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THE QUEEN

V

W I L L I A M F U L T O N & O T H E R S (No. 6)

R U L I N G

Of

THE HONOURABLE MR. JUSTICE HART

On

THURSDAY, 10 NOVEMBER 2005

B.C.1 R. –v- FULTON & ORS 10.11.05

R U L I N G

I propose to give my ruling in relation to the applications for a stay which were made earlier this week.

Applications have been made on behalf of the accused Fulton and Gibson that I should stay the proceedings on the grounds of alleged abuse of process. The grounds on which these applications were made relate to a number of different issues and because Mr Macdonald's submissions on the issue of the legality of the Disclosure Judge's rulings to refuse a number of Section 8 applications without a hearing were made first and adopted by Mr Treacy for Fulton I propose to deal with Mr Macdonald's submissions first although in chronological terms some of Mr Treacy's submissions related to matters that occurred earlier.

I have had the benefit of extensive written submissions in the form of skeleton arguments, and oral submissions, from Mr Macdonald, Mr Treacy and Mr Kerr and I have considered them all, although I do not consider it necessary to refer to all of the points each made.

So far as the law governing the principles on which a stay should be granted are concerned, I dealt with these in my ruling of 13 October and it is unnecessary to reiterate them. I have applied the principles I set out in that ruling to the present applications.

B.C.2

Orders of the Disclosure Judge of 30 September 2005

On 13 September 2005 a notice under S.8(2) of the 1996 act was served on behalf of Muriel Gibson making an application for an order seeking the disclosure of material described at (A) of the notice. The material can be described as all unedited covert audio and video recordings of the accused and her conversations with her family, her co-accused, her legal advisers and any other person from the date of her arrest on 20 June 2001 to date. It also sought details of any documents relating to these, or surveillance of her mail or the same people. For convenience I shall refer to all of the material

sought as "post-arrest surveillance material". Part (C) of the notice was in the following terms, and I quote –

"(C) The reason why the material might be expected to assist the accused.

(i) The material sought at (A) above, in accordance with the Attorney General's Revised Guidelines on Disclosure, published in 2005, and section 4 of the Code of Prosecutors published in June 2005, ought to have been disclosed to the Defence.

(ii) The material sought satisfies the test for disclosure and is of the kind exemplified at para 10 and para 12 of the Attorney General's Revised Guidelines. Without prejudice to the generality of the foregoing the material sought has the capacity to support submissions that may lead to or have a bearing on:

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a) The exclusion of evidence;

b) A stay in the proceedings;

c) A court finding that a public authority has acted incompatibly with the accused's rights under the convention;

TO C.H. 10.35 am

(d) The credibility of any prosecution witness;

(e) The admissibility of prosecution evidence;

(f) Section 7(a) of the Criminal Procedures & Investigations Act 1996 imposes a continuing duty on the prosecutor to keep the question of disclosure under review at all times. Such material is identified above and the prosecutor is under a duty to disclose the said material."

The prosecution responded on 23 September by notice saying that the request had been considered, that any material therein had been disclosed and there was no other material to which a duty of disclosure attaches. The reference to material that had been disclosed was to a letter of that date from the PPS. The letter has not been put before me but it appears that it was in the same terms as a letter to Fulton's solicitors of the same date contained in Tab 10 of Mr. Treacy's skeleton argument of 20 October 2005. Three conversations were referred to, of which one was between Muriel Gibson and her sister, Joyce Young.

On 21 September 2005 a second Section 8 application was made on behalf of Muriel Gibson relating to guidelines relating to the work of undercover officers and in relation to expenses incurred by the undercover officers for items provided for or given to the defendant and her daughter. I shall refer to this as the

guideline and expenses material. The relevant portions of the notice are:

"(A) The material to which this application relates is as follows:

i) Guidelines of the Working Group in relation to the work of undercover officers in the United Kingdom.

ii) All expenses claims, minutes, memorandum or documentation of whatever kind relating to expenses claimed by the undercover officers known as Liz, Dave S, Sam or Neil in relation to expenses incurred in respect of items provided for or given to the Defendant Muriel Gibson, or her daughter Aisha Landry. For the sake of clarification we include items such as alcohol, cigarettes, food, or petrol expenses incurred in transporting our client.

10.40am to BC

B.C.4 10.40 am

(B) The above material has not been disclosed to the Accused.

(C) The reason why the material might be expected to assist the Accused.

