

First reference to the Miscarriages of Justice Panel

1. On 12 May 1972 the British Lions rugby team was due to depart from Heathrow for its South African tour. The team had been staying at the Star and Garter hotel in Richmond. They were due to depart by coach at about 4pm from the car park of the hotel. A Special Demonstration Squad ('SDS') undercover officer HN298 "Michael Scott", who had infiltrated the Putney branch of the Young Liberals, learnt of a meeting at the home of Ernest Rodker at which a group of individuals would make plans to try and stop them leaving. The circumstances in which he learnt of the meeting do not matter, save that they did not leave enough time for him to contact those in operational charge of the SDS before he attended it.
2. The meeting lasted from 1:30 pm until 3:15 pm. HN298 recorded what was discussed and what plans were made in paragraphs 1 to 7 of an intelligence report typed and dated 16 May 1972 (MPS-0526782/9). One of the two principal organisers, Professor Jonathan Rosenhead accepts that this part of the report is accurate and I have no reason to doubt that it is.
3. At 3:15 pm the participants made their way to the hotel car park. Some of them, including HN298 drove their cars and parked them there, blocking the exit. A builder's skip arrived and was left in the car park. A plan to disable the coach was abandoned due to the presence of a single uniformed police officer, who summoned additional police help. Building workers removed the cars. About 20 protesters then sat down in the path of the coach, in an attempt to prevent its departure. Precisely where they sat down was a matter of dispute: most of them said that they sat in the car park, on private land. Police officers, including the Chief Inspector in command of the police unit which attended, said that 14 of them sat down in Nightingale Lane, a public highway leading off the car park. They were arrested and later charged with obstructing the highway and obstructing a police officer in the execution of his duty. One of them was HN298.
4. All were advised by Benedict Birnberg at Richmond police station. Advice reportedly given by him to Professor Rosenhead was discussed at private meetings of the defendants, attended by HN298 on 21 May and 11 June 1972. All pleaded not guilty at Richmond Magistrates Court on 15 May 1972. Seven, including HN298 and Christabel Gurney were tried and convicted at Mortlake Magistrates Court on 14 June 1972. She has little memory of the trial, save that it was over rapidly and HN298 cannot remember whether or not he gave evidence. The trial of the remaining seven was postponed to enable them to consider making an application to the Divisional Court. Six, including Ernest Rodker were tried and convicted of both offences at Mortlake Magistrates Court on 12 July 1972.

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Professor Rosenhead was convicted on the same date of highway obstruction only. The remaining defendant was acquitted on 23 August 1972. No court record of proceedings has been recovered, but their outcome is recorded in a police schedule (MPS-0737126/1-4), the accuracy of which is not in dispute.

5. No one suggests that the true identity and role of HN298 were disclosed to the prosecutor or to the Court. HN298 says that it would have been silly to have done so, because it would have compromised his undercover role. Sergeant David Smith, who worked in the back office of the SDS attended Court on 12 May 1972, when the defendants, including HN298, pleaded not guilty. He produced a report to that effect typed and dated 15 May 1972 (MPS-0526782/13-14). He has yet to give oral evidence, but has produced a witness statement, which contains a passage which is unlikely to be disputed, in which he states that to his knowledge neither the prosecutor nor the magistrates knew that HN298 was an undercover officer.
6. HN298 reported what had happened to his superior officers to seek their direction as to what he should do. His Detective Inspector, HN294, sought the advice of MD Rodger, Commander (Operations) in a memorandum dated 16 May 1972. The choice proposed was for HN298 to continue to learn more about the group which he had penetrated, in which event he would probably have to apply for legal aid and to attend meetings with all arrested to discuss tactics, or to disappear from the scene. In a memorandum to DAC Ferguson Smith dated 17 May 1972, Commander Rodger stated his view: that advantage should be taken of the situation to keep abreast of the intentions the group. He said that he had discussed the eventual Court proceedings with HN294 and Sergeant Smith, who were waiting to see what Ernest Rodker and company decided to do. It was anticipated that he would convene a meeting in the near future to discuss tactics. In a memorandum dated 18 May 1972 DAC Ferguson Smith advised that provided the charges against HN 298 and the others arrested remain as at present formulated "then we should not run into difficulties and HN 298 will have to go through with it."
7. On 26 June 1972 HN294 reported the outcome of the case to Commander Rodger, who referred the report to DAC Ferguson Smith: the case should prove beneficial in that HN298 "has proved himself to the extremists and may well become privy to subsequent mischief".
8. This material satisfies me, to a high standard, that HN298 pleaded not guilty in the name of Michael Scott and that his true identity was not revealed to the prosecutor or the Court.

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9. Because the surviving defendants are elderly and one at least is infirm, it is, in my opinion, necessary that the outcome of the Court proceedings against them should be put right without delay. For that reason, I will express the reasons for my decision to refer their convictions to the Miscarriages of Justice panel in plain terms.
10. Home Office circular no. 97/1969 "Informants who take part in crime" (MPS – 0727104/1-2) stated, at paragraph 3 (a),

"The police must never commit themselves to a course which, whether to protect an informant or otherwise, will constrain them to mislead a court in any subsequent proceedings. This must always be regarded as a prime consideration when deciding whether, and in what manner, an informant may be used and how far, if at all, he is to be allowed to take part in an offence. If his use in the way envisaged will, or is likely to, result in its being impossible to protect him without subsequently misleading the court, that must be regarded as a decisive reason for his not being so used or not being protected."

and at paragraph 3 (g),

"Where an informant has been used who has taken part in the commission of a crime for which others have been arrested, the prosecuting solicitor, counsel, and (where he is concerned) the Director of Public Prosecutions should be informed of the fact and of the part that the informant took in the commission of the offence, although, subject to (c) above, not necessarily of his identity."

11. Although this guidance derived from the observations of the Court of Appeal in a case involving a classic informant (*R v Marco* (1969) Crim L.R. 205), they apply with equal force to an undercover officer who has participated in a crime for which he and others have been arrested and are to be prosecuted, whether or not the information which he has provided to his superiors is intended to be put to use in the prosecution. The guidance correctly stated a constant principle: the court must not be misled. Subsequent case law has established what is required: the prosecutor must be informed and must decide whether or not it is necessary to inform the Court; the circumstances in which he may not do so are rare in the extreme; it is for the trial Court to decide what, if any, disclosure should be made to the defence to ensure that justice is done: see *R v Patel and others* (2001) EWCA Crim 2505 and *R v Early* (2002) EWCA Crim 1904. HN298 did provide information about the offence for which he and others were arrested, albeit not until immediately after his release from Richmond police station. He did participate in the events which gave rise to the arrest. The prosecutor and the Court were

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deliberately misled about his identity and role in the events which it was considering.

12. Similar considerations led the Criminal Cases Review Commission ('CCRC') to refer the convictions of John Jordan and Michael Gracia to the Crown Court (for assaulting a police officer in the execution of his duty and being in unlawful possession of a police helmet at the offices of London Transport on 7 August 1996) on 31 July 2013 and 1 June 2015 respectively (see the confidential annex to the reference in the case of John Jordan (MPS-0721019)). The Crown Prosecution Service did not oppose either appeal and both were allowed. The reason for this outcome was one of those identified as a reason for referral in paragraph 6 of the CCRC's published casework policy: "whether the prosecution constituted... an affront to justice". The same reason applies in this case.
13. The permission of the CCRC will be sought for publication of the confidential annex. It will, in any event, be provided to the panel.

07 June 2021

Sir John Mitting
Chairman, Undercover Policing Inquiry