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(subject to editorial corrections)

IN THE CROWN COURT IN NORTHERN IRELAND

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THE QUEEN

-v-

PHILIP JOSEPH BLANEY

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COGHLIN J

[1] The accused in this case, Philip Joseph Blaney, came to trial upon an indictment containing thirteen counts. At the conclusion of the Crown case I directed that the prosecution had not made out a prima facie case in respect of Counts 5,6,7,8,9,12 and 13 and, accordingly, I found the accused not guilty in relation to those counts. The trial then proceeded in respect of the remaining counts which related to the manslaughter of Elizabeth O'Neill on 5 June 1999, two counts of causing explosions by pipe bombs on the same date, possession of a pipe bomb on the same date and two counts relating to the possession of a firearm on a date unknown between 31 December 1997 and 1 December 1999.

The Factual background

[2] The deceased, Mary Elizabeth O'Neill, a 59 year old female, lived with her husband, John Joseph O'Neill, at 49 Corcrain Drive in the Westland Estate, Portadown an address at which the couple had resided for some 36 years prior to the death of the deceased on Saturday 5 June 1999. During the evening of Friday 4 June 1999 Mr and Mrs O'Neill had watched television in their home with Mr O'Neill retiring to bed at about 12.30 am. The deceased remained downstairs watching television in the living room at the front of the house. A short time after going to bed, Mr O'Neill heard a bang from the front of the house accompanied by a shout from his wife. He jumped out of bed and went downstairs. Upon reaching the third or fourth stair from the bottom he saw his wife in the doorway leading from the front hall into the living room. At that point there was a large explosion and the front hall was filled with smoke. He recalled seeing his wife standing in the hall with her

back to the living room door and shouting "Joe" just before falling back into the living room. Mr O'Neill summoned the emergency services but, despite their rapid attendance, his wife was found to be dead when the ambulance personnel arrived at approximately 12.45 am on the morning of 5 June. The report from the State Pathologist, Professor Crane, confirmed that the deceased had been killed as a result of injuries caused by a blast bomb a fragment of which had penetrated her chest lacerating her left lung and aorta, the principal artery of the body, in two places. The resulting massive haemorrhage, both externally and into the left chest cavity, had proved fatal. In the course of searching the premises, the civilian scenes of crime officer observed two holes in the living room window and, on the floor beneath the window, he found a brick. From the hallway pieces of an explosive device were recovered by the police and the Ammunition Technical Officer and these were subsequently identified by Dr Murray from the Forensic Science Agency as being some of the components of a "pipe bomb". Apart from the injuries to her chest, the deceased also suffered very serious damage to her left hand which, according to the report from Professor Crane, was consistent with her holding the device close to her body when it exploded. It seems that she died while making a valiant attempt to save herself, her husband and her home.

[3] Shortly after the attack upon 49 Corcrain Drive a second explosion occurred at No. 137 Westland Road, premises which are also located within the Westland Estate. At the material time, these premises were occupied by Janelle Woods, her sister and Janelle Woods' 10 month old daughter. At about 7.30 pm on 4 June 1999 Janelle Woods placed her daughter in a cot in an upstairs room and, at about 11.00 pm, her sister went to bed. Janelle Woods and her boyfriend continued to watch television until they both fell asleep about 12.30 am. At approximately 12.50 am they awoke as a result of a loud explosion and saw that the window was broken. Police and forensic examination of these premises subsequently revealed that a side window at the front of the house had been smashed and that the front garden also contained the remains of a pipe bomb similar to the device detected at 49 Corcrain Drive. Fortunately, no injuries resulted from the attack upon 137 Westland Road.

[4] It appears that the Westland Estate is predominantly Protestant and that the motive for both attacks was purely sectarian.

[5] The evidence by which the prosecution sought to link the accused with the attacks in the Westland Estate, together with the offences alleged in the tenth and eleventh counts on the indictment, consisted of a series of admissions alleged by the prosecution to have been made by the accused, subsequent to his arrest on 30 November 1999, during his detention at Gough Barracks between 30 November 1999 and 3 December 1999. Mr Treacy QC who appeared with Mr Berry on behalf of the accused objected to the admissibility of these admissions on the basis that they should be excluded by

the court in the course of exercising its discretion in accordance with Section 12(3) of the Northern Ireland (Emergency Provisions) Act 1996. The court may exercise such a discretion if it concludes that it is appropriate to exclude the statement in order to avoid unfairness to the accused or otherwise in the interests of justice. Accordingly, it was necessary to hold a voir dire.

[6] Mr Treacy QC put forward a number of arguments as to why the court should exclude the admissions alleged to have been made by the accused during the course of his police interviews:

The decision by the police to permit interview of the accused before he had been given access to legal advice