(i) The Defendant is entitled to be provided with information about the Guidelines within which undercover officers operate in order to assess whether the undercover officers in the instant case have conducted themselves within the Guidelines.

(ii) The Defendant is entitled to be provided with a full breakdown of the expenses incurred by undercover operatives in purchasing items for her and her daughter, such as food, drink, alcohol, cigarettes etc inasmuch as such expenditure was designed to encourage a relationship of trust and dependence on the part of the Defendant on the undercover officers."

By notice dated 29 September the Prosecution replied in the following terms –

"I wish to make the following representations to the court as regards the material specified at (A) (i) and (ii) in the Defence application –

B.C.5

A(i) (a) A copy of the relevant ACPO Guidelines concerning covert Law Enforcement Techniques has already been disclosed to the Defence.

(b) I am willing to disclose the standard

operational instructions for undercover police officers.

A(ii) (a) I am willing to disclose details of primary payments and goods supplied to the Defendant by undercover officers over the relevant period.

(b) No duty of disclosure is considered to attach to any "expenses claimed" by the named officers in respect of any items or money provided as referred to. The Notice does not adequately state how this material might be expected to assist the accused's defence."

On 30 September the Disclosure Judge made identically worded orders in respect of both applications, the relevant part of which was in these terms – "The said application in present form does not comply with the requirements of Rule 7(2)(c) of the Crown Court (Criminal Procedure and Investigations Act 1996 (Disclosure) Rules (NI) 1997, can be determined without a hearing and is not granted."

As is apparent from the orders, no hearing took place in respect of the applications of the 13th or 21st September. Mr Macdonald submits that in failing to have a hearing the Disclosure

B.C.6

Judge misdirected himself and acted unlawfully, and he advanced several propositions in support of this.

(1) As the reasons were specified at (c) in each application they complied with the requirements of Rule 7(2)(c).

(2) The Judge failed to give reasons for his finding, or to specify those respects in which the application did not comply with the rules.

(3) It was unlawful to determine the matter without a hearing.

(4) No reasons were given for the decision that the application could be determined without a hearing.

(5) Even if it was open to the Judge to determine the applications without a hearing the refusal was arbitrary, capricious and perverse.

(6) No reasons were given for the refusal of the application.

Mr Macdonald then submits that a stay should be granted as the defendant cannot have a fair trial, or that it would be unjust for the trial to continue.

Orders of the Disclosure Judge dated 13 September 2005

On 13 September the Disclosure Judge made identically worded orders in the same terms as the orders of 30 September which I have already set out and which I do not need to repeat. These orders were made in respect of two applications on behalf of the defendant Fulton, each dated 6

B.C.7

September 2005. The first application was in the following terms –

"A. The material to which this application relates is as follows:

i. All unedited covert audio and video recordings of the accused and his conversations from the date of his arrest on 12 June 2001 until the date hereof with:

1. His Solicitor
2. His Counsel
3. His Co-accused
4. His family
5. Any other party.

TO C.H. 10.45 am

For the avoidance of doubt this will include, but is not limited to, all recordings made whilst detained in Gough Holding Centre, Lurgan Police Station and Maghaberry Prison, as well as any recordings made of conversations after his release.

ii All unedited transcripts of the said recordings and any other notes or documents in relation hereto.

iii All telephone or other intercepts from the date of arrest until the date hereof.

iv All unedited covert audio and video recordings of the accused's solicitor and counsel.

v. All unedited transcripts of the said recordings and any other notes or documents in relation thereto.

vi. All documents relating to any ongoing surveillance of:

1. The accused.
2. His co-accused.
3. His family.
4. Any other third party.
5. His solicitor and
6. Counsel.

B. The above material has not been disclosed to the accused.

C. The reasons why the material might be expected to assist the accused is as follows:

1. The material sought at (A) above, in accordance

CH.4

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with the Attorney General's Revised Guidelines on Disclosure, published in 2005, and Section 4 of the Code for Prosecutors published in June 2005, ought to have been disclosed to the Defence.

2. The material sought justifies the test for disclosure and is of kind exemplified at para. 10 and para. 12 of the Attorney General's Revised Guidelines. Without prejudice to the generality of the foregoing the material sought has the capacity to support submissions that may lead to or have a bearing on:

i. the exclusion of evidence;

(ii) a stay of proceedings;

(iii) a Court finding that a public authority acted incompatibly with the accused's rights under the ECHR;

(iv) the credibility of a prosecution witness;

(v) the admissibility of any prosecution evidence.

