Case No: 201502972 B5

Neutral Citation Number: [2016] EWCA Crim 1564
IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
His Honour Judge Marks QC, the Common Serjeant
T2014 7203

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/10/2016

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE POPPLEWELL
and
MR JUSTICE GOSS

- -

Between :

	REGINA	**Respondent**
	- and -	
	ROBERT NORMAN	**Appellant**

- -
- -

Mr Keir Monteith and Ms Lucie Wibberley (instructed by **Powell Spencer & Partners**) for the **Appellant**
Mr Julian Christopher QC and Mr Jacob Hallam (instructed by **CPS Organised Crime Division**) for the **Respondent**

Hearing dates : 17 May 2016

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Judgment

This is the judgment of the court to which each of us has contributed.

Introduction

1. The appellant was a prison officer at HMP Belmarsh. Between May 2006 and April 2011, he had a corrupt relationship with Stephen Moyes, a tabloid journalist who was working for the Daily Mirror until 2010, and thereafter for the News of the World. The newspapers

paid the appellant sums totalling £10,684 in return for information supplied to Mr Moyes about the prison which formed the subject matter of numerous published articles.

2. In May 2015 the appellant was tried at the Central Criminal Court before HHJ Marks QC, the Common Serjeant, and a jury, on one count of misconduct in public office. On 19 May 2015 the Judge rejected an application to stay the proceedings as an abuse of process. After the close of the prosecution case, on 26 May 2015 the Judge rejected a submission of no case to answer. On 1 June 2015 the appellant was convicted and the following day sentenced to 20 months imprisonment. An appeal against sentence was dismissed by this Court on 22 September 2015. He appeals against conviction with leave of the single judge.

3. The appellant advances two grounds of appeal. The first is that the trial Judge erred in failing to stay the prosecution as an abuse of process on the grounds that both the appellant's identity, and the material upon which the prosecution against him was founded, were obtained from the newspapers through improper pressure applied by the Metropolitan Police Service ("MPS") and in violation of article 10 of the European Convention on Human Rights. The second ground is that the Judge erred in failing to accede to a submission of no case to answer, principally on the ground that the appellant's conduct did not reach the high threshold of seriousness required for the offence of misconduct in public office.

The Appellant's Conduct

4. The appellant joined the Prison Service in 1992. Following his training he worked as a prison officer almost exclusively at HMP Belmarsh, a high security prison holding about 900 prisoners, up to 100 of whom are Category A, often including notorious criminals. As such, he was a holder of public office. He was also for the majority of that period a trade union representative at the prison for the Prison Officers Association. Aside from the conduct which forms the subject matter of this appeal, he was of exemplary good character, which was attested to by references and work appraisals which were placed before the jury.

5. As a prison officer, he was bound by the Prison Rules and the Civil Service Code. Rule 67.1 of the Prison Rules provides:

> "(1) No officer shall make, directly or indirectly, any unauthorised communication to a representative of the press or any other person concerning matters which have become known to him in the course of his duties."

6. Article 4.8 of the Civil Service Code provides:

> "Civil Servants must not misuse their official position or information acquired in the course of their official duties to further their private interests or those of others. They should not receive benefits of any kind from a third party which might reasonably be seen to compromise their personal judgment or

integrity."

7. The appellant first approached Mr Moyes in April 2006 with information which led to an article in The Daily Mirror on Wednesday 19 April 2006 to the effect that the prison was out of control with officers having to battle Islamic gangs. He was not paid for that information, and the approach may very well have been motivated by a desire to make public what the appellant regarded as a matter of public interest.

8. Thereafter, the appellant provided information in return for payments on 40 occasions. The payments varied between £75 and £1,000, and amounted in total to £10,684. Up until November 2009, the payments were made by way of cheques to the appellant's son, with the sums then being transferred by his son to him. Thereafter, and as a result of his son joining the prison service, the payments were made by direct transfer to the appellant's bank account. On most, but not all, occasions on which the appellant provided information in return for payment, there was an article in the newspaper. Sometimes the appellant approached Mr Moyes with the information; on other occasions Mr Moyes made a request for information, or for confirmation of a story or aspects of it. No stories appeared between February 2008 and November 2009 because the appellant was working away from Belmarsh for most of that period. All the information was provided without the knowledge and approval of the appellant's employers. However, it became apparent to them, given the frequency of the articles, that there was an informant leaking information from within the prison, whose identity they had been unable to ascertain.

