HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Regina *v.* Hayter (Appellant) (On Appeal from the Court of Appeal (Criminal Division))

[2005] UKHL 6

LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the advantage of reading in draft the opinions of all my noble and learned friends. For the reasons given by Lord Brown of Eaton-under-Heywood, which are substantially those of Lord Steyn also, I too would answer both the certified questions in the affirmative and would accordingly dismiss this appeal.

LORD STEYN

My Lords,

I. The case in a nutshell

2. On the present appeal a point of law of general public importance arises about the principle that the confession of a defendant is inadmissible in a joint criminal case against a co-defendant.

3. What the point is, and how it arises, is best introduced by a simplified description of the real case of murder which in June 2001 came for trial before Judge Hyam, the Recorder of London, and a jury. The trial took place at the Central Criminal Court. Three defendants were charged with murder. All three were indicted as principals. The

prosecution case was as follows. The first defendant (Bristow) was a woman who wanted to arrange a contract killing of her husband. The evidence against her came from a number of sources and was cogent. The third accused (Ryan) was the killer who actually shot and killed the husband of the first defendant. The evidence against the killer was solely based on a confession which he had allegedly made to his girlfriend. The prosecution case was that the contract killing was arranged by the first defendant through the second accused (Hayter) who engaged and paid the killer. The judge invited the jury to consider in logical phases the cases against the alleged killer, then against the woman who allegedly procured the killing, and finally against the middleman. The judge directed the jury that only if they found both the actual gunman, and the woman who arranged the killing, guilty of murder, would it be open to them, taking into account those findings of guilt, together with other evidence against the middleman, to convict the middleman. The jury convicted all three defendants of murder.

4. The principal argument on behalf of the middleman was and is that the rule that an out of court confession by one defendant may not be used by the prosecution against a co-defendant has been breached by the way in which the judge directed the jury.

5. In a reserved judgment given by Mantell LJ the Court of Appeal (Criminal Division) upheld the rulings of the trial judge and dismissed the appeal of the middleman: *R v Hayter* [2003] 1 WLR 1910. The court granted a certificate that a point of law of general public importance under section 33(2) of the Criminal Appeal Act 1968 was involved in the decision. The certified questions were as follows:

> "(1) In a joint trial of two or more defendants for a joint offence is a jury entitled to consider first the case in respect of defendant A which is solely based on his own out of court admissions and then to use their findings of A's guilt and the role A played as a fact to be used evidentially in respect of co-defendant B?" and, if so,
>
> (2) Where proof of A's guilt is necessary for there to be a case to answer against B, is there a case to answer against B at the close of the prosecution case where the only evidence of A's guilt is his own out of court admissions?"

The Court of Appeal refused leave to appeal. The House of Lords granted leave to appeal.

II. A joint trial

6. The practice favouring joint criminal trials is clear. It has been accepted for a long time in English practice that, subject to a judge's discretion to order separate trials in the interests of justice, there are powerful public reasons why joint offences should be tried jointly: *R v Lake* (1976) 64 Cr App R 172, 175, per Widgery CJ. While considerations of the avoidance of delay, costs and convenience, can be cited in favour of joint trials this is not the prime basis of the practice. Instead it is founded principally on the perception that a just outcome is more likely to be established in a joint trial than in separate trials. The topic is intimately connected with public confidence in jury trials. Subject to a judge's discretion to order otherwise, joint trials of those involved in a joint criminal case are in the public interest and are the norm. This practice hardly requires citation of authority but in recent times the practice has been affirmed by the Privy Council in *Lobban v The Queen* [1995] 1 WLR 877, 884B-D and by the House of Lords in *R v Randall* [2004] 1 WLR 56, para 16, 61F. Conceivably, in the present case, the middleman could have applied for an order severing his case on the ground that he might be prejudiced in a case in which a co-accused (Ryan) allegedly made a confession. The answer to such an application would usually be that the judge would give appropriate directions. In some cases such directions may include directions about the editing of a confession. In the present case no application for severance was made. If it had been made, it would almost certainly have been refused. It was in the public interest that the three accused should be tried jointly. It was a paradigm case for a joint trial.

III. The rule about confessions

7. A voluntary out of court confession or admission against interest made by a defendant is an exception to the hearsay rule and is admissible against him. That was so under the common law. That is also the effect of section 76 of the Police and Criminal Evidence Act 1984. (Given the wide definition of confession in section 82(1) of PACE I will simply refer to confessions.) A confession is, however, generally inadmissible against any other person implicated in the confession. The rationale of the rule was stated in the 12th edition (1936) of a *Digest of the Law of Evidence* by Sir James Fitzjames Stephen as follows (at 36):

> "A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime. Confessions, if voluntary, are *deemed to be relevant facts as against the persons who make them only*."
>
> (My emphasis)

In a joint trial the prosecution may not rely on what the maker of a confession said against a co-accused. This is a general rule of law. It is buttressed by a rule of practice requiring a trial judge to direct the jury to ignore a confession made by an accused in considering the case against a co-defendant.

8. The confession of Ryan was irrelevant and inadmissible in the case against the other defendants. And the judge was bound, in accordance with well settled principles of criminal practice, to direct the jury accordingly. That is exactly what he did.

9. For the sake of completeness, I would mention section 76A of PACE which was inserted by section 128 of the Criminal Justice Act 2003. Section 76A(1) provides that, subject to its terms, a confession made by an accused person may be given in evidence for another person charged in the same proceedings (a co-accused) insofar as it is relevant to any matter in the proceedings. This provision has not yet been brought into operation. And, in any event, on the facts of this case it would not have been relevant even if it had been in operation.

IV. The prosecution case

10. The shape of the prosecution case against the three accused was as follows. The indictment charged Angela Bristow, Paul Hayter and Raymond Ryan, respectively accused Nos. 1, 2 and 3, with the murder of Mario Commatteo. On 30 March 2000 he was shot in the head at point blank range with a 12-bore shotgun as he was leaving his home. He died instantly. Bristow lived with the deceased. In the case against Bristow there was abundant evidence that in the two years preceding her husband's death she had repeatedly stated to various witnesses that she wanted him killed. On occasions she asked witnesses whether they could help to kill him. There was evidence of association between Bristow and Hayter (the alleged middleman) during the first half of 2000 including a number of telephone calls. Hayter was a frequent

customer of Bristow's sandwich shop. In turn Bristow was a customer of Hayter's car-wash. There was also evidence of associations between Hayter and Ryan. In addition there was evidence that on two occasions after the murder Hayter had sent packages containing £400 and £500 in cash to Ryan via the witness Lee Salter who was then employed by Hayter. There was evidence from which the Crown invited the jury to infer that the money came from Bristow who, it was suggested, had added the money to the bags of sandwiches which Lee Salter had been sent to collect by Hayter. When seen by the police in July 2000 Hayter had falsely minimised the extent of his association with both co-defendants and maintained that position when he was arrested and interviewed under caution in September 2000. The Crown conceded at trial that the circumstantial evidence against Hayter did not provide a case to answer unless it could be proved that Ryan was the killer. The case against Ryan was dependent upon his alleged confessions to his girlfriend Vanessa Salter. There was no evidence independent of those confessions which identified Ryan as the killer. In those confessions Ryan was alleged to have implicated Hayter as his recruiter and paymaster.

V. Ruling on the submission of no case to answer

11. At the end of the prosecution case counsel for Bristow invited the judge to rule that she had no case to answer. The judge rejected this submission. Counsel for Hayter, but not counsel for Ryan, made a similar submission that Hayter had no case to answer. The judge held that if the jury were satisfied on evidence admissible against Ryan that he was the killer then that conclusion was relevant in considering the case against Hayter. The judge observed:

> "This analysis shows that the prosecution are not using and do not seek to use the alleged confession of [Ryan] to confront any part of [Hayter's] defence. There is thus no erosion of the fundamental evidential rule that the alleged confession of one defendant in the absence of the other defendant is not evidence against that other defendant."

This ruling formed the legal basis on which the judge in due course summed up the case against Hayter.

VI. The evidence for the defence

12. The case continued against all three defendants. Bristow and Ryan testified in their own defence. Hayter did not give evidence.

VII. The judge's summing up

13. The judge gave a detailed summing up which, leaving aside the points of law in issue, has not in any way been criticised. It was a characteristically thorough and helpful summing by the late Recorder of London.

14. It is only necessary to deal with the summing up so far as it has an impact on the points of law at issue. The judge directed the jury in clear terms that the evidence of Vanessa Salter about the confession that Ryan allegedly made to her was only evidence in the case against Ryan and not evidence in the separate cases against Bristow and Hayter. It is necessary to set out the relevant part of the summing up *in extenso*:

> "The second distinction that I should make as a matter of law between Vanessa Salter's evidence of Raymond Ryan's confession only being admissible against him is this. If, as a result of considering her evidence, you were sure that Raymond Ryan murdered Mario, you could properly use that finding of guilt in your consideration of the cases of Angela Bristow and Paul Hayter. Your approach to those cases will then be to use the fact of Raymond Ryan's guilt simply as a fact in the consideration of the cases of the other two defendants.
>
> If you are sure of the fact of Raymond Ryan's guilt, you could then go on to consider the individual cases of Angela Bristow and Paul Hayter on the admissible evidence against them, all the while, taking care not to allow anything in Vanessa Salter's evidence regarding Raymond Ryan's confession which may have indicated Angela Bristow or Paul Hayter to play any part in your consideration of their cases.
>
> In short, if you found Raymond Ryan guilty you could use the fact of his guilt in your consideration of his co-defendants' cases, but not allow any of the evidence of

Vanessa Salter as to what Raymond Ryan may have said to her to play any further part in your deliberations.

