The distinction between lawful and unlawful intercepts can be criticised on two further grounds. As Lord Hope explained in *Morgans*, if unlawful intercepts fell outside the prohibition in section 9, "therein would lie the seeds of temptation for the unscrupulous" (p. 407). Finally, there is a critical human rights argument which militates against drawing this distinction. Even if the prosecution can introduce its evidence without alluding to the intercept, the defendant will almost certainly wish to explore this forbidden territory. By preventing him from testing the evidence, section 9 deprives the defendant of proper safeguards and, owing to an inequality of arms, infringes his right to fair trial under Article 6 of the Convention. Therefore, the unsurprising conclusion drawn by Lord Hope was that "evidence of material obtained by the interception by the persons mentioned in section 9(2) of the Act of 1985 of communications of the kind described in section 1(1) of that Act ... will always be inadmissible. It is not possible to say that section 9(1) of the Act provides for this in express language. But, in the context of the Act as a whole, the prohibitions which it contains lead inexorably to that result" (p. 407).

At the time of writing, a Regulation of Investigatory Powers Bill has just passed through its committee stage. This Bill, which will repeal the 1985 Act, is intended to subject investigatory powers involving the interception of communications to the requirements of human rights law. Clause 16 contains a broadly similar prohibition to section 9, but expresses more pointedly Parliament's determination to exclude any evidence, questioning, assertion or disclosure in legal proceedings which might suggest the existence or absence of an intercept warrant. The unholy muddle, ultimately unravelled in *Morgans* v. *D.P.P.*, is at least unlikely to recur.

RODERICK MUNDAY

PROTECTING THE MENTALLY DISTURBED DEFENDANT AGAINST HIMSELF

A PARTICULAR problem for English criminal procedure is the defendant on a murder charge who is (to put it crudely) so mad that he believes that he is sane—and instead of running the obvious defences of insanity or diminished responsibility, runs some other defence that seems plausible to him but no one else. In *Weekes* [1999] 2 Cr.App.R. 520 the Court of Appeal departed from its earlier case law on the subject and pointed the law in what this commentator feels to be a sounder direction.

In the earlier cases—notably *Kooken* (1982) 74 Cr.App.R. 30

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and *Straw* (1985) [1995] 1 All E.R. 187 (noted at [1995] C.L.J. 232)—the Court of Appeal took a hard and uncompromising line. Provided the defendant is found fit to plead, it said, he (or she) must live with the consequences of the decisions he has made. The trial judge is under no obligation to pull the defendant's legal chestnuts out of the fire by producing psychiatric evidence under his discretionary power to call witnesses, and his failure to do so gives the defendant no arguable grounds for appeal. Nor, it said, does it help the defendant to approach his appeal a different way by asking the Court of Appeal to exercise its own discretionary power to hear fresh evidence under section 23 of the Criminal Appeal Act 1968, with a view to getting it to substitute a different finding for the murder verdict that the jury reached without it. Thus the defendant stays convicted—and though mad, in jail, unless the governor can persuade the Home Secretary to transfer him to a mental hospital.

In *Weekes* the Court of Appeal, having examined these authorities and a number of more recent ones, took a softer line on the question of its power to hear "fresh evidence" from the psychiatrists under section 23. The fact that the defendant had been properly found fit to plead, it said, did not conclude the matter, and despite such a finding, it was still proper for the Court of Appeal to hear from the psychiatrists where his decision not to call them was significantly affected by his mental illness. On this basis it admitted the evidence, and then substituted for the murder verdict a conviction of manslaughter on grounds of diminished responsibility.

So far so good: but it would surely be much better if this particular problem never reached the Court of Appeal and the psychiatrists were always heard at trial. As things stand, however, it is often difficult to ensure the psychiatric evidence is heard at trial, because at trial it often suits neither the prosecution nor the defence to call it. The prosecution claims the defendant is a murderer and does not see it as its job to rebut the case that it has come to court to make. And the defence feels unable to call it, either because defence counsel fears that it will undermine some other plausible and preferable defence, like self-defence or provocation, or (as in the present case) because the defendant has expressly told his counsel that he will not allow it.

The answer, surely, is that the trial judge should be required to call the psychiatrists under his general power to call additional evidence: and that the Court of Appeal needs to rethink what was said in *Straw* and *Kooken* not only in relation to the point about hearing fresh evidence on appeal, but also on the judge's duty (if any) to call such evidence on his own initiative at trial.

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It is true that English criminal procedure is basically adversarial, and leaves the parties free to call what evidence they choose with minimum intervention from the court. But it only does so, surely, because it traditionally believes that this is the soundest way of establishing the truth, which is an essential ingredient for doing justice. As Denning L.J. once said, citing Lord Eldon, "truth is best discovered by powerful statements on both sides of the question": *Jones* v. *National Coal Board* [1957] 2 Q.B. 55.

Thus as the law now stands the judge (or magistrates) are already permitted—and sometimes expected—to intervene on their own initiative when this is necessary to prevent normal adversarial practices resulting in inaccurate fact-finding and consequent injustice. So if the defendant tries to plead guilty whilst still protesting his innocence, they must reject his "equivocal plea" and proceed to hear the evidence against him. Where after a guilty plea the prosecution and defence present an "agreed version" of the facts for the judge to sentence on, he can reject it if he thinks it is implausible and have his own investigations made. When directing the jury, the judge is bound to put before them any possible defence that is suggested by the evidence, even if defence counsel—whether for tactical reasons or incompetence—does not expressly rely on it.

Lastly, there are already situations where it seems to be recognised that the court must call witnesses whom neither side has called. In two decisions (*R.* v. *Wellingborough JJ., ex p. Francois* (1994) 158 J.P. 813 and *R.* v. *Haringey Justices, ex p. D.P.P.* [1996] Q.B. 351) the Divisional Court has indicated that the court should intervene to call a witness where the prosecution first says that it will call him, and then at trial tells the defence "We've changed our mind, you call him"—so forcing them, if they want the court to hear him, to call him as their own witness: which means they cannot cross-examine him, although he is probably favourable to the other side.

What lies behind these cases seems to be the principle that the court must intervene to call a witness where his evidence might realistically help to establish a defendant's innocence of the offence of which he stands accused. And it is hard to think of a clearer case for the application of this principle than where a mentally disturbed defendant on a murder charge perversely refuses to call evidence relating to his mental state.

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