9. The stories for which the appellant's information was said to have been the source ranged from general stories in which individuals generally remained anonymous, to specific or personal stories in which prisoners or staff were named or identifiable. The latter category included information about the following:

i) an identified prisoner who had committed suicide;

ii) the suspension of the prison chaplain for inappropriate behaviour with other prisoners and the perceived inadequacy of what the appellant thought at the time was going to be the sanction imposed;

iii) the demands which Abu Hamza had made upon the Prison Service;

iv) the costs incurred in keeping the Ipswich murderer, Stephen Wright, in isolation and the costs of his transport to and from Ipswich for his trial there, which would not have been incurred had he been tried at a court centre closer to Belmarsh;

v) what was believed to be the transfer of Jamie Bulger's killer, John Venables, to the prison;

vi) the arrest of a prison officer ("O") on suspicion of possessing false identity documents, although charges were subsequently dropped; O was not referred to by name in the article; it was O's evidence that the appellant was his union representative at his disciplinary meeting with the Governor and Deputy

Governor, but this was denied by the appellant;

vii) a sexual relationship between a female prison officer and one of the prisoners;

viii) an article relating to the dismissal of a prison officer ("L") over allegations of sexual harassment in which both his name and town of residence were given; he subsequently received an out of court settlement for wrongful dismissal;

ix) a story about a named sex offender who had been transferred to Belmarsh;

x) the Governor being reprimanded for a budgetary overspend;

xi) the Governor's decision to ban the use of control and restraint methods;

xii) the staff's dislike of the then Governor.

10. The more general stories comprised information about the following:

i) prison staff cuts in conjunction with increased prisoner numbers;

ii) a prison van breaking down near court with prisoners in it;

iii) violent prisoners being transferred to open prisons as a result of overcrowding at Belmarsh;

iv) a fight between Muslims and non-Muslims at the prison;

v) excessive expenditure on a staff party off site;

vi) prisoner suicides;

vii) staff overtime payments in breach of the Prison Rules;

viii) attacks on, and plots to kill, prison staff by Al Qaeda linked prisoners;

ix) access by Al Qaeda linked prisoners to laptops;

x) the suspension of a prison officer for falsifying his CV;

xi) the falsification, for the Governor's inspection, of figures about the time

prisoners spent out of their cells;

xii) the prison failing a security inspection;

xiii) the increased costs being caused by centralised sourcing;

xiv) the foiling by staff of an escape plot;

xv) a tuberculosis outbreak;

xvi) the arrest of a prison officer for a firearms offence;

xvii) the placement of expensive televisions in prisoners' cells;

xviii) a plot by inmates to kill the Governor;

xix) an attack by Muslim prisoners on a fellow prisoner after a row about observing silence on Remembrance Sunday;

xx) a ban on topless pin-ups.

11. The appellant had not taken up his concerns through official channels. It was the prosecution case that the stories did not, save in a few cases, have any public interest and that the appellant knew that what he was doing was very wrong given the scale and scope of his activities, conducted behind his employer's back, in return for substantial payments which were routed via his son's bank account in order to conceal them.

Disclosure by the Newspapers of the Appellant's Identity and of Evidence of his Corrupt Relationship with Mr Moyes

12. The appellant's identity and wrongdoing came to light as a result of the police inquiry named Operation Elveden. It is necessary to say a little about how this occurred because at the heart of the appeal is the appellant's complaint that he was exposed to prosecution by the unjust and improper way in which the police obtained evidence of his identity and conduct.

13. Operation Elveden itself arose following an earlier police inquiry into journalists hacking into voicemails, called Operation Weeting. Operation Elveden was formed in June 2011 when News International, the group owning and publishing the Sun and the News of the World, provided emails to the MPS which tended to show that journalists had paid police officers for information. Operation Elveden subsequently expanded to investigate payments to other public officials, including prison officers. News International sought to co-operate with MPS in relation to disclosure of material for the purposes of Operation Weeting and then Operation Elveden. It set up an internal committee, headed

by an eminent practising barrister, advised by City solicitors, which oversaw a very substantial exercise of searching for and analysing documents which might evidence any corrupt payments or criminal activity.

14. Initial disclosures relating to payments by journalists at the Sun were made by News International before any investigation into such activity by the police had been started. Thereafter a written protocol was agreed between the MPS and News International under which News International agreed to assist and provide material. Under this protocol News International agreed not to seek to maintain confidentiality of its sources where it appeared that illegal activity might have been involved. There were subsequent variations to the terms of the protocol. Entering into these agreements did not create any legal obligation on News International to comply with their terms; News International was entitled to resile from them at any time. Some material was supplied in answer to requests from the MPS; other material was provided without having been requested. All relevant material was disclosed voluntarily without any compulsion by judicial process.

