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Judgment: approved by the Court for handing down | *Delivered:* **15/3/2011**

(subject to editorial corrections)

IN THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

THE QUEEN

v

DARREN IVAN KERNOHAN

HART J

[1] Kernohan is charged with the murder of Geoff Kerr on 27 April 2009 and his trial commenced with the opening of the case to the jury at Belfast Crown Court on 8 March 2011. In the course of his opening Mr Ciaran Murphy QC (who appears on behalf of the prosecution with Mr Neil Connor) informed the jury that Kernohan had been interviewed by the police and had made a no comment response to the questions put to him in May 2009, but in September 2010 he advanced a defence in the course of his defence statement.

[2] Mr Barry McDonald QC (who appears on behalf of Kernohan with Mr Tom McCreanor) objected to this reference, and invited Mr Murphy to correct the position as Mr McDonald maintained it should be before the case proceeded any further. Mr Murphy declined to do so, and I heard argument from Mr McDonald and from Mr Murphy before giving a brief *ex tempore* ruling in which I declined to discharge the jury. I said that in view of the significance of the issue which had been raised I would give fuller reasons in due course in writing and I now do so.

[3] As I understand it the basis of Mr McDonald's application that the jury be discharged is that Kernohan's solicitor made it clear to the police in interview that he was advising his client to refuse to answer questions, inter alia, because a response given by the police to the request by Kernohan's solicitor for an assurance that privileged legal consultations between himself

and Kernohan were not subject to surveillance was regarded as inadequate, or as Mr McDonald described it, "equivocal".

[4] Before considering the implications of the application and what transpired on that occasion it is appropriate to set the matter in context.

[5] On 19 April 2006 C and A were arrested under the provisions of Section 41 of the Terrorism Act 2000, and on 16 May 2006 W was arrested under Article 26 of the Police and Criminal Evidence (Northern Ireland) Order 1989. In each case their solicitor requested an assurance from the police that any private consultations between their client and his/her legal advisor would not be monitored by any form of surveillance. On 30 May 2006 M was arrested under Section 41 and arrangements were made by the defence to have M medically examined by a Consultant Psychiatrist. In each instance the police refused to provide the assurances sought. McE was a remand prisoner and he complained that his legal visits in prison were the subject of surveillance.

[6] Each applicant then sought declaratory relief that the failure of the police or the prison authorities to provide the assurances sought was, inter alia, incompatible with the provisions of Articles 6 and 8 of the European Convention of Human Rights.

[7] On 30 November 2007 the Divisional Court in Northern Ireland held that the failure of the authorities to give the assurances sought meant that there was a breach of the Article 8 rights of each of the applicants because the private consultations to which they were entitled under Article 8 of the European Convention did not take place because the relevant authorities refused to give the assurances sought. See [2008] NI 203. The effect of this ruling was to render illegal the practice of covert surveillance of otherwise privileged consultations between a suspect or prisoner and his/her solicitor. The authorities did not appeal the ruling in R v McE & Ors.

[8] On 6 February 2008 Paul Matthew Murphy and others were arrested. This was less than two months after the decision of the Divisional Court, and their solicitors sought an assurance in each case that their private consultations with their clients were not the subject of surveillance and the police refused to give that assurance. As a result the solicitors advised their clients not to answer questions in the subsequent interviews and accordingly each defendant made a "no comment" response. It is sufficient to say that the Recorder of Belfast, His Honour Judge Burgess, held that the stance of the police in the case of Paul Matthew Murphy and others was to ignore the ruling of the Divisional Court and continue to apply the policy which it had declared to be illegal. He ruled that this amounted to an abuse of process and stayed the proceedings.

[9] Although the respondents to the Divisional Court's decision did not appeal, the applicants did, and on 11 March 2009 the House of Lords dismissed the appeal and upheld the reasoning of the majority in the Divisional Court. See Re McE & Ors [2009] NI 258. In the course of a number of the judgments comments were made on the failure by the relevant Secretary of State to take the necessary steps to promptly make an order which would change the regime for the authorisation of covert surveillance in order to comply with the Divisional Court's ruling which by then had been given more than a year before. Lord Phillips said at [53]:

> "The position was simply that unless and until she took the appropriate steps she could not lawfully continue to carry out surveillance on legal consultations in prisons or police stations".

[10] At [119] Lord Neuberger observed:

> "Having decided not to appeal the Divisional Court's decision that surveillance of privileged and private consultations under the present regime is unlawful the Secretary of State should have ensured that such surveillance did not take place or she should have promptly changed the regime so as to comply with the Divisional Court's decision. As Lord Carswell points out, more than a year has elapsed since that decision, and Your Lordships were told that the Secretary of State was not even in a position to produce a draft Regulation embodying the changes to ensure that such surveillance was carried out legally. Unless no surveillance of privileged and private consultations has been going on for the past year in the United Kingdom (which appears most unlikely), this strongly suggests that the Government has being knowingly sanctioning illegal surveillance for more than a year. If that is indeed so, to describe such a state of affairs as "regrettable" strikes me as an understatement."