3. Section 7(a) of the Criminal Procedure and Investigations Act 1996 imposes a continuing duty on the prosecutor to keep the question of disclosure under review at all times. Such material is identified above and the prosecutor

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is under an obligation to disclose."

The references to a revival of a previous Section 8 application and the reasons for it at 4(i)-(iii), to which I shall refer in a moment, relate to a ruling by the Disclosure Judge on 31 August 2005. The previous Section 8 application was referred to in the second application which was also on 6 September and in the following terms:

"A. The material to which this application relates is as follows:

i. All instructions, circulars, memoranda, strategic, methodological or other documents concerning the obtaining of incriminating admissions from the accused;

ii. All documents, recordings, transcripts, briefing and de-briefing records, progress reports, analyses, training manuals and records, leading up and connected to the obtaining of incriminating admissions from the accused;

iii. All unedited covert recordings;

iv. All unedited transcripts of covert recordings.

(Items iii. and iv. are a revival of a previous Section 8 application, the reasons for which are explained below).

B. The above material has not been disclosed to the accused.

C. The reasons why the material might be expected to assist the accused is as follows:

1. The material sought at (1) above, in accordance with the Attorney General's Revised Guidelines on Disclosure, published in 2005, and Section 4 of the Code for Prosecutors, published in June

2005, ought to have been disclosed to the defence."

10.50am to BC

B.C.8 10.50 am

2. The material sought satisfies the test for disclosure and is of kind exemplified at para 10 and para 12 of the Attorney General's Revised Guidelines. Without prejudice to the generality of the foregoing the material sought has the capacity to support submissions that may lead to or have a bearing on:

i. the exclusion of evidence

ii. a stay of proceedings

iii. a Court finding that a public authority acted incompatibly with the accused's rights under the ECHR;

iv. the accuracy of any prosecution evidence;

v. the reliability of the admissions relied upon by the prosecution

vi. the credibility of a prosecution witness

vii. the defence raised

viii. its capacity to suggest an explanation or partial explanation of the accused's actions

ix. the admissibility of any prosecution evidence.

3. Section 7(a) of the Criminal Procedure and Investigations Act 1996 imposes a continuing duty on the prosecutor to keep the question of disclosure under review at all times. Such material is identified above and the prosecutor is under an obligation to disclose.

B.C.9

4. The revival of the application for all unedited covert recordings and transcripts (Items (A) iii) and iv) arises for the following reasons:

(i) the rejection of the application was made in the absence of submissions from Counsel despite the fact that it had been indicated to the court that the Defendant wished Counsel to make the application on his behalf and in circumstances of unfairness and in breach of the defendant's right to a fair trial;

(ii) there are cogent and additional reasons referred to above as to why this material ought to have been disclosed which were not before or considered by the Judge in rejecting the previous Section 8 application;

(iii) the Prosecution considered the question of this disclosure by reference to the Defence Statement. This was insufficient enquiry."

Mr Treacy adopted Mr Macdonald's submissions in respect of the failure of the Disclosure Judge to conduct a hearing. Mr Kerr's submissions on the absence of a hearing may be summarised as follows:

(1) The Disclosure judge was entitled to take the view that the S.8 application did not comply with the provision of Rule 7(2)(c) and he pointed to part C of Gibson's notice of 13

B.C.10

September 2005 and to part C of Fulton's first notice of 6 September 2005. In both he submitted that there were no

factual averments as to how the material sought might be expected to assist the accused, rather there were statements of the principles which it was suggested should be followed in the form of references to the Attorney General's Revised Guidelines and the Code for Prosecutors.

2) It was wrong to suggest that the Disclosure Judge could not make a further ruling on a further S.8 application on these matters merely because he had ruled that the notices were defective.

As this is a trial without a jury of scheduled offences provision is made for issues of disclosure to be dealt with by a different judge to the trial judge, and the rules governing the procedure to be adopted in respect of disclosure matters are contained in the Crown Court (Criminal Disclosure and Investigations Act 1996) (Disclosure) Rules (NI) 1997, the 1997 Disclosure Rules. Whilst the trial judge retains ultimate responsibility for ensuring that the defendant receives a fair trial, judicial superintendence of the nature and extent of disclosure is a task performed by the Disclosure Judge, whose responsibility it is to examine the subject of the material that should be made available to the defence. See R –v- McKeown [2004] NICA 41 at para 44. That being so, it is for the Disclosure Judge to determine whether any disclosure should be made, and what procedures are followed. That is not to say that the trial judge

B.C.11

may not in certain circumstances take such steps as may be necessary to ensure that the Disclosure Judge has 'a full
understanding and appreciation on an ongoing basis of all the issues in the trial and in particular the nature of the defence.'

