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R v Fulton & Others (No.4)

12.05

RULING ON AUTHORISATIONS:

MR JUSTICE HART: The prosecution propose to call Sir John Evans, Chief Constable of the Devon & Cornwall Constabulary from the 1st of January 1989 until the 30th of June 2002, to give evidence as to the steps taken by him to authorise various forms of surveillance which resulted in the evidential transcripts upon which the prosecution rely to prove the charges against the defendants. It is clear from the submissions which have been made on behalf of the defendants, principally by Mr Macdonald QC on behalf of Muriel Gibson, but supported by counsel for the other defendants, that the defence wish to explore the basis on which the authorisations were given. This has given rise to an issue as to whether, and if so to what extent, the defence can cross-examine Sir John Evans about the authorisations in order to establish their validity.

This has resulted in the court revisiting the issues which were considered by me in my earlier ruling of the 27th of September 2005 and I have reconsidered the issue afresh in the light of the submissions made to me.

Before turning to the issues of law which have been raised, it is necessary to say something about the various authorisations as they fall into different categories. Some were in relation to intrusive surveillance, others were for directed surveillance. Some purported to have been granted under either the Police Act 1997 (the 1997 Act) or under the Regulation of Investigatory Powers Act 2000 (the 2000 Act). Others were made under non statutory guidelines issued by the Home Office (the Home Office Guidelines)

or under guidelines later issued by the Association of Chief Police Officers, the Association of Chief Police Officers in Scotland, Her Majesty's Customs & Excise, and the Director General of the National Crime Squad and the National Criminal Intelligence Service (the ACPO guidelines). Not all of the transcripts which resulted from these authorisations relate to each defendant, but as the submissions of the defendants cover between them the whole range of authorisations and transcripts, I propose to consider them collectively.

There are 99 transcripts exhibited in this case and they contain conversations in which it is alleged that the defendants made various admissions. The period covered by the transcripts starts in September 1999, and they purport to have been obtained under authorisations that fall within one of four categories:

(a) Intrusive surveillance under the provisions of Part III of the 1997 Act and then under the provisions of the 2000 Act.

(b) Directed surveillance under the provisions of the 2000 Act.

(c) Undercover surveillance officers under the provisions of s.26 (8) of the 2000 Act from the 25th of September 2000.

(d) Undercover surveillance officers under non statutory guidelines which fall into two sub categories:

(i) The Home Office Guidelines until the 1st of January 2000, and (ii) the ACPO Guidelines from the 1st of January 2000 until the 25th of September when s.26 (8) of the 2000 Act came into force.

Of the 99 transcripts, 38 were the result of surveillance by undercover officers operating under the Home Office or ACPO Guidelines and so fall within categories (d)(i) and (d)(ii). Of these, only one was carried out under the Home Office Guidelines, and the remaining 37 were carried out under the ACPO Guidelines.

A further 37 were the result of intrusive surveillance under the relevant statutes and so fall within category (a). The prosecution accept that these 37 transcripts were obtained as a result of a breach of the Art.8 rights of the

defendant in question, but they argue that the breach of Art. 8 does not render the transcript inadmissible and to admit them would not be in breach of the defendant's Art.6 rights.

The remaining 24 transcripts were, it is alleged, lawfully obtained under the relevant statutory provisions in force.

Authorisations for intrusive surveillance may be granted under both the 1997 and the 2000 Acts. Whilst intrusive surveillance is not defined under the 1997 Act, it is under the 2000 Act by s.26 (3), (4), (5) and (6) and consists of covert surveillance of residential premises, or a private vehicle, by a person on such premises or in the vehicle using a surveillance device. Directed surveillance is defined only in s.26 (2) and is covert but not intrusive. Covert surveillance is defined by s.26 (8) and is carried out by undercover officers.

Common to both the 1997 and 2000 Acts is that surveillance is subject to a statutory framework, and it is convenient to start with the decision in R.v.GS & Ors [2005] EWCA Crim 887 when considering the significance of that framework. The scheme of the legislation was considered in GS by Auld LJ in paras 4 - 12, and I do not propose to repeat the analysis contained in the judgment.

At paragraph 27 he concluded that:

"*It is plain that s. 91 (10) of 1997 Act, in the context of the 2000 Act, is designed to prevent re-litigation in the course of a criminal trial of the entire protective regime of high level authorisation and approval of it*".

The court then considered the decision in R.v.Templar [2003] EWCA Crim 3186 upon which Mr Treacy relied, at paras 31 and 32:

31: "*A possible example of such recourse to s.78 in the case of the 1997 Act surveillance evidence is R.v.Templar [2003] EWCA Crim 3186, in which the prosecution, on an application based on defence allegations of manipulation of the recorded material, declined to disclose the underlying material on the ground of*

Public Interest Immunity. The trial judge and the Court of Appeal looked at the material, and held that the prosecution was right to withhold disclosure.

