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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

WILLIAM JAMES FULTON

Girvan LJ Gillen J and McLaughlin J

GIRVAN LJ

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Introduction

[1] The appellant appeals against his conviction by the learned trial judge Hart J ("the trial judge") sitting alone without a jury on a large number of counts charged on a bill of indictment dated 11th June 2003. The appellant was found guilty of more than 40 offences including aiding and abetting

murder, conspiracy to murder, causing explosions, possession of explosives, malicious wounding, causing grievous bodily harm, membership of a terrorist organisation and directing terrorism. He was sentenced to life imprisonment with a tariff of 25 years on the first count and was sentenced to a number of determinate sentences in relation to the other counts on which he was convicted. Details of the convictions and the sentences are set out in the table below:

SUMMARY OF CONVICTIONS

COUNT NO.	OFFENCE	SENTENCE
1	Murder of Mary Elizabeth O'Neill (common law)	Life (25 years minimum term)
2	Between 3 June 1999 and 6 June 1999 aiding, abetting, counselling or procuring others to use a pipe bomb to cause an explosion likely to endanger life/cause serious injury to property (s2 Explosive Substances Act 1883)	20 years (concurrent)
3	Between 3 June 1999 and 6 June 1999 aiding, abetting, counselling or procuring others to attempt to murder Janelle Woods (Article 3(1) Criminal Attempts and Conspiracy (NI) Order 1983 and common law)	20 years (concurrent)
4	Between 3 June 1999 and 6 June 1999 aiding, abetting, counselling or procuring others to attempt to murder Steven Black (Article 3(1) Criminal Attempts and Conspiracy (NI) Order 1983 and common law)	20 years (concurrent)
5	Between 3 June 1999 and 6 June 1999 aiding, abetting, counselling or procuring others to attempt to cause GBH to Janelle Woods (section 18 Offences Against the Person Act 1861, Article 3(1) Criminal Attempts and Conspiracy (NI) Order 1983)	20 years (concurrent)
6	Between 3 June 1999 and 6 June 1999 aiding, abetting, counselling or procuring others to use a pipe bomb to cause an explosion likely to endanger life/cause serious	20 years (concurrent)

	injury to property (s2 Explosive Substances Act 1883)	
7	Between 3 June 1999 and 6 June 1999 aiding, abetting, counselling or procuring others to attempt to cause GBH to Steven Black (section 18 Offences Against the Person Act 1861, Article 3(1) Criminal Attempts and Conspiracy (NI) Order 1983)	20 years (concurrent)
8	Attempted murder Joseph Murnin on 4 June 1999 (Article 3(1) Criminal Attempts and Conspiracy (NI) Order 1983 and common law)	20 years (concurrent)
9	Attempted murder Mark Thomas Murphy on 4 June 1999 (Article 3(1) Criminal Attempts and Conspiracy (NI) Order 1983 and common law	20 years (concurrent)
10	Attempt to cause GBH with intent Joseph Murnin on 4 June 1999 (section 18 Offences Against the Person Act 1861, Article 3(1) Criminal Attempts and Conspiracy (NI) Order 1983)	20 years (concurrent)
11	Attempt to cause GBH with intent Mark Thomas Murphy on 4 June 1999 (section 18 Offences Against the Person Act 1861, Article 3(1) Criminal Attempts and Conspiracy (NI) Order 1983)	20 years (concurrent)
12	Causing an explosion likely to endanger life/cause serious injury to property on 4 June 1999 (s2 Explosive Substances Act 1883)	20 years (concurrent)
13	Possession of RGD grenade with intent to cause an explosion likely to endanger life/cause serious injury to property on 4 June 1999 (s3(1)(b) Explosive Substances Act 1883)	20 years (concurrent)
14	Attempted murder of John Barr on 9 July 1998 (Article 3(1) Criminal Attempts and Conspiracy (NI) Order 1983 and common law)	28 years (concurrent)
15	Attempted murder of Jason	28 years (concurrent)

	McBrien on 9 July 1998 (Article 3(1) Criminal Attempts and Conspiracy (NI) Order 1983 and common law)	
16	Attempted murder of James Harkness on 9 July 1998 (Article 3(1) Criminal Attempts and Conspiracy (NI) Order 1983 and common law)	28 years (concurrent)
17	Attempted murder of William Devine on 9 July 1998 (Article 3(1) Criminal Attempts and Conspiracy (NI) Order 1983 and common law)	28 years (concurrent)
18	Section 18 Offences Against the Person Act 1861 John Barr on 9 July 1998	25 years (concurrent)
19	Section 18 Offences Against the Person Act 1861 Jason McBrien on 9 July 1998	25 years (concurrent)
20	Section 18 Offences Against the Person Act 1861 Jason Harkness on 9 July 1998	25 years (concurrent)
21	Section 18 Offences Against the Person Act 1861 William Irvine 9 July 1998	25 years (concurrent)
22	Causing an explosion likely to endanger life/cause serious injury to property on 9 July 1998 (s2 Explosive Substances Act 1883)	25 years (concurrent)
23	Possession of a pipe bomb on 9 July 1998 with intent to cause an explosion likely to endanger life/cause serious injury to property (s3(1)(b) Explosive Substances Act 1883)	25 years (concurrent)
24	Attempted robbery of Conor McAleavey on 25 October 1996 using a firearm or imitation firearm (section 8(1) Theft Act (NI) 1969, Article 3(1) Criminal Attempts and Conspiracy (NI) Order 1983)	15 years (concurrent)
25	False imprisonment of Conor McAleavey on 25 October 1996 (common law)	10 years (concurrent)
26	Conspiracy to murder Derek Wray	20 years (concurrent)

	between 1 January 1997 and 7 January 1997 (Article 9(1) Criminal Attempts and Conspiracy (NI) Order 1983 and common law)	
28	Section 18 Offences Against the Person Act 1861 William Fletcher on 6 January 1997	20 years (concurrent)
29	Possession of firearm and ammunition on 6 January 1997 with intent to endanger life, cause serious injury to property to enable some other person to do so (Article 17 Firearms (NI) Order 1981)	15 years (concurrent)
30	Section 18 Offences Against the Person Act 1861 James Buchanan on 3 January 1997	10 years (concurrent)
31	Section 18 Offences Against the Person Act 1861 Jonathan Birney on 3 January 1997	10 years (concurrent)
32	Section 18 Offences Against the Person Act 1861 Andrew Doran on 3 January 1997	10 years (concurrent)
33	Possession of a loaded Browning 9mm pistol on 3 January 1997 with intent to endanger life, cause serious injury to property or enable some other person to do so (Article 17 Firearms (NI) Order 1981)	15 years (concurrent)
34	Hijacking of postal van and compulsion of driver to use it as a hoax bomb on 10 July 1996 (Article 3(1) Criminal Law (Amendment) (Northern Ireland) Order 1977; section 2(1)(b) Criminal Jurisdiction Act 1975	12 years (concurrent)
35	Possession of firearm on 10 July 1996 with intent to commit the above offence (Article 19(1) Firearms (NI) Order 1981)	12 years (concurrent)
36	Possession of a Star .22 pistol between 1 July 1995 and 8 July 1996 with intent to endanger life or cause serious injury to property to enable some other person to do so	12 years (concurrent)

	(Article 17 Firearms (NI) Order 1981)	
41	Direction of Terrorism (Loyalist Volunteer Force) (section 29 Northern Ireland (Emergency Provisions) Act 1996)	25 years (concurrent)
42	Membership of the Loyalist Volunteer Force (section 30(1)(a) Northern Ireland (Emergency Provisions) Act 1996)	10 years (concurrent)
43	Perverting the course of justice between 1 July 2001 and 26 July 2001 (re Tania Fulton) (common law)	5 years (concurrent)
44	Possession of a handgun with intent to endanger life or cause serious injury to property or enable some other person to do so between 1 July 1996 and 31 July 1996	10 years (concurrent)
50	Hijacking a vehicle on 6 March 1992 (section 2(1)(a) Criminal Jurisdiction Act 1975)	15 years (concurrent)
51	False imprisonment of James Joseph McCollum on 6 March 1992 (common law)	12 years (concurrent)
52	Possession of firearm on 6 March 1992 with intent to commit an indictable offence, namely hijacking or to resist arrest or allow another to resist arrest (Article 19(1) Firearms (NI) Order 1981)	10 years (concurrent)
53	Conspiracy to murder persons in the vicinity of the Newry Sinn Fein Centre between 23 May 1994 and 26 May 1994 (Article 19(1) Criminal Attempts and Conspiracy (NI) Order 1983 and common law)	20 years (concurrent)
54	Acting with intent to cause an explosion between 23 May 1994 and 26 May 1994 (attempt to repair a broken timing mechanism on an improvised explosive device) (section 3(1)(a) Explosive Substances Act 1883)	20 years (concurrent)

55	Possession of an improvised explosive device containing Powergel between 23 May 1994 and 26 May 1994 with intent to endanger life/cause serious injury to property or enable another to do so (s3(1)(b) Explosive Substances Act 1883)	20 years (concurrent)
59	Supply of a Class B drug, namely Cannabis between 1 January 1998 and 30 September 1999 (section 4(1) and 4(3)(b)) of the Misuse of Drugs Act 1971)	14 years (concurrent)
60	Possession of Cannabis with intent to supply between 1 January 1998 and 30 September 1999 (section 4(1) and 5(3) of the Misuse of Drugs Act 1971)	10 years (concurrent)
62	Possession of a .38 handgun and ammunition on 10 February 1998 (Article 23 Firearms (NI) Order 1981)	10 years (concurrent)

[2] Mr Turner QC and Ms Doherty appeared on the appeal on behalf of the appellant. Mr Kerr QC and Mr McCrudden appeared on behalf of the Crown. The Court is indebted to counsel for their arguments which were presented with clarity and succinctness and whose organisation, preparation and presentation of the documents were of great assistance to the court. We must also pay tribute to the careful and meticulous judgment of the trial judge which sets out his analysis of the evidence and the law and the findings of fact with commendable lucidity.

[3] The appellant's appeal focussed on four main issues. Firstly, it was argued that that trial judge should have stayed the prosecution in relation to all counts for abuse of process ("the abuse of process issue"). Secondly, it was argued that the trial judge erred in not exercising his discretion to exclude the evidence of alleged admissions made by the appellant while under surveillance ("the admissibility issue"). Thirdly, it was argued that in any event there was insufficient evidence to support the convictions on a number of the counts ("the insufficiency of evidence issue"). Fourthly, it was argued that in relation to a number of the verdicts the trial judge had wrongly convicted the appellant in relation to what were in law or in substance alternative counts ("the alternative counts issue").

The Background to the Appeal

[4] The appellant was the subject of covert surveillance between September 1999 and June 2001. The prosecution case against the appellant on all save three counts depended on alleged admissions of involvement in many serious offences in Northern Ireland made by him in the course of conversations taking place during the surveillance operation. These conversations which were recorded took place between him and his co-accused Gibson (who is not a party to this appeal) or with other persons and between him and undercover police officers posing as members of a fictitious criminal gang living and operating in the south-west of England.

[5] The covert surveillance operation, which was given the name "Operation George", began in the summer of 1999 on the co-accused Gibson who had left Northern Ireland and was then living in Cornwall. The original purpose of the investigation related to the murder of Rosemary Nelson. The appellant at that time was under arrest in the United States of America for unrelated matters. Whilst he was remanded in custody the managers of Operation George, in conjunction with the American authorities, secretly recorded conversations between the appellant and another prisoner. In these conversations, the appellant denied being involved in the Rosemary Nelson murder or UVF activity. When released from prison in America, the appellant returned to the United Kingdom landing at Heathrow airport on 11 April 2000 where he was informed by police of a death threat to him in Northern Ireland. Despite that he returned to Northern Ireland for a month and then moved to Cornwall where covert monitoring of the appellant commenced. During this time undercover police officers engaged in the operation posed as members of a criminal gang in order to gain the confidence of the appellant and his co-accused. The appellant began to work for the gang as a driver.

[6] The relevant police officers involved in the operation so far as material to the abuse of process application were:

(i) Deputy Chief Constable Colin Port	Officer in overall command of Rosemary Nelson murder inquiry
(ii) Detective Chief Superintendent Provoost	Deputy officer in command of Rosemary Nelson murder inquiry
(iii) Detective Chief Inspector Mawer	In command of cover operation management team
(iv) Detective Inspector Leitch	Assistant to DCI Mawer (May-July 2000)

(v) Detective Sergeant McMurdie	Assistant to DCI Mawer (July 2000–end)
(vi) Detective Inspector Toyne	Covert operation management team
(vii) Detective Sergeant Craig	Covert operation management team
(viii) Acting Detective Chief Inspector Bailey	Undertook review or covert operations and disclosure exercise
(ix) Sir John Evans	Chief Constable of Devon & Cornwall

[7] As a consequence of the investigation, the appellant, Gibson, Rain Landry and Talutha Landry were returned for trial in the Crown Court sitting in Belfast. They were jointly indicted, but separately charged, with a large number of offences which were allegedly committed in Portadown and the surrounding area between December 1991 and 30 September 1999. Fulton was ultimately charged with 62 counts relating to 19 separate incidents or groups of charges. In the course of the surveillance operation he made various statements in which he implicated himself in a large number of serious criminal enterprises connected with Loyalist terrorism.

The Appellant's Defence Statement

[8] In his defence statement served pursuant to section 3 of the Criminal Procedure and Investigations Act 1996 ("the CPIA") the appellant denied that he was guilty of the offences and he took issue with the evidence against him. He denied that he committed the offences and made the case that he only made the statements alleged to be admissions in order to "ingratiate himself" and "bolster his credibility" with the members of the perceived criminal gang and that he was only "acting 'the big man'" in front of them. It was his case that he knew the facts of the incidents to which he referred because he had knowledge of the facts referred from stories he heard from pubs and clubs, from persons whom he knew in Northern Ireland, from media reports relating to the incidents and from information obtained by him from having been interviewed in the past by the police in relation to some of the offences. At the trial the defence case was presented on that basis.