[7] The accused was arrested at his home at 7.05 am on 30 November 1999 and taken to Gough Barracks where he arrived at 7.40 am. During the course of being processed, at 8.52 am, the accused indicated that he wished to see a solicitor and nominated Gabriel Ingram. The custody sergeant arranged for Mr Ingram to be contacted at approximately 9.00 am and he indicated that he would attend at Gough Barracks at approximately 2.00 pm. Three other suspects had been arrested at the same time as the accused and each of these suspects had also nominated Gabriel Ingram as the solicitor with whom they wished to consult. The custody sergeant relayed this information to Detective Inspector Irwin, the officer in charge of the investigation who decided to contact Detective Superintendent McBurney with a view to seeking his authorisation to commence interviews before the arrival of Mr Ingram. In taking this course of action Detective Inspector Irwin took into account the fact that all four prisoners had requested access to the same solicitor, the fact that this solicitor had indicated that he would not attend before 2.00 pm, the fact that the briefing of the interviewing officers had been completed and the fact that all four suspects had been seen by the medical officer. Detective Inspector Irwin could not predict which of the prisoners would be seen first by the solicitor when he arrived and he reasonably anticipated that postponing the interviews would mean at least one of the prisoners not being available for interview until later that evening. The Detective Inspector balanced the requests from the prisoners to see the solicitor against the need to proceed with the investigation and to ensure that all persons in custody were dealt with expeditiously. Detective Inspector Irwin then discussed the matter with Chief Superintendent McBurney who then duly authorised the commencement of interviews pending the arrival of the solicitor. When Mr Ingram did not arrive at 2.00 pm, the police again contacted his office and he indicated that he would come at 4.30 pm.

[8] The accused was interviewed between 10.49 am and 11.52 am by Detective Sergeant Lynas and Detective Constable Morton and again, by the same two officers, between 12.50 am and 1.05 pm. A third interview took place on the same day with the same officers between 2.57 pm and 3.29 pm.

At 4.30 pm the accused had an opportunity to consult with his solicitor. A further interview between the accused and Detective Sergeant Lynas and Detective Constable Morton took place between the 4.49 pm and 5.18 pm. At 5.24 the accused had a further consultation with his solicitor.

[9] From 8.12 pm until 8.45 pm the accused was interviewed once more by Detective Constable Morton and Detective Sergeant Lynas and a sixth interview with the same two officers took place between 9.40 pm and 10.00. The accused's fingerprints were taken between 10.00 pm and 10.20 pm. This interview recommenced at 10.20 pm and terminated at 10.30 pm. During interviews 1-6 the accused made no admissions.

[10] The accused was again interviewed by Detective Sergeant Lynas and Detective Constable Morton from 10.58 pm on 30 November 1999 until 1.08 am on 1 December 1999. During this interview it is alleged that the accused made a series of admissions.

[11] On 1 December 1999 the accused was again interviewed by Detective Sergeant Lynas and Detective Constable Morton between 10.26 am and 11.52 am when the accused was given a further opportunity to consult with his solicitor. From 12.43 pm to 13.14 pm the accused was interviewed by Detective Sergeant Lawther and Detective Constable Lilley. He was again interviewed by Detective Sergeant Lynas and Detective Constable Morton from 3.16 pm until 4.56 pm and at 7.27 pm, shortly after he had been informed that the police had applied for an extension of his period of detention, the accused made a further request to see his solicitor. It seems that Mr Ingram had been expected to attend the police station at 6.00 pm but he had not done so and it was not possible to contact him until 8.30 pm. Detective Inspector Irwin again consulted Detective Chief Superintendent McBurney who, at 7.35 pm, gave authority for the accused to be interviewed pending the arrival of his solicitor. Thereafter a further interview took place between the accused and Detective Sergeant Lawther and Detective Constable Lilley between 7.51 pm and 8.21 pm. Mr Ingram attended the police station at 10.00 pm and had a consultation with the accused at that time. It seems that the accused had a further consultation with his solicitor between 10.40 and 10.59.

[12] The accused was again interviewed by Detective Sergeant Lynas and Detective Constable Morton on 2 December 1999 between 10.18 am and 12.01 pm. As he was being escorted back to his cell from the interview room he made a request to see his solicitor. Detective Inspector Irwin gave evidence that he took into account the previous unpredictability of Mr Ingram's attendances and sought a further authorisation from Detective Chief Superintendent McBurney for the accused to be interviewed pending the arrival of his solicitor and this was duly granted. Mr Ingram eventually attended at 2.30 pm when he consulted with the accused.

[13] A fourth and final request was made by the accused to consult with his solicitor at 9.03 am on 3 December 1999. Mr Ingram was contacted and indicated that he was going to court and could not attend until 11.30 am. Detective Inspector Irwin again sought and obtained an authorisation from Detective Chief Superintendent McBurney to interview the accused pending the arrival of his solicitor. Upon this occasion, Mr Ingram did not in fact arrive to consult with the accused until 4.00 pm.

[14] Mr Treacy QC argued that in permitting the accused to be interviewed before the arrival of his solicitor, despite the request of the accused to have access to his solicitor, the police committed breaches of Articles 6(1) and 6(3)(*c*) of the European Convention on Human Rights ("ECHR") and that, in such circumstances the court was bound to exclude the alleged admissions under Section 12(3) of the Northern Ireland (Emergency Provisions) Act 1996. In this context Mr Treacy QC relied upon Murray v UK [1996] 22 EHRR 29 and Quinn v UK (Application No. 23496/94).