It is for that reason I strongly advise you as a matter of logic and good sense to consider first the case of Raymond Ryan.

If you find him guilty, you may use the fact of guilt in the way I have just described in your consideration of the case of Angela Bristow and of Paul Hayter.

If you have found Raymond Ryan guilty, you should then consider the case of Angela Bristow, and finally the case of Paul Hayter. If, in following that advice you found Raymond Ryan not guilty, or Angela Bristow not guilty, you would not have to consider the case of Paul Hayter at all; because if Raymond Ryan did not on your finding kill Mario Commatteo you must acquit Paul Hayter because the prosecution would have failed to prove both that Angela Bristow had procured him to kill Mario and that he had procured Ryan to kill him.

You would, of course, have to consider whether Angela Bristow was guilty of procuring Mario's death, notwithstanding that Ryan did not do it upon the basis I explained earlier when defining her role as an accessory for murder. I said that if you were sure first that she procured Mario's death by recruiting another, or others, to kill him. Secondly, that when she procured another or others you are sure that she did so with the intention of bringing about Mario's death.

So the position, in brief, is that you should if you follow my advice, consider Raymond Ryan's case first. If you conclude that he is not guilty of that offence, you would automatically conclude that Paul Hayter is also not guilty.

You would nonetheless go on to consider whether Angela Bristow was nonetheless guilty because she procured another, or others, to kill with the intention that Mario should be killed.

If, on the other hand, you were to find Raymond Ryan guilty, then you would go on to consider the case of Angela Bristow. If you found Angela Bristow guilty as well as Raymond Ryan, then you would go on to consider the case against Mr Hayter. If you found Angela Bristow not guilty, even or though you found Ryan guilty, you would have to find Paul Hayter not guilty, because the link in the case of Mr Hayter is that you must find both Raymond Ryan and Angela Bristow guilty before you could find the defendant, Mr Hayter, guilty."

These are the passages in the summing up which are relevant to the points of law on this appeal.

VIII. The convictions

15. On 3 July 2001, the jury returned verdicts of guilty of murder against all three accused. The judge sentenced each to life imprisonment.

IX. The Court of Appeal judgment

16. Hayter appealed to the Court of Appeal (Criminal Division). He relied on two grounds of appeal. First, his case was that the judge had erred in law (1) in directing the jury that, in the event that they convicted Ryan of murder, they could use their finding that he was the killer as evidence in the case against Hayter and, (2) in failing to withdraw the case from the jury at the close of the Crown's case when there was no evidence admissible against Hayter sufficient to amount to a case to answer.

17. The Court of Appeal took the view that the judge's reasoning was in accord with first principles: *R v Hayter* [2003] 1 WLR 1910. Mantell LJ reviewed three earlier decisions of the Court of Appeal, viz *R v Rhodes* (1959) 44 Cr App R 23; *R v Spinks* [1982] 1 All E R 587; R *v Hickey (unreported), 30 July* 1997 (the "Carl Bridgewater" case). Mantell LJ observed (at para 16, 1914H):

> ". . . it is perhaps worth remembering that at the time of both decisions [*Rhodes* and *Spinks*] evidence of a prior conviction would not have been admissible in separate criminal proceedings to establish the truth of the underlying allegation: see *Hollington v F Hewthorn & Co Ltd* [1943] KB 587. If it is necessary to say so, the same is true of the time when the trial of Hickey took place."

Mantell LJ drew attention to section 74 of PACE. It provides:

> "In any proceedings the fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom or by a Service court outside the United Kingdom shall be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that that person committed that offence, whether or not any other evidence of his having committed that offence is given."

Mantell LJ observed that section 74 removed the foundation for the decisions in *Spinks* and *Rhodes*: para 18, at 1915C. He did not think that the three decisions reviewed by him stood in the way of applying the principled analysis adopted by the trial judge.

X. The primary submission of Hayter.

18. Counsel for Hayter relied on the general rule that a confession is only relevant and admissible against the maker of it. The existence of this rule, as well as the auxiliary rule that a trial judge in a joint trial must direct a jury not to rely on the confession of one defendant against other defendants, is not in doubt. The controversy is about the application of the rule in the present case. Counsel for Hayter said that his central submission was that the judge, by permitting the jury to use their finding that Ryan was guilty, *in effect* permitted the jury to rely on the words and content of the confession of Ryan as evidence against Hayter.

19. In my view counsel for Hayter has not established this proposition. In clear terms the judge directed the jury not to take into account the words or content of Ryan's confession in the case against Hayter. Subject to the jury being satisfied of the guilt of Ryan and Bristow, he directed the jury that they could take into account those findings, together with other evidence, in the case against Hayter. There is, therefore, no direct or indirect infringement of the rule. This becomes even clearer when one bears in mind that the mischief at which the rule is directed is to prevent the content or words of a confession to be used against anybody but the maker. The judge, of course, directed the jury that they could not use the content or words of any part the confession of Ryan against Hayter. And there is no reason to doubt that the jury would have understood and given effect to this direction.

20. This conclusion is reinforced if one postulates, contrary to the facts of the case, that Ryan made no out of court confession but that his guilt was established by an eye witness, a fingerprint or circumstantial evidence. In such circumstances counsel for Hayter rightly accepted that the judge would have been entitled to direct the jury that they may take into account their finding that Ryan was guilty of murder in considering the case against Hayter. What is the difference? Counsel for Hayter said that in the case of evidence by an eye witness, a fingerprint or circumstantial evidence, the evidence is "evidence in the whole case". This is analytically not an answer. It obscures the true position. It is necessary to consider the case against each defendant separately. That is part of the very alphabet of criminal practice. The three hypothetical types of evidence against a gunman in the position of Ryan would be irrelevant to the case against Hayter and would therefore as a matter of law be inadmissible in the separate case as against Hayter. On the hypothesis that there was evidence in such categories the judge would in practice not have directed the jury to ignore such evidence. The reason is, of course, that it is perfectly obvious that none of these categories of evidence could implicate Hayter. It would be unnecessary to give any such direction. On the other hand, a finding by the jury that Ryan was guilty of murder in the three postulated cases could logically be relevant in the case against Hayter. Counsel for Hayter accepted this proposition. If that is right, there is no sensible or rational reason why the same should not apply in the case of an out of court statement by a defendant. Logically this strongly reinforces the conclusion I have reached. Criminal practice is not impervious to logic.

21. It is also necessary to approach the point from the perspective of policy. The rule in *Hollington v Hewthorn* [1943] KB 587, was to the effect that evidence that a person had been convicted of an earlier offence was inadmissible in civil or criminal proceedings so as to prove that that person had in fact committed the offence. This rule was abolished for civil proceedings by section 11 of the Civil Evidence Act 1968 and for criminal proceedings by sections 74-75 of the Police and Criminal Evidence Act 1984: see *Current Law Statutes Annotated,* 1984, Vol 4, 60-120. This legislation marked an advance of the rationality of our law. It is true that section 74 of PACE is not available to prove the guilt of one defendant of the offence which is the subject of a joint trial. Given the legislative policy underlying section 74, it would, however, be curious if the procedure adopted by the Recorder of London in the present case is not available in a joint trial. That is when in practice it is most needed. Counsel observed that the remedy was to indict Ryan separately and to adduce his conviction against Hayter in a subsequent trial. That would have been possible. But, for reasons I have already set out, such a procedure would have been contrary to the

public interest. The policy underlying section 74 suggests that it would be wrong and anomalous now to give an unnecessarily expansive reach to the rule about out of court confessions.

22. In a generally favourable case note on the decision of the Court of Appeal in the present case Professor Diana Birch ((2003) Crim LR 887-888) pointed out that a joint trial has the advantage that the secondary party is in a better position to challenge the evidence pointing to the guilt of the principal and does not incur any burden of proof even where the evidence against the principal is extremely strong. The procedure adopted by the Recorder of London served the interests of justice.

23. In my view the Court of Appeal correctly concluded for the reasons Mantell LJ gave that the decisions in *Rhodes* and *Spinks* do not stand in the way of a principled decision such as the Recorder of London adopted. Nowadays, and particularly since the enactment of section 74, these cases would be differently decided. And at the time when the trial of *Hickey* took place *Hollington v Hawthorn* still held sway. In any event, so much went wrong in the case of *Hickey*, as counsel for the Crown showed, that this decision ought not to be allowed to continue to bedevil any branch of criminal law.

24. For these reasons I would reject the primary argument on behalf of *Hayter*.

25. If I am wrong in my approach, I would conclude that only a modest adjustment of the rule about out of court confessions in joint trials is necessary and I would be prepared to make a modification sanctioning the sensible and just procedure adopted by the Recorder of London. It is a principled evolution in keeping with modern developments, statutory and judge made, which corrected some of the worst absurdities of the law of evidence of a bygone era. This view is reinforced if one stands back and considers the rule in question in a broader legal context. The rule about confessions is subject to exceptions. Keane, *The Modern Law of Evidence* 5th ed., (2000) p 385-386, explains:

> "In two exceptional situations, a confession may be admitted not only as evidence against its maker but also as evidence against a co-accused implicated thereby. The

> first is where the co-accused by his words or conduct accepts the truth of the statement so as to make all or part of it a confession statement of his own. The second exception, which is perhaps best understood in terms of implied agency, applies in the case of conspiracy: statements (or acts) of one conspirator which the jury is satisfied were said (or done) in the execution or furtherance of the common design are admissible in evidence against another conspirator, even though he was not present at the time, to prove the nature and scope of the conspiracy, provided that there is some independent evidence to show the existence of the conspiracy and that the other conspirator was a party to it.
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> . . .
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> There is also a third exception, in fact an extension of the second: when, although a conspiracy is not charged, two or more people are engaged in a common enterprise, the acts and declarations of one in pursuance of the common purpose are admissible against another. This principle applies to the commission of a substantive offence or series of offences by two or more people acting in concert, but is limited to evidence which shows the involvement of each accused in the commission of the offence or offences. It cannot be extended to cases where individual defendants are charged with a number of separate substantive offences and the terms of a common enterprise are not proved or are ill-defined."