15. Before the MPS decided to agree to this voluntary disclosure, it had sought and received legal advice. Part of that legal advice was that it could not get a production order under section 9 and Schedule 1 of the Police and Criminal Evidence Act 1978 ("PACE") unless it had exhausted all other methods of obtaining the information, including receiving the information pursuant to voluntary disclosure; and that the procedure would not be available to compel general disclosure by News International because it could not achieve the requisite degree of specificity.

16. One of the motives of News International in co-operating was a desire to avoid corporate charges, although the MPS made no promise, express or implied, that it would not face such charges. Once MPS had formally put News International on notice that corporate charges were being contemplated, it became more reluctant to co-operate and give disclosure. Nevertheless it did continue to make disclosure thereafter. It is apparent that another major motivation for the co-operation and disclosure by News International was a desire to demonstrate publicly and to the Leveson Inquiry that the organisation was co-operating fully in a climate of heightened public debate and concern about journalistic activity and how stories were obtained by newspapers.

17. The disclosure given by News International did not reveal the identity or wrong doing of the appellant. That was revealed by the owners and publishers of the Daily Mirror, Mirror Group Newspapers Limited ("MGN").

18. MGN had also undertaken its own internal investigation into payments by journalists to public officials, starting in July 2012. The terms and remit of that internal investigation were agreed with advice from solicitors and approval by MGN's Board. The investigation was conducted by an independent third party with extensive financial and accounting experience within the media sector. In addition, independent data analysts and advisers were instructed for the purposes of the collection and search of the material which was in electronic form. For those purposes, sixty eight search words were used; although it is not clear by whom or by what criteria they were selected, they were obviously designed to uncover any improper payments made to public officials including prison officers.

19. The MPS sought and were provided with the results of that investigation pursuant to the terms of a draft Memorandum of Understanding (the "MOU") with MGN. The MOU provided that MGN would disclose relevant documentation identified as a result of the investigation unless it was "Excluded Material". Clause 8.1 provided that MGN might withhold, or provide a redacted or edited version, of any relevant documentation to the extent that it amounted to Excluded Material. Excluded Material was defined in Clause 8.2 as follows:

> "*For the purposes of this MOU, Excluded Material means material which is:*
>
> *(a) subject to Legal Professional Privilege ("LPP")*
>
> *(b) journalistic material held in confidence which, in the judgment of* [MGN] *would not be in the public interest to disclose having regard to the CPS Guidance* [as defined]*, the Code* [for Crown Prosecutors] *and the PCC Code and in particular to the public interest served by freedom of expression on the one hand and the extent of any apparent wrong doing and harm on the other.*"

20. Under that procedure, MGN provided material which identified the appellant as the recipient of payments from MGN. A production order was sought in relation to his bank account which revealed that he had continued to receive payments after Mr Moyes had moved to the News of the World. A request was made by the MPS to News International for documentation in relation to those payments, which News International provided. Shortly before trial the MPS made an application for a production order of the telephone billing data relating to calls between the appellant and Mr Moyes. The inter partes application was opposed by the appellant but granted by Sweeney J.

Abuse of process

21. It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case (***R v Maxwell*** [2011] 1 WLR 1837 per Lord Dyson SCJ at paragraph [13]). We are concerned with the second category. It is not suggested that the appellant's trial was in any way unfair.

22. Within the second category fall cases where the police or prosecuting authorities have been engaged in misconduct in bringing the accused before the court for trial. In such cases the court is concerned to protect the integrity of the criminal justice system. A stay will be granted where the court concludes that in all the circumstances a trial will offend the court's sense of propriety and justice (per Lord Lowry in ***R v Horseferry Road Magistrates Court, ex pte Bennett*** [1994] 1 AC 42, 74G) or will undermine confidence in the criminal justice system and bring it into disrepute (per Lord Steyn in ***R v Latif*** [1966] 1 WLR 104, 112F).

