**R v A & B; R v RAYNER**

1. On 17 April 2016, the police evacuated the Westfield shopping centre, London minutes before an explosive device was due to detonate. Extensive damage to the building was caused but the evacuation saved many lives. The evacuation took place on the instructions of the police and security services. There was much public, press, parliamentary and ministerial acclaim for the successful police and intelligence agencies operation.
2. The information had been obtained from a suspect, Mohamed Al-Basir, who had been under surveillance by officers of the Security Service (MI5) for some time. Following compelling intelligence from several sources that a bomb had been or was about to be placed on the orders of Al-Basir, Metropolitan Police anti-terrorist officers, in the company of MI5 officers, arrested Al-Basir on the morning of April 17 and took him to a secret location where he was interrogated by two MI5 officers (A and B) in the presence of DS Rayner of the MPS.
3. The interrogation techniques grew increasingly severe and eventually, despite DS Rayner’s protests, took the form of serious physical assaults that led to Al-Basir’s hospitalisation for 10 days. He continues to suffer from the assaults, both physically and mentally. After three hours, the interrogation elicited the information about the bomb which led to the timely evacuation of the shopping centre.
4. DS Rayner submitted a full report to his superiors which in due course was passed to the CPS. The DPP decided that a prosecution was not in the public interest.
5. None of this was known publicly and DS Rayner was enraged when he heard from his superiors that there would be no further action. He felt that the matter should become public and he telephoned the news desk of a major national newspaper. He gave a general account of who he was and what he wanted to tell them, but withheld the full story until he had agreed a suitable fee. He was initially offered £500, asked for £5000 and eventually agreed on £2500. The story was given front-page prominence and provoked a huge nation-wide outcry, involving the press, Parliament and Ministers. There were those who applauded the conduct of the MI5 officers for saving countless lives while others denounced their behaviour as repugnant to civilised values, unlawful and inexcusable.
6. A review of the DPP’s decision not to prosecute led to a reversal of that decision on the ground that it was in the public interest for the courts to determine whether the MI5 officers’ conduct was lawful. The DPP also decided that in all the circumstances DS Rayner should be charged with the common law offence of misconduct in public office in that he had passed to the press for personal profit confidential information which he had obtained in his capacity as a police officer.
7. A and B were tried on charges of torture (contrary to s. 134 of the Criminal Justice Act 1988) and causing grievous bodily harm with intent (contrary to s. 18 of the Offences against the Person Act 1861) at the Central Criminal Court before Rickshaw J and a jury. They admitted causing gbh with intent and using torture but pleaded the common law defence of necessity. The judge heard submissions on the defence of necessity but ruled that it could not apply to the torture charge even if it could apply to the s. 18 offence. He directed the jury that there was no defence in law to the charge of torture (and withdrew the gbh charge to lie on the file) but strongly indicated that, as their conduct was exemplary and in the public interest, the sentence in the event of convictions would reflect that view.
8. The jury convicted both defendants and strongly urged the judge not to impose a custodial sentence. In his sentencing remarks, Rickshaw J praised the defendants, commended them for saving lives by having to engage in unpleasant conduct and granted both absolute discharges.
9. At the subsequent trial of DS Rayner, Rickshaw J (who had refused to recuse himself on account of his remarks in *A & B*) directed the jury that the defendant had abused his position as a police officer for personal profit and his conduct had done much damage. He said there was no defence in law to the charge. The jury convicted and he was sentenced to 12 months’ imprisonment.
10. All three defendants obtained leave to appeal to the Court of Appeal, Criminal Division against their convictions (and in Rayner’s case his sentence too) and the appeals were heard together. The Court held:
11. (i) The trial judge was right to conclude that the common law defence of necessity did not apply to the torture charge;
12. (ii) English law could never countenance the use of torture in any circumstances, as the 1988 offence and Art 3 of the ECHR made clear, and it was an affront to civilised values and was never acceptable or permissible;
13. (iii) Although there is no power to increase the sentences, the absolute discharges imposed by the trial judge were wholly inappropriate and inadequate and failed to give expression to the seriousness of the unlawful conduct and the law’s abhorrence of the use of torture by public officials. The correct sentences would have been 4 years’ imprisonment.
14. (iv) Although DS Rayner was paid for passing the information to the press, he performed a public service and was therefore not guilty of the offence of misconduct in a public office. The conviction was unsafe and would be quashed. The following authorities were considered:

*Attorney General’s Reference No. 3 of 2003* [2004 EWCA Crim 868, [2005] QB 73;

*R*. v. *Chapman* [2015] QB 883;

*R.* v. *Norman* [2015] EWCA Crim 177; and

*R.* v. *France* [2016] EWCA Crim 1588.

1. The Court certified that both appeals raised points of law of general public importance and granted leave to appeal to the Supreme Court.
2. A and B and the Crown now appeal to the Supreme Court on the following grounds:
3. (i) As regards A and B, 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; and
4. (ii) As regards DS Rayner, 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).

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