For Distribution to CPs

A Court of Appeal

*Regina v Shannon

2000 July 11, 12; Sept 14 — Potter LJ, Hidden J and Judge Ann Goddard QC

B *Crime — Evidence — Discretion to exclude — Defendant charged with supplying controlled drugs — Journalist acting as agent provocateur — Whether journalist's evidence to be excluded — Police and Criminal Evidence Act 1984 (c 60), s 78(1) — Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969), art 6(1)*

The defendant was charged with supplying drugs to a journalist posing as an Arab sheikh in an elaborate stratagem to obtain evidence of drug offences against C him. Prior to the trial the judge held a voire dire to determine an application by the defendant to exclude all the prosecution evidence on the ground that it was agent provocateur evidence unfairly obtained, contrary to section 78 of the Police and Criminal Evidence Act 1984[1], which deprived the defendant of a fair trial guaranteed by article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[2]. The judge ruled that the evidence was admissible. The defendant was subsequently convicted of supplying small quantities of cocaine and D cannabis resin.

On the defendant's appeal against conviction—

Held, dismissing the appeal, that on an application under section 78 to exclude evidence on the grounds of entrapment, while the facts and circumstances of such entrapment might be taken into account and might in an appropriate case prove decisive, the principal focus of the judge's attention had to be upon the fairness of the proceedings, the nature and reliability of the prosecution evidence and the fullness E and fairness of the opportunity available to a defendant to deal with the evidence which the prosecution sought to adduce; that there was no general rule requiring a court on grounds of fundamental fairness not to entertain a prosecution at all in cases of incitement or instigation by an agent provocateur regardless of whether the trial as a whole could be a fair one in the procedural sense; that the judge found correctly that the evidence fell short of establishing actual incitement or instigation of the offences concerned and that in any event the admission of the evidence would not have an F adverse effect on the procedural fairness of the trial; and that, accordingly, the judge did not err in exercising his discretion to refuse the defendant's application under section 78 (post, pp 67G–68A, 69E–F, 70B–C, 73A–C, E).

R v Chalkley [1998] QB 848, CA applied.

The following cases are referred to in the judgment of the court:

Jeffrey v Black [1978] QB 490; [1977] 3 WLR 895; [1978] 1 All ER 555, DC
G *King v The Queen* [1969] 1 AC 304; [1968] 3 WLR 391; [1968] 2 All ER 610, PC
Kuruma v The Queen [1955] AC 197; [1955] 2 WLR 223; [1955] 1 All ER 236, PC
R v Agar [1990] 2 All ER 442, CA
R v Ameer [1977] Crim LR 104, CA
R v Burnett [1973] Crim LR 748, CA
R v Chalkley [1998] QB 848; [1998] 3 WLR 146; [1998] 2 All ER 155, CA
R v Christou [1992] QB 979; [1992] 3 WLR 228; [1992] 4 All ER 559, CA
H *R v Foulder* [1973] Crim LR 45

[1] Police and Criminal Evidence Act 1984, s 78: see post, p 64E–F.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, art 6(1): "In the determination . . . of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . ."

MOD100052746

For Distribution to CPs

R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42; [1993] 3 WLR 90; [1993] 3 All ER 138, HL(E)
R v Jelen (1989) 90 Cr App R 456, CA
R v K (T D) (1992) 97 Cr App R 342, CA
R v Khan (Sultan) [1997] AC 558; [1996] 3 WLR 162; [1996] 3 All ER 289, HL(E)
R v Mann [1995] Crim LR 647, CA
R v Mason (Carl) [1988] 1 WLR 139; [1987] 3 All ER 481, CA
R v Morley [1994] Crim LR 919, CA
R v Quinn [1990] Crim LR 581, CA
R v Sang [1980] AC 402; [1979] 3 WLR 263; [1979] 2 All ER 1222, HL(E)
R v Smurthwaite [1994] 1 All ER 898, CA
R v Staines [1997] 2 Cr App R 426, CA
R v Turner (Paul) [1995] 1 WLR 264; [1995] 3 All ER 432, CA
Schenk v Switzerland (1988) 13 EHRR 242
Teixeira de Castro v Portugal (1998) 28 EHRR 101