23. This involves a two stage approach. First it must be determined whether and in what respects the prosecutorial authorities have been guilty of misconduct. Secondly it must be

determined whether such misconduct justifies staying the proceedings as an abuse. This second stage requires an evaluation which weighs in the balance the public interest in ensuring that those charged with crimes should be tried against the competing public interest in maintaining confidence in the criminal justice system and not giving the impression that the end will always be treated as justifying any means. How the discretion will be exercised will depend upon the particular circumstances of each case, including such factors as the seriousness of the violation of the accused's rights; whether the police have acted in bad faith or maliciously; whether the misconduct was committed in circumstances of urgency, emergency or necessity; the availability of a sanction against the person(s) responsible for the misconduct; and the seriousness of the offence with which the accused is charged. These are merely examples of factors which may be relevant. Each case is fact specific. These principles were reaffirmed by the Privy Council in ***Warren v Attorney General for Jersey*** [2012] 1 AC 22, in which the Board upheld a refusal to stay a prosecution for serious drugs offences where the police had acted unlawfully in foreign jurisdictions and deliberately lied to the foreign authorities, the Attorney General and Chief of Police, in order to obtain incriminating recordings of conversations in a car without which no prosecution would have been possible.

24. At the heart of Mr Monteith's submissions on behalf of the appellant was article 10 of the European Convention on Human Rights which provides:

"Freedom of expression

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

25. We were pressed with much of the Strasbourg and domestic jurisprudence on article 10 and its importance to the maintenance of a free and effective press by protection of journalistic sources. All the authorities to which we were referred were concerned with compulsory disclosure of journalistic sources or materials. It is sufficient for the purposes of this case to quote from the judgment of Lord Dyson MR in the recent case of ***R (Miranda) v the Secretary of State for the Home Department*** [2016] EWCA Civ 6:

> "101 It is clear enough that the Strasbourg jurisprudence requires prior, or (in an urgent case) immediate *post factum,* judicial oversight of interferences with article 10 rights where journalists are required to reveal their sources. In such cases, lack of

such oversight means that there are no safeguards sufficient to make the interference with the right "prescribed by law". This is not surprising in view of the importance to press freedom of the protection of journalistic sources: see, for example, *Sanoma* at paras 88 to 92. As the ECtHR said in *Nordisk Film & TV A/S v Denmark*:

> "The protection of journalistic sources is one of the cornerstones of freedom of the press. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest"."

> ……

> "113. ……The central concern is that disclosure of journalistic material (whether or not it involves the identification of a journalist's source) undermines the confidentiality that is inherent in such material and which is necessary to avoid the chilling effect of disclosure and to protect article 10 rights. If journalists and their sources can have no expectation of confidentiality, they may decide against providing information on sensitive matters of public interest. That is why the confidentiality of such information is so important."

26. Mr Monteith submits that the appellant's identity, and the material upon which his prosecution depended, was obtained by police misconduct in putting pressure upon the newspapers to give disclosure in order to avoid a corporate prosecution; and that the evidence was "tainted" because the decision whether or not to disclose it was in the hands of a suspect. He further submits that there was a breach of article 10 because the material was obtained without any prior judicial process of scrutiny which would provide the necessary legal safeguards and provide for the necessary balancing of the public interests involved.

27. The first difficulty with this submission is that there is no evidential basis for suggesting that the MPS exerted any improper pressure upon the newspapers. Mr Monteith relied upon the passage at paragraph 10 of the Judge's written reasons for refusing a stay where he said:

> "10.The relevant information evidencing these activities was all within the possession of NI and Mirror Group Newspapers (MGN), both of whom agreed to assist the Metropolitan Police Service (MPS) with their investigation. On all the available material I accept that there is a reasonable inference that they did so not for altruistic reasons but rather in the hope that by so assisting the police, there was a likelihood that any possibility of prosecutions at a higher level would be avoided."

28. That finding merely records the motivation of the newspapers. It is not a finding that the MPS sought to impose any pressure upon the newspapers, and there is no other evidence to support such a suggestion. Indeed all the evidence suggests the reverse. The police made no threat or promise, express or implied, about the bringing of a prosecution against the company or companies or their top management. The police were seeking voluntary disclosure under the terms of the MOU, clause 8 of which made clear that MGN retained the right to invoke article 10 grounds for refusing disclosure. MGN was

a large organisation with access to in house and external legal advice. Given the general stance of newspapers to protect the identity of their sources, it is inconceivable that MGN did not give careful consideration to whether to make disclosure to the MPS in the context of the publicity which Operation Elveden and the Leveson Inquiry were attracting. The MPS was entitled to assume that the disclosure which was proffered was as a result of a considered and informed decision with the benefit of full and accurate legal advice.

