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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **13/03/2006**

R. v Fulton & Others (No.8)

10.30 Morning start:

MR JUSTICE HART: I propose to give my ruling on the issues of admissibility that were raised last week and then I will deal with whatever issues maybe said to arise from that and any issues that arise from the disclosure application before the Disclosure Judge last week.

RULING

Applications have been made on behalf of each defendant that I exclude the evidential transcripts which contain alleged admissions made by each defendant.

Although Fulton admitted that he had made the admissions attributed to him and Muriel Gibson is alleged to have made remarks which support the same inference regarding her, both say that they are untrue. Rain and Talutha Landry have not admitted they have made the alleged admissions.

For the sake of brevity I propose to refer to the alleged admissions throughout as 'the admissions' and to the individual transcripts by the reference number only eg B73.

The applications are made under both Articles 74 and 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989, the 1989 Order, and it is common case that these are the relevant provisions following the repeal of Section 76 of the Terrorism Act 2000 with effect from the 26th July 2002.

In addition, Mr Treacy QC sought to renew his application that a stay of the proceedings should be granted but he argued that as an alternative the admissions

made by Fulton should be excluded under either Article 74 or Article 76. Although the applications made under Article 74 have not been formally advanced as part of a voir dire, Mr Kerr QC for the Crown has applied to call witnesses to prove that the admissions should not be excluded under Article 74 as part of a voir dire submitting that the Court should hear evidence as to how the admissions were obtained before it rules on the admissibility of those admissions under Article 74.

The relevant provisions of Article 74, subsection (1) are:

"*In any criminal proceedings the confession made by an accused person maybe given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this Article.*

(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:

(A) by oppression of the person who made it, or

(b) 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 maybe true was not obtained as aforesaid".

The Defence submissions primarily rely upon Article 74(2)(b).

I am satisfied that Mr Kerr is entitled to call evidence. Whilst the burden is upon the Crown to prove beyond reasonable doubt that the admissions were not obtained in breach of Article 74, it would be highly unusual to determine this issue without hearing evidence. The fact that this is a scheduled case does not bear on this issue and as was pointed out in R.v. McKeown [2000] Northern Ireland Judgment Bulletins 139, if the evidence is admitted it is normal to agree that the evidence given on the voir dire need not be repeated. It maybe possible in exceptional circumstances to rule that an admission can be excluded on the

prosecution evidence only under Article 74, as was said in R.v. Jackson [1985] Criminal Law Review 444, but I do not consider that to be the position in the present case. In Jackson the Court contemplated that such an exceptional case would be where the prosecution evidence made it clear that an admission was involuntary. I do not consider that to have been established on the present state of the evidence. The prosecution and the defence, should they wish, are entitled to call evidence and I do not propose to rule on the admissions under Article 74 at this stage.

The position is somewhat different in so far as Article 76(1) is concerned:

"*In any criminal proceedings, the Court may refuse to allow evidence in 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*".

In the normal way the application of Article 76 will be considered at the end of the voir dire. However, in the present case objection is taken to the admissibility of all the transcripts on various grounds, and some on specific grounds: All the submissions being such that, if successful, that would be the end of the case. In particular, objection is taken on the ground that in respect of those transcripts admittedly obtained in breach of the Article 8 rights of the defendant concerned, the Court should exercise its powers under Article 76 to ensure that the defendant has a fair trial under Article 6. In the particular circumstances of this case I therefore propose to rule on the Article 76 issues raised at this stage.

As in previous applications I have been furnished with comprehensive written submissions on behalf of each of the defendants and by the prosecution. I do not propose to refer to each in detail and in any event many of the submissions make points that are common to each of the defendants. I have considered all of the submissions both oral and written and I propose to deal with some of the common issues at this stage before turning to the submissions of each defendant.

Central to many of the submissions is the suggestion that the recordings

were obtained in breach of the right to privacy of the defendant concerned under Article 8 of the European Convention. The prosecution concede that of the 99 evidential transcripts relied on in this case, 37 were obtained in breach of Article 8 but deny that the remainder were, and it will be necessary to consider whether some or all of the remainder were also obtained in breach of Article 8.

It is well established that a breach of Article 8 does not of itself render a defendant's trial unfair under Article 6 because the Court has the power to exclude evidence under Article 76. It is unnecessary to refer to all of the many decisions to this effect. Khan -v- the UK at paragraphs 39 and 40, the European Court found that the use of secretly taped material did not infringe Article 6, and that had its admission given rise to substantive unfairness the Court would have had a discretion to exclude it under Article 76. The same view was taken in Allan -v- the UK (see paragraph 48). In the domestic law of the UK the same view has been taken on many occasions and was reaffirmed in R.v. Button [2005] EWCA Criminal 516 at paragraph 23. In the following passage from R.v. P [2001] 2AER at page 70, Lord Hobhouse referred to the earlier ruling of the House of Lords in Khan and to the later decision of European court in the same case:

"*The decision of your Lordships' House was arrived at at a time before the 1998 Act had been enacted let alone introduced into Parliament. Therefore, the Convention did not then have the place it now has in English law. The importance of the Court of Human Rights decision is that it confirms that the direct operation of Articles 8 and 6 does not invalidate their Lordships' conclusion or alter the vital role of Section 78 as the means by which questions of the use of evidence obtained in breach of Article 8 are to be resolved at a criminal trial.*

The criterion to be applied is the criterion of fairness in Article 6 which is likewise the criterion to be applied by the judge under Section 78. Similarly, the Court of Human Rights decision that any remedy for a breach of Article 8 lies outside the scope of the criminal trial and that Article 13 does not require a remedy for a breach of Article 8 to be given within that trial shows that their Lordships were right to say that a breach of Article 8 did not require the exclusion of evidence. Such an exclusion, if

any, would have to come about because of the application of Article 6 and Section 78.