TO C.H. 10.55 am

CH.7 10.55am (From BC)
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This can be done by the provision of a transcript or, as I suggested in R v. Balandowitz (unreported 24 October 2002), the Trial Judge could formulate

questions for the Disclosure Judge if necessary. However, this would be an exceptional course because it is for the parties to define the issues in relation to what disclosure is sought by the services of notices under the Disclosure Rules.

The role of the Disclosure Judge is therefore to determine what disclosure should or should not be made and it is not for the Trial Judge to look behind any orders made by the Disclosure Judge. If those orders are to be challenged, in my judgment that can only be done by way of a fresh application to the Disclosure Judge to review any order he has made or, in the event of a conviction, to challenge any disclosure ruling on appeal. As I stated in my ruling of 28 October, I know of no principle or rule that says a defendant is not entitled to ask the Disclosure Judge to review rulings he has given or to consider points that have not been made before.

I do not consider that it is open to me as the Trial Judge to sit by way of appeal from or by way of review of decisions made by the Disclosure Judge. To do so would be to usurp the function of the Disclosure Judge. Although the present applications are framed as applications for a stay on the grounds of an alleged abuse of process, in reality they are a collateral attack on the

decisions of the Disclosure Judge and the submissions made by Mr. Macdonald and adopted by Mr. Treacy demonstrate that that is what I am being asked to consider. I am satisfied that I do not have jurisdiction to entertain such a collateral attack and I do not propose to do so.

A further reason for not entertaining the application for a stay based on the orders of the Disclosure Judge of 13 and 30 September is that the Defence have chosen not to make any further application on these matters to the Disclosure Judge, although I ruled on 28 October that I was not prepared to consider these applications until the Defence have explored the matters of which they complain as fully as they can before the Disclosure Judge. If,

contrary to the view I have taken, I can review the decision of the Disclosure Judge, I consider that it would be wrong to do so where the defendants have refused to make any further applications to the Disclosure Judge in respect of these matters. For these reasons I refuse to grant a stay on the grounds of an abuse of process so far as the applications rest on the orders of 13 and 30 September and the absence of a hearing.

I now turn to consider the submissions made by Mr. Treacy in relation to that part of the first application of 6 September 2005 which purported to be a revival of a previous Section 8 application and the rejection of that application. At paragraph 3(ii) of his skeleton argument Mr. Treacy touched on this and made the

following oral submissions. It was unfair to dismiss the earlier Section 8 application in the absence of submissions from counsel for four reasons:

(1) The application had been in the system for a long time.

(2) There had been attempts to get an inter-partes hearing before the long vacation.

(3) Counsel had always been present when other applications were made; and

(4) As appears from the Disclosure Judge's Ruling of 31 August 2005, the Judge was aware that counsel was unavailable.

11.00am to BC

B.C.12 11.00 am

The Disclosure Judges' ruling of 31st August 2005 to which Mr Treacy referred deals with his decision to consider the various applications which were being made to him and included not just disclosure but also sought that the trial judge should determine all matters relating to disclosure. The appointment of Special Counsel was also sought. The Disclosure Judge dealt with all these matters and at pages 10 and 11 described what steps were taken to secure the attendance of Counsel and how the proceedings were conducted. I refer to this ruling to illustrate that the present application for a stay in relation to that matter is plainly a collateral attack on the Disclosure Judge's decision to proceed with the hearing. For the reasons I have already given in respect of the orders of the 13th and 30th September I am satisfied that I do not have jurisdiction to entertain such a collateral attack and I do not propose to do so. I refuse the application for a stay insofar as it relies on that ground.