29. This is reinforced by the material we have been shown relating to disclosure by News International. In its case it is clear that the possibility of a corporate charge was in the minds of both parties from an early stage of the process, but the MPS never gave any promise, express or implied, that such a charge would not be brought, nor linked the possibility to its their request for voluntary disclosure. When a formal letter was sent by the MPS indicating that such a charge was under consideration, News International's cooperation became less fulsome, but disclosure of material to the MPS nevertheless continued, albeit to a lesser extent. It appears that News International remained keen to be able to portray its position to the Leveson Inquiry as one of full cooperation in the light of the widespread public concern at that time about the activities of the press and how they obtained their information.

30. This ground of appeal therefore fails at the first hurdle. The disclosure by the newspapers was not procured by any improper pressure or coercion. It was truly voluntary. There was no misconduct by the MPS in receiving voluntary disclosure from the newspapers or in acting upon it. The fact that it was disclosed by a suspect, in the sense that the MPS had not ruled out a corporate charge against either newspaper does nothing to "taint" it, to use Mr Monteith's expression. Subject to compliance with PACE and other prescribed procedural safeguards, the police are free to act upon information voluntarily provided by a suspect just as much as from a non suspect. In different factual circumstances from those which arise in the present case it may affect the weight to be attached to a piece of evidence that it emanates from a suspect whose motives may cast doubt upon its reliability. It is in that sense that such evidence may be "tainted" to use Mr Monteith's expression. That has no bearing on the propriety of the prosecuting authorities in relying upon it to bring proceedings.

31. Nor can we accept Mr Monteith's further submission that the provision of voluntary disclosure was a breach of the appellant's article 10 right, as a journalistic source, to have his anonymity maintained.

32. There is room for doubt whether article 10 rights are engaged at all in the case of a source whose identity is voluntarily disclosed by the newspaper. In Recommendation No R (2000) 7 of the Committee of Ministers of the Council of Europe, adopted by the Committee on 8 March 2000 ("the 2000 Recommendation"), it is made clear that whilst the right of journalists to withhold journalistic material is an important right whose protection article 10 is intended to secure, there is no concomitant obligation on journalists inherent in article 10. The 2000 Recommendation records that some countries have introduced domestic legislation to make illegal the voluntary disclosure of sources by journalists, and are free to do so, but the 2000 Recommendation proceeds on the footing that whilst journalists have a right to withhold disclosure of their sources, they have no obligation to do so in the absence of one imposed by domestic legislation. The UK has enacted no such legislation. A subsequent Recommendation of the

Parliamentary Assembly, No 1950 of 2011, and the Committee of Ministers' Response to it adopted on 18 January 2012 do not alter the approach of the 2000 Recommendation. The 2015 edition of the Editor's Code of Practice published by the press regulator, The Independent Press Standards Organisation, describes a journalist's obligation to protect confidential sources of information as a "moral obligation".

33. For the purposes of the present appeal we emphasise that it is not necessary to decide whether a source may be able to assert an article 10 right to protect his anonymity in circumstances where the journalist or another intends to provide voluntary disclosure or has done so. What is clear is that if such right exists, it is not unqualified. If the source's freedom of expression to communicate with the journalist remains protected by article 10(1) in the face of voluntary disclosure, it is subject to the qualifications in article 10(2). The consideration of Article 10 (2) requires a fact sensitive inquiry.

34. Assuming in the appellant's favour that article 10(1) is engaged, so as to provide him with a prima facie right to protect his anonymity as a source despite the newspapers' voluntary disclosure, we have little doubt that the use of the material in his prosecution in the particular circumstances of this case would fall within the qualification provided for in article 10(2). The freedom of expression which potentially falls within article 10(1) is in respect of his communications with Mr Moyes which provided information about the prison. That was in fact the provision of information by the appellant in return for the corrupt acceptance of money by him as a public official over a prolonged period; it amounted, as the jury found and as we explain in relation to the second ground of appeal, to the commission by the appellant of the serious criminal offence of misconduct in public office Revelation of his wrongdoing would be necessary and proportionate for the important public interests of prosecuting a crime which exists, in this context, to maintain the integrity and efficacy of the prison service and the public's confidence in it. The offence of misconduct in public office is prescribed in law as the consequence of the very activity which the appellant seeks to suggest is protected from disclosure by article 10(1), and fulfils the requirements of judicial scrutiny and legal certainty (as to which see below). Different considerations might arise in the case of a genuine whistleblower seeking to act in the public interest, where the only wrongdoing might lie in breach of obligations to the employer rather than in the circumstances of the communication to the journalist. In the appellant's case the expression whose freedom he claims to be protected is itself serious criminal conduct.

