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IN THE COURT OF APPEAL  
CRIMINAL DIVISION

Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Tuesday 21 January 2014

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES  
(Lord Thomas of Cwmgiedd)

MR JUSTICE SIMON

and

MR JUSTICE IRWIN

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**J U D G M E N T**  
**(As Approved by the Court)**

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**REGINA**

- v -

**THEO BARD**  
**CAROLINE MARY WILLIAMS**  
**ROBBIN ALISTAIR GILLET**  
**GRAINNE GANNON**  
**MATTHEW JAMES FAWCETT**  
**BRIAN FARRELLY**  
**MELANIE EVANS**  
**AMY LOUISE CLANCY**  
**FELIX WIGHT**  
**ELIZABETH WHELAN**  
**ELLEN POTTS**  
**PAUL MORROZZO**  
**PAUL MELLETT**  
**SAM EDMUND MARTIN-GELL**  
**JASMIN KARALIS**  
**KRISTINA BONNIE JONES**  
**CHRISTOPHER WARD**  
**ALISON BETH STRATFORD**  
**OLIVER RODKER**  
**THEO BROWN**  
**LOUISE CATHERINE HEMMERMAN**  
**BRYN HOSKINS**  
**JONATHAN STEVENSON**  
**THOMAS FITZROY SOMERSET JOHNSTONE**  
**PAUL CHATTERTON**  
**THOMAS ANTHONY JOHN SPENCER**  
**MALCOLM CLIVE CARROLL**  
**CLEMMIE JAMES**  
**BERTIE RUSSELL**

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**Mr M Ryder QC** appeared on behalf of all the Applicants

**Mr B Altman QC and Mr A Blake** appeared on behalf of the Crown

Tuesday 21 January 2014

**THE LORD CHIEF JUSTICE:**

1. As long ago as 13 June 2008 the 29 applicants executed a plan to stop and occupy a freight train taking coal to Drax Power Station. Drax Power Station was a very large, coal-fired power station in North Yorkshire. Two of the applicants, dressed as Network Rail staff, signalled to the driver to make an emergency stop. The train came to a halt by a bridge. Both the train and the bridge were occupied. There was no violence. It was a protest of a political nature, motivated out of concern for climate change. The train driver stated that he did not consider that he was threatened at all by the protesters. He said that he was free to stay or leave. Coal was removed from the train. The protesters then locked themselves in the train. The occupation of the train lasted 16 hours. Eventually, all the applicants were removed by the police. As they were removed, they were arrested. On interview each stated that he or she had no comment to make.
2. They were all subsequently charged with one count of obstructing an engine using a railway, contrary to section 36 of the Malicious Damage Act 1861.
3. On 7 October 2008 they were committed for trial to the Crown Court. The case was then transferred to Leeds. In their Defence Statements the applicants accepted that they had occupied the train and took defences of necessity (an allowed offence) on the basis that they were trying to prevent a crime being committed. The crime related to the effect of coal on the climate.
4. Unsurprisingly, an application was made to the judge to consider whether that amounted to a defence in law. On 1 June 2009 the judge ruled that no such defence was available and that no evidence relating to the effect of burning fossil fuels and global warming could be called. Thereafter, some of the applicants pleaded guilty. The others who did not were convicted on 3 July 2009.
5. Between 4 September 2009 and 1 March 2010 each of the applicants was sentenced. It is unnecessary to detail the sentences; they varied between conditional discharges for six months, conditional discharges for twelve months with a requirement to pay compensation to Network Rail, and a community order with one requirement to carry out 60 hours of unpaid work within twelve months. In addition, a substantial costs order was made.
6. There was nothing unremarkable about the case. However, as a result of an investigation carried out by Mr Altman QC, the following transpired. According to Mark Kennedy (an undercover police officer, though unknown to be such by the protestors), on 7 June 2008 one of the applicants, Paul Morrozzo, approached him and asked him to hire a van to transport some of the activists to a rendezvous location. He agreed to participate and became responsible for the transportation.
7. It is clear from the documents through which we have been taken this morning that Mr Kennedy was authorised by the Assistant Chief Constable of the West Yorkshire Police and the Acting Chief Constable of the Yorkshire Police to act as an undercover officer from 29 January 2007. He so acted as part of the National Domestic Extremism Team ("NDET"), a team within the Metropolitan Police.