[15] I rejected this submission. In the course of giving judgment in R v Forbes [2001] 1 AC 473, at p 487, Lord Bingham emphasised the importance of considering all the facts in relation to the Article 6 guarantee of a fair trial and the Strasbourg Court has repeatedly emphasised the importance of confining its attention to the history and the particular facts of the case when determining whether criminal proceedings have been unfair within the meaning of Article 6, particularly with regard to the accused's right of access to legal advice. The Quinn case bears some similarity to this case in that, in both, the police allowed the suspect to be interviewed before the arrival of a solicitor despite a request for access to the solicitor. However, unlike the Quinn case, in this case both sound and video recording facilities were available and it was the accused himself who refused to be interviewed on tape. In this case senior police officers who were familiar with the circumstances of the case, namely, Detective Inspector Irwin and Detective Chief Superintendent McCoubrey gave evidence and were cross-examined as to the circumstances in which authorisations were given for the accused to be interviewed prior to the arrival of his solicitor despite a request for access to a solicitor. Both officers described in detail the circumstances in which authorisations were given in accordance with paragraph 6.6(*b*)(*ii*) of the Code of Practice revised in July 1996 and issued under the provisions of Section 61 of the Northern Ireland (Emergency Provisions) Act 1991. Both men impressed me as responsible and conscientious officers who gave their evidence in a credible manner and I am satisfied that factors of significance which they considered included the fact that all four accused nominated Mr Ingram as their solicitor and that there was considerable difficulty in accurately predicting the time at which he would attend. Furthermore, the cases of Murray and Quinn both involved courts which drew an adverse inference from the silence of the accused when being questioned by the police prior to being given access to legal advice. In this case, the drawing of such

inferences did not arise. The accused had access to his solicitor at 4.26 pm on 30 November 1999 after three interviews during which he had made no admissions of any kind. A further interview then took place during which he made no admissions and he then again saw his solicitor for consultation at 5.24 pm. The accused is alleged to have made admissions during the seventh interview which lasted from 10.56 pm on 30 November until 1.08 am on 1 December. The accused was again interviewed at 10.26 am on 1 December during which interview it is alleged that he again made admissions and this interview was actually terminated at 11.52 am in order to permit the accused to consult with his solicitor. The accused did not give evidence on the voir dire and his solicitor did not make any complaint to the court that interviewing the accused prior to his arrival had resulted in unfairness. In the circumstances, I am satisfied that permitting the accused to be interviewed prior to the arrival of his solicitor, despite his request for access to a solicitor, did not involve any breach of Article 6 of the ECHR.

[16] Specific breaches of relevant Code

(*i*) Mr Treacy QC referred the court to paragraph 4.7 of the Code of Practice issued in connection with the audio recording of police interviews with persons detained under Section 14(1)(*a*) or (*b*) of the Prevention of Terrorism (Temporary Provisions) Act 1989 and submitted that the interviewing officers had not recorded on tape the accused's objections to the interview being tape recorded. The transcript of the tape of the accused's first interview with Detective Sergeant Lynas and Detective Constable Morton at 10.51 am on 30 November 1999 clearly records the accused as saying "I don't want to be interviewed by tape". After some formalities and the administration of the caution, the accused is again recorded as saying "I don't want to be interviewed on tape". In cross-examination by Mr Treacy QC Detective Sergeant Lynas agreed that the police officers had not asked the accused for his reasons as to why he should not be interviewed on tape and stated that they had simply switched off the tape at the accused's request. The detective sergeant also agreed that they had not explained in detail why it was in the accused's best interests for the interview to be taped. However, insofar as the accused's objections to the interview being tape recorded were clearly recorded on tape, it does not seem to me that there was any breach of paragraph 4.7. During all interviews the accused made absolutely clear his refusal to have the interviews tape recorded and I am quite satisfied from the evidence of Mrs Tunstall, clinical psychologist, that his reason for doing so was his belief that it would be impossible to deny the contents of an interview which was recorded on tape whereas he could always reject as falsified notes compiled by interviewing officers which he had not signed or otherwise independently acknowledged. If there was any breach of paragraph 4.7 I am satisfied that it was entirely technical and not such as to render the proceedings unfair or unjust.

(*ii*) Mr Treacy QC also argued that Detective Sergeant Lynas and Detective Constable Morton had acted in breach of paragraph 11.8 of the Code by failing to record the remarks made by the accused with regard to his involvement with the Special Branch of the then RUC at the start of the first interview. No reference to these remarks appeared in either the statement prepared by Detective Sergeant Lynas or that prepared by his co-interviewer, Detective Constable Morton.

It is clear that prior to the offences with which he was charged and, indeed, at the time those offences were committed, the accused was acting as a Special Branch source. The interviewing officers were aware of these activities before their first interview with the accused. Detective Sergeant Lynas gave evidence that, at the start of the first interview, after the audio tape had been switched off at the insistence of the accused, the accused had then mentioned his connection with Special Branch but had requested the interviewing officers not to make any notes about this matter. Detective Sergeant Lynas said that, accordingly, no notes of this matter were made although they did draw the attention of Detective Inspector Irwin to the fact that it was mentioned by the accused at the post interview briefing. Detective Sergeant Lynas said that, since the accused's involvement with Special Branch was already known to the them prior to the interview, it did not seem to be particularly important.

Detective Inspector Irwin confirmed that, after the first interview, Detective Sergeant Lynas had reported to him that the accused had spoken of his Special Branch connection and mentioned the code names of his Special Branch handlers but that, at the request of the accused, no written note had been made of these remarks. The Detective Inspector gave Detective Sergeant Lynas a direction that such remarks should be written down and that at an appropriate later stage the accused should be reminded of the remarks that he had made at the first interview. Subsequent references to the accused's connection with Special Branch were recorded in the notes made by the same detectives. I accept the explanation put forward by the police officers in relation to the omission of the plaintiff's remarks about his involvement with Special Branch from the notes relating to the first interview. No notes were made as a result of a specific request from the accused. He mentioned the code names of his handlers and, in my view, Detective Sergeant Lynas acted quite properly in drawing the matter to the attention of Detective Inspector Irwin. Detective Inspector Irwin then gave an appropriate direction. While there may have been a technical breach of the Code requirement to record everything said in interview, I do not believe that such a breach caused any unfairness or injustice to the accused.