Latham LJ, giving the judgment of the court, adopting prosecution counsel's concession that section 91 (10) did not preclude such an inquiry said, at paragraph 14:

"It seems to us that this sub-section does not preclude, in itself... an inquiry into the question of whether or not the relevant decision of the Commissioner has been obtained by deception or by some other reprehensible conduct amounting to an abuse of process, which could found an argument under s. 78 of the Police & Criminal Evidence Act to the effect that evidence so obtained should be excluded".

However, as Judge Loraine-Smith asked in R.v.C-D, who is to conduct that inquiry?

We agree with him that s.27 of the 2000 Act and section 91 (10) of the 1997 Act as applied to the 2000 Act clearly preclude an inquiry by a criminal court into the lawfulness of an approved authorisation. Lawfulness or otherwise in that respect may, but does not necessarily, have an effect on any decision as to admissibility under s.78 that the court may be called upon to make. It is no part of a Surveillance Commissioner's or of a Section 65 Tribunal's function to determine admissibility. So much is implicitly acknowledged in s.37(7) of the 2000 Act, in its prohibition of an order for destruction of records following a quashing of an authorisation, pending criminal or civil proceedings. Equally it is not open to the criminal court to embark upon an examination of material underlying an approved authorisation, to determine whether the correct statutory criteria have been correctly taken into account and so on, all of which go to the issue of lawfulness. If there are other aspects - which the courts have, so far, found somewhat elusive to identify - upon which s.78 considerations of fairness may be called into play, they are not to be found by looking behind the decisions of the Chief Officers and Surveillance Commissioners to test their lawfulness".

It is clear from the references to Templar at para 33 in GS that the court in the latter case considered that as Templar preceded the decision of the House of Lords in R-v-H & C, and especially the reasoning of Lord Bingham cited in para 33, that the decision in Templar could be distinguished.

In GS the court held at para 32 that,

"*Section 27 of the 2000 Act and Section 91(10) of the 1997 Act as applied to the 2000 Act clearly preclude an inquiry by a criminal court into the lawfulness of an approved authorisation. Lawfulness or otherwise in that respect may, but does not necessarily have, an effect on any decision as to admissibility under section 78 that the court may be called upon to make*".

Whilst GS was a decision relating to authorisations of intrusive surveillance under the 2000 Act, the scheme of the 1997 Act as described in para 4 of the judgment is the same as that under the 2000 Act in two significant respects. The first is that approval for surveillance had to be obtained in advance from independent commissioners who hold, or who have held, high judicial office (see s.91(2)). As Auld LJ stated at paragraph 27:

"*The statutory backcloth, now of both the 1997 and 2000 Acts, is one of provision for independent verification at very high 'judicial' level that intrusive surveillance authorisations have at all times been lawful*".

The second is that Section 91(10) of the 1997 Act applies also to the 2000 Act and provides that the decisions of the independent commissioners "*shall not be subject to appeal or liable to be questioned in any court*".

I consider that the reasoning in GS applies equally to authorisations under the 1997 Act as to authorisations under the 2000 Act, and I can see no valid reason for distinguishing between authorisations made under the two Acts as these important features are common to both statutes.

It is suggested that the effect of GS is to breach the defendant's rights to a fair trial under Art.6 of the European Convention because it prevents

cross-examination in order to re-open the lawfulness of the authorisation. It is correct that as GS precludes inquiry by the court into the lawfulness of an approved authorisation that this prevents the defence from considering the material underlying an approved authorisation to determine whether the correct statutory criteria have been correctly taken into account. See GS at para 32. However, that such inquiries are circumscribed does not mean that defendants in this case cannot probe the manner in which the transcripts were obtained. It is open to them to cross-examine the officers who actually obtained the recordings (see R.v. Alsopp [2005] EWCA Crim 703 at [28]), and to challenge the authenticity and integrity of the recordings, as in Templar at [7].

The protection for the defendants Article 6 rights is provided by a combination of factors. First of all, by the statutory procedures and judicial approval required from the surveillance commissioners under the 1997 and the 2000 Acts. Secondly, by the ability to cross-examine about, and to challenge, the authenticity and integrity of the tapes. Thirdly, by the power of the court to exclude evidence under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989. Fourthly, by the review by the disclosure judge of any material for which PII has been claimed. See Alsopp at [26] & [28], GS at [35], Button [2005] EWCA Crim 516, and the authorities reviewed therein.

It was suggested that Section 91(10) of the 1997 Act is incompatible with the defendant's rights to a fair trial under Article 6 because the defendants do not have the ability, through access to disclosure and the cross-examination of witnesses, to challenge the legality of the surveillance operation in order to demonstrate the illegality of the operation which resulted in the evidential tapes. See Mr Macdonald's skeleton argument at [31]. However, for the reasons I have already given I am satisfied that when one takes into account the four safeguards described above Section 91(10) is Article 6 compliant.

So far as those authorisations which were admittedly in breach of Article 8 are concerned, the prosecution submit that the breach of a defendant's Article 8 rights does not render the trial unlawful. I am satisfied that that is correct. The contrary argument was rejected in Button. As was pointed out in that case at [21], any breach of Article 8 is subsumed by the Article 6 duty to ensure a fair trial.