The following additional cases, although not cited, were referred to in the skeleton arguments:

Goodwin v United Kingdom (1996) 22 EHRR 123
Inquiry under the Company Securities (Insider Dealing) Act 1985, In re An [1988] AC 660; [1988] 2 WLR 33; [1988] 1 All ER 203, CA and HL(E)
R v Dutton (Josephine) (unreported) 15 May 1997, Crown Ct at Worcester
R v Mealey (1974) 60 Cr App R 59, CA
R v Smith (Brian) [1995] Crim LR 658, CA
R v Stagg (unreported) 14 September 1994, CCC
R v Tonnessen The Times, 3 March 1998, CA
Secretary of State for Defence v Guardian Newspapers Ltd [1985] AC 339; [1984] 3 WLR 986; [1984] 3 All ER 601, HL(E)
X Ltd v Morgan-Grampian (Publishers) Ltd [1991] 1 AC 1; [1990] 2 WLR 1000; [1990] 2 All ER 1, HL(E)

APPEAL against conviction

On 5 May 1999 in the Crown Court at Snaresbrook before Judge Robbins and a jury the defendant, John James Shannon (also known as John Alford), was convicted on count 1 of an indictment of supplying a class A controlled drug (cocaine) and on count 2 of supplying a class B controlled drug (cannabis resin). He was acquitted on count 3, offering to supply a class A controlled drug. On 26 May 1999 he was sentenced to nine months' imprisonment on count 1 and two months' imprisonment on count 2, to run concurrently, making a total sentence of nine months' imprisonment. A confiscation order was made in the sum of £300, to be paid forthwith, with 14 days' consecutive imprisonment in default. He was also ordered to pay £3,000 towards the costs of the prosecution. He appealed by leave of the full court (Mantell LJ, Penry-Davey J and Judge Fabyan Evans) granted on 12 May 2000, following refusal of leave by the single judge.

The facts are stated in the judgment of the court.

David Etherington QC and *Jennifer Dempster* for the defendant.
Martin Hicks for the Crown.
Christopher Cousins for the "News of the World".

Cur adv vult

MOD100052747

For Distribution to CPs

14 September. POTTER LJ handed down the following judgment of the court.

1 On 5 May 1999 in the Crown Court at Snaresbrook before Judge Robbins and a jury the defendant (who conducted his own defence at the trial) was convicted by a majority of 10 to 2 of one offence of supplying a class A controlled drug, namely cocaine (count 1) and one offence of supplying a class B controlled drug, namely cannabis resin (count 2). On 26 May 1999 he was sentenced to nine months' imprisonment on count 1 and two months' imprisonment on count 2, the sentences to run concurrently. A confiscation order was made in the sum of £300 to be paid forthwith, with 14 days' imprisonment in default. He was further ordered to pay £3,000 towards the costs of the prosecution. He was acquitted in respect of an offence of offering to supply a class A drug (count 3). The defendant appeals with the leave of the full court granted on 12 May 2000 following refusal by the single judge.