[17] The personality of the accused and the conduct of the interviews

(*i*) Mr Treacy QC called Mrs Olive Tunstall, clinical psychologist, to give evidence as to the personality of the accused. Mrs Tunstall administered the Wechsler Adult Intelligence Scale and determined that the accused had a Verbal IQ of 76 with a Performance IQ of 90. Mrs Tunstall considered that the discrepancy of 14 IQ points was highly abnormal and she did not derive a Full Scale IQ because the difference was so significant. Applying the Wechsler Objective Reading Dimension indicated that the accused had a reading age of seven years. She also administered the Gudjonsson test of Suggestibility and the Gudjonsson Compliance Scale to the accused. These scales are devised for the purpose of measuring the extent to which a subject will yield to suggestive questioning and the degree to which a subject will change his or her answers when placed under pressure to so. The Gudjonsson suggestibility test comprises two sub-tests which measure Yield, the tendency to yield to suggestive questioning, and Shift, the tendency to change answers when placed under pressure. The accused's yield score was not abnormal and, according to Mrs Tunstall, provided no evidence of an abnormal tendency to yield to suggestive questioning. His shift score was abnormally high and, again according to Mrs Tunstall, indicated that the accused had an abnormal tendency to change his answers when placed under pressure to do so. Mrs Tunstall stated that the total suggestibility score was abnormally high and indicated that the accused was abnormally suggestible. Mrs Tunstall explained that the distinction between Suggestibility and Compliance, as these traits are defined and measured by the Gudjonsson scales is that Suggestibility requires personal acceptance by the subject of information provided or requests made whereas Compliance refers to the tendency of an individual to agree to propositions, requests or instructions put forward by others even though he may privately disagree with what is being put to him. Insofar as the general personality of the accused was concerned, after administering the Eysenck Personality Questionnaire, Mrs Tunstall concluded that the results did not show any abnormality and were consistent with the personal history of the accused.

(*ii*) While, to some extent, it may have been due to the decision by the accused not to give evidence on the voir dire, I did not find Mrs Tunstall to be a particularly satisfactory witness nor was it easy to assimilate her evidence into the circumstances of this case. For example:

(*a*) At one point during the course of her interview with the accused it appears that Mr Blaney told Mrs Tunstall that he had made the self-incriminating admissions as a result of threats by the interviewing officers, while the tapes were turned off, that they would expose him as an informer and that they would involve his girlfriend. Neither the accused nor his solicitor appear to have made any such contemporaneous complaint to the police and in the course of giving evidence Mrs Tunstall said that she had not

taken these alleged threats into account and that, in general, she had not relied upon what she was told by the accused. While it may well not be determinative, it seems to me that, as a matter of simple common sense, it would be important to obtain full details of and carefully examine any explanation or account given by the accused as to his experience of and reaction to the interviewing process. In this respect, I preferred the evidence of Dr F W A Browne, consultant forensic psychiatrist, who was called on behalf of the prosecution and who confirmed that he would have regarded a detailed account from the accused as being very important. Indeed, Dr Browne stated that Dr Gudjonsson recommended that the information acquired as a result of his scales should be correlated with all other relevant information. Such an approach at least offers the prospect of a degree of objectivity. By contrast, Mrs Tunstall relied solely on her test results stating that, since the accused would not be "aware" of the processes by which he was being influenced, there was nothing to be gained by examining his articulated thoughts and feelings.

(*b*) As a result, a good deal of Mrs Tunstall's evidence tended towards speculation eg. "his will to resist could have been diminished", he could have made an "unconscious" decision to "end the distress of the interviewing process", by the commencement of interview 7 he was "likely to be very tired" and "exhaustion alone could have been a factor".

(*c*) In dealing with the accused's IQ and his reading age equivalent to seven years Mrs Tunstall said that "illiterates are massively handicapped in our society" facing difficulties in obtaining employment, benefits etc. By way of example she referred to the problems faced by the illiterate in trying to "cope with addresses". Mrs Tunstall then had some difficulty in reconciling this assertion with the address book containing addresses and phone numbers which was seized from the accused by the police. In addition, Mrs Tunstall herself recorded from the accused a history of employment as a coalman in the course of which he said that he had "a good work record in that capacity" having done the job "on and off" for about 14 years. He also told her that he had worked in a scrap metal yard and as a baker in a factory.

(*d*) In cross-examination Mr Lynch QC drew Mrs Tunstall's attention to the final paragraph in the "conclusions" section of her report dated 28 January 2002 in which she expressed her opinion that there was "a possibility" that Mr Blaney's behaviour during the police interviews may have been influenced by the content of conversations he had both with the police officers who interviewed him and with other police officers, of which no records were available. In cross-examination by Mr Lynch QC Mrs Tunstall responded by remarks such as:

> "He claims there was conversation – I don't know – could be completely innocuous – may have been

> some pressures in conversations about Special Branch or conversations that were not recorded – I have not factored that into my opinion."

