rickshaw J was correct to direct the jury that there was no defence to the charge and, considering the strength of the evidence, he was also entitled to make robust judicious comment to DS Rayner's detriment.

The Safety of the Conviction

27. It nonetheless remains incumbent on the jury to return its own voluntary verdict. It is submitted that Rickshaw J's comments did not cross the line that separates forceful comment from a direction to convict and the conviction was therefore safe. See, for example, *R v. Kelleher (Paul) [2003] EWCA Crim 3525*, at paragraphs 36 to 44.

28. If, in the alternative, concerns remain about the strength of language used in the direction or any other irregularities in the trial process, it is submitted that the conviction is *nonetheless* safe because, assuming the trial had been free from legal error, the only reasonable and proper verdict would have been one of guilty. *(See R v. Kelleher (Paul*) at paragraphs 45-52.

NICHOLAS HIGGS
GERARD PITT
COUNSEL FOR THE APPELLANTS
27 OCTOBER 2017

INDEX TO THE APPELLANTS' AUTHORITIES

AUTHORITY	TAB
Criminal Justice Act 1988	2
Regina (on the application of Anderson) v Secretary of State for the Home Department [2002] UKHL 46; [2003] 1 A.C. 837	3
Regina v Shayler [2001] EWCA Crim 1977; [2001] 1 W.L.R. 2206	4
AG's Ref (no.3 of 2003)[2004] EWCA Crim 868, [2005] QB 73	5
R v Chapman [2015] EWCA Crim 539, [2015] QB 883	6
R v. Kelleher (Paul) [2003] EWCA Crim 3525	7