2 It is not, and never was, in dispute that the defendant supplied a small quantity of cocaine (just over 2 grams) contained in three packages and worth about £200 (count 1) and a small amount of cannabis resin worth about £40 on the same date to a "News of the World" journalist posing as an Arab sheikh in an elaborate and expensive stratagem designed to obtain evidence of drugs offences against him. It was the case for the Crown that the drugs were supplied by way of sample in respect of a party which the "sheikh" said he wished to hold some time later for a number of friends who would expect to be supplied with free drugs at the party. In October 1998 prior to the trial the trial judge held a five-day hearing on a voire dire, at which the defendant was represented by junior counsel, Miss Dempster. The hearing was for the purpose of determining an application by the defence to exclude all the prosecution evidence on the ground that it was agent provocateur evidence unfairly obtained contrary to section 78 of the Police and Criminal Evidence Act 1984 and deprived the defendant of a fair trial guaranteed by article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) ("the Convention"). The judge ruled the evidence admissible and the case was adjourned for a substantial period for trial. During that period, the defendant was advised that, whilst counsel could assist him at trial in putting the prosecution to proof and testing its case, he or she would be unable to invite the jury to acquit the defendant if he gave evidence because English law does not recognise entrapment by an agent provocateur as a defence to a criminal charge. Accordingly the defendant represented himself at trial with the results we have already indicated. Count 3, upon which he was acquitted, was based upon his offer to supply a substantial amount of cocaine for the fictitious party which the "the sheikh" stated that he was due to host. The "defence" was that the offer was not genuine and was in any event retracted, a version which the jury apparently accepted and declined to convict on that basis. They none the less convicted on the basis of the actual supply which formed the subject of counts 1 and 2.

3 The progenitor and organiser of the stratagem was a Mr Mazher Mahmood ("Mahmood"), a journalist who had worked for the "News of the World" for some eight years. He described himself in the course of the voire dire as an investigating reporter with 89 successful criminal convictions to his name. He stated that he had received a telephone conversation from an

MOD100052748

For Distribution to CPs

informant which indicated that the defendant had been supplying drugs in "show business" circles. He said that, because his (Mahmood's) name was well known in show business circles, he decided that it was necessary to set up an operation in which he posed as a sheikh, invited the defendant to the Savoy Hotel, collecting him in a Rolls Royce and giving him dinner in the River Restaurant, all on the basis of a fictitious offer and intention to invite him out to Dubai as a celebrity to participate in the opening of a night club out there. Mahmood, who had booked a suite at the Savoy in the name of "His Royal Highness Sheikh Mohammed Al-Karim", justified his representing himself as a sheikh moving in royal circles by saying:

> "The only way to get into [the defendant's] circle is to pose as somebody who he would want to come out and meet and want to relax with . . . get him to feel, if anything, we are above him and he will be himself."

In fact, the meeting with the defendant was arranged via Mahmood's assistant, Sarah Issett, through the defendant's agent, Russell Emmanuel, for the bogus purpose of the sheikh personally offering the defendant employment by appearing as a celebrity guest at the opening of the night club at which a number of famous personalities would attend. The conversations which took place (and which it was planned would be steered towards the possibility of the defendant supplying drugs to the sheikh) would be recorded on covert video and audio equipment already installed in the hotel by Mahmood's colleagues. A fellow journalist, called Malik, would pose as a wealthy Arab businessman and Sarah Issett, who was an attractive young woman, would pose as the sheikh's personal assistant, thus making up the sheikh's entourage, together with a private investigator, Mr Heraty, hired by the newspaper to pose as the sheikh's "minder".

4 The defendant arrived at the Savoy at 6.30 p m on Wednesday, 13 August 1997 and was taken to meet Mahmood at 6.50 p m. Before he entered the hotel suite, Mahmood, Malik and Issett rehearsed what they intended to say, which conversation was also recorded. In the course of that conversation Mahmood indicated that he had heard that "he [the defendant] takes a lot" (i e drugs). Mahmood said that he would say that his throat was feeling bad as a cue for Ali to bring up the question of drugs. He also instructed his assistants to mention a number of well known names, with a view to impressing the defendant. As soon as the defendant entered and was introduced, he referred to himself as feeling nervous. Offered a drink, he asked for water, indicating that he had been "teetotal" for some six months. After a good deal of talk about the sheikh's gambling and acquaintanceship with a number of well known people, the defendant asked if he could smoke and offered a cigarette to Miss Issett. The sheikh observed "no dirty cigarettes please Sarah . . . later, later". The talk then turned to football, footballers and other matters, with more name-dropping, including a statement by the sheikh that he was a friend of Mr Dodi Fayed. There was then talk of girls and the defendant was encouraged to have his photograph taken with Miss Issett, the defendant being offered a visit to Dubai where he could be found a girl "as lovely as Miss Issett". Later the offer was extended by the sheikh to the defendant to bring any guests he wished to Dubai, the accommodation and payment for their flights being "no problem". The defendant remarked that it all seemed too good to be true.