(*e*) Mrs Tunstall gave evidence that the accused's "suggestibility" operated to make him believe what the police officer was saying and that the officers had reasons for believing that he had committed the offences. On the other hand, her notes of her interview with the accused recorded that he accepted that he had made the admissions recorded in the police handwritten notes but maintained that he had "invented all of it". This would appear to be difficult to reconcile with Mrs Tunstall's interpretation of the high shift score as indicating a vulnerability to change answers under pressure. The accused told Mrs Tunstall that he had asked for the tapes to be switched off because tapes were impossible to deny and would leave him open to revenge by the LVF whereas handwritten notes could always be denied especially when they were not signed or otherwise acknowledged. Mrs Tunstall accepted that this represented a rational response to the situation. She also agreed that the accused had not made the case to her that he had only made the admissions because of continuing pressure from the police.

(*iii*) Mr Treacy QC also attacked the intensity of the interviewing by the police criticising, in particular, the fifth interview with the accused conducted by Detective Sergeant Lynas and Detective Constable Morton. Mr Treacy characterised this interview as "burdensome and harsh" referring to the Detective Sergeant raising his voice for a protracted period of time and banging the table some 50 times. He also condemned the use by the police officers of phrases such as "you can't sit like that now and say nothing", "now sort yourself out and start telling the truth", "you are going to have to start telling the truth about it " etc. as being inconsistent with the accused's right of silence of which he was specifically reminded in the official caution.

While I accept that the police questioning of the accused was robust and persistent, I think that it is important to place these criticisms of the fifth interview in context. In the course of cross-examination Mr Treacy QC initially put to Detective Sergeant Lynas that he had shouted at the accused and thumped the table. This was subsequently amended to an allegation of raised voice and repeatedly banging the table. The detective sergeant accepted that voices might have been raised during the interview and that it was possible that he had banged the table. He also agreed with Mr Treacy QC that he didn't normally do either of those things. I had an opportunity to hear and see the audio and silent video recording of this interview and it is clear that the detective sergeant did not thump or bang his fist upon the table. The tapes confirm that Detective Sergeant Lynas did raise his voice and slap the flat of his hand, which was resting on the table, some 45-50 times in emphasis over a period of some three minutes. This sound was picked up by

the microphone which is clearly very sensitive since it is capable of detecting whispered remarks.

Of the nineteen interviews which took place between police officers and the accused during his detention only the audio/video tapes of interview five were played for the court at the request of the defence. Interview five took place after the accused had enjoyed a break from interviewing of approximately three hours. During interviews 1-4 the accused made no admissions nor did he make any admission during interview 5. At the commencement of interview 5 the accused was smoking a cigarette and during the interview neither the audio nor video tapes confirm any obvious signs of anxiety or distress on the part of the accused. Interview 5 lasted, in all, only some 33 minutes. After interview 5 concluded his detention was reviewed by the Detective Inspector Irwin to whom the accused made no complaint. During interview 6, which took place approximately one hour after the completion of interview 5 the accused made no admissions.

(*f*) Mr Treacy QC criticised Detective Sergeant Lynas and Detective Constable Morton for commencing the seventh interview at 10.56 pm – some 16 hours after the accused's arrest at 7.05 am. However, it is important to bear in mind that, while the accused had been interviewed upon six previous occasions during those 16 hours, the total time occupied by all six previous interviews was only just over 3 hours. In cross-examination by Mr Treacy QC Detective Sergeant Lynas agreed that it was probably abnormal to commence an interview at 11.00 pm but he suggested that the relevant decision had probably been taken by Detective Inspector Irwin. Detective Inspector Irwin confirmed that this had been the case and that he had taken into account the fact that from 5.30 to 10.30 pm the accused had been interviewed for a total of approximately one hour with interview six lasting only some 20 minutes. Detective Inspector Irwin recalled that Detective Sergeant Lynas had indicated to him at some stage during interview 7 that the accused was making admissions and he then directed that the interview should proceed after conferring with the duty inspector who was monitoring the interviews. At the commencement of interview 7 the accused once more made it perfectly clear that he would not speak while the audio tape was recording and stated that he would tell the truth but he didn't want it on tape. This would appear to have been a rational decision reached by a positive exercise of the independent will of the accused.

(*g*) In his skeleton argument Mr Treacy QC referred to the "spartan conditions" at Gough Barracks and the fact that the accused was held "incommunicado" during his detention, drawing the attention of the court to the report of the Bennett Committee 1979, the report of the Independent Commissioner for Holding Centres 1994, the report of the Committee for the Prevention of Torture 1993 and the recommendations of the Patten Commission 1999. In cross-examination by Mr Treacy QC, Detective Sergeant

Lynas agreed that, apart from a solicitor, terrorist suspects generally had no contact with the outside world at Gough Barracks, although he pointed out that upon request, a yard was available for smoke breaks and exercise. However, during the course of his detention neither the accused nor his solicitor appears to have made any complaint about being held incommunicado or the spartan conditions of Gough Barracks nor did the accused apparently attribute the making of his admissions to any such factors during the course of his interview with Mrs Tunstall.

Mr Treacy was also critical of the failure to re-administer the caution when moving from recording the interview on audio tape to recording the interview in handwritten notes. However, I am quite satisfied that the appropriate caution was administered at the commencement of each interview, that the accused would have been aware of his right to remain silent and that he was under no misapprehension as to the status of the handwritten notes which he preferred upon the rational basis that they could later be denied.

[18] <u>The refusal to permit a solicitor to be present during the interviews with the accused</u>

In developing his submission in relation to this aspect of the case, Mr Treacy QC advanced a number of basic propositions:

(*i*) The accused was arrested under the provisions of Section 14(1)(*b*) of the Prevention of Terrorism (Temporary Provisions) Act 1989 a piece of legislation which applied with equal force in Northern Ireland and in England and Wales.