The Disclosure Applications during the Trial

[9] In March 2005 an application for disclosure was made by the appellant to the trial judge pursuant to Article 8(2) of the Criminal Procedure and Investigations Act 1996 ("CPIA"). Mr. Treacy QC, who was acting for the appellant at that time, argued that the trial judge should deal with all

disclosure issues, including public interest immunity, in order that the trial judge fulfil his obligation to keep disclosure under review. He also argued that 'special counsel' should be appointed to protect the appellant's interests in any ex parte applications made by the prosecution in relation to disclosure and public interest immunity. On 4 March 2005 Hart J gave a ruling that the appointment of a disclosure judge was consistent with the appellant's Article 6 ECHR rights during a Diplock trial and that the issue of special counsel was a matter for the disclosure judge as it was the disclosure judge who was most conversant with the issues that may necessitate such an appointment. The disclosure judge was Higgins J.

[10] In August 2005 a hearing was listed before the disclosure judge who on 31 August 2005 gave a ruling relating to 3 applications by the appellant. Firstly, he ruled against the appellant's argument that the trial judge should deal with disclosure rather than the disclosure judge. The second application was that special counsel should be appointed. Higgins J ruled that issues regarding public interest immunity had already been ruled upon but that the necessity or otherwise of special counsel would be kept under review. Thirdly, the appellant applied for disclosure pursuant to section 8(2) CPIA of a number of documents including all unedited covert recordings and unedited transcripts of covert recordings. In relation to most of the items sought, the disclosure judge was satisfied that the prosecution had fulfilled its disclosure obligations to the appellant. In relation to recordings the judge noted that only a small proportion of the covert recordings was being relied on by the prosecution. Transcripts of these had been made and were in the depositions. 'Typed tape summaries' ("TTSs") and 'road map summaries' had been made of the unused recordings and had been made available to the appellant. These related to some 2,600 tapes covering 8,184 hours of recordings. The appellant claimed he was entitled to any recording in which he said that he was merely "boasting" about the offences and that the disclosure judge should listen to all 8,184 hours to identify same. The judge took the view that the appellant was unable to identify any specific conversation when he may have said that he was "boasting" and therefore refused to make an order disclosing the unused recordings (or transcripts thereof). However, on 16 June 2005, the disclosure judge ordered that all the TTSs be disclosed to the co-accused Gibson and he subsequently ordered that all the TTSs should be disclosed to the appellant.

[11] Further disclosure was sought of the applications for and authorisations of the conduct of the police officers which led to the recordings being made and which were relied on by the prosecution. The appellant asserted that he was entitled to these documents as he wished to challenge the legality of the conduct leading to the recordings. The prosecution resisted these applications for disclosure on the grounds of public interest immunity and applied for a ruling under the section 8(5) of CPIA that it was not obliged to disclose them. The disclosure judge ruled against the prosecution and

ordered disclosure to the defence of the applications for authorisations and approvals of the authorisations. However, at the same time he concluded that it was not in the public interest to disclose certain parts of the applications and authorisations. Accordingly, it was ordered that they be disclosed in redacted form with the parts to which public interest immunity applied not revealed.

[12] The trial of the appellant and his co-accused commenced on 8 September 2005. After the trial started the trial judge was not satisfied with the manner in which the prosecution chose to prove the applications and authorisations for the covert surveillance. He directed what he considered necessary to prove them. This required the prosecution to reconsider the redactions which they had made to the applications and authorisations and led the officer in charge of the case, Detective Chief Superintendent Provoost, to prepare what were described as abstracts. In the course of this something came to light that had not been adverted to previously. Under section 36 (2) of Regulation of Investigatory Powers Act 2000 ("RIPA") an authorisation does not take effect until such time as written notice of the Surveillance Commissioner's decision to approve the grant of the authorisation has been given to the person who granted the authorisation, in this instance that person being the Chief Constable of Devon and Cornwall Sir John Evans. In the case of the Commissioner's decisions to approve 37 of the relevant authorisations granted no written notice had been given to Sir John Evans as required by Section 36(2) before the conduct authorised commenced.

[13] The appellant and the co-accused applied to the trial judge to stay the proceedings for abuse of process on the grounds of the prosecution's failure to disclose that 37 of the 99 evidential recordings upon which the prosecution sought to rely were obtained in breach of the statutory procedure under section 36(2) of RIPA and therefore in breach of the defendants' Article 8 Convention rights. The trial judge issued a ruling on 13 October 2005. Having heard and considered the evidence of Chief Superintendent Provoost and Detective Superintendent Bailey he concluded that they had been unaware of the erroneous practice adopted of not sending the written authorisations to the Chief Constable and did not become so aware until enquiries were made after Chief Superintendent Provoost's discovery of the error on 28 September 2005. He was satisfied that they did not act in bad faith. He accepted that the failure of the disclosure process to reveal at an earlier stage that the authorisations had not been returned to the Chief Constable in accordance with the statutory requirement was a matter of considerable concern because it meant that an unjustified and incorrect assertion as to the legality of the authorisations was maintained until the trial was already under way. However, he took the view that the disclosure process had not failed as the matter had been brought properly to the attention of the court and defence by the prosecution after it was told about it by the police. He concluded that none of the defendants had been prejudiced

by the disclosure not being made earlier and that any breach of Article 8 could be corrected by the use of the trial judge's discretion to exclude evidence should it be found appropriate to do so.

[14] On 10 November 2005 the trial judge gave another ruling following a second application by the appellant that proceedings be stayed as an abuse of process. The grounds for that application were that the disclosure judge should not have continued with the hearing on 31 August 2005 in the absence of defence counsel, that he should not have made his ruling on 13 September 2005 without holding a hearing, and that the prosecution failed to disclose to the appellant recordings of his telephone conversations at HMP Maghaberry, despite the applications for specific disclosure until 23 September 2005. The judge ruled that he was not an appellate court from decisions of the disclosure judge and he could not look behind the decisions of the disclosure judge. Nor was there was anything prohibiting the appellant from renewing an application for disclosure to the disclosure judge. In respect of the Maghaberry tapes, Hart J held that they did fall within the second disclosure application lodged on 6 September 2005 and fell within secondary disclosure and therefore should have been disclosed earlier. However, the material which was eventually disclosed on 23 September was not of such weight that the appellant could no longer have a fair trial nor was there any other basis for concluding that it would otherwise be unjust to try the appellant.

[15] On 13 December 2005 the disclosure judge gave a further disclosure ruling in relation to the appellant's application for documents relating to the undercover officers, namely documents relating to their training, their instructions as to questioning, what conduct they were permitted to engage in, how their relationship with the accused developed through the provision of gifts and such like. Higgins J reviewed all the authorisations and directed the prosecution to disclose some further information relating to the nature of the authorisation granted (in redacted form). He took the view that it was not in the public interest to disclose the guidelines, training and personnel records of the undercover officers. The journals and notebooks of the officers who acted as the 'managers' of the operation were also not in the public interest to disclose. It appears that entries in Mr. Mawer's journal relating to the notification of the authorisations were disclosed by the prosecution on the same date. The disclosure judge took the view that the non-evidential tapes did not fall to be disclosed, but he reiterated that the TTSs for those tapes should be disclosed. Redacted copies of transcripts of conversations while the appellant was detained in America were disclosed. However the so-called 'Heathrow' and further 'Maghaberry' materials were not to be disclosed in the public interest. In relation to gifts and money given to the appellant by the undercover officers, the prosecution prepared a 'master transaction sheet' which the disclosure judge considered provided the defence with the information they sought as the original claim forms were protected by public interest.

[16] As the trial proceeded further applications for disclosure arose, in the main in relation to issues that had arisen during the cross-examination of certain witnesses. In a ruling dated 26 January 2006 Higgins J dealt with these applications as well as a renewed application to appoint special counsel. In relation to special counsel, the disclosure judge remained of the view that there was nothing exceptional about the circumstances of this case which would justify the appointment of special counsel. He held there was no further disclosable material relating to the existence of a strategy to get the appellant back from the United States of America or to locate the appellant in Devon and Cornwall. Certain material in Detective Chief Superintendent Provoost's journal would be disclosed but the remainder of the journal was protected by public interest,

[17] On 14 February 2006, following representations by the appellant's legal representatives, the prosecution informed the court that not all the TTSs had been served. It seemed that a total of 69 TTSs were outstanding, 22 relating to the appellant.

[18] This was followed by a further stay application in respect of which the trial judge gave a written ruling on 23 February 2006. The appellant argued that the proceedings should be stayed due to a systemic failure of the disclosure process. The appellant argued that abuse of process was established by evidence of collusion between police witnesses regarding their evidence in relation to the processes for obtaining the covert surveillance authorisations; by the failure by the prosecution to disclose 69 TTS after the disclosure judge ordered disclosure of all TTSs; and by the non-disclosure, or alternatively late disclosure, by the prosecution of the following:

- contemporaneous journal articles by 'managers' relating to the notification of the authorisations;

- material which indicated that some admissions were not spontaneous or unprompted;

- material relating to the appellant's use of drink and drugs;

- material relating to payments being made to the appellant by the undercover officers;

- material relating to the alleged failure to tell Sir John Evans that the appellant had not been arrested for Rosemary Nelson's murder;

- material and recordings relating to the appellant's detention in America and his meeting with special branch at Heathrow upon his return to the UK; and

- material relating to a public statement by Colin Port that the appellant was not a suspect in the Rosemary Nelson investigation.

[19] Despite making findings that he was not satisfied that the evidence of certain senior police officers had not been fabricated and that certain material should have been disclosed at an earlier stage in the proceedings, the trial judge refused the application to stay the proceedings. Since the appellant argued that the trial judge erred in his ruling and his analysis of the issues it is necessary to consider the ruling in some detail.

Analysis of the Ruling of 23 February 2006

[20] The appellant referred to the prosecution's obligations under CPIA and also to the Code of Practice issued under Part 2 thereof. It was argued that

(a) material was not examined in accordance with the code in breach of paragraph 2.1;

(b) material was not revealed in accordance with the code to the disclosure officer in breach of paragraph 2.1;

(c) material was not revealed in accordance with the Code by the disclosure officer to the prosecutor in breach of paragraph 2.1 and paragraph 6.2;

(d) material was not listed on a schedule in accordance with the Code in breach of paragraph 6.2;

(e) material which might, and in fact did satisfy the test for primary disclosure, was not referred to at all, much less listed and described individually, in breach of paragraph 6.11;

(f) material which may fall within the test for primary disclosure was not specifically drawn to the prosecutor's attention by the disclosure officer in breach of paragraph 7.2;

(g) the disclosure officer was in breach of his specific duty to provide the prosecutor with a copy of any material which may satisfy the test for primary disclosure in breach of paragraph 7.3;

(h) the disclosure officer falsely certified that all retained material had been made available to him and revealed to the prosecutor in accordance with the Code in breach of paragraph 9.1;

(i) the disclosure officer did not look again at the material and draw to the prosecutor's attention any material which might reasonably be expected to

assist the defence in breach of paragraph 8.2; and

(j) the disclosure officer, after service of a defence statement, either did not certify at all or falsely certified that the material had been reconsidered in accordance with the Code in breach of paragraph 9.1.

The issue of collusion by prosecution witnesses

[21] The appellant raised an issue of police collusion issue relating to the preparation of witness statements and also to allegedly improper contact between prosecution witnesses during the period when some had finished giving evidence while others had given evidence-in-chief but had yet to be cross-examined.

[22] On the 11th of October 2005 Detective Chief Superintendent Provoost gave evidence as to when he became aware that Sir John Evans had not been properly notified that the authorisations he had granted had been approved by a Surveillance Commissioner. He gave his evidence-in-chief and was cross-examined and then re-examined. Hart J considered that Provoost had completed his evidence on the issue and was, therefore, not placed under any restriction about discussing this evidence. Acting Detective Chief Inspector Bailey then gave evidence. Sir John Evans was called to give evidence on the authorisations issue and was cross-examined on 29 October 2005. As there were issues of disclosure which the defence wished to explore, the remainder of the cross-examination of Sir John was deferred until a later date.

[23] The trial was then adjourned during the mid-term recess. During this time Detective Chief Superintendent Provoost contacted six witnesses collectively described as 'the managers' of Operation George He made arrangements for them to come to Northern Ireland to examine the authorisations and prepare written statements. This was required as it had not been anticipated that they would be required to give evidence in relation to the authorisations and had not previously made witness statements. Detective Chief Superintendent Provoost arranged for these witnesses to be provided with transcripts of the evidence of himself, Acting Detective Chief Inspector Bailey and Sir John Evans, together with some disclosure letters encapsulating what difficulties there were with what he described as the 'flawed authorities' as a reference bundle. He briefed them as to what they were expected to cover in their statements, such as their experience when they came to 'Operation George', their duties, who they worked with, what their processes were in terms of prior approval notices, their contact with the Chief Constable, and why they had failed to provide the Chief Constable (as the authorizing officer) with written notice of the Surveillance Commissioner's approval. He later denied that the purpose of the meeting was to establish that the failure to notify the Chief Constable was inadvertent, that no-one had realized that there had been a failure to comply with this requirement until

September 2005, and that the explanation was that the written notice requirement was not specified in the Code of Practice.

[24] On the 10 November Detective Chief Superintendent Provoost briefly gave further evidence about the criteria adopted by the police when the applications were made for surveillance whether under the Home Office guidelines, under what has been referred to as CLET and then under RIPA. He also touched on the preparation of the redacted abstracts. His cross-examination was then deferred until the end of the cross-examination of the surveillance managers.

[25] On the 14 November evidence-in-chief was given by five of the six managers. These were Detective Chief Inspector Mawer, Detective Inspector Leitch, Mr Craig, Detective Sergeant McMurdy and Detective Inspector Toyne. It appears that the trial judge ordered the exclusion of these witnesses from the courtroom while they individually gave evidence. In each case their cross-examination was deferred, pending the outcome of applications before the Disclosure Judge. Cross examination did not resume until the 9 January when Detective Chief Inspector Mawer's cross-examination resumed followed by the cross-examinations of Detective Chief Inspector Leitch, Sir John Evans, Detective Chief Inspector McMurdie, Detective Inspector Toyne and Detective Inspector Craig. The remaining manager was Detective Inspector Fernandez gave his evidence-in-chief. He was not cross-examined on behalf of any of the defendants. On the 16 January Detective Chief Superintendent Provoost was recalled to resume his evidence from the 10 November 2005. He was cross-examined by Mr Macdonald QC for Muriel Gibson, about the preparation of the managers' statements on 2 or 3 November 2005 and in relation to the fact that certain passages in each of the statements were identical.