The second and third exceptions are of interest in regard to the appeal before the House. I am not saying that these exceptions are directly relevant. But the account of roles of the wife determined to kill her husband, the hired gunman, and the middleman, which the jury must have accepted are uncommonly close to those exceptions.

26. On this ground too I would reject the primary submission of counsel for Hayter.

XI. The alternative argument

27. In the alternative counsel for Hayter submitted that, even if a jury's finding of guilt based upon one defendant's out of court confession can, once reached, add to an existing case against a co-

accused, it cannot contribute to the case against that co-accused *at the close of the prosecution case*. The argument is that at that stage of proceedings a trial judge must examine the evidence admissible in the case of each defendant and determine whether in each case that evidence is such that a properly directed jury could convict. The fact that the evidence against one may or may not be added to later in the case cannot, it was submitted, affect the decision as to whether there is a case to answer at the close of the prosecution evidence.

28. This submission ignores the dynamics of a criminal trial by a judge and jury. It loses sight of the necessity for a judge sometimes to make conditional rulings on issues or the relevance or admissibility of evidence. *Cross and Tapper On Evidence,* 10th ed., 2004, explain [at 79]:

> "One fact may be relevant to another only if it is taken together with some further matter, and it may well be the case that this can be proved only by a witness who will be called after the one who testifies to the fact the relevancy of which is being considered. In such circumstances, the court allows the evidence to be given conditionally on its turning out to be relevant. If it proves to be irrelevant, the judge will tell the jury to disregard it. An excellent example is provided by the rules governing the admissibility of statements made in the presence of a party. These have probative value only in the light of the conduct of the person to whom they were made. If A confronts B and alleges that he has committed a crime against him, and B is later tried for that offence, evidence of what A said will usually be relevant only if B's conduct is something other than a stalwart denial of the charge; but there is no doubt that A's statement may always be proved in the first instance, although the judge may subsequently be obliged to tell the jury to disregard it altogether. Such a statement of affairs is better regarded as a concession to the fact that the evidence in a case often emerges slowly, and from the mouths of many witnesses, rather than an exception to the rule prohibiting the reception of irrelevant, or insufficiently relevant, matter."

By analogy in the present case the judge was entitled to make the conditional rulings already described.

29. The alternative argument of counsel for Hayter must be rejected.

XII. Conclusion

30. It follows that I am in agreement with the decisions and reasoning of the Recorder of London and the Court of Appeal.

XIII. Disposal

31. For the reasons I have given, and the reasons given by my noble and learned friend Lord Brown of Eaton-Under-Heywood in his opinion, I would dismiss the appeal. The answers to the certified questions appear sufficiently from the majority opinions delivered today.

LORD RODGER OF EARLSFERRY

My Lords,

32. After trial at the Central Criminal Court, the appellant, Paul Hayter, and his two co-defendants, Angela Bristow and Raymond Ryan, were convicted of murdering Bristow's husband, Mario Commatteo. In brief, the Crown case was that Bristow procured the appellant to arrange for a hitman to kill her husband. The appellant in turn recruited Ryan whom Bristow paid through the appellant. On 30 March 2000 Ryan shot Mr Commatteo at point-blank range with a twelve-bore shotgun, as he was leaving for work.

33. To convict Ryan, all that the Crown had to prove was that he was the person who shot the deceased in this way. To convict the appellant, the Crown had to prove that he procured Ryan to kill the deceased, that he did so with the intention of bringing about the deceased's death, and that Ryan killed the deceased. The only evidence that identified Ryan as the killer came from his girlfriend, Vanessa Salter, who said that, at times when the appellant was not present, Ryan told her that he had shot the deceased. At the close of the Crown case, counsel for the appellant submitted that he had no case to answer, on the ground that Vanessa

Salter's evidence of Ryan's confession was admissible only against Ryan and not against the appellant. Therefore, the Crown had not led evidence capable, if accepted, of proving against the appellant that Ryan had killed the deceased. The late Recorder of London rejected that submission. He held:

> "This analysis shows that the prosecution are not using and do not seek to use the alleged confession of Raymond Ryan to confront any part of Mr Hayter's defence. There is thus no erosion of the fundamental evidential rule that the alleged confession of one defendant in the absence of the other defendant is not evidence against that other defendant.
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> It seems to me that, since the Crown are put to proof that Raymond Ryan killed Commatteo, they are entitled to go ahead and prove it, if they can, by admissible evidence against Raymond Ryan. If they succeed in that proof, they may then use the fact of guilt produced by that evidence in seeking to prove by other evidence the guilt of the co-defendants."

The Recorder subsequently directed the jury in similar terms. The appellant appealed against his conviction on the ground that the Recorder had erred in rejecting the submission of no case to answer. Describing the point as "short but difficult", the Court of Criminal Appeal upheld the Recorder's ruling and dismissed the appeal. In my view the point is short but easy and the appeal should be allowed.

34. In the witness box Vanessa Salter spoke to being present at meetings between Ryan and the appellant, to the appellant telephoning to speak to Ryan and to the appellant having had money for Ryan on one occasion. All this was primary evidence which was admissible against the appellant. But, as I have indicated, she also gave certain hearsay evidence. She said that Ryan told her that the appellant had asked him if knew anyone who could kill the deceased. Ryan also told her that he was going to ask Bristow for more money through the appellant and that he had told the appellant that he had not been paid enough. At the hearing of the appeal, Mr Dennis, who appeared for the Crown, seemed to wish to segregate these elements from the rest of Ryan's story because they related specifically to the appellant. As I understood counsel's approach, he considered that these elements, but only these elements, could not be used as any part of the Crown case against the appellant.

35. The defendants were tried together. This was clearly the best course to adopt in the interests of justice, because it saved time and resources and also eliminated the risk of different juries returning inconsistent verdicts. Nevertheless, the defendants could have been tried separately and if, for example, one of them had been taken ill, this might well have been the appropriate course to follow. Whether the defendants are tried together or separately, however, the general law of evidence is the same and what the Crown have to prove against each of the defendants also remains the same. There are, in effect, three separate trials and the jury must consider the case against each of the defendants separately.

36. Counsel for the Crown fastened on one hypothetical sequence of events. Suppose, he said, that Ryan had been tried first and, on the basis of his confession to Valerie Salter, the jury had convicted him of murdering the deceased. Then section 74(1) of the Police and Criminal Evidence Act 1984 ("PACE") would have come into play. Section 74(1) provides:

> "In any proceedings the fact that a person other than the accused had been convicted of an offence by or before any court in the United Kingdom or by a Service court outside the United Kingdom shall be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that that person committed that offence, whether or not any other evidence of his having committed that offence is given."

At the subsequent trial of the appellant, the fact that Ryan had been convicted of murdering the deceased would have been admissible for the purpose of proving that Ryan shot him. Mr Kelsey-Fry QC conceded that this was indeed the position and that nothing in section 78(2) would have entitled the judge in the appellant's trial to exclude that evidence on the ground that the conviction had been based on the evidence of Ryan's confession, which would not have been admissible against the appellant. Mr Dennis argued that, since the jury could have taken account of Ryan's conviction if the appellant had been tried after Ryan was convicted, it was only sensible for the jury in the joint trial of the defendants to be able to use their conclusion, that Ryan was guilty of murdering the deceased, in considering the case against the appellant.

37. As Mr Kelsey-Fry pointed out, if the Crown had wanted to take advantage of section 74(1), they could have proceeded against Ryan first and then, if he had been convicted, they could have used the conviction against the appellant. Naturally, that advantage to the Crown would have been purchased at the expense of the advantages of a joint trial. As a matter of fact, however, Ryan was not tried first and the three defendants were tried together. So the proper comparison is between the position of the appellant in the joint trial of the defendants and his position if he had been tried alone, without either of the others having been tried and convicted.

38. In that situation, would the Crown have been able to lead Vanessa Salter's evidence of what Ryan told her? The answer is plainly No. This is not because her evidence would have been irrelevant: on the contrary, it would have been highly relevant to the proof of one of the essentials of the Crown case against the appellant, viz, that Ryan had killed the deceased. Her evidence would none the less have been inadmissible because it would have been pure hearsay, not falling within any of the recognised exceptions to the rule: she would have been speaking to what someone else, Ryan, told her about killing the deceased. If the Crown had wanted to use Ryan to prove that he killed the deceased, they would have had to lead Ryan himself as a witness. Cf *HM Advocate v Kemp* (1891) 3 White 17. In the absence of any undertaking by the Director of Public Prosecutions not to prosecute him for the killing (which would have been unthinkable), the judge would have had to tell Ryan that he did not require to answer any question that tended to incriminate him. Naturally, in those circumstances he would have been extremely unlikely to confess to the murder and so ensure his own conviction in his subsequent trial for murder. But if, by any chance, Ryan had confessed in the witness box, his evidence would have been subject to challenge by the appellant and would have been admissible against him. Similarly, and consistently, any confession which Ryan made when giving evidence as a co-defendant in the joint trial would have been subject to challenge by the appellant and admissible against him.