(*ii*) However, in England and Wales, the provisions of the Police and Criminal Evidence Act 1986, together with the Codes issued thereunder, provided that all persons who were arrested, whether they were arrested in respect of terrorist or non-terrorist offences, were entitled to have their solicitor present during the course of interviews.

(*iii*) In Northern Ireland the Police and Criminal Evidence (Northern Ireland) Order 1989 and the PACE Codes issued thereunder afforded non-terrorist criminal suspects arrested in Northern Ireland a right to have a solicitor present during the course of interviews. On the other hand, the provisions of the 1989 Order did not alter the regime for persons arrested in Northern Ireland under the Prevention of Terrorism (Temporary Provisions) Act 1989. A suspect detained in Northern Ireland upon suspicion of such an offence was merely entitled to consult privately with a solicitor – see Section 47 of the Northern Ireland (Emergency Provisions) Act 1996 and paragraph 6, Annex B of the Code of Practice issued under Section 61 of the Northern Ireland (Emergency Provisions) Act 1991.

(*iv*) In September 2000, some ten months after the arrest of this accused, the Chief Constable of the RUC, in advance of anticipated legislative change, announced that, as a matter of practice, henceforward solicitors would be allowed to be present during interviews with terrorist suspects at the holding centres. This right was formally incorporated into legislation by the provisions of the Terrorism Act 2000 and the Code issued thereunder.

(*v*) Mr Treacy QC argued that these changes, initially in practice and, subsequently, in the legislative framework, embodied the reaction of the Government of the United Kingdom to decisions of the European Court of Human Rights such as Murray [1996] 22 EHRR 29, Quinn [Application No. 23496/94], Averill [2001] 31 EHRR 36 and Magee [2001] 31 EHRR 35.

(*vi*) As a result of the coming into force of Section 7(1)(*b*) of the Human Rights Act 1998 the accused was entitled to rely on his Convention rights and, by virtue of Section 6 of the same Act, the court, as a public authority, was bound to act in a manner compatible with such rights.

[19] Furthermore In such circumstances, relying upon authorities such as R v Bentley [1999] Crim LR, R v Gordon [2001] NIJB 50 and R v Lyons (unreported judgment of the Court of Appeal) 21 December 2001, Mr Treacy QC argued that by refusing to permit a solicitor to be present during the course of the accused's interviews the police had acted both in breach of contemporary standards and in breach of the accused's right to a fair trial in accordance with Article 6 of the ECHR.

[20] By way of response Mr Lynch QC, on behalf of the prosecution, relied upon the decision of the House of Lords in R v Begley and McWilliams [1997] NI 275 as establishing that, at the date of his arrest, the accused had no right, either at common law or under statute, to the presence of a solicitor during the course of interviews relating to his alleged involvement in a terrorist offence. In particular, Mr Lynch QC referred the court to the passage in the judgment of Lord Browne-Wilkinson at pages 280-281 in which he gave careful consideration to the argument that the House of Lords should recognise a suspect's right to be accompanied by a solicitor in a police interview by analogy with the right to consult a solicitor outside the interview room and on the grounds of fairness and, having done so, expressed the following view:

> "The conclusion is inescapable that it is the clearly expressed will of Parliament that persons arrested under Section 14(1) of the 1989 Act should not have the right to have a solicitor present during interview. In these circumstances I would reject the invitation to

develop such a right as beyond the power of the House of Lords."

[21] In dealing with the ECHR cases Mr Lynch QC submitted that the Strasbourg jurisprudence recognised that the right of access to legal advice could be restricted and that any such restriction should be considered in the context of the whole proceedings. He further argued that the breach of Article 6 recognised by the ECHR in Murray, Avril and Quinn was the drawing of adverse inferences against the accused at times when they had not been given access to solicitors, whereas, in this case, the prosecution was not seeking to persuade the court that any such inference was relevant.

[22] I shall first consider the alleged breach of Article 6(1) and 6(3)(*c*) of the Convention. In Murray v The United Kingdom [1996] 22 EHRR 29 the Strasbourg court confirmed that Article 6 applied to the preliminary investigation of an offence by the police and normally required the accused to have access to a lawyer at the police interrogation stage. In Murray's case the applicant's right to consult privately with a solicitor was deferred for 48 hours as a consequence of the relevant statutory provisions and Code, the exercise of which was not challenged by the accused, and the trial judge drew "very strong inferences" from the fact that, during this period, the accused failed to give any explanation of his presence in the house. The court held that, in the circumstances, there had been a breach of Article 6(1) in conjunction with 6(3)(c) in relation to the 48 hour period during which the accused was denied access to a lawyer. However, the court also confirmed that the manner in which Article 6(3)(c) is to be applied during the preliminary investigation stage depends upon the special features of the particular proceedings and the circumstances of the case. The court stated that where national laws attached consequences to the attitude of an accused during the initial stages of police interrogation Article 6 would normally require that the accused should be allowed to benefit from the assistance of a lawyer but noted that this right was not explicitly set out in the Convention and could be the subject of restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing. In Murray, the court specifically did not examine the argument that Article 6 required the presence of a lawyer during interrogation.