Part of Mr Macdonald's application for a stay rested upon the defendant's concern that in particular conversations and her correspondence with others including her co-accused and legal representatives may have been monitored and recorded. See paragraph 3 of the skeleton argument dated 17th October 2005. Reference was made at paragraph 7 to disclosure letter of 23rd September 2005 in which reference was made to a conversation between Muriel Gibson and her sister Joyce Young. Mr Kerr produced a statement of additional evidence from Governor Alcock

B.C.13

in which it is said that in effect prisoners were warned by prominently displayed notices stating that telephone calls may be monitored and recorded. However, as Governor Alcock was not available this week and no other witness could apparently be produced to give this evidence the position is that there is insufficient material before me at present to allow any issue relating to the recording of Muriel Gibson's conversations to be explored and Mr Macdonald did not advance separate submissions on this. For the avoidance of doubt I make it clear that my refusal of the application for a stay only relates to the issue of the Disclosure Judge's orders and does not, either expressly or by implication, cover any application that may be made in the future on behalf of Muriel Gibson based on these recordings, any correspondence and any disclosed material.

Mr Treacy has made a number of separate submissions relating to the disclosure on the 23rd September 2005 of the material relating to the recording of conversations at Maghaberry Prison in June and July 2001 and I propose to deal with them in somewhat different sequence to that which he presented them.

The first relates to his absence from the hearing before the Disclosure Judge that took place on the 22nd September. This hearing was on foot of a notice served by the Prosecution of which the following are the material terms.

"This application relates to –

B.C.14

i. 5 unedited Digital Audio tapes (from which evidential transcripts marked as B26, B70, B71, B82 and B91 were produced); 2 unedited microcassette tapes (out of which evidential transcripts marked as B83 were produced) and all associated documentary material.

ii. Other material, not specified in this Notice, which shall be placed before the court.

Then the notice is signed on behalf of the Director of Public Prosecutions, dated 19th September, and is directed to the Chief Clerk at Belfast Crown Court and to the accused William Fulton.

Although the notice was directed to Fulton Mr Treacy says that unlike Mr Macdonald, who was present on the 22nd September at the inter parties element of the disclosure hearing, Fulton's advisors were not informed of the date of the hearing and were unaware of it. Such enquiries as I have been able to make of the court records do not disclose any record of the court notifying Fulton's solicitors that there was to be a disclosure hearing that day, something which confirms Mr Treacy's statement that he was not notified. I therefore proceed on the basis that Fulton's representatives were not told of the hearing on the 22nd September as they should have been and that must be regarded as a fault on the part of the court staff and hence of the court.

TO C.H. 11.05 am

CH.10 11.05am (From BC)
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Why this occurred I cannot say. If Mr. Treacy's absence did not prompt any enquiry may well have been because, as Mr. Macdonald observed, it was thought that the inter-partes hearing related solely to Muriel Gibson and certainly there was nothing whatever in the notice of 19 September to alert the Defence that any issue was going to arise which may have a bearing on any issue that Mr. Treacy might wish to raise on behalf of his client other than that Fulton was a notice party in the notice of the 19th. Had it been the case that the notice had been in the form of the notice of 21 October 2005 which said: "The application is in respect of material relating to the accused in

Maghaberry Prison" then one might have expected some enquiry to be made by the Defence as to when there would be a hearing. However, that was not the case and I do not consider that Fulton's legal representatives can be criticised for not being aware that there was to be a hearing because there was nothing to suggest it would concern Fulton.

Whilst it is singularly unfortunate that this oversight occurred does that justify the grant of a stay? Had Fulton been in some way prejudiced by his legal representatives not being present it would be necessary to consider whether such a fault by the Court could amount to conduct that could give rise to a stay. For the present, without so deciding, I am prepared to accept that it could. However, one has to consider whether Fulton was in any

way prejudiced. It seems that no reference was made during the inter-partes hearing to any Maghaberry material so far as I can
tell from the references to the inter-partes hearing by Mr. Kerr and Mr. Macdonald, as that part of the hearing was in relation to unedited tapes relating to pre-arrest surveillance. As I infer that the Maghaberry material was not raised until the inter-partes hearing had concluded, had Mr. Treacy been there it seems that nothing would have occurred in his presence to alert him to that material and therefore, unfortunate though this error was, as it deprived Mr. Treacy of the opportunity to be present, in reality it did not deprive Fulton of any opportunity to make submissions that would otherwise have occurred. I therefore do not consider that Fulton suffered any prejudice and I do not consider that this error justifies the granting of a stay.

Mr. Treacy also made a number of submissions based on the failure of the Prosecution to disclose the existence of the contents of the recordings that were revealed by the letter of 23 September and it is necessary to view these submissions against the background of the relevant circumstances.