MOD100052749

For Distribution to CPs

5 After more talk of surfing, sport and famous sportsmen the sheikh mentioned that he had a headache. The defendant suggested that it might be a hangover and Ali suggested that he might have smoked "something dodgy". The sheikh then said: "No, we had something, you know his throat—is everything very bad" (gesturing to Ali). The defendant said "Um hard?" (agreed to be a reference to cannabis) and the sheikh said "No . . . cocaine." Extensive conversation then ensued about use of cocaine. The sheikh inquired of Heraty where he had got the cocaine the previous night, to be told it was in a club but that Heraty always found difficulty in London. The sheikh then observed "Why you can't get here? . . . There must be some places" to which the defendant replied "There is." Asked, "So you know some places?" the defendant apparently nodded slightly and then asked "Was it powder?" He was told it was not pure. The defendant observed that the powder had to be in nuggets which could be crushed in order to be pure. After some further discussion the defendant made clear: "I started very young but I don't do it myself anymore." He went on to say that, in order to tell whether cocaine was good or bad "You have to have test kit. If you have test kit you can work it out and get pure or you can clean it up . . ."

6 At that point the sheikh said: "Next week I'm having a party." He went on "All my friends they all expect to be the complimentary you know sometime. In Dubai we have a party everyone brings cocaine ball. Good." The defendant immediately said "I'll sort it." The sheikh said "Good you can sort it?" to which the defendant nodded and replied "I can wear it, I can do this." There was then a general conversation about cocaine use in which the sheikh said that the night before he had paid £60 for 1 gram, having offered £80 to the supplier if he would bring good cocaine. The defendant indicated that he shouldn't have to pay as much as £80. A little later the sheikh said "So now we have party next week we must need lots?" and the defendant said "That's all right." The sheikh said "You can arrange some?" and the defendant replied "That's all right," adding "I'll do it. I'll bring it." Asked by the sheikh and Ali if he could get pure cocaine in rock form the defendant replied "I can get some, yeah." He went on to say that he would not recommend pure cocaine, but that the rock could be crushed up and it would be fine. The sheikh then asked "if you can bring one sample we will send someone, a driver will be no problem". The defendant replied "Yeah, definitely I'll do it." The sheikh said "We will try a few grams, see if it is good." Later, when the sheikh made clear that perhaps 60 guests would be coming and as much as an ounce required, the defendant indicated that he was "a bit wary of doing this you know, I'm not really confident in doing this." However, upon the sheikh's saying "or you put us . . .", he interrupted to say "OK, I'll do it."

7 So far as cannabis was concerned, shortly before his final agreement to supply cocaine, as described, the defendant had made clear that he was a hashish (cannabis) smoker, also making clear that he kept some at home and that he had had a smoke before he came because he needed to. Asked by the Sheikh "none for us?" he said that, if he had known, he would have brought some, as he had it at home. The sheikh observed "You disappoint us" and Miss Issett said "You should always bring a gift." The defendant replied

For Distribution to CPs

A "The court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence
B was taken, were fair."

41 The ECHR went on to state, at p 115, para 36, that the use of undercover agents had none the less to be properly controlled and: "The public interest cannot justify the use of evidence obtained as a result of police incitement." Having considered various arguments and issues raised, the court concluded, at p 116, para 39:

C "In the light of all these considerations . . . the two police officers' actions went beyond those of undercover agents because they instigated the offence and there is nothing to suggest that without their intervention it would have been committed."