[23] In Brennan v United Kingdom (Application No. 39846/98 16 October 2001) the applicant specifically complained that during his interviews with the police in Castlereagh he was not permitted to have a solicitor present and that this failure, together with the absence of video and audio recording, contributed to the oppressiveness of the interrogation process. In that case the applicant had requested access to a solicitor but the police had deferred such access for a period of 24 hours. The domestic Court of Appeal accepted that there had been a technical breach of Section 45 of the Northern Ireland

(Emergency Provisions) Act 1991 in that the decision to defer had been premature but it found that the deferral was made in good faith and upon reasonable grounds. The applicant made no incriminating admissions during the 24 hour period of deferral and no inferences were drawn by the court in respect of this period. The applicant did make incriminating admissions after the deferral period ended but before the arrival of his solicitor. He continued to make such admissions after he had received access to his solicitor. The applicant alleged that his admissions had been made as a consequence of ill-treatment by the police and, before the Strasbourg court, he argued that, in the absence of independent evidence and video or taped records and in the absence of his solicitor there were considerable difficulties for an accused to convince a court, against the testimony of police officers, that any oppression had taken place. The domestic Court of Appeal rejected the allegations of ill-treatment and the ECHR went on to observe, at paragraph 53:

> "The court agrees that the recording of interviews provides a safeguard against police misconduct, as does the attendance of the suspect's lawyer. However, it is not persuaded that these are indispensable precondition of fairness within the meaning of Article 6(1) of the Convention. The essential issue in each application brought before this court remains whether in the circumstances of the individual case the applicant received a fair trial. The court considers that the adversarial procedure conducted before the trial court at which evidence was heard from the applicant, psychological experts, the various police officers involved in the interrogations and the police doctors who examined him during his detention, was capable of bringing to light any oppressive conduct by the police. In the circumstances, the lack of additional safeguards has not been shown to render the applicant's trial unfair."

[24] The court distinguished the case of Magee v United Kingdom [2001] 31 EHRR 35 on the basis that it was a case which concerned a more extreme situation where the applicant had been kept incommunicado by the police for a 48 hour period and his admissions were all made before he was allowed to see his solicitor. In the context of this case it is interesting to note that, in Brennan's case, there was unchallenged independent medical evidence to the effect that:

(1) The applicant had a full scale IQ of 72.

(2) The applicant was on the borderline of mental retardation.

(3) The applicant had a reading ability equivalent to that of an average 10 year old child.

(4) His suggestibility was average but he had a high level of compliance.

[25] Evidence given later in the trial by a psychologist that the applicant was psychologically vulnerable was rejected by the judge who considered that the applicant did not need any form of independent support doing interviews and that the police had been entitled to treat him as an ordinary member of society.

[26] In conclusion, I do not consider that Article 6(1) in conjunction with Article 6(3)(*c*) affords an accused an absolute right to the presence of a solicitor during the course of police interrogation. The Convention jurisprudence clearly confirms that, in each case, the question is whether any restriction upon the right of access to legal advice, considered in the light of the circumstances of the entire proceedings, has deprived the accused of a fair hearing.

[27] I now come to consider Mr Treacy QC's submission that, quite apart from the provisions of the Convention, I should exclude the admissions alleged to have been made by the accused because, as a result of subsequent changes in police policy and legislation, he would now be entitled to have a solicitor present during his interrogation. Before doing so, I think that it is important to emphasis that, as I have indicated above, I do not find that there was anything unjust or unfair about the police decision to permit interviews of the accused to take place in the absence of his solicitor. Furthermore, at the time of the interviews the House of Lords had confirmed in R v Begley and McWilliams [1997] NIR 275 that the common law did not confer upon an accused a right to have a solicitor present during the course of a police interview and that the differential treatment in this respect of suspects charged with terrorist offences in Northern Ireland, as opposed to England and Wales, was as a result of the clearly expressed will of Parliament. Therefore there was no question of a refusal by the police to grant a recognised right.

[28] The question of contemporary standards was considered by Carswell LCJ in R v Gordon [2001] NIJB 50 at pp 66 to 69. During the passage in which he did so the learned Lord Chief Justice referred to R v Bentley [1999] Crim LR 330 and to subsequent English and Scottish authorities. However, at page 69, the learned Lord Chief Justice pointed out that, on the view that the court had taken of the issues it was not necessary to give further consideration to the authorities which he cited and contented himself with observing that there would appear to be matters which awaited clarification in future decisions. In R v Bentley [1999] Crim LR 330 Lord Bingham CJ specifically excluded changes effected by statute in his remarks relating to the

application of contemporary standards and in R v King [2000] 2 Criminal Appeal Reports 391 the same judge, in delivering the judgment of the Court of Appeal observed, at page 401/402:

> "We were invited by counsel at the outset to consider as a general question what the approach of the court should be in a situation such as this where crime is investigated and a suspect interrogated and detained at a time when the statutory framework governing investigation, interrogation and detention was different from that now in force. We remind ourselves that our task is to consider whether this conviction is unsafe. If we do so consider it, Section 2(1)(*a*) of the Criminal Appeal Act 1968 obliges us to allow the appeal. We should not (other things being equal) consider a conviction unsafe simply because of a failure to comply with a statute governing police detention, interrogation and investigation, which was not in force at the time."

[29] I note that in R v King the confessions made by the accused during interrogation were found to have been made in breach of the rules in force at the time including the use by the police of a "white lie" and a failure to advise him of his right to receive legal advice until after at least two interviews during which he made extensive admissions. It may be that, as suggested in the commentary upon this case contained in "2000" Crim Law Review at 838 to 841, that it is a pre-requisite that there should have been breaches of the standards applicable at the time of the interrogation before the court can take into account contemporary standards which have changed since that time.