(1) Fulton's defence statement of 22 September 2003 repeated the broad thrust of his interviews in 2001, namely that he attributed a role to himself to seek adulation from those around him. In order to lend credibility to this he presented as his behaviour facts he had picked up in various ways,

such as stories he had heard in pubs or loyalist gatherings; from contacts with loyalist terrorists; facts in the public domain; or from discussing the crimes with those involved or because he had had allegations about some of these offences put to him on various occasions in the past.

(2) Correspondence from the PPS accepts that the three conversations disclosed on 23 September 2005 had been known to the police since June and July 2001. (See the letter of the PPS of 7 November 2005).

(3) This material was reviewed by the Prosecution and Senior Crown Counsel in October 2003 and again by Senior Crown Counsel in September 2005.

11.10am to BC

B.C.15 11.10 am

The letter of 7th November says on 22nd September that as the notice was dated the 19th September and the disclosure hearing was on the 22nd September. The letter must be wrong and the material considered before 22nd September perhaps on or before the 19th September.

(4) The existence of the recordings was not disclosed as part of either primary or secondary disclosure.

(5) Some of the material considered by the Prosecution in October 2005 had only been provided to Crown Counsel in October 2005 despite being in the possession of police since June 2001.

(6) Only some of the material considered in October 2005 was included on a sensitive schedule.

That the material disclosed on 23rd September was not disclosed prior to that on either primary or secondary disclosure raises the question should it have been? The Prosecution say that it was considered that disclosure was not necessary because the conversations were "non evidential, unspecific, post arrest, and added nothing to other such material in the case. It was no part of the Prosecution case that Fulton had recently invented this defence nor was it disputed by the Prosecution that he maintained this to be the position in the course of his interviews." Para 4 of the Crown's skeleton of 2nd November.

I consider that this may well have been a perfectly tenable view for the Prosecution to adopt of some of the disclosed conversations. Two were conversations to which Fulton was a

B.C.16

party and so he was already aware of them. The third was an expression of opinion by his co-accused Gibson which might be thought to be confirmatory of Fulton's case. Whatever might be the weight to be attached to it the conversation was something that might assist Fulton and I consider it should

have been the subject of secondary disclosure as something which might reasonably be expected to assist Fulton's defence under S.7(2)(a) of the Criminal Procedure and Investigations Act, 1996 (the 1996 Act) in the light of the case he was making in the defence statement. This conversation was obviously placed before the Disclosure Judge who then ordered its disclosure.

I understand from what has been said by Counsel that there has been a further disclosure hearing on the 26th October when there was an inter parties hearing. Thereafter the Disclosure Judge directed disclosure of the fact that the conversations disclosed on the 23rd September come from monitored 'phone calls. I infer from there being an inter parties hearing that the defendants including Fulton had the opportunity to place before the Disclosure Judge such submissions as they wished to make about the relevance of this material and I bear this in mind when considering the application for a stay.

I now turn to a further aspect of the disclosure of these conversations, namely, the failure of the Prosecution to disclose them in response to the S.8 notice which had been served by the Defence on 25th January 2005 and the two S.8 notices served on 6th September 2005. Mr Treacy laid some emphasis on these as

B.C.17

containing requests for covert recordings and therefore should have elicited discovery of these conversations.

TO C.H. 11.15 am

It is therefore necessary to consider each application in turn. That of 25 January 2005 requested at A(i) and (ii) all unedited and edited transcripts of "covert recordings." However, the references to "covert recordings" at C.2 and 3 clearly refer to covert recordings of pre-arrest conversations. I do not consider that this Section 8 application could be said to expressly or impliedly contain a request for disclosure of the Maghaberry conversations.

The Section 8 application of 6 September referred to covert recordings at A iii and iv which were expressed to be a revival of the earlier Section 8 application and also clearly referred to pre-arrest conversations. It does not advance Mr. Treacy's submission.

The third Section 8 application, also of 6 September, dealt

with post-arrest recordings and specifically included Maghaberry at A(i). With the exception of A(iii) these referred to "covert audio and video recordings." The Prosecution response is that the disclosed conversations were not the subject of "covert" recordings, relying on Governor Alcock's statement of evidence. However, that is not in evidence but I do not consider it necessary for present purposes to determine whether the recordings were "covert" in the sense that expression is used, that is without the person concerned having the opportunity to consider that their conversation may be being monitored. I do not consider it necessary to determine that because A(iii) referred to "all

telephone or other intercepts from the date of arrest until the date hereof." That was, in my opinion, sufficient to put the Prosecution on notice that it should review its earlier consideration of this material of October 2003. This was not done until some time before 22 September and on 7 September 2005 the Prosecution replied saying: "there is no material which attracts a duty of disclosure." I am satisfied that statement was incorrect and the material disclosed on 23 September 2003 should have been disclosed in response to the notice of 6 September. I will return to this in due course.