[26] Disclosure hearings before the disclosure judge resulted in the trial not resuming until 30 January. On that date Detective Chief Inspector Mawer was recalled for further cross-examination. Initially he was asked had he spoken to any of the managers since the 14 November and he said that whilst he had spoken to some about other matters or about innocuous administrative matters, he had not spoken to any of them about any of the issues connected with this case. However, entries in Detective Chief Superintendent Provoost's journal in November and December were then put to him. Detective Chief Inspector Mawer then conceded that he had been "briefing" some of the Operation George managers during the period between their evidence-in-chief and their cross-examination before they had finished giving evidence. Those witnesses were Detective Chief Inspector Leitch and Detective Sergeant McMurdy.

[27] Detective Chief Inspector Leitch was recalled on the 2 February and further cross-examined. He conceded that he had been approached by

Detective Chief Superintendent Provoost or one of the officers working with him, and asked to look at his journals. He denied that Detective Chief Inspector Mawer had spoken to him about any of these issues. Detective Sergeant McMurdy was not recalled to give further evidence.

[28] The trial judge took the view that it was not improper for the managers to confer before they made their statements. However he decided that there was a real danger that the statements may not have been a true recollection by witnesses but rather the result of a collective decision as to what the group thought had happened. He concluded that the journal entries of Detective Chief Inspector Mawer and Detective Chief Superintendent Provoost did not sit easily with Detective Chief Inspector Mawer's evidence that he was unaware back in 2000 that the authorisations required to be served on the authorising officer. This coupled with his evidence that he had briefed managers after they began their evidence, having originally denied this, led the trial judge to conclude that the prosecution had failed to satisfy him that it was safe to rely on Detective Chief Superintendent Mawer's evidence, the prosecution having failed to exclude the possibility of fabrication. Since Detective Chief Superintendent Mawer had spoken to Detective Sergeant McMurdy and Detective Chief Inspector Leitch during the period of their evidence, the judge concluded that the prosecution had failed to exclude the possibility that their evidence was also fabricated. Furthermore, he took the view that for Detective Chief Superintendent Provoost to have given the managers transcripts of the evidence to date and to have asked Detective Chief Superintendent Mawer to speak to them about their journals during the period when they were giving their evidence were two errors of such significance that the prosecution had failed to exclude the possibility that his evidence had also not been fabricated.

[29] Thus, in relation Detective Chief Superintendent Provoost, Detective Chief Superintendent Mawer, Detective Chief Inspector Leitch and Detective Sergeant McMurdy, Hart J directed that the prosecution could not rely on any of their evidence but that the defendants could rely on such parts of their evidence as assisted their defence.

<u>*Contemporaneous journal entries in 2000 relating to the notification of the authorisations:*</u>

[30] Detective Inspector Leitch's and Detective Chief Inspector Mawer's journal entries were not disclosed until 27 October 2005 and 13 December 2005, respectively. The trial judge considered that these entries should have been disclosed, at the latest, once it was appreciated that written notice had not been given to Sir John Evans. However, the court noted that they had been disclosed in advance of Detective Chief Inspector Mawer's resumed cross-examination and before other relevant witnesses were cross-examined.

Material which indicated that some admissions were not spontaneous or unprompted:

[31] In relation to material concerning the undercover officers' questioning techniques and to the issue that admissions had been obtained through persistent questioning equivalent to an interrogation but outside the protection of PACE Hart J considered that the only material which may have fallen into this category was an entry in a "Socialising and related issues" paper disclosed on 26 January 2006 relating to questioning on 13 May 2003. However, since the recordings for that date were not being used as evidence against the appellant, the Judge held that the material did not become disclosable until Counsel for Gibson started to cross-examine the managers and Sir John Evans regarding questioning techniques.

Material relating to the appellant's use of drink and drugs:

[32] The appellant argued that his use of drink and drugs affected the reliability of his admissions and, therefore, any material relating to his use of such substances should have been disclosed to him. Hart J considered that the appellant's case was that he made the admissions in order to impress and not because he was drinking or on drugs. Furthermore, he was satisfied that Sir John Evans' decisions to give authorisations would not have been effected by the knowledge the appellant was a drug user. The trial judge also accepted that disclosure of the material was eventually made by the prosecution because of the appellant's allegation during cross-examination that there was a strategy to take advantage of the appellant's drink and drug use.

Material relating to payments being made to the appellant by the undercover officers:

[33] Hart J was of the view that the payments did not require disclosure at any earlier stage as they were not something which undermined the prosecution case or assisted the defence because the appellant did not make the case that he made the admissions in order to be paid. Furthermore, he was satisfied that the knowledge of the payments would not have altered Sir John Evans' decisions to issue the authorisations.

Material relating to whether Sir John Evans had been misled regarding the appellant not having been arrested for Rosemary Nelson's murder:

[34] This issue related to what Sir John Evans had been told about the appellant when considering the authorisations. Sir John initially said that he vaguely remembered something being said to him about the appellant denying involvement in the Nelson murder but he could not remember when he was told this. Upon being given time to review those parts of the authorisations which had been redacted under the PII order, Sir John confirmed that the initial authorisations did not contain any reference to either the appellant's denials (when he was under surveillance in America) or

the fact that he had never been arrested directly in relation to the Nelson murder. However, the first authorisation apparently did make reference to the fact that he had been arrested on another matter and during that period of arrest he was not asked about the murder of Rosemary Nelson.

[35] Hart J ruled that there was no basis for considering Sir John Evans had been misled and that the material being sought was clearly sensitive. He said that Sir John Evans gave evidence that he knew the appellant had been arrested on another matter and had been questioned about the Nelson murder in which he denied involvement.

Material and recordings relating to the appellant's detention in America and his meeting with special branch at Heathrow upon his return to the UK:

[36] The PPS sent a letter to the appellant dated 15 September 2005 in which the prosecution stated, inter alia, "The investigations by the American authorities were unconnected with the investigation out of which your client presently stands charged". However, during cross-examination Detective Chief Inspector Mawer accepted that this was inaccurate. The appellant, therefore, argued that the American recording should have been disclosed to him. Hart J took the view that this material was plainly of the utmost sensitivity and, although its existence was known from 2000, according to the PPS letter of the 15 September 2005, the material was not made available for inspection by the PSNI until November 2004 and not received by them until late June of 2005. The material had then to be put before the Disclosure Judge and he approved edited transcripts, which were served on the 9 September 2005. Given the sensitivity of these documents and the need to obtain them from a foreign Government, the trial judge considered that disclosure was made in the appropriate fashion and there was no breach of its duty by the Prosecution. However, the judge was also of the opinion that the letter from the PPS dated 15 September which stated that "the investigations by the American authority were unconnected with the investigation out of which your client presently stands charged" was "less than frank, at best, and on one construction deliberately misleading".

Material relating to a public statement by Colin Port that the appellant was not a suspect in the Rosemary Nelson investigation:

[37] It was accepted by the prosecution that a statement in the form of a press release was apparently made by Deputy Chief Constable Colin Port, the officer in overall charge of the investigation into the Nelson murder, to the effect that the appellant was neither a suspect nor being sought for interview in connection with the murder. The trial judge considered that it was made sometime before the appellant was placed under surveillance early in March 2000. Sir John Evans gave evidence that he was unaware of this statement and if he had known he would have asked the management team whether

they also held such a belief as "it might well affect the decisions I was arriving at in terms of authorisations". However, the prosecution did not have a copy of Deputy Chief Constable Port's press release and merely disclosed a 'policy document' to the appellant. Hart J ruled that failure to inform Sir John Evans of the Deputy Chief Constable Port's statement was not sufficiently significant to warrant a stay of the whole proceedings but rather it was a factor to take into consideration when determining whether the evidence should be excluded under article 76 of PACE.

Failure to disclose all the 'typed tape summaries' (TTSs):

[38] On 16 June 2005 the disclosure judge ordered all TTSs to be disclosed to Gibson and on a later date he ordered that they also be disclosed to the appellant. The TTSs were delivered in electronic format on a CD to the defence solicitors on 30 September 2005. However, following scrupulous investigations by defence solicitors, the prosecutions admitted to the court on 14 February 2006 that not all TTSs had been disclosed. It was established that a total of 69 TTSs had not been disclosed (22 of which related to the appellant). Within these 22 TTSs, the trial judge considered that 2 revealed pieces of material which should have properly been disclosed, namely (a) a reference at 'Tab 9' in TSL 500 attributing to the appellant the statement "Anything I said is third-hand, hearsay" and (b) a reference at 'Tab 13' regarding Gibson remarking that the appellant repeats things that he has heard on the news.

The ruling on whether the proceedings should be stayed

[39] The trial judge adopted the summary of the law in relation to abuse of process as given by him in his ruling on 13 October 2005 to the first abuse of process applications. He considered whether the appellant could have a fair trial in light of his determinations on the issues raised before him given the fact that he had concluded that Detective Chief Superintendent Provoost's evidence could no longer be relied upon. In doing so he considered whether the trial process was equipped to deal with the issues that now arose. He said that the 69 TTSs had not revealed important material that had not been capable of identification by the defence from material and that the 3 references that should have been disclosed, taken together, did not "materially add to the defence application", nor did the statement in the PPS letter of 15 September 2005. In relation to the police failure to advise Sir John Evans of Deputy Chief Constable Port's statement the judge said that this did lend some support to argument that there was a misuse or manipulation of the process that led to the authorisations being granted. However, he considered that trial process could ensure a fair trial with the power of the Court to exclude evidence under article 76 of PACE and the defendants' ability to rely on those parts of the evidence of Detective Chief Superintendent Provoost, Detective Chief Inspector Mawer, Detective

Inspector Leitch and Detective Sergeant McMurdie which may assist them. Hart J said that whilst there were legitimate criticisms that could be levelled at the way in which disclosure had been made, the disclosure process had resulted in the defence becoming aware of present issues. He then concluded:

> "Whilst there are legitimate criticisms that can be levelled at the way in which disclosure has been made, the disclosure process has resulted in the defence becoming aware of the material at 5, 6 and 7 for Fulton and eight for Gibson. It has also enabled the defence to have the material at 2 which contributed to the ruling in relation to Mr Mawer and the others. I consider that the trial process can ensure the defendants receive a fair trial and that were I to grant the application for a stay, I would be exercising a disciplinary jurisdiction. I do not consider that this would be a proper exercise in my discretion in all of the circumstances of the case. I, therefore, refuse the applications to stay the proceedings."

The Abuse of Process Issue

The Arguments

[40] The grounds of appeal relating to disclosure and abuse of process alleged that the trial process was fundamentally flawed and unfair due to the inadequacy of the prosecution and the disclosure judge in failing to detect that a significant number of the RIPA applications and authorisations did not comply with the requirements of the statute and the failure of the prosecution to reveal the unlawful applications until the defence were close to discovering this. There had been a failure to comply with the Code of Practice under the CPIA 1996. Independent counsel should have been instructed to assist in the disclosure process. The trial judge should have acceded to the stay application in October 2005 when the judge was misled by prosecution assertions that the authorisations were lawful and that the court should not permit an examination of the documents. He should likewise have acceded to the application of November 2005. His ruling of 23 February was an error having regard to the improper collusion of police witnesses; the misuse of the authorisation procedure and the prosecution's contempt of the orders of the court. The judge erroneously ruled that it was not improper for the managers to confer before they made their statements and that Mr Provoost was not acting improperly in speaking to the managers before they made their statements. He was likewise in error in concluding that Sir John Evans and a Surveillance Commissioner were not misled by the failure to provide them

with relevant information. The numerous errors could not be adequately dealt with under Article 76 of PACE.

[41] The gravamen of the appellant's argument was that the trial judge, having found that there had been serious breaches of good practices in the disclosure process and that the prosecution had failed to satisfy him that the evidence of Messrs Provoost, Mawer, Leitch and McMurdie was reliable and in the absence of the potential safeguards provided by the appointment of a special counsel should have stayed the proceedings because the court could not rely on the integrity of the disclosure process in the trial.

[42] Mr Turner relied on specific findings made by the trial judge on the voir dire and in the earlier applications for a stay which he contended should inevitably have led to a stay. These included:

- the failure to disclose that 37 of 99 evidential tapes were not dealt with in accordance with the appropriate statutory procedures rendering them in breach of Article 8 and contrary to statute;

- the failure to reveal relevant entries from Mr Mawer's journal entries until 13 December 2005;

- the disingenuous contents of the PPS letter of 15 September 2005 which falsely gave the impression that the American investigation was wholly unrelated to the investigations leading to the charges against Fulton in the proceedings;

- the failure to inform Sir John Evans that Fulton was not a suspect in relation to the Rosemary Nelson murder;

- the failure to disclose Fulton's recorded assertion in Tab 9 that "anything I say was third hand and hearsay" and Gibson's statement that Fulton only repeated things that he heard on the news.;

- the failure to produce 69 TTSs. It was subsequently revealed that full disclosure of the TTSs had not been made of these. A further 19 referred to drink and drugs, consumption by the alcohol and the payment of wages.

In the course of the hearing counsel accepted that the information in Tab 9 referred to at 9(e) above had in fact been disclosed.

[43] Counsel argued that whilst the trial judge correctly identified the principles to be applied when considering an application to grant a stay he misapplied them. His conclusion that the trial process could ensure that the defendants received a fair trial was a conclusion that no reasonable tribunal

could have reached given what had gone before. The authorisations for the surveillance were gained by subterfuge at least by omission. Sir John Evans had been persuaded to grant authorisations in respect of the initial surveillance for the purpose of investigation into an offence in respect of which the defendant was not a suspect. The British role in the United States surveillance was covered up. Mr Mawer's notebook entries were not disclosed even though they showed the procedural flaw in their authorisations. All matters connected with the payment of wages and the taking of drugs and alcohol were kept from the defence. Non-disclosure was not the result of mere error or incompetence but was deliberate. How, it is asked, could one be satisfied that the duty of disclosure had in fact been fulfilled if one cannot rely on the evidence of the officer in charge and cannot be sure that he has not committed perjury. It was argued that unless the services of special counsel were deployed the trial judge could not have been so satisfied. Where the judge has had to exclude the evidence of the officer in charge of disclosure by reason of potential perjury the problems could only possibly be resolved by the appointment of a special counsel.