39. Therefore, the only reason why the Crown could lead Vanessa Salter to speak to Ryan's confession at the joint trial was because Ryan was one of the defendants and so, as part of their case against *him*, the Crown could lead her evidence of his confession, as an admission against interest, to prove the facts stated by him. But nothing in that confession formed any part of the evidence in the case against the appellant. If this were not the position, evidence which would have been inadmissible against the appellant if he had been tried alone would

become admissible against him, simply because he was being tried along with Ryan. Joint trials conducted on that basis would be prejudicial to the interests of the defendants and so would be resisted, quite legitimately.

40. Since it would not have been possible for the Crown to lead Vanessa Salter's evidence of Ryan's confession if the appellant had been tried alone, in such a trial the jury could never have reached a conclusion, on the basis of that evidence, that Ryan shot the deceased. The Crown concede that there is no other evidence showing that Ryan was the killer. It follows that, in any trial of the appellant alone, the judge would have had to sustain a submission of no case to answer since, taking the prosecution evidence at its highest, the Crown could not have proved one of the essential elements in the case against the appellant. Again, that must also be the position if the appellant happens to be tried along with Ryan as a co-defendant.

41. As I mentioned above, at times during the hearing Mr Dennis seemed to draw a distinction between those parts of Ryan's confession which referred to his own actions and those parts which referred to the involvement of the appellant. The supposition seemed to be that, somehow, what Ryan said about his own acts did not incriminate the appellant, whereas what he said about the appellant did. So the former could be admitted, the latter not. The Recorder also seems to have entertained some such view since, in going through Vanessa Salter's evidence during his summing up, it was only when he came to the passage about what happened between Ryan and the appellant at Squeaky Cleans that he warned the jury that this was evidence "in Ryan's case and not evidence in the case of the other two."

42. This approach rests on a fundamental error. In a case like the present where, in order to secure the conviction of the appellant, the Crown had to prove that Ryan killed the deceased, there is no relevant difference whatever between the two aspects of what Ryan said. If admissible, everything which he said about killing the deceased would have incriminated the appellant, in the sense of proving a vital part of the Crown's case against him, viz that Ryan killed the deceased. For that reason, all of Vanessa Salter's evidence of his confessions, made when the appellant was not present to challenge them, if he saw fit, was not admissible against the appellant. At the joint trial of the defendants, however, the Recorder had to allow the Crown to lead Vanessa Salter's evidence of Ryan's confession to killing the deceased, because it formed a vital part of the admissible evidence in their case against Ryan. But,

when the Recorder came to consider the submission of no case to answer, he should have excluded all of that evidence from the body of evidence available against the appellant. If he had done so, he would have had to sustain the submission and acquit the appellant.

43. The error in the opposite approach is patent and, as Mr Kelsey-Fry perceived, it hardly needs to be demonstrated by reference to authority. It so happens, however, that the point is covered by the decision of the Court of Criminal Appeal (Watkins LJ, Kilner Brown and Russell JJ) in *R v Spinks* (1981) 74 Cr App R 23. Spinks was charged with a contravention of section 4(1) of the Criminal Law Act 1967 which makes it an offence for anyone, knowing or believing that someone has committed an arrestable offence, to do any act with intent to impede his apprehension or prosecution. The allegation against Spinks was that he had so acted in relation to a Mr Fairey. The Court held that, in order to prove their case against Spinks, the Crown had to prove that Fairey had committed an arrestable offence. For this purpose, the Crown relied on evidence from police officers of a statement made by Fairey, in the absence of the defendant, in which he said that he had stabbed someone. A submission of no case to answer was rejected and Spinks was convicted. The Court allowed his appeal. In the words of Russell J, at p 266:

> "In the judgment of this Court the offence with which the appellant was charged and the means of establishing it do not provide any exception to the universal rule which excludes out of court admissions being used to provide evidence against a co-accused, *whether indicted jointly or separately*" (emphasis added).

Russell J went on to say:

> "In his summing-up the learned recorder left the jury with the clear impression that they could, if they wished, rely upon Fairey's admissions to prove the wounding, not only against him but against the appellant. In doing so there was a plain misdirection…."

It is right to notice that, although in reaching his decision Russell J said that the fallacy of the Crown's position could be demonstrated in a number of ways, the only point he actually made was that, if Fairey had

been tried separately and convicted, the Crown could not have relied on his conviction to prove the first ingredient in the charge against Spinks. That was a correct statement of the law at the time, but the position was changed by section 74(1) of PACE. It follows that the decision can no longer be supported on that particular ground; but it is more than amply supported by the more fundamental considerations to which I have already referred. Statute has not impinged on this aspect of the law relating to hearsay evidence at trials and the "universal rule", to which Russell J referred, remains as much part of the law today as it did in 1981.

44. If – which I doubt – any further authority is needed, it is readily to be found north of the border. Sir Gerald Gordon QC, the distinguished editor of Renton & Brown's *Criminal Procedure According to the Law of Scotland* 6th ed (1996), summarises the Scots law, at para 24-132: "A statement made by one co-accused outwith the presence of another is not evidence against that other, *whether or not it directly incriminates him*" (emphasis added). In support of this proposition, Sir Gerald relies inter alia on *McIntosh v HM Advocate* 1986 SC 169. The appellant was convicted of having supplied cannabis to a named individual at a house in Paisley. The Crown case, which the jury accepted, was that the appellant had acted in concert with his co-accused Deborah Campbell who had made the actual supply. There was sufficient evidence against Deborah Campbell to prove that she had made the supply in question. It came from two sources: a statement that she had made to the police, admitting the supply, and the eye-witness testimony of her sister. The sister's evidence was available against the appellant, but the Appeal Court quashed the appellant's conviction on the ground that the co-accused's statement was not evidence against the appellant and therefore the sister's evidence was not corroborated, as it requires to be in Scots law. The Lord Justice Clerk (Ross) said, at p 174:

> "It is plain that without the evidence of Deborah Campbell's voluntary statement, there was no corroborated evidence of supply to Maureen Campbell. In a question with Deborah Campbell the jury were entitled to treat her voluntary statement as corroboration. However, the jury were not entitled to rely on the evidence of the voluntary statement of Deborah Campbell when considering the case against the other co-accused including the appellant. What Deborah Campbell said in her voluntary statement to the police was not evidence against the appellant."

For present purposes, what matters is that the co-accused's statement made no mention of the appellant, but was none the less not admissible against him to prove the supply with which he was charged.

45. Similarly, in *Montes v HM Advocate* 1990 SCCR 645, the appellant was convicted of being knowingly concerned in the fraudulent evasion of a prohibition on the importation of cocaine by importing a quantity of cocaine on a ship which docked at Greenock. The trial judge directed the jury that, in considering the case against the appellant, they were entitled to have regard to a statement by one of his co-accused, Jensen, to Customs and Excise officers, admitting that cocaine found in his possession had been put on the ship in Colombia. The appeal court held that this had been a misdirection. Lord Justice Clerk Ross observed, at p 666:

> "In my opinion this clearly constituted a misdirection. What the appellant Jensen said to the [Customs and Excise] officers was plainly evidence against him, but it was not evidence against the other appellants. In his report the trial judge deals with this ground of appeal. It is not entirely clear whether he is maintaining that because of the earlier direction which he had given to the jury about statements by one co-accused, they ought to have realised that the answers which the appellant Jensen gave to the Customs and Excise officers were not evidence against the other accused, or whether the trial judge's view was that these answers were evidence against the other appellants. In his report he states: 'It is my understanding that a statement made by one accused out with the presence of another is only inadmissible against the latter if it incriminates him.' The passage would suggest to me that the trial judge's view was that the answers made by the appellant Jensen were in this case admissible against his co-accused. The trial judge recognised that what Jensen said was relevant to the question of importation of cocaine, but he opined that importation by itself was not a criminal act for the purposes of charge (1). That may well be so but importation was a fact which required to be proved by the Crown if guilt under charge (1) was to be established. What the Customs and Excise Officers testified that the appellant Jensen had said to them was hearsay evidence, and so was not admissible against the co-accused as evidence of the facts alleged in the statement. In directing the jury that the evidence of the

> appellant Jensen's answers was evidence upon which the jury could rely in the case of the other appellants, the trial judge, in my opinion, misdirected the jury."

The approach of the trial judge, which the appeal court rejected, resembled the approach of the Recorder of London in this case. As a matter of principle, it should be rejected in English law too.

46. My Lords, in my view, these considerations are sufficient to show that the decision of the Recorder to reject the appellant's submission of no case to answer was wrong in law and that this appeal should be allowed. Out of deference to the Recorder and the Court of Criminal Appeal, and since the majority of your Lordships take a different view, it may, however, be worth exploring some of the implications of that view.

47. In their written case counsel for the Crown put their argument in this form:

> "in a joint trial a judge is entitled to find a case to answer against a defendant B if, on the admissible evidence against a co-defendant A, a jury properly directed could find A guilty and, having done so, use the fact of that guilt in considering whether the case has been proved against B."