35. Mr Monteith also submitted that the MPS deliberately, or at least incompetently, circumvented article 10 because the only legitimate procedure for obtaining journalistic material of this kind was by seeking a production order under PACE; and that the MPS knew that such a course would be unsuccessful in this case, both because it could not define the material to be sought with sufficient specificity, and because the material was excluded material which could not be ordered to be disclosed.

36. Section 9 of PACE provides for access to "special procedure material" by the grant of production orders. By virtue of sections 13 and 14 "journalistic material" is special procedure material unless it is "excluded material". No production order may be made for journalistic material which is excluded material. By sections 11(1)(c) and 11(3)(a) journalistic material is excluded material if it is held in confidence pursuant to an express or implied undertaking to hold it in confidence (or a statutory restriction on disclosure). If it is not excluded material, a production order may be made provided the access

conditions set out in paragraph 2 or 3 of Schedule 1 are fulfilled. The relevant paragraph in this case is paragraph 2 which includes amongst its threshold requirements at paragraph 2(b) that other methods of obtaining the material have been tried without success, or not tried because it appeared that they were bound to fail.

37. Mr Monteith's argument in relation to production orders involves the surprising proposition that the police are unable to receive voluntary disclosure without going through a judicial process in circumstances where no such process is available. The argument is flawed for two reasons. First, one of the very reasons why the MPS was precluded from seeking to invoke the production order jurisdiction was because the material was being offered voluntarily, as the MPS was correctly advised at the time. The threshold access condition in paragraph 2(b) of Schedule 1 could not be fulfilled. This condition is obviously designed to encourage the police to seek voluntary disclosure before resort is had to the process of compulsion by a court order. Seeking or accepting voluntary disclosure cannot be said in any pejorative sense to be a circumvention of the production order jurisdiction. On the contrary it is the fulfilment of the statutory scheme which encourages the police to seek voluntary disclosure before and instead of making an application.

38. Secondly, it is wrong to assert that no production order could have been obtained in this case. It is true that had the newspapers not offered any voluntary disclosure at all, the MPS would have been unable to frame an application with sufficient specificity to obtain the material which disclosed the appellant's criminal activity. But that is not the relevant question. The relevant question is whether a production order would have been available had the voluntary disclosure by the newspapers been article 10 compliant. Assuming in the appellant's favour that it was not so compliant because it revealed his identity without his consent, nevertheless there could be no violation of the appellant's article 10 rights had the newspapers revealed his wrongdoing but redacted the material so as to preserve his anonymity. In those circumstances a production order could have been framed with sufficient particularity to obtain his identification.

39. The material so sought would not have amounted to "excluded material" because it would not have been impressed with the necessary quality of confidentiality to bring it within section 11. It is well established in the context of legal professional privilege that a communication made in furtherance of a crime prevents the privilege from arising by reason of what is commonly called the iniquity exception. Iniquity for these purposes includes the commission of a crime, although it is not so limited and extends to fraud or equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interests of justice. The reason such iniquity prevents the existence of legal privilege in the relevant communication is that it precludes the existence of confidentiality in the communication; and confidentiality is a necessary condition for legal privilege. These principles are well established by a long line of cases from ***R v Cox & Railton*** (1884) 14 QBD 153, which were considered and analysed in ***JSC BTA Bank v Ablyazov*** [2014] EWHC 2788 (Comm), [2014] 2 CLC 263 at paragraphs [68] to [93]. The appellant's communications with Mr Moyes were in furtherance of his criminal conduct and so attracted no confidentiality. They are not therefore excluded material for the purposes of a PACE production order. The position might be otherwise for a genuine whistleblower acting in the public interest whose conduct vis a vis the journalist would retain its express or implied undertaking of confidentiality.