[44] Mr Kerr on behalf of the Crown contended that the trial judge in his rulings rejecting the stay application reviewed the materials thoroughly and completely. He correctly identified the proper applicable principles to apply and exercised discretion appropriately by refusing to grant a stay.

[45] Dealing with the particular matters raised by Mr Turner counsel argued that in relation to the failure to disclose the fact that 37 of the transcripts did not arise from authorised recordings it was accepted that there was a procedural error but the prosecution only became aware of the failure during the trial and when it was discovered it was disclosed. In fact in all the cases the covert activities had been authorised and approved by the Surveillance Commissioner and there was a procedural error in relation to the failure to record in writing. In relation to the failure to disclose Mr Mawer's journal entries the evidence indicated that an internal operating decision had been taken to deal with the issue. The PPS's letter of 15 September 2005 had to be read as a whole. It set out in detail the steps taken to obtain and consider the American material. The phrase complained of related to the charges faced by the accused which did not include any offences arising from the death of Rosemary Nelson. That was factually correct. In respect of the alleged failure to inform Sir John Evans of Mr Port's press statement Sir John's evidence in cross-examination was bound to state as he did that if the statement had been drawn to his attention he would have been likely to have asked Mr Port what was behind it. If it was accurate it might well have affected the decision he was making in terms of authorisations. Mr Kerr submitted that Sir John Evans could not have answered otherwise. Counsel pointed out that all of the undisclosed tapes and contents of the said tapes were fully placed before the judge who in the event ruled that two of the outstanding tapes should be disclosed which in fact was done.

[46] Mr Kerr further argued that the appellant had no justification for his suggestion that the authorisations were obtained by subterfuge. There was no evidence that Fulton was not a suspect in relation to the Nelson investigation or that Sir John Evans was misled. He knew that Fulton denied involvement in that murder. On his evidence he would only have been influenced if on enquiry he was told of the management's firm view that Fulton was not a suspect. From the time that Fulton was arrested and interviewed in relation to these matters he knew that payments had been received, the work that he had agreed to do and the drugs and alcohol which he had consumed. The tape that never came to light was non-evidentiary and was not relied upon.

[47] Mr Kerr rejected the proposition that this was a case in which special counsel was appropriate because there was a designated disclosure judge who could see and review all materials in the case and the issues in the case were clearly defined.

Conclusions on the Abuse of Process Issue

[48] In Re DPP's Application for Judicial Review [1999] NI 106 Carswell LCJ giving the judgment of the court reviewed the authorities which established that the jurisdiction to stay for abuse of process is firmly rooted in the obligation of every court to give a fair trial to the defendant appearing before it. Carswell LCJ stated:

> "The courts have constantly been enjoined to bear several factors in mind when considering an application for a stay.
>
> (1) The jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons: ex parte Bennett [1994] 1 AC 42 at 74 per Lord Lowry.
>
> (2) The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct: ibid.
>
> (3) The element of possible prejudice may depend on the nature of the issues and the evidence against the defendant."

[49] In Bowe v R [2001] UKPC 19 Lord Bingham stressed that account must also be taken of the public interest in convicting the guilty, deterring violent

crime and maintaining confidence in the efficacy of the criminal justice system. This was a point restated by Lord Bingham in Attorney General's Reference (No. 2 of 2001) [2004] 2 AC 72 in which he stated that:

> "The public interest in the final determination of criminal charges require that such a charge should not be stayed or dismissed if any lesser remedy would be just and proportionate in all the circumstances."

[50] In R v Murray and Others [2006] NICA 33 Kerr LCJ giving the judgment of the court pointed out that it was important to focus carefully on what Lord Bingham said about the category of cases where a fair trial is possible but where some other species of unfairness to the accused makes a stay appropriate. He went on to stress that Lord Bingham made the emphatic statement that where any lesser remedy to reflect the breach of the defendant's Convention right is possible a stay will never be appropriate. He went on to say:

> "It is absolutely clear … that he considered that such cases should be wholly exceptional to the point that they would be readily identifiable. The exceptionality requirement is, in our judgment, central to the theme of this passage of a speech and is not surprising that this should be so. Where a fair trial of someone is charged with a criminal offence can take place, society would expect such a trial to proceed unless there are exceptional reasons that it should not."

[51] This approach is entirely in line with what was stated by Lord Clyde in R v Martin [1998] AC 917 at 946:

> "No single formulation will readily cover all cases, but there must be something so gravely wrong as to make it unconscionable that a trial should go forward, such as some fundamental disregard for basic human rights or some gross neglect of the elementary principles of fairness. … I am not prepared (to conclude that in this case) there was so grave an invasion of human rights or something so grossly unfair or oppressive as to threaten the stability of the verdict of the court martial."

[52] As pointed out by Neill LJ in Beckford [1996] 1 Cr App R 94 the constitutional principle which underlines the jurisdiction to stay criminal proceedings is that the courts have the power and the duty to protect the law

by protecting its purposes and functions. The courts have a duty to secure fair treatment for those who come before them. The ultimate objective of the discretionary power is to ensure that there should be a fair trial according to law which involves fairness both to the defendant and to the prosecution (per Sir Roger Ormrod in Derby Crown Court ex parte Brooks [1985] Cr App Rep 164). Nor, it might be added, should the interests of the victims of crime in ensuring a just trial be overlooked. The normal rule is that he who asserts the abuse of process must prove it and to do so on the balance of probabilities (Telford Justices ex parte Badhan [1991] 2 QB 78). This proposition must be read in the light of S(SP) [2006] 2 Criminal Appeal Reports 341 in which the Court of Appeal observed that the discretionary decision of whether or not to grant a stay by reason of, for example delay, is an exercise in judicial assessment dependent on judgment rather than on any conclusion as to fact based on evidence. The judicial balancing of competing interests is at the heart of all abuse claims.

[53] One further important point arises. Under the provisions of Section 2(1) of the Criminal Appeal (Northern Ireland) Act 1980 as substituted by Section 2(2) of the Criminal Appeal Act 1995 the function of the Court of Appeal on an appeal against conviction is to allow an appeal only if it thinks that the conviction is unsafe. The test of unsafeness subsumes the former tests of whether the conviction was unsatisfactory or whether there had been a material irregularity at the trial which are no longer substantive grounds for allowing an appeal although they may form a step in the reasoning or thought processes leading to a decision as to the safety of the convictions. The House of Lords in Stafford and Luvaglio v DPP [1974] AC 878 made clear that it is the opinion of the Court of Appeal itself on the safety of the convictions which is relevant (see Carswell LCJ in R v Clegg [1998] NIJB 68).

[54] In R v Martin [1998] AC 917 the question arose as to whether the Courts Martial Appeal Court should have stayed proceedings in a court martial before which the appellant, a civilian subject to military law under the Army Act 1955, was tried for murder. The House of Lords concluded that Court Martial Appeal Court correctly refused the argument that the trial was an abuse of process. Lord Lloyd added:

> "I should mention that even if the Courts Martial Appeal Court had been satisfied that there was an abuse of process it would still have been necessary for the court to dismiss the appeal unless persuaded that the conviction was unsafe. For the Courts Martial Appeal Court is a creature of statute and has no power to allow appeals save in accordance with Section 12(1) of the Courts Martials (Appeals) Act 1968 as substituted by Section 29(1) of and paragraph 5 of Schedule 2(2) the Criminal Appeals Act 1995 …

> Nothing in such material as we have makes me think that the conviction was unsafe. I would dismiss the appeal."

The function of the Court of Appeal, accordingly, is to consider the overall safety of the convictions. Since the court must review the whole case to consider the safety of the conviction it is, accordingly, bound to consider the entirety of the trial process and not simply whether at a point in the trial the judge could or should have stayed the proceedings. It is thus necessary to consider what happened in the course of the trial including what happened after the point when the appellant contends the case should have been stayed.

[55] The authorities make clear that where, as in the present case, the trial judge is called on to exercise a judicial discretion, this court will not interfere with the exercise of the discretion unless he erred in principle or that there was no material on which he could properly have arrived at his decision (per Lord Dilhorne in <u>Selvey v DPP</u> [1970] AC 304 at 342). This court will only interfere if there has been a failure to exercise any discretion, a failure to take into account a material consideration or taking into account an immaterial consideration:

> "It has not been shown that the trial judge made an error or that he took into account any extraneous factor which he ought to have excluded or that he left out of account any relevant factor which he ought to have considered. It has not been shown that there has been a miscarriage of justice."

(per Lord Pearson in <u>R v Ludlow</u> [1971] AC 29 at 40D-E).

[56] Having regard to the fact that a stay for abuse of process must be fully exceptional and relate to some fundamental disregard of the rights of the defendant or some disregard of elementary principles of fairness properly established by the defendant, and having regard to the law's strong preference to allow a trial to proceed if a remedy short of a stay is just and proportionate, it is not surprising that the trial judge was extremely reluctant to grant a stay which would have had the effect of bringing the entirety of the proceedings to a conclusion, even in relation to the counts on which there was clear evidence of guilt apart from any surveillance evidence. The gravamen of the appellant's argument is that because the court concluded that the evidence of the police witnesses should be excluded from consideration on behalf of the Crown the court could repose no confidence in the integrity of the disclosure system in the trial and thus the defendant ran the risk of unfairness in the trial process. As <u>R v Martin</u> makes clear it is necessary for this court to stand back and review the safety of the appellant's convictions and consider whether in the light of the conduct of the whole trial the

appellant has shown that the trial process was an abuse of process in fact. A theoretical possibility that the prosecution may have withheld some disclosable material which might possibly have assisted the appellant to defend the charges would be insufficient to show that the trial process was an abuse of process if on the evidence adduced proof of guilt was established beyond reasonable doubt. In considering the safety of the convictions in the light of the suggestion that the disclosure process was seriously compromised by the police conduct criticised by the judge it must be borne in mind that the defendant gave no evidence and adduced no evidence to suggest that there may have existed material that may have assisted his case or detracted from the Crown case. It was not in dispute that he said the things which were recorded either in his conversations with the undercover agents or with Gibson and other third parties. The defence, as the trial judge noted, claimed that the appellant was only seeking to boost his standing and credibility and to ingratiate himself with the gang members, a defence which was of no real relevance in relation to what he said to Gibson and the parties other than the undercover agents.

[57] The trial judge scrupulously considered the disclosure made by the prosecution; identified further material which should be disclosed; and clearly kept the issue of disclosure under review throughout the trial process. He excluded entirely the evidence of the police officers he criticised save where their evidence might assist the defence. This was a ruling which was very much in ease of the defendant and another trial judge could legitimately have taken a stance less favourable to the appellant. He kept open for determination the question of admissibility of the evidence having regard to Article 74 and 76 and in due course carefully considered that question. It will be necessary to consider the admissibility issue separately later in this judgment but the judge correctly concluded that the trial process was apt to enable the question of admissibility to be considered as part of the fair trial rights of the appellant. The judge's conclusion that the trial process could ensure a fair trial and that a stay of proceedings was inappropriate was one which he was fully entitled to reach in the exercise of his judicial assessment of the question of whether a stay or some lesser remedy was appropriate. As trial judge he had access to all the trial material and had a full appreciation of the unfolding issues in the trial and he was accordingly well placed to make that assessment.

[58] While the Port press statements said that the appellant was not a suspect in the Rosemary Nelson murder investigation there is nothing to suggest that he was not considered to be an individual who could provide leads or assistance to that inquiry and much to suggest that he was such a person. The Rosemary Nelson investigation remained very much open. The surveillance of Gibson commenced in the context of that investigation and Fulton was a known associate of Gibson and suspected to be a leading figure in unlawful Loyalist paramilitary activity in Mid Ulster where the murder

had occurred. The suggestion that the surveillance operation should be viewed as an illegitimate operation brought about by a subterfuge is unsustainable.

[59] The proposition that the trial judge and the disclosure judge erred in not requiring the appointment of a special counsel must likewise be rejected. Special counsel may in limited circumstances have a role to play in relation to issues of public interest immunity and disclosure issues in criminal cases. Normally the functions of the disclosure judge will fulfil the functions which might in other situations be played by a special counsel. In Jasper v United Kingdom [2000] 30 EHRR 441 this very point was considered. In that case the court was satisfied that the defence had been kept informed and permitted to make submissions and participate in the decision-making process in relation to disclosure as far as was possible. Whilst it was true that in a number of different contexts the United Kingdom had introduced or was introducing a special counsel procedure the court did not accept that such a procedure was necessary in the case before it. It noted in particular that the material which was not disclosed formed no part of the prosecution case and was never put to the jury. The position was to be contrasted with the circumstances addressed by the Special Immigration Appeals Commission Act and the Northern Ireland Act 1998, where impugned decisions were based on material in the hands of the Executive not available to the supervising courts at all. The fact that the need for disclosure was at all times under the supervision of the trial judge provided a further important safeguard in that it was his duty to monitor throughout the trial the fairness or otherwise of the evidence being withheld. It was not suggested that the judge was not independent or impartial within the meaning of Article 6(1). He was fully versed in all the evidence and issues in the case and was in a position to monitor the issue of disclosure throughout the trial. The role which it was suggested by Mr Turner could have been played by a special counsel in the present case appears to have been one requiring the special counsel to carry out investigative functions seeking to go behind the prosecution's disclosure and demanding a right of access to undisclosed material. The statutory scheme laid down by CPIA does not envisage such a role or empower a special counsel to exercise the kind of powers impliedly required by the appellant's argument. Since we have concluded that the trial judge was correct in refusing to stay the proceedings it is unnecessary to consider further the question of special counsel. As the history of the disclosure applications and rulings set out above make clear the trial judge and the disclosure judge conscientiously and carefully supervised the disclosure process to ensure a fair trial. We are satisfied that the appellant had a fair trial.

The Admissibility Issue

[60] Applications were made at the trial under Articles 74 and 76 of the Police and Criminal Evidence (NI) Order 1989 ("PACE")to exclude all of the evidential transcripts on which the trial judge gave rulings on 13 March and 8 May 2006. The appellant contends that the trial judge was in error in his rulings and that the evidence of admissions made by the appellant to the undercover police officers as recorded during the course of the surveillance operation should have been excluded. This argument did not relate to any statements made by the appellant in the course of monitoring his conversations with Gibson and others who were not undercover police officers. In view of that a question would arise as to whether any of the convictions could be regarded as safe on the basis of the evidence obtained by the probe surveillance if the admissions made to the undercover agents should properly be excluded.