The proposition is stated in terms of the jury first finding A guilty on the admissible evidence against him and then using "the fact of that guilt" in considering whether the case has been proved against B. That can only mean that "the fact of [A's] guilt" is part of the evidence which the jury are entitled to take into account when deciding whether the Crown have proved their case against B. In the present case, for example, if the jury found, on the basis of Vanessa Salter's evidence of Ryan's confession – which was not admissible against the appellant – that Ryan killed the deceased, or, in other words, that Ryan was guilty of killing the deceased, then the "fact of Ryan's guilt" was part of the evidence which the jury could take into account when deciding whether the prosecution had proved their case against the appellant. In my respectful view, the Crown are in substance asserting that the jury have a power to turn inadmissible into admissible evidence, and to convict a defendant by using evidence that is inadmissible against him.

48. When the jury considered the case against Ryan, they were entitled to have regard to all aspects of his confession, including what he said about his contacts with the appellant. Having considered that evidence, in all probability they concluded, not simply that Ryan shot the deceased, but that he did so after the appellant paid him sums of money which Bristow had passed to the appellant for that purpose. After all, on the evidence there was no other reason for Ryan to kill the deceased. If, then, the jury were entitled to turn their conclusion from Ryan's confession into a fact that they could use against the appellant, there seems no reason in principle why they should not have used the whole of that conclusion, rather than just the "fact" that Ryan killed the deceased. If, therefore, in reaching their verdict, they concluded that the appellant passed money to Ryan to pay for the killing, why should that "fact" also not have been available for their consideration of the case against the appellant? From the jury's point of view, the one is just as much a fact as the other. The Crown say, however, that the jury cannot do this. On their approach, the jury's supposed powers are incoherently selective.

49. Suppose that A and B are charged with murdering someone by stabbing him. There is evidence that they were together, not far from the locus, not long before the incident. A gives a statement to the police in which he says that, just before the fight began, B gave him a knife which he used to stab the deceased. At trial, A goes back on his statement and both A and B say that they had nothing to do with the stabbing, but there is evidence that the fingerprints of both A and B were on a knife found at the scene. In considering whether the account given by A in his statement was true, the jury would be entitled to have regard to the fact that the two sets of fingerprints were on the knife, as being consistent with his story that B handed the knife to him and he used it to stab the deceased. Indeed, the corroboration provided by the fingerprint evidence might well be the reason why they accepted that A's confession was true and so decided to find him guilty. If the Crown approach is correct, however, the jury will be told that, if they find the Crown case against A proved, in going on to consider the case against B, they will be entitled to have regard to the fact that his fingerprints, along with those of A, were on a knife found at the scene and to the "fact" that A is guilty of stabbing the deceased. But, at the same time, the judge will have to direct them that, if in reaching their verdict against A, they find that B handed the knife to A shortly before the fight began, they must disregard that fact when considering the case against B. Any reasonable jury would find such a direction not just perplexing but impossible to apply.

50. Counsel for the Crown confined their proposed rule to the situation where the jury find A guilty. But guilt makes no sense as a touchstone for such a rule. Suppose, for instance, that A and B are co-defendants, A being charged with possessing heroin with intent to supply it to another, and B with being concerned in supplying the heroin. The theory of the Crown case is that, when he was arrested, A was a courier taking the heroin from B to a street dealer. There is circumstantial evidence of contacts between A and B, but the only evidence that B gave the parcel containing the heroin to A is in a statement by A to the police. In that statement, A also says that he thought that the parcel contained fake Viagra tablets. In addition the prosecution evidence shows that, when the police opened the parcel in front of him, A appeared to be astonished that it contained heroin powder. The Crown lead the evidence of his mixed statement. A does not give evidence. The jury, having considered A's statement, decide that B did indeed give the parcel of heroin to A to carry to the street dealer and that A was carrying it to the dealer, but acquit A on the ground that he neither knew nor suspected, nor had any reason to suspect, that the parcel contained a controlled drug. Since A is not found guilty, there is no "fact" of guilt which the jury can use against B. But, in any rational world where the kind of rule for which the Crown contend operated, the jury would surely be able to use the "fact" that B gave the parcel of heroin to A in considering whether B was concerned in supplying heroin. A's knowledge or suspicions about the contents of the parcel, and hence his guilt or innocence, are completely irrelevant to this issue.

51. This example simply goes to show that, in reality, on the Crown's approach, what the jury are being asked to do is to use their conclusions on the evidence against A in the case against B. That is tantamount to using the evidence itself, which is admissible against A, as evidence against B, against whom it is inadmissible. If, instead of first considering the evidence of A's confession in relation to A and reaching a conclusion on it as to his guilt, they first considered that evidence in relation to B, they would come to precisely the same conclusions in respect of both A and B. The "modest 'erosion'" of the hearsay rule simply obliterates the rule as it applies to statements of co-defendants in a joint trial.

52. Of course, the general hearsay rule and, more particularly, the rule that the extrajudicial admission or confession of one defendant is admissible only against him, are productive of anomalies. Generations of judges and practitioners have been well aware of this. One area where the point used to be sharply focused was divorce on the ground of

adultery. In *Rutherford v Richardson* [1923] AC 1, 5, for instance, Viscount Birkenhead stressed that the decision of legal issues must depend on rigid rules of evidence necessarily general in their scope. It was very likely, therefore, in individual applications, to present an appearance of artificiality and even of inconsistency. He added:

> "The issues pronounced upon by courts in criminal, and indeed, in civil matters are attended with such decisive consequences that the adoption in matters of evidence of a standard of admissibility which is so cautious as to be meticulous may not only be defended, but is in fact essential."

He illustrated his point in this way, at p 6:

> "Applying these considerations to the kind of difficulty which has often presented itself in the Divorce Court, we find that a case which has sometimes been ignorantly derided is in fact both logical and defensible: for instance A, a husband, brings against his wife, B, a petition for divorce on the ground of her adultery with a named co-respondent, C. There is some independent evidence against both B and C, but not sufficient to justify a positive adverse conclusion. B, however, makes a full confession. Here the court may very reasonably pronounce a decree against B, while concluding that the matter is not established as against C. Indeed, to hold otherwise would be to lay it down that the admission or confession of B – which may be quite untrue and which may be induced by hidden and private motives – is to be treated as good evidence against C. And so it happens that the court may quite reasonably conclude that it is proved that B has committed adultery with C, but not that C has committed adultery with B."

Many similar statements of the law on adultery are to be found in both the English and Scottish reports, as well as in textbooks on the law of evidence. In the Court of Session, indeed, at one time tyro advocates always had to consider the point when drafting summonses in actions of divorce on the ground of the wife's adultery. If there was only sufficient evidence to prove the adultery against the wife, then the wife would be the sole defender, but if there was also sufficient evidence against the

paramour to prove adultery, he would be made a co-defender, with a view to proving his adultery and recovering the expenses of the action from him. Nearly always, the course to be adopted depended on whether the paramour was present at the time when the wife admitted her adultery to the private detectives acting for her husband.

53. On the other hand, if the general approach favoured by the Crown were correct, it is hard to imagine a clearer case than adultery for applying their remedy, since the adulterers were necessarily connected with one another. When the judge considered the wife's admission and the other evidence, as Viscount Birkenhead notes, he might conclude that she committed adultery with the paramour. Having made that finding, why should he not have applied it in considering the case against the paramour and so concluded that the paramour committed adultery with the wife? Apparently, the Crown's answer would be that the only "fact" that the judge could consider in relation to the paramour was that the wife had committed adultery – not that she had committed adultery with the paramour. So the judge would have to truncate his finding when considering the case of the paramour. Needless to say, there is not the slightest hint of such a bizarre approach in the case law. On the contrary, the cases show, quite simply, that the evidence of the wife's confession was regarded as inadmissible against the paramour and so it formed no part of the evidence in the case against him. So the court would find that the wife committed adultery with the paramour but not that the paramour committed adultery with the wife.

54. Wigmore describes this result as "perfectly and absurdly artificial" and says that it "negates the claim of courts of justice to be efficient fact-finders": *Evidence in Trials at Common Law* (Chadbourn rev, 1972), Vol 4, para 1076 n 13. There is force in that criticism, especially as regards the field of civil law. Not surprisingly, therefore, the Civil Evidence Act 1995 replaced the common law rules with a new system which includes carefully worked-out safeguards. In considering whether it is appropriate for the House to make significant changes in the rules on extrajudicial confessions of co-defendants in criminal trials, it is important to bear in mind the words of Lord Reid in *Myers v Director of Public Prosecutions* [1965] AC 1001. The case concerned a different aspect of the law of hearsay in criminal proceedings and was decided in 1964, before the Law Commission was established and before the Practice Statement allowing the House to depart from its previous decisions. Nevertheless, Lord Reid's statement of principle, at pp 1021E – 1022C, as to the inadvisability of the House modifying particular aspects of the law on hearsay evidence, remains as powerful today as when he made it:

> "I have never taken a narrow view of the functions of this House as an appellate tribunal. The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this House in old cases. But there are limits to what we can or should do. If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations: that must be left to legislation. And if we do in effect change the law, we ought in my opinion only to do that in cases where our decision will produce some finality or certainty. If we disregard technicalities in this case and seek to apply principle and common sense, there are a number of other parts of the existing law of hearsay susceptible of similar treatment, and we shall probably have a series of appeals in cases where the existing technical limitations produce an unjust result. If we are to give a wide interpretation to our judicial functions questions of policy cannot be wholly excluded, and it seems to me to be against public policy to produce uncertainty. The only satisfactory solution is by legislation following on a wide survey of the whole field, and I think that such a survey is overdue. A policy of make do and mend is no longer adequate. The most powerful argument of those who support the strict doctrine of precedent is that if it is relaxed judges will be tempted to encroach on the proper field of the legislature, and this case to my mind offers a strong temptation to that which ought to be resisted."