40. There is, finally, a further reason why the first ground of appeal must fail. Even if there had been some misconduct on the part of the MPS, or some violation of article 10, there would remain the question whether a stay should be ordered in the exercise of the discretion, taking into account the factors which have to be weighed in the balance in accordance with the principles reaffirmed in ***Warren v Attorney General for Jersey.*** The appellant does not argue that it was impossible for him to have a fair trial. He did have a fair trial. He was able to test the evidence, seek to contextualise it, give evidence about his motivation, and address whether his conduct met the necessary threshold for the various legal ingredients of the offence. He makes no criticism of the directions given to the jury. The sole ground for a stay is that despite his ability to have a fair trial, despite the powerful public interest in serious crime being prosecuted and public officials standing trial for corruption, and despite the public harm caused by his conduct which is an ingredient of this offence, the conduct of the police was so egregious that his prosecution offends the court's sense of propriety and justice or undermines confidence in the criminal justice system so as to bring it into disrepute. The conduct of the MPS in this case comes nowhere near justifying such a conclusion. We have already expressed the view that it involved no impropriety or violation of article 10. But even had it done so, it is pertinent that the MPS was acting on legal advice that it had no alternative but to receive and act on the voluntary disclosure provided by the newspapers; and that if the material had been provided by the newspapers but redacted so as to preserve the anonymity of the appellant as the source, the MPS could have obtained his identity by seeking a production order. There was no deliberate disregard by the police of appropriate practice and procedure. If the conduct of the MPS could be the subject of any criticism, which we do not consider it can, it could not be categorised as serious.

41. For all these reasons there is no merit in the first ground of appeal.

Submission of No Case to Answer

42. There are four elements to the offence of misconduct in public office: (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; (iv) without reasonable excuse or justification: ***Attorney General's Reference (No 3 of 2003)*** [2004] 2 Cr App R 23, [2005] 1 QB 73; ***R v Chapman, R v Sabey*** [2015] 2 Cr App R 10, [2015] 1 QB 883.

43. The submission of no case to answer made to the Judge was that the prosecution case was insufficient to be left to the jury on each of the four elements. On appeal, the argument has been confined to the second and third element. So far as the second element is concerned, it is argued that there has been no breach of duty or wilful misconduct because Rule 67 of the Prison Rules must be read down so as to be compliant with article 10, by reason of section 3 of the Human Rights Act 1988; and that what the appellant was doing was in accordance with the freedom of expression protected by article 10 such that it cannot amount to a breach of duty. So far as the third element is concerned, the argument is that the conduct was no more than a breach of the terms of the appellant's employment such as to merit disciplinary sanction at most, and did not meet the high threshold of seriousness required for it to be characterised as a criminal abuse of the public's trust in him as an office holder.

44.It is convenient to address them in reverse order. The third element of the offence involves a high threshold, requiring an affront to the standing of the public office held, and conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder; the culpability must be of such a degree that the misconduct impugned has the effect of injuring the public interest so as to call for condemnation and punishment: ***A-G's Reference (No 3 of 2003)*** at paragraphs [56]-[57], ***R v Chapman*** paragraph [32], [35]). In ***R v Chapman*** this court said:

> "34. The offence requires, as the third element, that the misconduct must be so serious as to amount to an abuse of the public's trust in the office holder. It is not, in our view, sufficient simply to tell the jury that the conduct must be so serious as to amount to an abuse of the public's trust in the office holder, as such a direction gives them no assistance on how to determine that level of seriousness. There are, we consider, two ways that the jury might be assisted in determining whether the misconduct is so serious. The first is to refer the jury to the need for them to reach a judgment that the misconduct is worthy of condemnation and punishment. The second is to refer them to the requirement that the misconduct must be judged by them as having the effect of harming the public interest....
>
> 36. We therefore turn to examine the second way in which the standard of seriousness can be judged – by reference to the harm to the public interest. In our view, in the context of provision of information to the media and thus the public, that is the way in which the jury should judge the seriousness of the misconduct in determining whether it amounts to an abuse of the public's trust in the office holder. The jury must, in our opinion, judge the misconduct by considering objectively whether the provision of the information by the officeholder in deliberate breach of his duty had the effect of harming the public interest. If it did not, then although there may have been a breach or indeed an abuse of trust by the office holder vis a vis his employers or commanding officer, there was no abuse of the public's trust in the office holder as the misconduct had not had the effect of harming the public interest. No criminal offence would have been committed. In the context of a case involving the media and the ability to report information provided in breach of duty and in breach of trust by a public officer, the harm to the public interest is in our view the major determinant in establishing whether the conduct can amount to an abuse of the public's trust and thus a criminal offence. For example the public interest can be sufficiently harmed if either the information disclosed itself damages the public interest (as may be the case in a leak of budget information) or the manner in which the information is provided or obtained damages the public interest (as may be the case if the public office holder is paid to provide the information in breach of duty)."