A matter relied upon by Mr. Treacy as indicative of what he described as a decision by the police to conceal the telephone conversations for 4 years was Mr. Kerr's statement that "we were trying to hide it until we had a ruling" in Mr. Treacy's words. I have had the transcript checked and what Mr. Kerr said was this: "Now, my Friend Mr. Treacy suggests that somehow we were trying to hide the material. Well, of course, until we had the

ruling, yes, we were trying to hide the nature of the material to that extent."

This has to be placed in the context of what Mr. Kerr had said shortly before that, namely that the Prosecution had adopted procedure "C" as set out at Blackstone, 2005 Edition, at Page 1279, because, in his words "it is a matter of common sense why we did so. Because if we had specified the nature of the material

we would, in effect, have been disclosing at that stage that there had been monitoring of telephone conversations which was the very matter which we wished to protect." I consider that although the Prosecution were mistaken in the view they took as to whether the material should be disclosed, the procedure adopted was proper in the circumstances.

Mr. Treacy also carried out a detailed analysis of various statements which the Prosecution have made in correspondence seeking to demonstrate inconsistencies in explanations given.

11.20am to BC

B.C.18 11.20 am

He also prepared these in a helpful tabular form. I do not propose to set these out. I have considered them in the light of the correspondence and the skeleton argument from which they have been extracted. I do not consider that they bear the significance Mr Treacy seeks to invest them with.

He submitted that there was evidence of "protracted and serious misleading of the accused and the Disclosure Judge about material of this type.", that is the disclosed conversations, and of "the further demonstrable systemic failure of the Prosecution in relation to the disclosure allegations (which have already been the subject of comment by the court in another area)."

I have already stated that I am satisfied that the material disclosed on 23rd September should have been disclosed in response to the notice of 6th September, and that it should have been the subject of secondary disclosure. I consider that these errors on the part of the Prosecution do not demonstrate or amount to systemic failure by the Prosecution to fulfil its disclosure obligations. They were corrected by the Prosecution bringing the material before the Disclosure Judge and the gravity of the error falls far short of that which I have already considered in relation to the transcripts which were obtained in breach of the Article 8 rights of those defendants concerned.

I accept that the failure to disclose these conversations represents a failure to comply with the Prosecution's duty to keep disclosure under review but in deciding whether to grant a stay I

B.C.19

have to consider whether those breaches, both taken in isolation and against the background of the earlier failure means that (a) there can be no longer a fair trial, or (b) that it would otherwise be unfair to try the defendant – see the

Attorney General's Reference (No 2 of 2001) [2004] 1 AER 1061 at para [24] per Lord Bingham.

The material disclosed on the 23rd September was not in my opinion of such weight that it can be said that the defendant can no longer have a fair trial or that it would be otherwise unfair to try him and I refuse to grant the stay to the defendant Fulton on this ground.

As I have said in relation to Mr Macdonald's submissions I should also make it clear that my ruling is in relation to the disclosure issue relating to those conversations only and does not cover any application that may be made in the future in respect of the defendant Fulton that may relate to the monitoring of other conversations at Maghaberry or elsewhere post arrest.

The final submission made by Mr Treacy related to the failure of the Prosecution to produce the unused typed taped summaries of conversations relating to Fulton even though the equivalent tapes in respect of Gibson have been disclosed as a result of a ruling of the Disclosure Judge. Mr Kerr's response is that the Prosecution have reconsidered the matter and have decided that no disclosure is required and that the Disclosure judge has refused to order disclosure of the tapes to which the taped typed summaries relate. He said that he had informed the Defence of this and had invited them to return to the Disclosure

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judge and seek his ruling if they disagreed but they have not done so.

For the reasons I have given earlier I consider that I am being invited to usurp the Disclosure Judge's function in the guise of an application for a stay. This is plainly a matter for the Disclosure Judge and I refuse the application for a stay on this ground also.

The applications are therefore refused.