[30] While, in my view, the authorities are far from clear at the present time I have reached the conclusion that the right of a suspect charged with a terrorist offence in Northern Ireland to have a solicitor present during interrogation by the police has been brought about by a specific legislative change namely Schedule 8 paragraph 7-9 of the Terrorism Act 2000 and paragraph 6.7 of the Code of Practice issued thereunder. In such circumstances, in accordance with the decisions in R v Bentley and R v King, I do not consider that breach of a statutorily derived right which was not in force at the material time requires me to exclude the alleged admissions.

[31] Notwithstanding my conclusions as expressed above, in the exercise of my discretion in determining whether or not it would avoid unfairness to the accused or be otherwise in the interests of justice to exclude the statements one of the factors that I have born in mind in relation to the conduct of the interviews and the personality of the accused is that, since the date of the relevant interrogation, the right to have a solicitor present at interview has

been enshrined in both policy and statute. Taking into account all of the matters set out above, I have come to the conclusion that the admissions alleged to have been made by the accused were made as a result of a deliberate and voluntary exercise of his independent will after he had been given access to his solicitor and been subjected to a relatively short period of questioning in circumstances about which neither he nor his solicitor made any complaint. The accused himself chose not to give any evidence on the voir dire and, having carefully considered the evidence of the interviewing police officers, together with the medical evidence, I was satisfied that it was neither unfair to the accused nor otherwise contrary to the interests of justice to admit the admissions and, consequently, I ruled that they could be given in evidence.

[32] Mr Lynch QC then recalled, as witnesses in the trial itself, Detective Sergeant Lynas, Detective Constable Morton, Detective Lilley and Detective Inspector Irwin. Each of these witnesses confirmed the evidence that they had given on the voir dire and their cross-examination was confirmed by Mr Treacy QC.

[33] After the Crown case was closed Mr Treacy confirmed that the accused did not intend to give evidence. As a result of a domestic accident, I was informed that the accused was in hospital under observation for a head injury and, accordingly, I acceded to an application from Mr Treacy QC for the trial to proceed in the absence of the accused. Mr Treacy QC confirmed that he had specific instructions from the accused to proceed in his absence and to formally waive any domestic or Convention rights he might have to be present.

[34] Mr Treacy QC then called Dr Michael Barbour, Chartered Psychologist, on behalf of the defence. Originally, Dr Barbour had been retained on behalf of the prosecution for whom he had furnished a report dated 4 June 2002. On 12 August 2002 he carried out an examination/assessment of the accused and furnished a report to the defence on 19 August 2002. Dr Barbour had been given access to reports by Dr McDonald, consultant psychiatrist and Mrs Tunstall, consultant psychologist together with the police custody records, the handwritten police notes, the cassette tape recordings of police interviews and the witness statements of the police in respect of their interviews with the accused. During the course of his assessment of the accused Dr Barbour administered the verbal items from the Wechsler Adult Intelligence Scale, the Wechsler Objective Reading Dimensions, the Eysenck Personality Questionnaire and the Cooper Smith Self Esteem Inventory. Dr Barbour concluded that the accused manifested significant vulnerability factors including limited intellectual and verbal ability with an attainment in basic literacy equivalent of a seven year old. He also noted that the accused seemed to suffer from low self-esteem which bears an inverse relationship to raised anxiety levels. He noted that it might

have been difficult for the police officers to appreciate the existence and extent of the accused's vulnerabilities and that, in particular, his reading difficulties were not detected until the seventh interview. After listening to the tapes of the police interviews Dr Barbour formed the impression that the officers had been repeatedly attempting to persuade the accused to answer questions and he expressed the view that, in the context of the vulnerabilities of the accused, the presence of a solicitor might have helped.

[35] However, in cross-examination, Dr Barbour agreed that he had not considered it to be within his remit to ask any questions whatever of the accused as to his own feelings, impressions or reactions to the police interviewing process. Specifically, he had not considered that it was in his remit to discuss with the accused his motivation for making the alleged admissions, although he agreed that knowledge of the accused's feelings at the material time might have been helpful. Ultimately, Dr Barbour accepted that he was speculating when he expressed the view that the factors which he had identified might make the accused more vulnerable to make unreliable admissions and he agreed that he could not say with any degree of certainty that the accused's vulnerabilities had played any part in causing him to make the alleged admissions.

[36] After ruling that the alleged admissions by the accused were admissible in evidence I gave careful consideration to the evidence of Dr Barbour, particularly since, to a significant extent, he supported the assessment findings of Mrs Tunstall. The accused did not give evidence and I accept the submissions of the prosecution that, in such circumstances, it would be open to the court to draw an adverse inference from his failure to do so in accordance with Article 4 of the Criminal Evidence (Northern Ireland) Order 1988. The accused himself was in a much better position than anyone else to provide an explanation as to why the alleged admissions were, or might reasonably have been unreliable and, if so, in what particular respects and, if so, how they came to be made. As a consequence of his decision not to give evidence, I concluded that he had no such explanation or no such explanation that would stand up to cross-examination. However, I think it is important that I should make clear that, in my view, I did not need to draw any such inference and, on the basis of the evidence which I have heard, I was quite satisfied beyond a reasonable doubt that the admissions alleged to have been made by the accused constituted a reliable and accurate account of his involvement in these alleged offences when considered in the context of the rest of the evidence.

[37] In the circumstances, I find the accused guilty of counts 1,2,3,4 and 10 on the indictment. I make no finding in respect of count 11 which is really an alternative count to count 10.