[61] Article 74(2)(b) provides as follows:

> "(2) If, in any criminal proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained:
>
> > …..
> >
> > in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,
>
> the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

[62] Article 76(1) provides as follows:

> "(1) In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness

of the proceedings that the court ought not to admit it."

[63] The appellant submitted both to the trial judge and to this court that the entirety of the transcript evidence should be excluded for the following broad reasons:

(a) the covert operation was based on authorizations which were contrary to Article 8 ECHR and obtained on a basis which the enquiry team knew to be false;
(b) the criteria for the grant of authorizations were not complied with;
(c) the entire operation was impermissible as unfair and an attempt to circumvent PACE;
(d) the admissions were obtained in circumstances that were the functional equivalent of an interrogation; and
(e) the admissions were unreliable as a result of the appellant's tendencies to drink, use drugs, boast, exaggerate or tell untruths.

The Judge's Rulings

[64] In his first ruling given on 13 March 2006 the trial judge deferred consideration of the Article 74 position since he noted that the burden rested on the prosecution to prove beyond reasonable doubt that the confessions were not made in consequence of anything said or done in the circumstances existing at the time which would render them unreliable. The prosecution would therefore be afforded the opportunity to call evidence to address that issue.

[65] In proceeding to consider the application to exclude the evidence under Article 76 he noted that central to many of the appellant's submissions was the proposition that the recordings were obtained in breach of the appellant's rights under Article 8 under of the Convention. Indeed the prosecution conceded that 37 of the 99 evidential transcripts relied on were obtained in breach of Article 8. He considered it necessary to determine whether some or all of the remainder were also obtained in breach of Article 8. He reviewed a number of authorities including Khan v UK, Allan v UK, R v Button, R v P and Attorney General's Reference (No 3 of 99) and observed that these establish that a breach of Article 8 rights will not of itself render a defendant's trial unfair under Article 6 and that there is a two stage process involved in considering this issue. First, the circumstances in which the evidence came to be obtained must be considered. Secondly, it was necessary to consider whether admission of the evidence would have an adverse effect upon the fairness of the proceedings. He quoted Lord Hutton in Attorney General's Reference (No 3 of 99) in the following terms (Page 590):

> "In the exercise of that discretion I consider that the interests of the victim and the public must be considered as well as the interests of the defendant. As Barwick CJ stated in his judgment in the High Court of Australia in R v Ireland [1970] 126 CLR 321 at 335, with which all the members of the court agreed: `Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise.' In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts maybe obtained at too high a price. Hence the judicial discretion".

The trial judge concluded that the further 38 transcripts obtained under the Home Office or ACPO Guidelines were also obtained in breach of Article 8.

[66] Bearing in mind the authorities the trial judge determined:

> 'It is only in respect of the failure to comply with the subsequent requirement to give notice that the scheme has not been followed. I can see no prejudice to the defendants because of that. In those circumstances, provided that is the only matter to be considered, I have no hesitation in holding that the balance to be struck comes down against the defendant….. it could not be a proper exercise of my discretion to exclude the admissions under Article 76 because of a failure to provide notification after the event.'

[67] On the question whether the undercover operation in which the appellant's alleged admissions were made was 'the functional equivalent of an interrogation' without the PACE protections and hence unfair as explained in Allan v UK he concluded that it was not to be so considered. He noted that while the undercover officers were clearly acting as agents of the state at the time of the alleged confessions, significant features considered objectionable in Allan were absent:

> "First of all, in many of the transcripts no undercover officer was present at all. See for

> example in Fulton's case B112 and in Gibson's case B91. Secondly, the defendants were at liberty at the time. Thirdly, they were not being formally questioned at the time."

As regards those occasions where an undercover officer was present he considered it necessary to examine all of the circumstances relating to each conversation in order to see whether there was something that could be said to be the functional equivalent of an interrogation since, as the European Court stated in Allan, whether there is a violation of Article 6 depends on all the circumstances of the individual case.

[68] The trial judge rejected a further line of argument on behalf of the appellant. This was that the admissions made by appellant were obtained without legal authority in that they were made before the authorisations were extended to activities other than the investigation into the murder of Rosemary Nelson (the original reason for setting up this surveillance operation). He concluded that

> "It was a murder which was also an assault of the most direct kind upon the rule of law itself. There is no reason to believe that had separate authorisations been considered for surveillance into other offences on the basis of Fulton's admissions, that a different view would have been taken. He was already covered by authorisations and no authority has been advanced to support the proposition that the Court should exclude admissions made in respect of other crimes of a very serious nature and I can see no justification for doing so."

[69] In his ruling of 8 May, 2006 the trial judge considered the admissions in a number of stages: (1) identifying what was said or done by undercover officers and others; (2) identifying whether there were other circumstances likely to render unreliable any confession made by the accused the test being an objective one; and (3) asking whether the prosecution had proved beyond a reasonable doubt that the admissions were not obtained in consequence of anything improperly said or done. He rejected the suggestion that the exclusion of one tape or more than one tape required the exclusion of a subsequent tape or tapes which essentially confirmed to the same officer the suggestion that had previously been improperly elicited by that officer. He observed in this context that Article 74(2)(b) requires the Court to consider the circumstances existing at the time the admissions were made. He also observed that if there was evidence to suggest that "a defendant's tongue may have been loosened by alcohol" consideration had to be given to excluding the tape in question either under Article 74 because the amount of alcohol

involved may affect the reliability of the admission or under Article 76 because it would be unfair to allow evidence to be relied upon if there was reason to believe that the officers may have supplied the drink to loosen the defendant's tongue. However, that was not to say that consumption of any alcohol would have that result because, as he noted, social gatherings on licensed premises are entirely normal and one or two drinks would not be significant because it cannot be expected to have any effect on the appellant. He also observed that it was a better approach to include a drugged (or drug dependant) state of a defendant as a potentially relevant circumstance within Article 74(2)(b) which might be conducive to the making of an unreliable confession.

[70] Having observed that the appellant's willingness to impress did not, of itself, suggest that his admissions may be unreliable and that there was no reason to exclude the admissions on such a basis or on the basis of any suggested social isolation, he systematically considered the tapes of evidence submitted by the prosecution and examined them against the criteria he had earlier mentioned. As a consequence, he refused to admit a significant number of these either on Article 74 or Article 76 grounds. These exclusions related to transcripts of conversations in which there was evidence of steering or directing of questions to the appellant and to conversations at times when there was the possibility of the defendant having consumed alcohol or taken drugs.

The Parties' Arguments on the Admissibility Issue

[71] In looking at the Article 6 rights of the appellant in relation to the Article 8 breaches Mr Turner argued that in R v Christou & Wright [1992] 3 WLR 228 the Lord Chief Justice made clear that in considering the legality of a police operation it should be looked at as a whole. The trial judge had failed to adopt the proper approach wrongly preferring to consider each conversation to see whether it individually bore evidence of questions or steering thereby breaching one of the requirements of PACE or evidence of the fact that Fulton had taken either drink or drugs, thereby affecting the reliability of what was said. It was argued that if an holistic approach had been properly taken there were very significant differences between what was determined to be a legitimate "trick" as utilized in Christou and the police operation in the appellant's case. Considering the operation as a whole a variety of steps were taken to ensure that Fulton ended up working for the covert operation. Muriel Gibson was befriended and encouraged to persuade the appellant to settle in Cornwall; he was encouraged not to return to Northern Ireland by informing him of a plan to assassinate him; and his settlement in the UK was made possible by providing him with a fictitious apparently criminal job for which he was paid. The nature of the operation ensured that the only method open to him to impress his fellow criminals (as

he believed them to be) was to talk. The more he talked the more reward he got, ensuring continued employment and a more favourable wage structure.

[72] Mr Turner submitted that the trial judge erred in refusing to exclude the transcripts in circumstances where:

(a) the manner in which the alleged admissions were obtained was contrary to Article 8 ECHR; did not comply with the statutory scheme for authorizations; and certain of the alleged admissions were obtained without authorization;

(b) the entirety or at least part of "Operation George" was unlawful on the basis that the authorizations had been obtained for the purposes of an investigation into the death of Rosemary Nelson and not for purposes of an investigation into any of the offences in respect of which the accused was standing trial;

(c) the whole process was the functional equivalent of an interrogation which necessitated the provision of the protections provided by PACE;

(d) there were clear and consistent breaches of PACE throughout the police operation in that:

- (i) the appellant was not arrested or informed that he had been arrested or the reasons for his arrest (Article 30);
- (ii) he did not have access to legal advice (Article 58, Codes of Practice Section 11);
- (iii) he was not cautioned (Codes of Practice Section 10);
- (iv) no or no adequate medical or other assessment of the appellant's fitness for questioning was made at the outset of the entire operation or of each conversation (section 9 Code C, Annex G); and
- (v) the interviews did not cease and he was not charged once evidence considered sufficient to charge was obtained (Code C paras 11.6, 16.1).

[73] In his submissions Mr Turner took the court carefully through the transcripts of recordings of the surveillance material pointing out what he contended were questions or comments on the part of the undercover agents that demonstrated the nature of the whole exercise as the functional equivalent of an interrogation. Counsel argued that while the trial judge rightly excluded some tapes on the basis that the 'steering' or direct questioning of undercover police officers might have been tantamount to interrogation he should have excluded them all on that basis since the whole process was interrelated and should be viewed as a whole.

[74] It was argued that the circumstances under which the appellant came to be subject to surveillance had to be examined as well as his relationship with the undercover agents. The circumstances were designed to exert pressure on him to come to Cornwall where Muriel Gibson was and where the surveillance operation was being carried out. In his relationship with the "gang" the appellant was in the position of an employee and was not in an equal position with the agents whom he believed to be his criminal employers. His employers by showing interest in what he was saying and in continuing his employment encouraged him to talk more and more. The agents were in effect seeking admissions and encouraged him to make "admissions" of a colourful nature. This combined with the availability of alcohol and drugs all were indicia of unreliability. The appellant's tendency to boast and exaggerate his role added to the objective unreliability of his "admissions." The whole operation was designed to achieve confessions but without any of the PACE safeguards which are designed to counter the risk of unreliability. It was for the prosecution to prove the objective reliability of the statements and for the police to create a situation in which the product could be shown to be reliable. This they had failed to do and the admissions should accordingly have been excluded as unfair.

[75] Mr Kerr argued that a breach of Article 8 did not of itself lead to the exclusion of the transcript surveillance evidence, a point not challenged by Mr Turner. The technical fault in relation to the notification of authorisations did not detract from the fact that the operation was in fact properly approved and there had been no subterfuge in establishing it (a point which this court has accepted at paragraph [58]). The surveillance operation was not to be categorised as unfair. It is well established that in order to deal with serious terrorist and other crime operations such as Operation George are permissible. The judge had excluded material which he considered evidence in permissible interrogation or where there was a real risk of the appellant having taken drink or drugs. The judge had properly analysed the authorities including Khan v UK [2001] 31 EHRR at 647. It was fanciful to suggest that Fulton had been forced into making the admissions he had or forced into joining what he thought was a criminal gang. There was no functional equivalent to an interrogation as happened in Allan v United Kingdom. The judge carefully considered the reliability of the admissions. He carried out a careful analysis and drew proper inferences. Where he could not be sure that as a result of directing or steering or the possible presence of alcohol or drugs a confession statement was reliable he excluded the material. Any questioning or steering in relation to the excluded material could not be viewed as tainting everything that was said in other circumstances and other conversations. In relation to the reliability of the admissions insofar as issues related to boasting, recounting stories heard in pubs and exaggerating the appellant chose to give no evidence in support of any such suggestion. Mr Kerr pointed out that no PACE rights applied in the case of probe tapes. On the evidence of those tapes alone there was, it was argued, clear evidence to

support the convictions on Counts 1 and 2, 14-23, 24, 25, 26 and 28. Those convictions accordingly were not shown to be unsafe even if the court accepted Mr Turner's argument on the inadmissibility of the rest of the surveillance evidence.

Conclusions on the Admissibility Issue

[76] In Khan v United Kingdom [2001] 31 EHRR 45 the defendant was convicted in connection with the unlawful importation of drugs as a result of a recording of a conversation between the defendant and third parties during which he admitted the offence. The surveillance was carried out without lawful authority. The trial judge admitted the evidence notwithstanding and the Court of Appeal upheld his ruling. It certified a point of general public importance on the question whether evidence of tape recorded conversations obtained by a listening device attached to a private home without the knowledge of the owner was admissible evidence. The House of Lords considered two questions, firstly whether the taped material was admissible at all and secondly whether the judge should have excluded it under Section 78 of PACE. As to the former the House of Lords held that there was no right to privacy in English law and, even if there was, the common law rule that relevant evidence which was obtained improperly or even unlawfully remained admissible applied to surveillance evidence. In relation to the exercise of discretion a breach of Article 8 was relevant but not determinative of the discretion to admit or exclude it. On the facts the judge was entitled to conclude as he did that the circumstances in which the relevant evidence was obtained even if it constituted a breach of Article 8 was not such as to require the exclusion of the evidence. The European Court of Human Rights considered the question whether the proceedings as a whole were fair. The court noted that (as is the case in the present instance) the applicant had ample opportunity to challenge both the authenticity and the use of the recording. He did not challenge its authenticity but challenged its use in the voir dire and again before the Court of Appeal and in the House of Lords. At each level of the jurisdictions the domestic courts assessed the effect of admission of the evidence on the fairness of the trial by reference to Section 78 of PACE and the court discussed the basis of the surveillance. The European Court found that the use at the applicant's trial of the secretly taped material did not conflict with the requirements of fairness under Article 6.

[77] The trial judge correctly analysed the proper legal approach in the light of Khan and by a ruling favourable to the defence concluded that he would treat all the surveillance evidence as not properly authorised. This did not mean that it was thereby rendered inadmissible. The fact that the evidence was obtained in breach of Article 8 was a factor but not determinative of the question whether the evidence should be excluded under Article 76.