In *R v Blastland* [1986] 1 AC 41, 52H Lord Bridge of Harwich said that the majority decision of the House in *Myers v DPP* "established the principle, never since challenged, that it is for the legislature, not the judiciary, to create new exceptions to the hearsay rule."

55. Whether or not it has always been followed religiously, Lord Reid's guidance is particularly apposite in this case where the Law Commission conducted a wide survey of the law and did not support any change in relation to Crown evidence of extrajudicial admissions of co-defendants in criminal trials. In their report on *Evidence in Criminal Proceedings: Hearsay and Related Topics* (Law Com No 245, 1997), para 8.96, they said

> "A hearsay admission is still evidence only against the person who made it, and a jury must be warned accordingly. A number of our respondents thought it extremely important that this principle be retained, and we agree."

Plainly, like Viscount Birkenhead, the Law Commission considered that, where the consequences of conviction in a criminal trial are so serious, it is essential to adopt a standard of admissibility on this matter which is so cautious as to be meticulous.

56. Even more importantly, Parliament agreed with, and gave effect to, the Law Commission's conclusion. Section 118(1) of the Criminal Justice Act 2003 specifically preserves any common law "rule relating to the admissibility of confessions or mixed statements in criminal proceedings."

57. If adopted, the Crown's submission will, in effect, destroy one vital aspect of the common law rule which Parliament has so recently decided should be preserved. In my respectful view, it is not for the House in its judicial capacity to contradict such a clear and recent expression of the will of the legislature, especially when there is no principled basis for doing so. In any event, the proposed change is likely to have undesirable effects in practice. Often, joint trials will be liable to produce different results from separate trials, to the prejudice of defendants. Applications for separate trials can be expected to multiply accordingly. The law of evidence as it is applied by the courts, day in day out, will be unsettled. Certainty will give way to uncertainty and the present, sometimes difficult, distinctions will be replaced by other distinctions which juries will neither understand nor be able to apply sensibly. In short, it seems likely that the House is storing up fresh difficulties for trial judges and juries.

58. For these reasons, as well as for those to be given by my noble and learned friend, Lord Carswell, I would allow the appeal and hold that the Recorder was wrong to reject the appellant's submission of no case to answer.

LORD CARSWELL

My Lords,

59. Two long-accepted fundamental principles of the criminal law lie at the heart of this appeal. The first is the rule against the admission of hearsay evidence and the second is the principle that evidence which is admissible only against one co-defendant cannot be taken into account when assessing the guilt of another. The way in which the application of these principles can have an important impact on the result of a trial may be seen in high relief in the present appeal. The question before the House is whether they can or should be modified in the manner which was regarded as justifiable in the courts below.

60. Since the facts and the course of the trial have been summarised in the opinions of my noble and learned friends Lord Steyn and Lord Rodger of Earlsferry, I do not need to do more than deal with them in outline in so far as they are material to the question of law in issue. The case against Raymond Ryan was, apart from his admissions to Vanessa Salter, exiguous and circumstantial. Taken at its height, it was that he had followed the victim Mario Commatteo in his Ford Sierra car on several occasions; he went four or five times to see the appellant Hayter; on one occasion he was observed in Hayter's premises counting out a large sum of money; and Vanessa Salter saw a piece of paper in his flat which bore the words "Whyteleafe" (Commatteo's home address) and "Merstham" (the location of his business premises). He also failed to refer in interview to some facts or circumstances which he might have been expected to mention. It was not suggested that a reasonable jury could have convicted him of the murder of Commatteo if the evidence had amounted to nothing more than that. The oral admissions which he made to Vanessa Salter were therefore crucial to the Crown case against Ryan as it stood at the close of the prosecution evidence.

61. The evidence against Hayter was equally exiguous at that stage. He was very closely and directly implicated in procuring the crime in the statements made by Ryan to Vanessa Salter, but this hearsay evidence was admissible only against Ryan. It was correctly conceded on behalf of the Crown in the statement of facts and issues in the appeal to your Lordships that the circumstantial evidence against him did not provide a case to answer unless it could be proved that Ryan was the killer. If at the close of the Crown case there was evidence of that fact admissible against Hayter, then the circumstantial evidence tending to

prove Hayter's complicity, added to the fact that Ryan killed Commatteo, might have been regarded as sufficient to amount to a prima facie case of murder against Hayter.

62. At the close of the Crown case counsel for the appellant submitted that there was no case to answer against him, that is to say, that on the evidence admissible against him at that stage, taken at its height and all accepted as true, a reasonable jury properly directed could not find him guilty of the murder of Commatteo, and the judge should direct an acquittal (I shall refer to this by the convenient term familiar to Irish lawyers as the "direction" stage). A similar submission was made on behalf of Angela Bristow, but none was advanced on behalf of Raymond Ryan.

63. In a careful ruling the Recorder of London, the late Judge Hyam, rejected the submission made in Mrs Bristow's case and went on to consider the appellant's. He considered the authorities cited to him and in particular *R v Hickey and others* (1997, unreported), which he distinguished, stating at pp 11-13 of his ruling:

> "In stark contrast to that case, the prosecution in this case do not seek to use the alleged confession by Ray Ryan to Vanessa Salter against either of the other two defendants. What they seek to do is to prove their case against Ray Ryan that he killed Commatteo at 79 Whyteleafe Hill on 30 March 2000. If they establish that, and only if they make the jury sure that Ryan killed Mario Commatteo, do they assert that the jury can take their own finding into account in deciding whether Angela Bristow procured Paul Hayter to recruit Ryan to kill Commatteo …
>
> In contrast to that case there is no issue as such between the Crown and Mr Hayter as to whether Mr Ryan was the killer. Mr Hayter says, in effect, I do not know whether he was there or not. If you the Crown say he was, you prove it.
>
> He goes on to say that if you cannot prove it, you have no case against me. But if you do prove it you still have no case against me, because I knew nothing about any such crime. It is not in my league.
>
> This analysis shows that the prosecution are not using and do not seek to use the alleged confession of Raymond Ryan to confront any part of Mr Hayter's defence. There

> is thus no erosion of the fundamental evidential rule that the alleged confession of one defendant in the absence of the other defendant is not evidence against that other defendant.
>
> It seems to me that since the Crown are put to proof that Raymond Ryan killed Commatteo, they are entitled to go ahead and prove it, if they can, by admissible evidence against Raymond Ryan.
>
> If they succeed in that proof, they may then use the fact of guilt produced by that evidence in seeking to prove by other evidence the guilt of the co-defendants".

The judge continued at pages 15-16:

> "I am fully satisfied that if there were no more evidence in this case, a reasonable jury properly directed could convict all three of the defendants. They could first convict Raymond Ryan, if they accepted the evidence of Vanessa Salter that Raymond Ryan had confessed that he had killed Commatteo.
>
> If they found him guilty on that evidence, they could then consider the circumstantial evidence alleged against Mrs Bristow and if sure that she procured the murder convict her.
>
> Finally, they could consider the circumstantial evidence against Mr Hayter if and only if they had concluded that Raymond Ryan killed, and Mrs Bristow procured, and if they accepted the circumstantial evidence adduced against Mr Hayter. They could, in those circumstances, convict them all, all the time being careful to observe the warning I shall give and explain why I am giving it, that the alleged confession by Raymond Ryan to Vanessa Salter is only evidence against Ray Ryan and not against the co-defendants."

The judge refused the application for a direction and proceeded with the trial. At the close of the evidence he directed the jury as he had indicated in his ruling. The jury convicted all three defendants of murder.

64. Hayter appealed to the Court of Appeal, and at the hearing counsel contended that the judge had been wrong to refuse his submission that there was no case to answer. Mantell LJ, giving the judgment of the court, stated that the court was impressed with the judge's reasoning and considered that his findings accorded with first principles. He examined the cases of *R v Hickey* (supra), *R v Rhodes* (1959) 44 Cr App R 23 and *R v Spinks* (1982) 74 Cr App R 263, concluding that they did not prevent the court from agreeing with the conclusion reached by the judge.

65. Mantell LJ set out the terms of section 74(1) of the Police and Criminal Evidence Act 1984 ("PACE"), which provides:

> "In any proceedings the fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom or by a Service court outside the United Kingdom shall be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that that person committed that offence, whether or not any other evidence of his having committed that offence is given."

He stated in paragraph 18 of the judgment of the court:

> "It seems to us that section 74 removes the foundation for the decisions in [*Spinks* and *Rhodes]*. Now it is unquestionably the case that a prior conviction would be admissible to prove, were it relevant to do so, that Mills or Fairey had committed the offences with which they had been charged. Similarly, in the present case the conviction of Ryan would be admissible in any retrial of the appellant. Is it sensible, in those circumstances, to hold that a jury cannot have regard to a conclusion which it had reached on evidence presented in a joint trial in order to prove the existence of a fact that is a pre-condition in law to establishing the guilt of the secondary party? We think not."

The court accordingly dismissed the appellant's appeal. It certified the questions set out by Lord Steyn at paragraph 5 of his opinion and

refused leave to appeal. The House of Lords subsequently gave leave to appeal.