I therefore conclude that so far as all of the statutory authorisations are concerned, the defence are precluded from cross-examining as to the lawfulness of the authorisations as a means of challenging their admissibility under Article 76 (or indeed Article 74) of PACE. That applies equally to the authorisations that were in breach of Article 8 insofar as the defence seek to explore the material underlying the authorisations, or to examine whether the correct statutory criteria have been taken into account.

However, insofar as the authorisations that breached Article 8 are concerned, that there was a breach of a defendant's Article 8 rights is relevant to the exercise of the Court's discretion under Article 76 of PACE. See R.v.Mason [2002] 2Cr.App.R. 628 per Lord Woolf at para 75. Matters which relate to that breach are, in my opinion, a proper subject for cross-examination as they may be relevant to the exercise of the court's discretion under Article 76.

I now turn to the non-statutory authorisations, that is those that were carried out under either the Home Office or ACPO Guidelines. Here the position is somewhat different. These authorisations did not require approval by a surveillance commissioner and therefore lacked the element of 'independent verification' by an independent judicial figure. Therefore the ouster provisions of Section 91(10) of the 1997 Act have no bearing on such authorisations. It is correct that the disclosure judge has considered whether they are subject to PII, and Article 76 of PACE applies when considering the effect of any breach of the defendant's Article 8 rights.

However, the absence of a statutory framework with which the authorisations must comply, and the absence of the requirement to obtain approval from an independent judicial figure in the form of a surveillance commissioner, are very substantial differences from the statutory regime considered in GS and other decisions. In my opinion, those differences are of such significance that the reasoning in GS cannot be extended to the authorisations that were granted under the Home Office or ACPO Guidelines.

In non-statutory situations the surveillance may well be lawful. See Khan.v.United Kingdom. That decision can only be arrived at when the court has considered all of the relevant circumstances in order to consider whether Article 76 of PACE should be invoked. That is not to say that a defendant has a right to cross-examine about matters for which PII has been or can be claimed, or matters that are irrelevant. However, both the Home Office and ACPO Guidelines require the officer granting the authorisations to have regard to certain criteria. Paragraphs four and five of the Home Office Guidelines, for example, deal with covert use of listening devices:

"*4. In each case in which the covert use of a listening device is requested, the authorising officer should satisfy himself that the following criteria are met:*

(a) the investigation concerns serious crime;

(b) normal methods of investigation must have been tried and failed or must, from the nature of things, be unlikely to succeed if tried;

(c) there must be good reason to think that use of the equipment would be likely to lead to an arrest and a conviction, or where appropriate, to the prevention of acts of terrorism;

(d) use of equipment must be operationally feasible.

5. In judging how far the seriousness of the crime under investigation justifies the use of particular surveillance techniques, authorising officers should satisfy

themselves that the degree of intrusion into the privacy of those affected by the surveillance is commensurate with the seriousness of the offence.

Where the targets of the surveillance might reasonably assume a high degree of privacy, for instance in their homes, listening devices should be used only for the investigation of major organised conspiracies and/or other particularly serious offences, especially crimes of violence".

Section 2.2 of the ACPO guidelines deals with surveillance in or into private places:

"*2.2. Before giving authorisations for surveillance, the authorising officer must be satisfied that:*

* *the surveillance is likely to be of value in connection with national security, in the prevention or detection of crime, in the maintenance of public order or community safety or in the assessment or collection of any tax or duty or of any imposition of a similar nature;*

* *the desired result of the surveillance cannot reasonably be achieved by other means [see Note 2B];*

* *the risks of collateral intrusion have been properly considered*".

As Mr Lyttle pointed out, the provisions of sections 2.10 and 2.17 of the ACPO guidelines are particularly germane to Rain Landry as the prosecution conceded in January 2004 that she was not named in an authority until the 4th of September 2000, although the evidence against her includes a recording obtained on 7th June 2000.

In his oral submissions on the 28th of September 2005 Mr Kerr recognised that in what I term non-statutory cases, it may be possible for a defendant to explore whether the relevant Code was followed when decisions were being made. I am satisfied that this must be the case because, as I have already indicated, all the relevant circumstances must be taken into account if Art.76 is being considered and Art.76 must be considered in order to determine whether such non statutory surveillance constitutes a breach of Art.6. [See the authorities reviewed in Button]. It must therefore be open to

the defendants who are implicated by transcripts obtained as a result of non-statutory surveillance to cross-examine to see whether the relevant criteria for such surveillance were observed, provided always that the cross-examination is relevant. Prima facie relevant means relevant to the criteria that applied under the appropriate guidelines, as well as to matters such as the integrity or authenticity of recordings.

In this ruling I have sought to determine and define the parameters within which the prosecution witnesses can be cross-examined. Whether particular questions relating to the authorisations are outside or within these parameters can only be decided if and when the questions are asked.