[78] In R v Christou and Wright [1992] 3 WLR 228 evidence implicating the accused was obtained by police in an undercover police operation in London. This operation involved the setting up of a shop purporting to buy and sell jewellery. It was staffed by undercover police officers purporting to be shady jewellers willing to buy stolen property and cameras and sound recorders recorded what happened. The object was to recover stolen property and obtain evidence against persons who had either stolen or dishonestly handled the goods. The conversations between the officers and the then vendors concerned bantered about prices and to maintain their cover the officers engaged in friendly banter, asked questions such as the area of London where it would be unwise to resell the goods and required the signing of receipts recording money paid. The appellants made repeated sales at the shop. When charged with burglary and handling stolen goods they challenged the admissibility of the evidence resulting from the undercover operation on the grounds that it should have been excluded at common law and under Section 78 of PACE as being contrary to Code C of the Code of Practice. The trial judge found that the police had engaged in a legitimate trick; had not acted as agents provocateurs or incited crime; had provided no market which would not have been available elsewhere; and had grounds to suspect that each of the appellants had committed the offence by the time when the first sale was transacted but had not been cautioned. The judge ruled that the operation had to be considered as a whole and that he had a discretion to exclude the evidence. He concluded that the admission of the challenged evidence would not have an adverse effect on the fairness of the trial within Section 78. The Court of Appeal upheld his decision and concluded that the exercise of his discretion was not unreasonable but was in fact correct. Code C of the Code of Practice was intended to protect suspects who were or thought themselves vulnerable to abuse and pressure from police officers and applied where a suspect was being questioned about an offence by a police officer acting as such for the purpose of obtaining evidence. The appellants were not being questioned by police officers as such and conversations were on equal terms. There could be no question of pressure or intimidation by the officers as persons actually believed to be in authority.

[79] Lord Taylor quoted with approval the words of the trial judge:

> "Nobody was forcing the defendants to do what they did. They were not persuaded or encouraged to do what they did. They were doing in that shop exactly what they intended to do and in all probability, what they intended to do from the moment they got up that morning. They were dishonestly disposing of dishonest goods. If the police had never set up the jewellers shop, they would, in my judgment have been doing the same thing though of course they would not have been

> doing it in that shop at that time. They were not tricked into doing what they would not otherwise have done, they were tricked into doing what they wanted to do in that place and before witnesses and devices who can now speak of what happened. I do not think that is unfair or leads to an unfairness in the trial."

[80] Lord Taylor went on to state:

> "Putting it into different words, the trick was not applied to the appellants; they voluntarily applied themselves to the trick. It is not every trick producing evidence against an accused which results in unfairness. There are, in criminal investigations, a number of situations in which the police adopt ruses or tricks in the public interest to obtain evidence. For example, to trap a blackmailer, the victim may be used as an agent of the police to arrange an appointment and false or marked money to be laid as bait to catch the offender. A trick, certainly; in a sense to, a trick which results in a form of self-incrimination; but not one which could reasonably be thought to involve unfairness. Cases such as R v Payne [1963] 1 WLR 637 and R v Mason [1988] 1 WLR 139 are very different from the present case or the blackmail example. In R v Mason as in R v Payne the defendant was in police custody at a police station. Officers lied to both the defendant and his solicitor. Having no evidence against the defendant, they falsely asserted that his fingerprint had been found in an incriminating place in order to elicit admissions from him. After advice from his solicitor the defendant made admissions. This court quashed his conviction.
>
> In the present case the argument was at one stage canvassed that requesting the receipt with the consequent of obtaining fingerprints, should be regarded separately from the main issue, that it amounted to a separate trick within a trick. However Mr Thornton made clear that in his submission requesting the receipt was merely an incident in the operation of the shop. The whole operation was a single trick, all the fruits of which should be excluded. We agree that the operation should be considered as a

> whole. In the end the judge treated the receipts as 'part of the general deceit concerning the dishonest jewellers, the general pretence by them that it was a proper jeweller shop.' It was not unfair. He gave us a further reason that no reason had been made for a receipt, fingerprints could easily have been obtained in other ways e.g. by dusting the counter …"

[81] The approach to the question of ruses and tricks by the police is usefully stated by Kirby J in the Australian case of R v Swaffield and Pavic [1998] High Court of Australia 1:

> "Subterfuge, ruses and tricks may be lawfully employed by the police, acting in the public interest … the critical question is not whether the accused has been tricked and secretly recorded. It is not even whether the trick has resulted in self-incrimination, electronically preserved to do great damage to the accused at trial. It is whether the trick may be thought to involve such unfairness to the accused or otherwise to be so contrary to public policy that a court should exercise its discretion to exclude the evidence notwithstanding its high probative value. In the case of covertly obtained confessions the line of forbidden conduct will be crossed if the confessions may be said to have been elicited by police (or by a person acting as an agent of police) in unfair derogation of the suspect's right to exercise a free choice to speak or to be silent."

[82] A similar approach is to be found in the Canadian case of R v Herbert [1990] 2 SCR 151 and in R v Broyles [1991] 3 SCR 595. In R v Herbert McLachlin J said:

> "When the police use subterfuge to interrogate an accused after he had advised them that he does not wish to speak to them, they are improperly eliciting information that they were unable to obtain by respecting the suspect's constitutional right to silence: the suspect's rights are breach because he has been deprived of his choice. However in the absence of eliciting behaviour on the part of the police, there is no violation of the accused's right to choose whether or not to speak to the police. If the suspect speaks, it is by his or her own choice, and he or she must be

> taken to have accepted the risk that the recipient may inform the police."

[83] In R v Broyles the court stated:

> "The right to silence is triggered when the accused is subjected to the coercive powers of the state through his or her detention. The right protects against the use of the state power to subvert the rights of the accused to choose whether or not to speak to the authorities. Where the informer who allegedly acted to subvert the right to silence of the accused is not obviously a state agent, the analysis must focus on both the relationship between the informer and the state and the relationship between the informer and the accused. The right to silence would only be infringed where the informer was acting as an agent of the state at the time the accused made the statement and where it was the informer who caused the accused to make the statement. Accordingly two distinct enquiries are required. First, was the evidence obtained by the agent of the state? Second, was the evidence elicited? The right to silence would be violated only if both questions are answered in the affirmative.
>
> Applying the above principles to the facts of this case it is clear that the informer was an agent of the state for the purposes of the right to silence … the conversation here would not have occurred or would have been materially difference but for the authority's intervention. Furthermore, the impugned statement was elicited. Parts of the conversation were functionally the equivalent of an interrogation and the appellant's trust and the former as a friend was used to undermine the appellant's confidence and his lawyer's advice remained silent and to create a mental state in which the appellant was more likely to talk."

In that case B had been arrested and held for questioning in respect of a suspicious death. He had spoken to his lawyer and had been advised to remain silent. The police arranged for a friend to visit B in custody while carrying a body pack recording device. The friend questioned B about his involvement in the murder and sought to exploit the accused's trust in him as a friend to undermine the accused's confidence in his lawyer's advice to

remain silent and to create the mental state in which the accused is more likely to talk. The Supreme Court held that it was wrong to admit the evidence obtained by the friend that the accused knew the time of the deceased's death.

[84] In R v Liew [1999] 3 Supreme Court Reports 237 the accused was arrested in connection with a cocaine deal and the police also pretended to arrest the undercover officer who negotiated the transaction. They were placed together in an interview room where the accused initiated a conversation referring to the arrest. The undercover officer asked the accused what happened and stated "yeah they got my fingerprints on the dope". The accused replied " And me too." The Supreme Court found nothing to suggest that the exchange was the functional equivalent of interrogation. It was of no consequence that the police officer was engaged in the subterfuge permitting himself to be misidentified or lied so long as the responses were not actively elicited or the result of interrogation. In this case the conversation had been initiated by the accused and the police officer picked up the flow and content of the conversation without directing or redirecting it in a sensitive area. Nor was there any relationship of trust between the accused and the officer or any appearance that the accused was obligated or vulnerable to the officer.

[85] In Allan v UK [2003] 36 EHRR 12 the applicant and another man were arrested on suspicion of an involvement in an armed robbery. The other man admitted the offence but the applicant denied it. Subsequently an anonymous informant told the police that the applicant had been involved in the murder of B. The defendant and his co-accused were placed in a cell which was bugged. The applicant was questioned about the murder by the police but relied on his right to silence. The bugging of his cell and the prison visit area continued. The police informer H was placed in the cell for the purpose of eliciting information from the applicant. The police instigated H to push the applicant for what he could get out of him and there was evidence of concerted police coaching. The applicant was re-interviewed by the police but again relied on his right to silence. H claimed that the defendant had admitted to him that he was at the murder scene, though that had not been recorded on the surveillance equipment.

[86] The European Court at paragraph 50 stated:

> "While the right to silence and the privilege against self-incrimination are primarily designed to protect against improper compulsion by the authorities and the obtaining of evidence through methods of coercion or oppression in defiance of the will of the accused, the scope of the right is not confined to cases where duress has been brought to bear on the accused or whether the will of the accused has been directly

> overborne in some way. The right which the court has previously observed is at the heart of the notion of a fair procedure serves in principle to protect the freedom of a suspected person to choose whether to speak or remain silent when questioned by the police. Such freedom of choice is effectively undermined in the case in which the suspect having elected to remain silent during questioning the authorities used subterfuge to elicit, from the suspect, confessions and other statements of an incriminatory nature, which they were unable to obtain during such questioning and where the confessions or statements thereby obtained are adduced in evidence at trial."

[87] In paragraph 52 the court went on to state that the evidence adduced at the applicant's trial showed that the police had coached H and instructed him to push him for what he could get. In contrast to the position in Khan the admissions allegedly made by the applicant to H which formed decisive evidence against him at the trial were not spontaneous and unprompted statements volunteered by the applicant but were induced by the persistent questioning of H who at the instance of the police channelled their conversations into discussions of the murder in circumstances which could be regarded as the functional equivalent of interrogation without any of safeguards which would attach to a formal police interview including the attendance of a solicitor and the issuing of the usual caution. The court considered that the applicant would have been subjected to psychological pressures which impinged on the voluntariness of the disclosures allegedly made to H. He was a suspect in a murder case in detention and under direct pressure from the police in interrogations about the murder and would have been susceptible to persuasion to take H with whom he shared a cell for some weeks into his confidence. In those circumstances the information gained by the use of H in that way was to be regarded as having been obtained in defiance of the will of the applicant and its use of trial impinged on the applicant's right to silence and privilege against self-incrimination.

[88] What emerges from the authorities is that the mere fact that the police use a trick or a stratagem to trap a defendant into incriminating himself does not of itself render that incriminating evidence inadmissible. Everything depends upon the context. Where the police by a ruse are in effect carrying out a functional equivalent of interrogation the resultant evidence will be inadmissible as being unfairly obtained. The police would in such circumstances be circumventing the requirements of PACE and the codes made thereunder. Such actions on the part of the police would produce evidence unfairly and improperly obtained. As to whether what happened constituted a functional equivalent of an interrogation must be determined in the light of what actually transpired.

[89] For there to have been such a functional equivalent to an interrogation the police must have elicited the admissions. If the police had not elicited the information the defendant was free to speak or not. If he spoke of his own free choice he must accept the risk that what he said would come to the attention of the police. R v Broyles indicates that there are two key questions. Firstly, was the evidence obtained by an agent of the state? That may be a police officer or it may include an informer acting at the behest of the police. Secondly, has the evidence been elicited? There is no doubt that in the present case the undercover police officers were agents of the state. The second question was whether the information was elicited in circumstances equivalent to a functional equivalent to an interrogation. R v Broyles also indicates that a third question can also arise namely whether the relationship between the defendant and the person to whom the admission is made was such that the defendant was obligated or vulnerable in the circumstances in such circumstances as to undermine the defendant's right to silence and creating a mental state in which the appellant was more likely to talk. The Australian case of R v Swaffield poses the question whether the confession was elicited by police or agents in unfair derogation of the right to exercise a free choice to speak or to be silent.

[90] Mr Turner contended that the relationship between the defendant and the gang members was one in which the defendant was subservient and had in effect been forced into a close involvement with the gang in which the relationship was maintained and enhanced by payment of wages and the availability of drink and drugs. This, however, is an unrealistic picture of the nature of his relationship with and involvement in the gang. It was suggested that the death threat exerted a form of extreme and unfair pressure on the defendant to throw in his lot with what he considered to be a criminal gang and that his need for the company and support of the gang and a paid job with them made him vulnerable to pressure. The evidence does not paint such a picture. He returned to Northern Ireland after the death threat (which may or may not have been true) and he remained in Northern Ireland for a month. He then of his own freewill decided to go to Cornwall and freely decided to become engaged in what he thought was a criminal gang. This is the situation far removed from any of the factual scenarios discussed in the authorities and bears a similarity to the actions of the criminals in Christou. The fact that he was paid did not render him subservient to the gang members. While it may on one view have looked like a job the defendant was in fact in his own mind undertaking an engagement in the criminal conspiracy in which he was an active participant and from which he was receiving what he thought was ill gotten money. There was thus nothing in his relationship with the gang members to lead to the conclusion that his ability to decide to talk freely or not was undermined and nothing to suggest that his mental capacity was undermined so as to make it more likely for him to talk so as to incriminate himself.

[91] The key question on which Mr Turner focused was whether the police by their words and conduct elicited the incriminating material and did so in circumstances that amounted to a functional interrogation. Mr Turner took the court through the various interjections made by the police agents in the course of the appellant's conversations in which he spelt out his criminal activities. It is clear from the transcripts that the appellant was a voluble talker who expanded on his views and actions at considerable length. A fair reading of the transcripts of the material admitted by the judge points clearly away from any form of functional interrogation as the trial judge held. As Liew shows where conversation is initiated by the accused and the undercover agents respond simply by picking up the flow and content of the conversation without directing or redirecting it into sensitive areas this could not be viewed as functional interrogation. Nothing transpired in those conversations that constituted an interrogation or a derogation of the appellant's right to exercise a free choice whether to speak or to be silent. The various admissions made by the appellant emerged in bits and pieces over a very protracted period of time. For example the full picture about his involvement in the killing of Mrs O'Neill referred to in Counts 1 and 2 emerged from various conversations between 22 March 2000 and 12 January 2001. Nothing occurred during those conversations that constituted a form of steering or directing. We have carefully considered the transcripts in which Mr Turner suggested improper interrogation had taken place and we are satisfied that nothing transpired that came close to a functional interrogation in the way in which that concept is understood in Allan or in the Commonwealth authorities. On the contrary the gaps between the admissions in many instances were indicative of a process in which the undercover agents permitted the appellant to set the pace and timing of those admissions rather than a functional interrogation where the police immediately followed up such admission with pointed questions to deal with outstanding details and ambiguities. This did not bear the stamp of an operation calculated to circumvent PACE as suggested by Mr Turner.