42 Pausing there, it is clear that the approach of the ECHR to the facts and whether, on those facts, the police officers should have been regarded as
D agents provocateurs was not inconsistent with that of this court in *R v Smurthwaite* [1994] 1 All ER 898, 903, i e to consider whether it was a case of causative incitement which would have rendered the evidence open to exclusion under the first two questions in Lord Taylor CJ's list: see paragraph 33 in this judgment above. However, the ECHR went on to say 28 EHRR 101, 116, para 39:

E "That intervention and its use in the impugned criminal proceedings meant that, right from the outset, the applicant was definitively deprived of a fair trial. Consequently, there has been a violation of article 6(1)."

43 In reliance upon that passage, it has been argued before us on this appeal that, in concluding as it did, the ECHR propounded a fundamental "fairness" objection of general application that, in cases of incitement or
F instigation by an agent provocateur, the court should not entertain a prosecution at all, regardless of the question of whether the trial as a whole can be a fair one in the procedural sense; or, put another way, that such circumstances render any trial by definition "unfair". We do not accept that, in the context considered by the ECHR, the sentence we have quoted falls to be read so widely. First, it is open to be read in its context simply as the
G court's conclusion on the facts and circumstances of the particular case. Second, if not so read, it is not clear how it is to be reconciled with the observations concerning the admissibility of evidence in national courts expressed at paragraph 34 of the decision, harmonising as they do with the view expressed by the ECHR in *Schenk v Switzerland* (1988) 13 EHRR 242. Third, in that connection, there is no analysis or discussion of the meaning or scope of the expression "fair trial" as used in article 6. In particular, no
H separate consideration is given to the strands of procedural fairness and abuse of process reviewed and applied in *R v Chalkley* [1998] QB 848. That is a factor of considerable importance because the judgment in *Teixeira de Castro v Portugal*, 28 EHRR 101 is specifically directed to the actions of police officers and the safeguards (in the form of judicial controls) properly

MOD100052764

For Distribution to CPs

to be applied to them in the course of their investigations as agents of the state. Finally, in the case of such police investigations, the ECHR appears to have drawn the line at the point of actual "incitement" (see para 36), the word "instigated" in para 39 falling to be read in that sense. In the case before us however, the judge (who was in any event not dealing with the activities of the police) found, rightly in our view, that the evidence fell short of establishing actual incitement or instigation of the offences concerned.

44 Accordingly, applying the principles of English law we have set out above, we are unable to find error in the exercise of the judge's discretion in dismissing the defendant's application under section 78 of the Police and Criminal Evidence Act 1984. His ruling followed citation of the relevant authorities and there is no indication that he misunderstood the factors to which he should have regard or the principles to be observed when exercising his discretion; these were fully canvassed not only in oral argument but in written skeleton arguments referred to by the judge at the outset of his lengthy ruling. He placed particular reliance on the principles recited in *R v Smurthwaite* [1994] 1 All ER 898 and made specific reference to the decision of this court in *R v Morley* [1994] Crim LR 919 which concerned agent provocateur issues on a section 78 application in another case involving the "News of the World". In that case, the prosecution was based on purchase by a reporter of counterfeit notes and traveller's cheques from the defendant. It appears from the report that, in dismissing the appeals, Lord Taylor CJ observed:

> "Although one might dislike the activities of certain informants or journalists, the criterion for admissibility did not depend on this or on the motive of a newspaper to sell a story or make money. It was clear that there was no defence in English law of entrapment . . ."

He went on to say:

> "it made no difference whether an undercover police officer or a journalist was involved. The question under section 78 of the Police and Criminal Evidence Act was one of fairness."