[11] Although it does not bear on the present application, the regime governing covert surveillance of legal consultations was later altered by virtue of the Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010 which was made under Section 47(1)(b) of the Regulation of Investigatory Powers Act, and this came into force on 25 February 2010. As Girvan LJ observed in RA's Application [2010] NIQB 99 the 2010 Order has to be read with the contents of the Revised Code of Practice in relation to Covert Surveillance and Property Interference.

[12] Kernohan was arrested in relation to the murder of Geoff Kerr on 27 April 2009 and at the commencement of his police interviews on 2 May 2009 his solicitors sought an assurance that legal consultations with Kernohan were not being subjected to covert surveillance. It appears from subsequent exchanges during the first interview that the initial request for an assurance that legal consultations were not being subjected to covert surveillance was addressed to the custody sergeant. However the response was characterised by Kernohan's solicitor as "inadequate and we don't accept it as an assurance". There was also a dispute about the adequacy of pre-interview disclosure, and for each of those reasons at the commencement of the first interview Kernohan's solicitor stated that for those reasons he had been advised to exercise his right to remain silent during the interview. The transcript then records that one of the interviewing officers, Detective Constable Brown, read out a pro forma response.

> "On 11 March 2009 the House of Lords held in the case of R v. McGee [2009] UKHL 15 that directed surveillance of legally privileged consultations in police stations and prisons could not lawfully be authorised under the present regime set out in the Regulation of Investigatory Powers Act 2000 and Covert Surveillance Code of Practice. Until such time as is appropriate steps are, until such time as the appropriate steps are taken to remedy the defects in the present regime identified by the House of Lords no such surveillance will be authorised under the Regulation Investigatory Powers Act 2000 or conducted by the PSNI."

[13] Both the content of the statement by Detective Constable Brown, and the context in which it was given, have therefore to be viewed against the background of the position in relation to covert surveillance of legal consultations which I have briefly outlined. As Mr McDonald readily admitted, the factual position in the present case is not on all fours with that which was considered by the Divisional Court and the House of Lords, or that which was subsequently considered by the Recorder of Belfast in R v. Murphy and Others. In R v. McE the police refused to give such an assurance, and that failure was held to be unlawful. In R v. Murphy, notwithstanding the policy of not giving such an assurance had been held to be unlawful, the police persisted with a policy which had been found to be illegal, a decision in respect of which there had been no appeal and which was subsequently affirmed by the House of Lords. Judge Burgess was therefore dealing with the situation which arose before the decision of the House of Lords, and it appears from the statement which I have set out above that following the decision of the House of Lords the PSNI adopted a new position. Mr McDonald described the statement as

equivocal. When one reads it in its entirety and places it in the context of the earlier decisions to which I have referred I am quite satisfied that it was a clear and unequivocal assurance by the PSNI that no covert surveillance, that is no directed surveillance, would be authorised, or conducted by the PSNI, until changes were made in the covert surveillance regime in respect of consultations between suspects and their legal advisers, changes which were subsequently made in 2010 and to which I have already referred.

[14] I should record that Mr McDonald suggested that the assurance did not state whether covert surveillance was not being carried on by any agency other than the police. However, I consider that the statement clearly said that no legal surveillance would be carried out, and that should have been a sufficient reassurance to enable Kernohan's solicitor to consult freely with his client at the police station before Kernohan was interviewed. I am therefore satisfied that the objection to the formula used by the police is without substance.

[15] In his opening to the jury Mr Murphy read the Article 3 caution to the jury and told them that –

> "[Kernohan] was then interviewed by the police at Antrim Serious Crime Suite on 2 May and throughout a number of interviews he made no comment. It was ultimately put to him that his DNA was found on the swabs from the house. Nothing further arose from those interviews."

[16] In RA's application Girvan LJ pointed out that, as Lord Hope had pointed out in Re McE at [58], a detained person has no right to object to covert surveillance which is authorised under RIPA. Nor, since this would be inconsistent with the covert nature of the conduct where it has been authorised, has he a right to be told whether or not surveillance is being undertaken in his case, an approach confirmed by the European Court of Human Rights in Kennedy v. the UK (Application 26839-05, judgment given on 18 May 2010). The statement made by Detective Constable Brown therefore had the effect of confirming something to the defendant that he may not have been entitled to know in any event, namely that no surveillance would be authorised or conducted of his consultations with his solicitor.

[17] I was satisfied that Mr Murphy was entitled to inform the jury that the accused had not answered questions and that he had subsequently advanced a detailed defence in his defence statement. In those circumstances I did not consider that Mr Murphy said anything to the jury which could be considered to be capable of giving rise to an unjustifiable or prejudicial inference and I therefore declined to discharge the jury.