[92] Mr Turner contended that what transpired in the excluded tapes set the tone of the whole operation and tainted even those transcripts of conversations which were not in the nature of the functional interrogation. Mr Kerr, however, correctly pointed to the fact that the conversations in which the admissions were made extended over a considerable period and it was entirely artificial to treat later conversations which had no directing or steering involved as in some way induced by comments, questions or sounds of interest that had been expressed in the excluded tapes.

[93] We conclude that the trial judge approached the question of the admissibility of the tapes in the correct way and that he was entitled to and indeed correct to conclude that the admitted transcripts contained evidence of admissions which were the product of a free choice to speak or to remain

silent on the part of the appellant. We further conclude that he properly and carefully analysed the evidence on the issue of the reliability of the admissions made and was right to have admitted the evidence.

The Issue of Insufficiency of Evidence on Counts 1, 3, 4, 9 and 11

[94] Mr Turner submitted further or in the alternative to his general submissions that the convictions for certain individual counts were unsafe on the grounds that the evidence did not support the convictions. These submissions related to Count 1 (the conviction for the murder of Mary Elizabeth O'Neill); the conviction on Count 3 and 4 (for aiding, abetting, counselling and procuring the attempt to murder Janelle Woods and Stephen Black) and Counts 9 and 11 for the attempted murder of Mark Thomas Murphy or attempted grievous bodily harm.

Count 1

[95] It was argued on behalf of the appellant that there was insufficient evidence of an intent to kill or cause grievous bodily harm to Mary Elizabeth O'Neill on the part of the accused. Another party to the attack on Mrs O'Neill's home, Philip Blaney, had been earlier convicted in connection with the death of the deceased but he was convicted of manslaughter and not murder, the Crown in those proceedings having conceded that they could not say that the person who threw the pipe bomb into the living room of Mrs O'Neill intended to kill her or cause grievous bodily harm. Counsel referred to the sentencing remarks of Coghlin J in the case of Blaney wherein he noted that the Crown accepted that Blaney did not have the intent to kill Mrs O'Neill or cause her grievous bodily harm; his participation was peripheral in that he was keeping watch; the attacks were directed against family of mixed religion with a view to driving them out of the Westland Estate in Portadown. Mr Turner contended that the state of mind of the appellant was that of a secondary party who was not physically present and it could only be determined in line with the findings made in relation to Blaney as to the extent of any joint enterprise. If the appellant and Blaney were secondary parties to an agreed plan and the principals carried out the agreed plan then it was inconsistent to convict the appellant of murder when Blaney was convicted of manslaughter. The covert recordings did not support the intention imputed to the appellant. The appellant's statement that he had ordered two houses occupied by Catholics in the area to be hit at its height demonstrated a plan to intimidate or frighten Catholic families out of their homes in Loyalist areas. The evidence of the conversation recorded by the probe as contained in B10 involved the appellant recounting what was alleged against him. He was not making an admission. It was also argued that the probe evidence should be excluded because the Crown could not prove that the appellant was not under the influence of drink and drugs.

[96] Mr Kerr referred to the evidence of Dr Murray which described the device used in the attack on Mrs O'Neill as primarily an anti-personnel weapon. Grooves had been cut into the metal and Dr Murray's evidence was that the purpose of such grooves was to reduce the thickness of the metal so as to make it easier for the pipe to break up. This was intended to increase the shrapnel effect. The device was deliberately put inside the house through a window broken to enable it to be put in. This indicated an intent to do considerably more than simply to frighten the inhabitants of the house which could be achieved by leaving the bomb on the windowsill. The nature of the weapon and the deliberate decision to put it into the living area of the house indicated a clear intention at least to cause very serious harm to those in the room. Counsel reminded the court that the appellant had not given evidence in the trial to explain or give any reason for the admissions which he had made. The judge had carefully and correctly analysed the impact of the conviction of Blaney for manslaughter and he had properly analysed the authorities in relation to joint enterprise.

The Trial Judge's Approach

[97] The trial judge dealt with Counts 1 and 2 at paragraphs [146]-[180] of his judgment. From his findings of fact it was established that Mrs O'Neill had stayed downstairs to watch television in the room in which the bomb was thrown while her husband was upstairs in bed. When he heard the bang at the front of the house he heard a shout from his wife and when he went downstairs he saw her in the doorway between the living room and the hall. There was an explosion which caused a massive haemorrhage externally to Mrs O'Neill and into her left chest cavity. The deceased sustained extensive mangling of the left hand consistent with her having picked up the device. The evidence clearly established that the window had been broken with a concrete brick and the explosive device had been thrown into the room. The explosion took place at around 12.45 am. Dr Murray of the Forensic Science Agency considered that the purpose of the device was primarily as an anti-personnel weapon.

[98] The judge carefully reviewed the evidence of what the appellant said about the attack at Mrs O'Neill's home at various times over an eight month period from 22 March 2000 to 16 November 2000. On 22 March 2000 during a probe the judge concluded that the appellant deliberately lied to the police about Dale Weatherhead in connection with an alibi the appellant had given when questioned about the death of Mrs O'Neill. On 18 May 2000 the appellant described how he had given the boys pipe bombs and had ordered "the fucking two houses hit with Catholics in them in our area … but they were only about a fucking about a two minutes walk from my own front door so he couldn't be in the area." On 16 August 2000 he described planning the attack on three houses and the sectarian motivation behind the attack on Mrs O'Neill's house, and the way in which it was carried out. He described being

arrested "for fucking O'Neill, Rosie O'Neill, that silly old bat fucking it was the night I fucking planned three of them …" He went on to describe the attack on Mrs O'Neill:

> "So they put the window through front with a brick and then tossed that in and she's so fucking house proud what she do she is sitting in the living room instead of fucking running out that sitting psst on the floor instead of fucking running out frightened she picked it up lifted it up and here and it goes off just completely blew her torso off from that."

[99] At paragraph [158] of his judgment the trial judge dealt with references made on 16 November 2000 by the appellant to Mrs O'Neill's murder as recorded in B10, a conversation recorded by probe which took place between himself, Gibson and Luther Landry:

> "Fulton refers at some length to allegations that appear to have been made in the United States about his involvement in the murder of Rosemary Nelson and other crimes, and in the course of his denials he referred to Mrs O'Neill's death at pages 163 and 164:
>
>> 'No no no, I actually thought that would have been you know what I mean but (inaudible) and this one cunt that's leading the congressional inquiry. The Senate. I can't remember his fucking name. Fuck he has it fucking in for me. He's me a convicted LVF terrorist and everything like (inaudible) leading fucking Protestant fucking murder squads fucking responsible for over 14 fucking murders in all.
>>
>> Muriel: Mary Elizabeth O'Neill for instance.
>>
>> Jim: Aye. That's another reason why what the disagreement was ordering me ordering me the death of Mary O'Neill and throwing blast bombs.
>>
>> Muriel: Mary Elizabeth O'Neill 59 year old grandmother.

> Jim: Went strictly against Billy Wright's wishes that she was not to be touched an order was given that she was not to be touched.
>
> Muriel: Billy was already dead (laughing).
>
> Jim: That she had not to be touched, only I made sure that she was, and then there was a police man with a blast bomb (inaudible) we, I order everybody all our men to stay away from all. None of our men were ever near there when that cop got blew up they just thought there was old (inaudible) with Mary.'

I am satisfied that in the sentence beginning "He's me a convicted LVF terrorist" Fulton was recounting the way he was being portrayed in the congressional inquiry, and not admitting to his supposed activities. However, when he responds to Gibson's interjection about Mrs O'Neill what he says is quite different. He is plainly saying that he ordered her death and the throwing of the blast bombs, and that despite an order from Billy Wright that Mrs O'Neill was not to be touched, in his words "only I made sure she was."

The trial judge referred to a final reference on the part of the appellant to Mrs O'Neill's death which occurred on 12 January 2001, a conversation recorded in B12. The appellant referred to the preparation of various attacks saying "I had to give the order that all the rest of the boys were going out and everybody had their check times." And that he and his companions were going to go first and give them time to get back into town "before they went so think it was four attacks altogether but they all had blast bombs."

[100] The trial judge concluded that the appellant's statement that he ordered Mrs O'Neill to be touched was incontrovertibly a statement that he had ordered her to be attacked; that he was not merely repeating an untruthful account as he had no need to impress Gibson; and that he had not invented his role in Mrs O'Neill's death but was describing his role in the events which resulted in her death.

[101] Dealing with the defence arguments that the court could not consistently convict the appellant of murder when Blaney was found guilty

only of manslaughter in connection with a joint enterprise the trial judge correctly stated the position in paragraph [171] of his judgment:

> "It is also well established that where a person has been killed and that result is the result intended by another participant, the mere fact that the actual killer may be convicted only of the reduced charge of manslaughter for some reason special to himself does not result in a compulsory reduction for the other participant; Lord Mackay of Clashfern in R v Howe [1987] AC at 458C. That being the case there is no obstacle in law to Fulton being convicted of the murder of Mrs O'Neill despite Blaney only being convicted of manslaughter, and to that extent Mr Treacy's submission at (i) is contrary to authority. I have no evidence as to what Blaney's intention was, or what he thought was the intention of the person from whom he was acting as a look out, and who threw the blast bomb into Mrs O'Neill's house or what knowledge Blaney had as to the nature of the device that was used. Therefore, that Blaney was charged with and convicted of manslaughter has no bearing on the charges against Fulton."

[102] In arriving at his conclusion that the appellant intended to kill or cause grievous bodily harm to Mrs O'Neill the trial judge had laid weight on a number of factors:

(a) Firstly, the device was an anti-personnel weapon as demonstrated by the grooves cut into the metal. It was a weapon designed to increase the chance causing risk to life and limb by fragmented shrapnel effect.

(b) Secondly, the appellant by his own admission was fully aware of the nature of the device, having narrowly escaped injury on a previous occasion with a similar device. For the attack on Mr Murnin's house at which he himself was personally present he selected for use a factory made hand grenade which did not present the same danger to the thrower.

(c) Thirdly, the plan of attack required the breaking of a window and the throwing of the device into the interior the house of the victim.

(d) Fourthly, when the appellant referred to making sure that Mrs O'Neill "was touched" the use of that terminology has to be interpreted in the overall context of that conversation and the other conversations the appellant had as recorded in the probes and covert surveillance. He never said anything to suggest that the deaths of Mrs O'Neill was unintended. The judge found that

he positively gloated about her death. The attack on Mrs O'Neill's house occurred on the same night as the appellant personally went to attack Mr Murnin where the evidence clearly showed an intent to kill.

Conclusions on Count 1

[103] In relation to the requisite mens rea in Count 1 the prosecution bore the burden of proving beyond reasonable doubt that the appellant either intended to kill Mrs O'Neill or to cause her really serious bodily harm. The intent that had to be established did not relate solely to Mrs O'Neill. The requisite mens rea would be established if the appellant intended either to kill or cause really serious injury to whoever was in the room into which the device was thrown.

[104] In R v Murphy [1993] NI 57 the defendants carried out a rocket and rifle attack on a police station. Although considerable damage was caused and some people received injuries no one was killed. The defendant was charged inter alia with attempted murder. The trial judge rejected the argument that there was a reasonable possibility the defendant's intent was to attack and damage the police station as a building and not to kill the persons in it. On appeal Kelly LJ giving the judgment of the court said:

> "We have no doubt at all that the purpose of this terrorist attack and the intent of those who carried it out was to kill such members of the security forces as were in the building. Commonsense, reality and experience point only to that conclusion. We are familiar only too well in this jurisdiction with many of the method of terrorist organisations in carrying out their terrorist activities … When the destruction of a building is their object an explosive device will be placed in or near the building or in a vehicle close by. More often than not a warning is given though sometimes it is not. Terrorists do not employ a rocket grenade or more particularly a rifle, no matter how powerful, to destroy a building. Furthermore, the building was a police station. No warning was given and the primary targets of the organisation for murder are members of the security forces."

[105] What was said in that case has a resonance in the present case where if the intention of the defendant was merely to intimidate a person out of his or her home a device such as this would more commonly have been placed outside or near the house in question. The device here was not going to be sufficient to destroy the building but it was designed as an anti-personnel device with immense capacity to seriously maim persons in proximity to the

device. Ensuring that the weapon was thrown into an occupied house showed an intent to go beyond mere intimidation. It showed an intent to cause an explosion with a device designed to cause serious injury to anybody close to the device when it exploded. In this case commonsense and reality leads to the conclusion that the person who organised the attack, gave the order that it was to be carried out, had knowledge of the manner of the construction of the device and personally knew its dangerousness and destructive capacity intended at least to cause serious injury to anyone in the O'Neill household who was in proximity to the device in the room into which it was thrown when it exploded.

[106] When interpreting the appellant's use of the words "I made sure she was touched" one is entitled to and bound to consider the entirety of his conversations relating to the attack on the O'Neills house and his general approach to the use of terrorist methods and furtherance of his Loyalist paramilitary activities. The clear picture that emerges from the entirety of the recorded conversations, including those recorded by probes, is of a ruthless and vicious individual devoid of human sympathy or empathy and steeped in deeply sectarian attitudes and bitterness who was prepared even to give expression to and countenance the desirability of genocide ("genocide means we have to wipe out Catholics; that's our belief if it doesn't work we're finished. We have to kill every Catholic and believe in it." See probe B18). As to the argument that the probe evidence should be excluded on the ground that the defendant may have been under the influence of drink or drugs there was absolutely no evidence of thought disorder, rambling or nonsensical patterns of speech to suggest anything to call into question the reliability of the appellant's statements. The appellant adduced no evidence himself to lay any basis for the proposition that he was under the influence of drink or drugs at any time relevant to the probe evidence.

[107] We are accordingly satisfied that the conviction on Count 1 was safe in that the prosecution established to the requisite level that the appellant intended at the least to cause serious bodily harm to Mrs O'Neill or whoever else was in the room into which the device was thrown.