45.In rejecting the submission of no case to answer in respect of this element of the offence, the Judge said that it would be open to the jury to conclude that the public interest had been harmed by the very fact of a prison officer having been in a long standing relationship with a journalist in circumstances such as these, in which he had repeatedly divulged information about events at the prison for money in breach of his duty; by reason of the adverse impact on morale within the prison of both staff and prisoners, of which two prosecution witnesses gave examples; and by reason of the adverse effect on L and O of

the specific disclosures in relation to them, of which they gave evidence.

46. We have little hesitation in concluding that the Judge was right and that the prosecution evidence was capable of meeting the high threshold of criminality because of the harm to the public interest caused by the appellant's conduct. The extent of the appellant's corrupt activity in this case, taking payments of over £10,000 for a period of some five years for selling stories was conduct which the jury were entitled to conclude in many instances could not be justified as disclosure in the public interest, and was conduct which caused significant public harm, because corruption of a prison officer on this scale undermined public confidence in the prison service. Moreover, enabling the reporting of internal prison affairs in the national press, and the very fact that there was a known but unidentified mole within the prison, were matters which the jury by their verdict was entitled to find were capable of undermining trust and morale amongst and between prisoners and staff; there is a deterrent effect on staff and prisoners reporting incidents if they think they may end up in the national press; constructive internal criticism and debate is inhibited by a prison officer airing criticisms in the national press and leaking information which is confidential. In all these ways the appellant's conduct was capable of damaging the efficient and effective running of the prison and undermining public confidence in its management. The jury was in our judgment and on the evidence entitled to conclude, as their verdict shows that they did, that the appellant's conduct caused harm to the public interest.

47. There was a further point raised in this context in the appellant's written skeleton argument, although it was not pursued in oral argument before us on either side. It was suggested that criminal prosecution of what was a disciplinary offence offends the principle of legal certainty and in doing so breaches Article 7 of the European Convention on Human Rights, which provides:

> "(1) No-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed….."

48. We can deal with the point briefly. In ***R v Misra and Srivastava*** [2005] 1 Cr App R 21 Judge LJ, as he then was, analysed the domestic and European jurisprudence on this subject when considering and rejecting the submission that gross negligence manslaughter offended the principle of legal certainty because the element which requires the negligence to be "gross" is simply that the breach of duty must be sufficiently serious to be treated as a crime. He concluded that the incorporation of the Convention had not effected any significant change to, or extension of, the principle requiring certainty as it had long been understood at common law (paragraph [37]) and said:

> "34. ….In summary, it is not to be supposed that prior to the implementation of the Human Rights Act 1998 either this Court, or the House of Lords, would have been indifferent to or unaware of the need for the criminal law in particular to be predictable and certain. Vague laws which purport to create criminal liability are undesirable, and in extreme cases, where it occurs, their very vagueness may make it impossible to identify the conduct which is prohibited by a criminal sanction. If the court is forced to guess at the ingredients of a purported crime any conviction for it would be unsafe. That said, however, the requirement is for sufficient rather than absolute certainty.
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> 35. The ambit of the principle, as well as its limitations, were clearly described

in *the Sunday Times v United Kingdom* (1979) 2 E.H.H.R 245. The law must be formulated:

> "…with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in all the circumstances, the consequences which any given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unobtainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice."

Moreover, there is a distinction to be drawn between undesirable, and in extreme cases, unacceptable uncertainty about the necessary ingredients of a criminal offence, and uncertainty in the process by which it is decided whether the required ingredients of the offence have been established in an individual case…."

49. There is no lack of certainty in this element of the offence of misconduct in public office. It has recently been clearly articulated and explained in ***A-G's Reference (No3 of 2003)*** and ***R v Chapman***. In the latter case it was made clear, in the passages quoted above, that the level of seriousness which must be reached to establish the third element is defined by recognised criteria on which the jury is to be directed. The element is sufficiently clear to enable a person, with appropriate legal advice if necessary, to regulate his or her behaviour and foresee whether such behaviour was capable of amounting to misconduct in public office.

50. We return to the other ground on which it is said that the case should not have been left to the jury, namely that there was no breach of duty or wilful misconduct because the appellant's freedom of expression was protected by article 10, and Rule 67 should be read down accordingly. The short answer to this point is that Rule 67 can be read down no further than necessary to protect the appellant's article 10 rights; and that the appellant's conduct, amounting to the serious offence of misconduct in public office, is not protected by article 10.

Conclusion

51. We have considered all the circumstances of the case and the conduct of the proceedings and the trial and are satisfied that the conviction was safe.

52. Accordingly the appeal will be dismissed.