66. Mr Kelsey-Fry QC for the appellant submitted that the judge was wrong to refuse his application for a ruling that there was no case for the appellant to answer. Starting from the premise that Ryan's confession to Vanessa Salter was admissible only against Ryan, he contended that unless it had been adopted or assented to by Hayter (which was not the case) it could not be taken into account in any way against the latter at the direction stage. He submitted that it was an impermissible erosion of this principle to direct the jury that they could rely upon their finding of guilt against Ryan – which was based almost wholly on that confession – but not that part of the content of the confession which implicated Hayter.

67. Admissions made against their interests by defendants in criminal matters are generally known as confessions, which are defined by section 76 of PACE as including "any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise." Like other admissions, they are provable under an exception to the rule against hearsay, which rule I now turn to examine.

68. The function of the law of evidence in an adversarial system of justice was usefully encapsulated in paragraph 1.2 of Discussion Paper No 1 (1990) of the Law Reform Advisory Committee for Northern Ireland, *Hearsay Evidence in Civil Proceedings.* It was there described as being

> "to govern the conduct of proceedings by determining how relevant facts may be proved – or, more often, how they may not be proved. When an exclusionary rule, such as the rule against hearsay, applies, the law does not prohibit the proof of a particular fact; but it does exclude the use of a particular kind of evidence to prove that fact."

The fact may, of course, be proved in some other way which does not offend against the rule.

69. The rule against hearsay has been effectively abolished in civil cases, the large majority of which are heard by judges without juries. The approach which underlies the reform brought in by the Civil Evidence Act 1995 is that a judge is equipped to determine the weight to be attributed to hearsay evidence and pay the appropriate amount of regard to it in assessing the totality of the evidence. In criminal cases, where jury trial is the norm, the rule has been preserved, notwithstanding some proposals for its abolition.

70. The reasons for the development of the rule against hearsay incorporate two strands, unreliability and unfairness. As it is stated in *Cross & Tapper on Evidence*, 8th ed (1995), p 565,

> "Legal historians are divided between those who ascribe the development of the rule predominantly to distrust of the capacity of the jury to evaluate it, and those who ascribe it predominantly to the unfairness of depriving a party of the opportunity to cross-examine the witness."

Sir Rupert Cross did not consider that distrust of the jury was a historically accurate ground for the development, but it seems probable that it played some part in it. As Lord Bridge of Harwich put it in *R v Blastland* [1986] AC 41, 54:

> "The rationale of excluding [hearsay] as inadmissible, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability in cross-examination."

The weakness of hearsay evidence which is most constantly described is that its quality cannot be directly tested in court. As Lord Normand observed in *Teper v The Queen* [1952] AC 480, 486,

> "The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost."

71. The second major principle to which I referred at the beginning of this opinion was that evidence which is admissible only against one co-defendant cannot be taken into account when assessing the guilt of another. The rule has no exception at common law; a confession is inadmissible hearsay against all but the maker of it: *Murphy on Evidence,* 8th ed (2003) para 8.15.3.

72. Before I discuss the application of these principles to the present appeal I must refer again to section 74(1) of PACE. This permits proof of a conviction without the necessity of calling evidence over again to prove the commission of the offence by the person convicted, the avowed object of the provision: see Hansard, HC Debates, 8 March 1984, cols 1625-6. The section abolished the much-criticised rule in *Hollington v F Hewthorn & Co Ltd* [1943] KB 587. It cannot, however, be directly invoked, as both the judge and the Court of Appeal accepted, since at the direction stage Ryan had not been convicted of any offence. The enactment of section 74 has, however, been invoked as a justification for amending the common law rule in the manner adopted in the lower courts.

73. The submission advanced by the Crown and accepted in the lower courts was that the jury would be entitled to take into account against Hayter the fact, if they found it to be established, that Ryan killed Commatteo and to add that to the circumstantial evidence in order to constitute a case of murder against Hayter. In my opinion this approach is flawed and cannot withstand examination. The case against Ryan depended critically on acceptance of the truth of his confessions to Vanessa Salter. To establish that he killed Commatteo it is essential to have regard to the content of that statement. Yet the jury was directed by the judge to disregard its content in considering the case against Hayter, since it was hearsay, but to take into account the fact that they found Ryan guilty on it. This instruction requires them not only to engage in mental gymnastics of an advanced and sophisticated kind which it is hard to expect the average jury to perform, but to indulge in what to my mind is false sophistry. I am quite unable to understand how any tribunal of fact, judge or jury, can legitimately take into account against one defendant a finding of guilt against another which is based almost solely on a confession whose contents are inadmissible against the first. I agree with the view expressed by Lord Rodger of Earlsferry at paragraph 47 of his opinion that this would be to turn inadmissible into admissible evidence. Such alchemy should not form part of the criminal law. Nor is it desirable that juries should be given directions which require them to draw such difficult distinctions and which are bound to cause confusion in their minds and misunderstanding. Those

concerned with reform of the law of evidence regularly state that the requirements for a rational law are simplicity, certainty and fairness. The approach adopted by the courts below would certainly fail to meet either of the first two criteria.

74. At the direction stage the evidence against each defendant must be considered as it then stands. The judge applies the test whether a reasonable jury properly directed could on that evidence find the charge proved beyond reasonable doubt against that defendant. It has to be borne in mind that only the evidence admissible against each defendant can be taken into account. At that stage the only evidence admissible against Hayter was insufficient to prove his guilt. The only means of linking him with the murder of Commatteo was through the confession made by Ryan, which was inadmissible against him. The way in which the lower courts approached this was by positing that the jury could on the evidence given in the prosecution case consider Ryan's case first, then if they found him guilty use the fact of his conviction to provide the necessary link between Hayter and Ryan's acts. But the only way in which they could find Ryan guilty was to rely on his confession. I am unable to agree with the view expressed by the judge and accepted by the Court of Appeal that the prosecution were not using Ryan's confession to confront any part of Hayter's defence. It seems to me inescapable that that is just what they were doing. Nor can I agree that the legislative policy behind the enactment of section 74 of PACE can give legitimacy to the course regarded as possible by the lower courts. However desirable it may be that rules of law which some might regard as technicalities should not be allowed to stand in the way of the achievement of a just result, that indirect reliance on the confession as against Hayter is in my view an impermissible breach of principle. If it is thought that that principle should be modified in the public interest – as to which there might be widely differing views when all the implications are considered – it is for Parliament to do it. The reasons set out by Lord Rodger of Earlsferry in paragraphs 54 to 57 of his opinion are in my view compelling.

75. If it is suggested that one can pray in aid the concept of conditional relevance to make it possible to take into account a co-defendant's confession, I must respectfully disagree. That concept relates to the dynamics of a criminal trial, as Lord Steyn has said, but I do not consider that it can plug the gap in the evidence against Hayter which existed at the direction stage. Evidence which is admitted as being conditionally relevant will have its relevance confirmed when a later piece of evidence is adduced in the course of the trial. The use of the concept for that purpose appears more clearly from the brief

discussion in *Phipson on Evidence*, 15th ed (1999) para 6-10. But at the direction stage one must consider the evidence as it stands, on the assumption that no further evidence will be adduced. That being so, there is nothing to come which will make the disputed piece of evidence relevant and admissible if it is not already so. The only factor which would make it admissible is the possibility that the jury would decide to convict Ryan on the evidence of his confession and then use that finding to fill the gap in the evidence against Hayter, a course which, for the reasons I have given, I consider to be incorrect.

76. Having decided the matter in issue in this appeal on principle for the reasons which I have set out, I do not find it necessary to enter into any extended discussion of the previous cases cited by the Court of Appeal. I would observe, however, that the issue in *R v Spinks* (1982) 74 Cr App R 263 was the same as that which we have had to consider in the present case. In my opinion the conclusion should be the same if *Spinks'* case were tried today, notwithstanding the enactment of section 74 of PACE, and the decision remains correct. In *R v Rhodes* (1959) 44 Cr App R 23 the case went to the jury and the issue was not the sufficiency of the evidence at direction stage. The Court of Appeal held that the judge's statement to the jury that they could take into account their finding of guilt against one defendant M, which had been based largely on a confession by him, when considering the case against the other defendant R, nullified his previous correct direction that M's confession was not evidence against R. It is suggested that this case would be decided differently since the enactment of section 74. I should prefer to reserve my opinion on that proposition for decision if it becomes relevant in a future case. The issues in *R v Hickey and others* (1997, unreported) are so far from those in the present appeal that I do not derive material assistance from the decision.

77. For the reasons which I have set out and for those given by Lord Rodger of Earlsferry I would allow the appeal and quash the appellant's conviction. I am conscious that adherence to the accepted principles of the common law governing the admission and exclusion of evidence in criminal trials may well result in the acquittal of a defendant against whom the evidence, if admitted, would make a strong case for his guilt. The Crown did, however, have the option of proceeding against the appellant in a separate trial, which might have enabled them to present admissible evidence which was sufficient to ground a conviction. They did not do so, and I am of the clear view that to modify the common law rule to fill the gap left in the evidence against the appellant would be an undesirable erosion of accepted principles.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

78. I am grateful to my noble and learned friends Lord Steyn and Lord Rodger of Earlsferry for their full exposition of the facts of this appeal and shall accordingly confine myself to a brief consideration of the point of law arising for decision, adopting for this purpose the shorthand used in the certified questions. These are as follows:

> "(1) In a joint trial of two or more defendants for a joint offence is a jury entitled to consider first the case in respect of defendant A which is solely based on his own out of court admissions and then to use their findings of A's guilt and the role A played as a fact to be used evidentially in respect of co-defendant B?
>
> and, if so,
>
> (2) Where proof of A's guilt is necessary for there to be a case to answer against B is there a case to answer against B at the close of the prosecution case where the only evidence of A's guilt is his own out of court admissions?"