8. It is clear from the documents through which we have been taken that Mr Kennedy kept a detailed record of what happened. Throughout the time immediately prior to the stopping of the train, during its stopping and thereafter, reports were made by Mr Kennedy to the officer who was his handler. That officer forwarded those communications on to the most senior officers in the West Yorkshire Constabulary, including the Assistant Chief Constable.

9. None of that, however, was disclosed at the trial or at any time prior thereto. Mr Altman QC has told us today that he has investigated why that did not happen. The result of his investigation is that although it was beyond argument that the involvement of Mark Kennedy should have been disclosed, it was not. It appears that this was either the fault of the police or someone in the Crown Prosecution Service, or possibly counsel involved at that time. Each of those interviewed has given a different account. It is not the function of this court to enquire into the position, save for one matter with which we shall deal at the conclusion of our judgment. What is important, however, is that the applicants were all convicted without disclosure having been made of the role of Mr Kennedy.

14. The importance of that role is set out in paragraph 14 of the Respondent's Notice. It reads:

"... according to the records of [Mr Kennedy's] handler at the NDET, Mr Kennedy was the sole driver for this protest. A brief report prepared by the NDET as part of an internal view into Mr Kennedy's involvement contains the following important concession at point 8: 'It cannot be categorically stated that the event would or would not have taken place without 133 [Kennedy's code name] involvement'."

15. It seems clear to us - and it was the Crown's concession - that the involvement ought to have been disclosed. Had it been disclosed, no doubt issues would have been raised prior to the trial as to whether there had been an abuse of process or whether Mr Kennedy had acted as agent provocateur.

16. It is important to record that the activities of Mr Kennedy, when they became public as they did at the beginning of 2011, had an effect on another case, R v Barkshire [2011] EWCA Crim 1885. That case involved a protest at the Ratcliffe-on-Soar power station. It was in connection with a trial in relation to that protestor, which took place subsequent to the case with which we are concerned, that Mr Kennedy's actions became public.

17. It was not until July 2012 that the then Director of Public Prosecutions, Sir Keir Starmer QC, wrote to the lawyers of the applicants inviting them to apply for leave to appeal against their conviction. The delay must be accounted for by the need to investigate and carry out the enquiries that Mr Altman QC has done.

18. Following that letter, applications were made to this court for an extension of time in which

to seek leave to appeal against conviction. In June 2013 the Crown indicated in their Respondent's Notice that they would not contest the appeals. Accordingly, the Registrar has referred the applications to the full court. We grant the extension of time sought and we grant leave to appeal.

19. For the reasons we have given we have no doubt that these convictions must be quashed. There was a complete and total failure, for reasons which remain unclear, to make a disclosure fundamental to the defence. In those circumstances this court has no alternative but to quash the convictions.

20. We are extremely grateful to Mr Altman QC for taking us through the details of what has happened. The appellants therefore make no application for any further investigation by this court into this matter.

21. Having quashed the convictions, there are three applications before us. First, there is an application by Paul Morrozzo for his costs to be paid. He was the only one of the appellants who instructed counsel privately. Although the law has changed since the time of this trial, it appears to be uncontested that the court has power to make an order for the payment of his costs.

22. Secondly, there is an application for the out-of-pocket expenses of the other appellants.

23. Thirdly, there is an application for a representation order, first, in respect of the activities of the solicitors between 2011 and the applications to this court for leave to appeal; and secondly, for junior counsel to advise.

24. In respect of the application by Mr Morrozzo for his legal costs and in respect of the out-of-pocket expenses, we direct that the details of those are considered by an officer of this court. He is to report to the court and we will make an appropriate order in the sums found. The body which is to pay that amount is yet to be determined by us. We queried whether the sums should be paid out of central funds - in effect a charge to the Ministry of Justice - or whether they should be recovered from those who are responsible - either the CPS or the West Yorkshire Constabulary. Accordingly, we will determine that matter after we have received written submissions. We cannot make an order today because the amounts have to be carefully gone into. An order will be made in due course.

25. Secondly, as regards the representation order sought by solicitors and the representation order sought by junior counsel, in this case it is appropriate that only one lawyer was employed prior to the decision to instruct Mr Ryder QC. It seems to us that a bill must be submitted which shows the work of one lawyer in the period claimed. The court can then consider the appropriate division between solicitors and counsel. That is the order we make.

26. The result is that the convictions are all quashed. The ancillary orders relating to costs will be dealt with in the way we have indicated. As far as this court is concerned, no further enquiry needs to be made, thanks to the way in which Mr Altman QC has presented the case to us.