Counts 3 and 4

[108] Mr Turner contended that the trial judge erred in concluding that the appellant intended to kill Janelle Woods and Stephen Black. He relied on the submission she made in relation to Count 1 and contended that there was no direct admissions in respect of those offences in the covert recordings.

[109] The judge concluded that the counts of attempted murder had been established because the appellant had ordered the attack to be carried out by means of an anti-personnel weapon thrown into the house through a window broken to enable it to be thrown in. He considered that the inescapable

conclusion was that he intended that Janelle Woods should be killed. It was Stephen Black not Janelle Woods who was in the room into which the device was thrown but the appellant was completely indifferent to the risk that someone other than Janelle Woods would be killed if he happened to be in the room. Accordingly he was also guilty of an attempted murder of Stephen Black. The trial judge concluded that the same considerations which satisfied him that the appellant intended to kill Mrs O'Neill satisfied him that his intent was to kill Mrs Woods.

[110] We have concluded that the verdict in Count 1 was safe on the ground that the evidence showed that the appellant intended, at the least, to cause grievous bodily harm to Mrs O'Neill. This was sufficient to establish the mens rea for the charge of murder. Attempted murder however is a crime with specific intent and requires proof beyond reasonable doubt that the defendant actually intended to kill. We conclude that while the evidence established that the appellant intended to cause grievous bodily harm to whoever was in the room into which the device was thrown and was aware that there was a very real possibility that the individual concerned might very well be killed as a result of the explosion this would not be sufficient to establish the specific intent to kill as opposed to an intent to cause serious bodily harm to the victim. Accordingly, we conclude that Counts 3 and 4 must be quashed.

Counts 9 and 11

[111] Mr Turner argued that the prosecution had failed to prove that the appellant possessed the requisite intention in relation to Mark Murphy. Mr Murphy was the nephew of Mr Murnin who was the primary victim of the attack in his house into which a grenade was thrown. Mr Murphy was simply staying in the house that night and there was no evidence before the court where Mr Murphy was in the house at the time of attack, although the evidence indicates he was in bed when he heard a bang and a car screeching away.

[112] The trial judge in his judgment of paragraphs [134] to [145] set out his reasons for concluding that the defendant should be convicted on Counts 9 and 11. He accepted there was no evidence where Mr Murphy was in the house. He accepted that the grenade was an anti-personnel device which was most effective at close range and that its lethal potential fell off very rapidly with increasing distance from the explosion. He accepted that the facts might suggest the prosecution had failed to prove that the appellant had the necessary intention to kill Murphy but he posed the question "If Mark Murphy had been in the room with Mr Murnin would they not have been encompassed by his intention to kill?" The appellant was completely indifferent as to who might be killed provided the intended victim was killed and on that ground the judge convicted him on the two counts.

[113] The trial found on the evidence as he was fully entitled to do that the appellant intended to kill Mr Murnin. This intention, however, does not of itself prove an intent to kill anyone else in the house, though the intent might encompass anyone else who was in close proximity to the place where the grenade landed. Clearly if Mark Murphy had been in close proximity to the device and had been killed or seriously injured as a result the appellant would have been guilty of murder by virtue of transferred malice. However, there was no evidence that Mark Murphy was in close proximity to the grenade at the time it was thrown into the room and the evidence pointed to a considerably reduced risk of death or injury to anyone not close to the grenade. The evidence does not establish that the appellant intended to kill or cause grievous bodily harm to anyone other than Mr Murnin or whoever was in the room into which the grenade was thrown. Accordingly the convictions on Counts 9 and 11 cannot be considered to be safe and must accordingly be quashed.

The Alternative Counts Issue

[114] Mr Turner argued that the court having convicted the appellant of murder on Count 1 should have brought in no verdict on the count which related to the use of the pipe bomb to cause, the explosion being the very matter which led to the conviction on Count 1. Having convicted the appellant of the attempted murder of Janelle Woods on Count 3 no verdict should have been brought in on Count 5 (the grievous bodily harm charge) similarly in relation to Count 7 in respect of Stephen Black the court having convicted the appellant of attempted murder no verdict should have been brought in in relation to Count 7. It was argued also that no verdict should have been brought in relation to Count 6 (causing an explosion) since that was the very matter which led to the convictions on Counts 3,4,5 and 7. Having convicted the appellant of the attempted murder of Joseph Murnin the court should have brought in no verdict in Count 10, the grievous bodily harm charge. Similarly in relation to Counts 9 and 11 it was claimed that the two counts were truly alternatives and one verdict only should have been returned. It was argued that no verdict should have been returned on Counts 12 and 13 relating to the possession of the grenade and causing an explosion in connection with the attempted murder of Joseph Murnin since it was the grenade attack which led to the conviction for attempted murder. In relation to the convictions of wounding with intent on Counts 18, 19, 20 and 21 it was argued that no verdict should have been returned since the court had brought in a verdict of attempted murder in relation to the four individuals. Similarly no verdict should have been returned on Counts 22 and 23 (causing an explosion using a pipe bomb and in possession of the said pipe bomb) since those were the very matters that led to the attempted murder convictions. In relation to the conviction for conspiracy to murder persons in the vicinity of Newry Sinn Fein offices on Count 53 no verdict should have been returned in

Count 54 (doing an act with intent to causing an explosion) and Count 55 (possession of an explosive substance) since those two counts were the very matters giving rise to the conspiracy to murder. No verdict should have been returned on Count 60 (possession of cannabis with intent to supply) once the defendant was convicted on Count 59 (supplying cannabis) which was an alternative count.

[115] Although counsel accepted that the appellant suffered no present prejudice in terms of sentencing in view of the fact that the sentences imposed on the various counts were concurrent, nevertheless counsel argued that prejudice could well be suffered by the appellant due to the multiplicity of convictions when the Parole Commissioners came to consider his release date following the completion of the life sentence tariff.

[116] Mr Kerr accepted the law was as stated in Archbold 2009 4.443, namely, that a verdict should be taken first on the more serious alternative offence charge and, if the verdict is guilty, the jury should then be discharged from returning a verdict on the less serious alternative. In this way the power of the Court of Appeal to substitute a verdict of the lesser alternative or the alternative of two equally grave offences is preserved. It was, he argued, proper practice to charge and return verdicts in cases involving the use or possession of firearms with verdicts relating to conspiracy or attempts to murder or cause grievous bodily harm. Such charges are not true alternatives. Numerous decisions establish the practice of returning verdicts in such circumstances. While it was accepted that in a case of murder or attempted murder or conspiracy to murder the normal practice would be to give no verdict on a charge of causing or attempting to cause or conspiring to cause grievous bodily harm arising from the same incident on the same facts Mr Kerr submitted that to do so did not offend the rationale for the rule in that it did not in any way affect the power of the Court of Appeal to allow an appeal on the more serious offence and if appropriate affirm the convictions in relation to the lesser offences.

Conclusions on the Issue

[117] Generally where an indictment contains genuine alternative counts a verdict should be given first on the more serious alternative and, if the accused is found guilty, no verdict should be returned on the less serious alternative. In the case of jury trials it reduces the risk of juries convicting on the wrong count for example handling where the evidence clearly points to theft and acquitting on the other. It also preserves the power of the Court of Appeal to substitute a verdict of the lesser alternative.

[118] Accordingly, where two charges arising out of the same incident have been preferred and one of them has merged into the other it is inappropriate that it should be left open to the jury to convict on both charges. Hence, in R

v Harris [1969] 53 Cr. App. R. 376 it was not proper that it should have been left open to the jury to convict an accused of buggery with a boy aged 14 and indecent assault on the same boy when the two charges arose out of the same incident. Edmund Davies LJ said at page 2 of his judgment:

> "It does not seem to this court right or desirable that one and the same incident should be made the subject matter of distinct charges, so that hereafter it may appear to those not familiar with the circumstances that two entirely separate offences were committed. Were this permitted generally, a single offence could frequently give rise a multiplicity of charges and great unfairness would ensue."

[119] Similarly in R v McEvilley [2008] EWCA Crim 1162 the applicant had stabbed the victim a large number of times using a knife to inflict the wounds. Inter alia the applicant was convicted on counts of attempted murder, Section 18 of the Offences Against the Person Act 1861 and Section 20 of the 1861 Act. King LJ said at paragraph 12:

> "It is the view of this court that there was here a procedural error by the judge. Where there are two charges in the alternative on the indictment arising on the same facts and with one more serious than the other the judge should not take a verdict of the less serious count until finality has been reached on the more serious charge. Such finality may take the form of a not guilty verdict or a decision to discharge the jury on that count because there is no realistic prospect of agreement on a verdict. If this course is not followed then there is a serious risk of a …… situation arising which arose here, with charges in the alternative leading to a multiplicity of convictions." (See also R v Fernandez) [1997] 1 Cr App R 123)

[120] On the other hand whilst the commonsense and the logic of that statement are self-evident the consequence which an infringement may attract is a different matter. In R v Duffy [2008] EWCA Crim. 1492 the appellant was convicted of the offence of aggravated burglary on Count 1 and of an offence of having an imitation firearm with intent to commit an indictable offence namely aggravated burglary on Count 2. The appellant was convicted on both counts arising out of a single incident where she and others had disguised themselves with balaclavas and an imitation firearm in the course of a burglary.

[121] Whilst the Court of Appeal in R v Duffy considered that it would have been preferable and of more assistance to the jury if the ultimate task had been limited to one count by the withdrawal of Count 2 or by a direction that it should be approached as an alternative count attracting no verdict in the event of conviction on Count 1 no injustice had arisen to the appellant as a result of this. At paragraph 14 Kaye LJ said:

> "We reject the suggestion that any, let alone great unfairness, has accrued to the appellant in this case. In our judgments, this appellant was tried on a valid indictment. Indeed no submission to the contrary has been advanced to us. Whilst we would have preferred there to have been only one count left to the jury no one at trial invited that course. That omission did not lead to any material unfairness in the consideration by the jury of the material before them and we would feel wholly unable to conclude that the conviction on Count 2 is unsafe. As we have said any potential injustice that might have flowed from a consecutive sentence did not materialise because no separate penalty was imposed."

Accordingly it seems to us that in those instances such as the present case where alternatives were the subject of verdicts by the judge the test we should apply is whether any potential injustice the appellant has flowed as a consequence.

It is also necessary to distinguish between on the one hand counts which are true alternatives and on the other counts which are not in fact true alternatives while superficially appearing to be so. This arises where additional counts add something of substance to the primary charge either in defining the nature of the primary offence, for example by illustrating an aggravating aspect, or where the true picture of the primary offence may not be clear to the public in the absence of the additional counts.

[122] We consider that in a number of instances counts which were described by Mr Turner as alternative were in fact not so but rather were instances where the additional counts added something of value to what on the face of it was a more serious charge. That is an approach that has found favour with courts in Northern Ireland. Examples include convictions of attempted murder and possession of firearms with intent to endanger life (R v Carragher and Maginn [1990] NICC 3072), convictions for possession of explosives with intent and convictions for conspiracy to cause grievous bodily harm (R v Carruthers [2000] NICA 25), convictions for manslaughter and for causing an explosion and possession of explosives with intent (R v Blaney [2004] NICA 28). Thus where a less serious conviction on a separate

count arising out the same set out of facts adds materially to the nature and content of the more serious convictions we consider that it is proper for the court to return its verdicts on both the counts.

[123] In relation to Count 2 (aiding and abetting counselling and procuring the use of the pipe bomb), that charge cannot be considered as an alternative to the charge of murder on Count 1. It was a self-contained serious offence involving the carrying out of an explosion likely to endanger life or property. It could not be considered as merging in the greater offence of murder. In any event bearing in mind the approach in Duffy the appellant can point to injustice or prejudice arising from the conviction on Count 2 in respect of which the sentence was concurrent. The suggestion that the Parole Commissioners may be misled is an entirely unreal one since the Commissioners when they are considering the circumstances will have to have regard to the trial judge's judgment, the judgment of this court and whatever material that the appellant seeks to put before them by way of representations. The Commissioners will be fully aware of the circumstances.

[124] Since we have concluded that the conviction on Counts 3 and 4 must be quashed, the safety of the verdicts on Counts 5 and 7 is not in question. By parity of reasoning in relation to Count 2 the conviction in Count 6 is to be regarded as safe.

[125] The appellant's conviction in Count 8 of the attempted murder of Joseph Murnin was a conviction for the more serious offence than the attempt to cause grievous bodily harm under Count 10. The better course would have been for the trial judge to have brought in no verdict in Count 10 since the lesser count merged in the greater one. However as in Duffy no injustice to the appellant arose from the verdict. It has not been shown that the verdict was unsafe. Since we have quashed the convictions on Counts 9 and 11 no question arises in relation to them. Count 12 (causing an explosion with a grenade) and Count 13 (possession of the grenade with intent) are not true alternatives to Count 8. Whilst it would have been open to the judge to have decided not to bring in a verdict on Count 13, being merged in Count 12 the verdicts are not unsafe, there being no injustice to the appellant in the light of Duffy.

[126] In relation to the convictions on Counts 14, 15, 16 and 17 for the attempted murder of the police officers at Drumcree the lesser offences of wounding with intent charged under Counts 18, 19, 20 and 21 effectively merged in the more serious offences. Accordingly the better course would have been to bring in no verdict in relation to the lesser counts. As in the case of Count 10 no injustice was caused to the appellant and the verdicts cannot be regarded as unsafe in the light of Duffy.

[127] The same reasoning that applies to Counts 12 and 13 applies in relation to Count 22 and 23 as between them and the convictions in Counts 14-17 and as between themselves. The verdicts cannot be regarded as unsafe.

[128] In relation to Counts 54 and 55 those counts could not be regarded as alternatives to the conspiracy to murder charge under Count 53 and there was nothing about the verdicts which rendered them unsafe.

[129] Count 59 (supplying cannabis) represents a different offence from that of possession with intent to supply. Even if the offence of possession with intent were to be viewed as having merged in the offences applying under Count 59 no injustice has been shown by the verdict and as in Duffy there is no reason to call into question the safety of the convictions under either count.

Disposal of the Appeal against Conviction

[130] For the reasons given we quash the convictions on Counts 3, 4, 9 and 11 and allow the appeal to that limited extent. We affirm all the other convictions.