45 On that issue the judge in this case said:

> "The fact is that in this case there is a very substantially agreed and unassailable record of what happened in the Savoy on the evening of 13 August 1997 so far as the defendant and the other individuals are concerned; save for when they went downstairs to have dinner in the River Room Restaurant . . . I have, therefore, considered very carefully the contents of the video and the audio transcripts, starting with the initial meeting especially at pages 27 to 36 of the transcript . . . During the course of that initial meeting the transcript makes it clear that the defendant said that in the past he had been a heavy user of cocaine from his teens until his early 20s. It is apparent that he displayed some knowledge concerning the price of cocaine, slang terms for the drug, quality and how to test it, how much in weight might be required for a future party for 60 people (which is the subject matter of count 3 on the indictment), awareness of the risk if caught, ways of treating and cleaning cocaine, and the fact that a mobile phone call by him could obtain the drugs required from a dealer for a price in 15 minutes or so. In my

MOD100052765

For Distribution to CPs

judgment, there is clear and abundant evidence on this audio transcript, and from viewing the video of that first meeting before dinner, that this defendant, without being subjected to pressure, volunteered, offered and agreed to supply drugs which are the subject matter of counts 1 to 3 on the indictment. The defendant gave evidence on the voire dire and he maintained that he did feel under pressure, but I have not only had the benefit of seeing the defendant give evidence in the voire dire and assessing him but, more pertinently, observed his demeanour on the contemporaneous video. The defendant maintains that thereafter, during dinner which was not recorded, he wanted to back out but was put under more pressure. The fact is that it culminated after dinner in the defendant accepting the sum of £300 and going off in a car around North London to obtain the drugs and thereafter, he is seen and heard on video, after his return to the Savoy, actually supplying the drugs in question . . . Out of the £300 he was given, his evidence was that he spent £200 on the cocaine, £40 on the cannabis and kept the balance for himself as a gift to himself."

46 The judge then referred to the ample opportunity available to the defendant when he left the Savoy to have had second thoughts, and dissociate himself from what was going on. He continued:

"However, he saw the financial prospects for himself of making money in Dubai where he was to open—or it was said he was to open a club and make contacts with film people and advance his show business career. Furthermore, the defendant, in his evidence, agreed that if there had been a problem with the cocaine that he had supplied, he would have taken it back to his contact. A lack of pressure may be gauged by the fact that the defendant ultimately delved into the cannabis that he had supplied and took some for his own use to take it home and use after he had left the Savoy."

47 The judge went on to express himself satisfied that Mr Mahmood and the other person with him, (which we take to be a reference to Miss Issett), although potential agents provocateurs, in the event did not become so. Having spoken of the difficulties of obtaining evidence of drug dealing of this kind other than by undercover agents, whether by police, customs officers or journalists, the judge stated: "I have had to ask myself: was the defendant entrapped to commit offences that he otherwise would not have committed? The answer, in my judgment, is no." He then went on to consider the position if he was wrong in that respect and said:

"Even if the answer was in the affirmative, then I have to weigh up whether the admission would have such an adverse effect on the fairness of the proceedings that I should not admit it. I also have to have regard for the aspect of fairness to the public and the principles set out in the leading case of *R v Sang* [1980] AC 402 which, despite being a pre-Police and Criminal Evidence Act case, is still good law. Would an ordinary individual, whether a TV celebrity as the defendant in this case, or not, be tempted to do the same thing as the defendant did in this case? Was he duped into doing something under pressure or unwillingly? Or was it voluntarily? I am bound to say, as I have indicated, that I do not find as a fact that his will was undermined or sapped by any pressure, but that the

MOD100052766

For Distribution to CPs

defendant, perfectly willingly, applied himself to the situation presented to him, albeit that it was by undercover subterfuge on the part of the 'News of the World' journalist."

48 The judge further stated that he placed reliance upon a matter to which we have not so far referred, namely evidence given upon the voire dire by Russell Emmanuel, the defendant's then agent upon whom he relied for advice both in career and social matters, and whom he called as a witness on his behalf. The judge said he regarded such evidence as crucial on the issues before him. Emmanuel stated that he had accompanied the defendant to the Savoy where he remained present in the American Bar for a time before being told by the defendant that he felt comfortable and Emmanuel could leave. He said that the defendant rang him from the Savoy River Room during the course of the dinner in an excited state saying they wanted him to get some Noriega or Charlie (both slang terms for cocaine). Mr Emmanuel said that he asked the defendant if he knew what he was doing, making clear that "If you do it, it's down to you." He said that his part in the conversation was tantamount to warning the defendant not to supply the drugs but that, instead of wavering or resisting, the defendant got angry and said "Don't worry, I'll sort something out and go somewhere else for the drugs."