79. Realistically there is but a single issue for determination since the answer to both questions must inevitably be the same. If the answer to question one is "no", then plainly B would have no case to answer; so much, indeed, is implicit in the words "if so" introducing question two. If, however, the answer to question one is in the affirmative then logically there would be a case to answer at the close of the prosecution's case since *ex hypothesi* on the evidence already adduced the jury could properly decide first that A was guilty and then that A's guilt, coupled with such other evidence as went to incriminate B, proved B guilty too.

80. Whilst, therefore, in my judgment everything turns on question one and no separate consideration is required of question two, the very formulation of question two does serve to demonstrate, as I myself

believe to be the case, that the Crown's argument (and, indeed, the rulings in this case both by the Recorder of London and by the Court of Appeal) necessarily involves some modification of what Russell J in *R v Spinks* (1981) 74 Cr App R 263, 266 called "the universal rule which excludes out of court admissions being used to provide evidence against a co-accused, whether indicted jointly or separately". The Crown's argument requires that A's out of court admissions are used at the halfway stage to provide evidence against B and that, to my mind, continues to be the position even once the jury have relied on those admissions to convict A. Evidence inadmissible against B is not suddenly transformed by that finding (of A's guilt) into admissible evidence: if the Crown's argument is soundly based, the admissions must (albeit only in a closely circumscribed way) have been admissible against B all along. This too, I may note, appears to have been Professor Birch's view when commenting on the Court of Appeal's decision in the Criminal Law Review – (2003) Crim LR 887-888:

> "The experienced trial judge's bold ruling made clear that, in his opinion, the prosecution were not seeking to use the evidence of A's confession 'to confront any part of B's defence'. Its use did not therefore 'erode the fundamental principle that the alleged confession of one defendant in the absence of the other defendant is not evidence against the other defendant'. To the extent, however, that the proof of A's guilt was a fundamental building-block in the prosecution case against B, there was some erosion of the principle, and an impressive array of common law authorities stand against it." (I have substituted A and B for the parties' names)

81. The critical question for your Lordships is whether this modest "erosion" of the basic principle ought properly to be countenanced. (The "impressive array of common law authorities" of which Professor Birch speaks is presumably a reference to the three decisions discussed by the Court of Appeal below: *R v Rhodes* (1959) 44 Crim App R 23, *R v Spinks* (1981) 74 Crim App R 263 and *R v Hickey and others* (unreported, transcript dated 30 July 1997.)) In answering this question one's starting point must surely be the supposed rationale of the basic rule itself. Why is it "the universal rule" that out of court admissions made by A in the absence of B are admissible only against A? The answer to this question is, of course, the hearsay rule itself: the admission of A's confession even against A himself is itself an exception to that rule. What, therefore, one asks, is the explanation for this exception?

82. To my mind there can be only one rational answer to this question: admissions made by A are admissible against him for the obvious reason that he would be unlikely to have made them unless they were true. Subject always to the safeguards provided for by section 76 (2) of the Police and Criminal Evidence Act 1984 (PACE)—which excludes confessions obtained oppressively or otherwise so as render them unreliable—such admissions are seen to be cogently, indeed powerfully, probative of the case against A. Why, then, should not such admissions be admissible too against A's co-accused B? The conventional answer to this question is that they were not made in B's presence so that B had no opportunity to deny them all the time they were made. Routinely juries are directed:

> "Members of the jury, bear in mind that anything said by A to [the police or, as here, Vanessa Salter to whom A is said to have confessed] is evidence only against A and not against B. The reason for this is that it would obviously be unfair to take account of what was said by A against B when B was not there at the time and so not in a position to deny it".

83. I confess, however, to having always thought this direction a hollow one. Why would it be "unfair", let alone "obviously unfair", to regard A's confession of his guilt as evidence (so far as it goes) also against B just because B was not there at the time? Is it really to be supposed that B, had he been there, would have denied it? And even if he had been there and denied it, how would that materially have assisted his case? Why should not the jury be directed instead simply to assume in B's favour that, had he been present when A made his admission, he would have resolutely denied it if and insofar as it might otherwise have been thought to constitute evidence against him?

84. Let me make it absolutely plain that in everything I have said thus far I have been assuming that A's confession is directed solely towards incriminating himself and that, whilst of course it tends to establish A's guilt, it says nothing directly implicating B. In other words it is incriminatory against B only insofar as the fact of A's guilt of itself helps to establish B's guilt (perhaps because, as in *Rhodes*, A and B had been in each other's company at the time of the offence or because, as in *Spinks*, it was necessary to prove that A had committed an arrestable offence, or for whatever other reason). I have assumed, in Professor Birch's words, that "proof of A's guilt [is] a fundamental

building block in the prosecution case against B", and that A's confession goes no further than this.

85. I understand that others of your Lordships are troubled by this assumption; it is, indeed, suggested that there is no relevant difference whatever between those parts of A's admissions which refer to his own actings and those parts which refer to the involvement in the offence of B himself. This I cannot accept: rather there seems to me a critical distinction between the two. I readily acknowledge that those parts of A's confession which directly implicate B ought strictly and for all purposes to be excluded from the jury's consideration of the case against B. But the reason for this is because those parts of A's confession which directly implicate B are not admissions against A's interest at all and so are materially less likely to be true. The objection to their admissibility against B is less, therefore, that they are hearsay than that there is a real risk that A will have had his own motives, and not merely a wish to clear his conscience, for casting blame on B.

86. With these thoughts in mind let me return to the certified questions. It is important in addressing them to recognise that the effect of the judgment below is distinctly limited. It is not proposed to admit A's confession as evidence against B for all purposes, but only subject to two conditions: first, that the jury are sufficiently sure of its truthfulness to decide that on that basis alone they can safely convict A; and secondly, that the jury are expressly directed that when deciding the case against B they must disregard entirely everything said out of court by A which might otherwise be thought to incriminate B. I acknowledge, of course, that the jury, in deciding at the first stage to convict A on the basis of his own out of court admissions, will already have had regard to that evidence for that purpose when they then come to use A's conviction as itself a building-block in the case against B. But by that second stage of the jury's deliberations A's out of court admissions will have been in effect subsumed within their finding of guilt against A.

87. What, then, apart from an unswerving adherence to the hearsay rule in its purest and most absolute form, are the objections to using a co-defendant's admissions in this carefully and narrowly circumscribed way? It is suggested that the jury will be unable to disentangle those parts of A's out of court admissions which go only to implicate A himself in the events from those which go also to incriminate B. But is this really any more difficult for the jury to follow than the basic direction that A's out of court admissions are evidence against A but not

against B? And consider this further point. It is implicit in the appellant's argument that, if the case against A consists not merely in his own out of court admissions but also of other evidence (perhaps fingerprint or identification evidence), then the jury would have to be directed that they could use their finding of guilt against A as a building-block in the case against B, but before doing so they would have to be sure that they would still have found A guilty even without the evidence of his out of court admissions. Now that, one might think, really *would* puzzle the jury.

88. That indeed to my mind illustrates the intrinsically unsatisfactory nature of the appellant's case. If, as I understand to be common ground, there is no good reason why A's guilt should not ordinarily be regarded by the jury as a fact capable of being used evidentially against B (its relevance, of course, being dependent always upon the particular issues arising in B's case), why should it make the least difference whether A's guilt is established by his own out of court admissions or by eyewitness, fingerprint, DNA, circumstantial or any other sort of evidence, or, indeed, by any combination of these different sorts of evidence?

89. As it seems to me the appellant offers no satisfactory answer to that question. His only answer, indeed, is to invoke the hearsay rule: all other forms of evidence, points out Mr Kelsey Fry QC, are direct evidence adduced at the trial and admissible against all defendants; the evidence of A's out of court admissions is by contrast adducible only as an exception to the hearsay rule and only against A. Mr Kelsey Fry unsurprisingly disavows any claim to commonsense or justice in support of his argument. It depends, he acknowledges, entirely upon a strict adherence to a long established rule which, he submits, only Parliament can now modify.

90. Although, in common with the Court of Appeal, I have not found this an easy point, I conclude that Mr Kelsey Fry's submission should be rejected. It is now twenty years since section 74 of PACE was enacted and with it the prosecution's right to adduce in evidence against an accused another person's prior conviction. True it is that section 74 has no direct application to a case like the present where both accused stand trial together. But it is hardly to be thought that Parliament, had it turned its mind to the comparatively rare case like the present where the question arises of using evidentially against B the jury's already formed conclusion that A is guilty, would have proposed a different approach. There is no logical reason why it should have done so, but rather every reason why it would have legislated for a similar approach. After all, as

Professor Birch points out, in a joint trial B is in a better position to challenge whatever evidence points to A's guilt than if A had already been convicted at a previous trial. Moreover by the same token that under section 74 another person's conviction is admissible against the secondary accused irrespective of the nature of the evidence on which that conviction had been based—whether identification evidence, out of court admissions or even, indeed, the principal defendant's plea of guilty at trial—so too, as already suggested, the particular evidential basis on which the jury find A guilty should equally make no difference merely because, for obvious good reason, the two defendants are tried jointly.

91. For these reasons, which do not, I think, differ substantially from those given by Lord Steyn, I too would answer both the certified questions in the affirmative and would in the result dismiss this appeal.