49 In argument before us, as before the judge, emphasis has been placed upon the element of entrapment in terms of the "enticement" involved in the original setting up of the meeting on the basis of false prospects as to employment and the temptation presented to the defendant to please the "sheikh" and his colleagues by supplying them with drugs which they were plainly keen to obtain; also the later supply of transport to enable the defendant to get the drugs. It has been submitted that this is a case where (cf *R v Christou* [1992] QB 979) the trick was applied to the defendant, rather than the defendant voluntarily applying himself to the trick. However, it does not seem to us that the aphorism of Lord Taylor CJ in *R v Christou* amounts, or was intended to amount, to a litmus test of admissibility or a substitute for detailed consideration of the facts in each case. In this case the defendant was plainly encouraged in a broad sense to do what he did by the setting in which he found himself and the opportunity which it appeared to present. However, as the judge found, when faced early on with the trick of a supposed sheikh interested in acquiring drugs, the defendant voluntarily and readily applied himself to it when volunteering in relation to the party "I'll sort it" (see paragraph 6 above). As the judge also found, by reason of the defendant's obvious familiarity with the current price of cocaine and his ready advice as to obtaining it in the quantity and to the quality required, he displayed a familiarity with the dealing scene which itself suggested a predisposition to be part of it.

50 It has also been pressed upon us that, by his emphasis on the lack of pressure applied to the defendant, the judge appears to have overlooked that the definition of an agent provocateur depends upon enticement rather than pressure. This led to the suggestion in the grounds of appeal that the judge misled himself as to what constituted entrapment as opposed to duress. We do not think that that is a fair criticism. It is clear that the judge concentrated upon the question of pressure, because it was the evidence of the defendant on the voire dire that he felt "pressurised". The judge made clear that there was, on the evidence of the videos, no basis for any such

MOD100052767

For Distribution to CPs

A feelings of pressure, other than the anxiety the defendant might have felt to please the company in which he found himself. Having ourselves viewed the videos and listened to the arguments, we agree. We see force in the argument that this was a case where at various points what was said or done amounted to "enticement". However, even if the borderline was crossed, it does not seem to us a case in which the judge's exercise of discretion should be disturbed. That is because it is plain that the judge also considered the B matter on the alternative basis that, even if the defendant was enticed to commit an offence that he otherwise would not have committed, that was ultimately not a sufficient reason to rule in favour of the defendant (a) because admission of the evidence would not have an adverse effect on the fairness of the trial (procedural fairness) and (b) because of the wider aspect of the public interest, bearing in mind the clear opportunity which the C defendant had for second thoughts and to withdraw from any perceived pressure or temptation as a result of the advice given to him by Emmanuel when the defendant rang him before departing to buy the drugs. In our view, that was a legitimate and important matter for the judge to take into account as part of the surrounding circumstances, affecting as it did both the causative element of any incitement or encouragement and the overall fairness of bringing proceedings none the less. It was also important D evidence to show that, whatever the truth as to who first raised the question of drugs supply during dinner, the defendant remained eager rather than reluctant to take advantage of the opportunity with which he was presented.

51 It merely remains to be noted that this appeal involves no criticism of the judge's summing up, which was impeccably full and fair. He also imposed a lenient sentence having taken into account in the defendant's E favour the full circumstances in which the offences were committed.

52 For the reasons above stated, this appeal is dismissed.

Appeal dismissed.

Solicitors: Hedley-Saunders & Co, Crawley; Crown Prosecution Service, London Area Secretariat; Daniel Taylor, News Group Newspapers.

F Reported by MRS CLARE BARSBY, Barrister

G

H

MOD100052768