The defendants' argument under Article 6 also fails and does so independently of their argument under Article 8".

When considering whether to exclude evidence under Article 76 the Court has to go through a two stage process as can be seen from the following extract from Archbold at 15-456(G): "*There are two stages in the application of section 78; first, the circumstances in which the evidence came to be obtained; secondly, whether admission of the evidence would have an adverse effect upon the fairness of the proceedings. In considering fairness, a balance has to be struck between that which is fair to the prosecution and that which is fair to the defence. (See R-v-Hughes). The final aspect of the fairness test appears to relate only to the defendant: whether 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". In R.v. Looseley Lord Nicholls said that the concept of fairness was not limited to procedural fairness and Lord Scott added that evidence could be excluded because it had been obtained by unfair means".*

As is apparent from this passage the Court has to strike a balance between that which is fair to the prosecution and to the defence. When considering what is fair it is important to remember that the concept of fairness does not just involve the interests of the defendant. In this context the following observations of Lord Steyn and Lord Hutton in Attorney General's Reference (No 3 of 99) [2001] 1AER 577 are instructive. At page 584 Lord Steyn observed:

"*It must be borne in mind that respect for the privacy of defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the Court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family and the public*".

These remarks were not made in the context of Article 76 although he pointed out at page 585 J that "*there is no principle of convention law that unlawfully obtained*

evidence is not admissible", referring to Schenk -v- Switzerland and R.v. Khan [1996] 3 AER 289. At first instance the trial judge ruled that he would have excluded the evidence in the exercise of his discretion under Section 78 and this was not technically before the House, and so their Lordships did not have to consider whether the discretion had been correctly exercised. However, at page 590 Lord Hutton did refer to the exercise of discretion in terms which were similar to those of Lord Steyn:

"*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*".

Mr Treacy referred to the discussion of the weight to be attached to a breach of the Convention right when considering the application of Article 76 in Emerson and Ashworth, "Human Rights and Criminal Justice", first edition (2001) at 15-26. The learned author stated at pages 428 to 429:

"*Breach of a convention right is inherently more serious than breach of a rule of domestic law, for the simple reason that the right in issue has been accorded the status of basic or fundamental right deserving of special protection by the courts. Such a breach does not necessarily require the exclusion of evidence obtained in consequence, but the constitutional nature of the right will weigh heavily in the balance. This approach appears consistent with the decision of the House of Lords in v R.v.P.*".

In Lord Steyn's judgment in the Privy Council case of Allie Mohammed -v- the State [1999] 2 WLR 552, he said it is necessary to "*perform a balancing exercise in the*

context of all the circumstances of the case", even though "*added value is attached to the protection of the right*", and because "*potential breaches can vary greatly in gravity*". The learned authors recognise that Lord Steyn's approach in Allie Mohammed is "*somewhat stronger*" than the approach in *R.v.P*, and one must recall that in *Khan* the only evidence against the defendant was the illegally obtained evidence and the European Court found that the proceedings as a whole were fair and there was no breach of Article 6. If there is a difference in emphasis between *R.v.P* and *Allie Mohammed* then I must follow *R.v.P*.

For reasons that will emerge later I propose to consider the authorisations and their compatibility with Article 6 on the basis that as well as the 37 transcripts to which the prosecution accept were obtained in breach of Article 8, the further 38 transcripts obtained under the Home Office or ACPO Guidelines were also obtained in breach of Article 8.

I do not consider it necessary to set out the provisions of the statutory schemes. The scheme of the legislation has been set out in detail by Lord Justice Auld at paragraphs 4 to 11 of the R.v. GS and Others to which frequent reference has already been made in this case. He summarized the effect of their provisions at paragraph 11 as follows:

"*Thus as Judge Jarvis noted in his judgment in this case, the law has erected a number of significant thresholds to be surmounted by authorities before they may employ the 2000 Act as a means of intrusion on an individual's private life, namely; satisfaction of a senior authorising officer and written approval, normally in advance, of an independent Surveillance Commissioner and sometimes, in the event of an appeal under section 38, the Chief Surveillance Commissioner; and if complaint is made by a suspect or other aggrieved person, the scrutiny of the Tribunal under section 65 to 70, that (1) the authorisation is necessary (in this case for preventing or detecting serious crime); (2) there is no reasonable alternative means of obtaining the information sought; and (3) the nature and extent of the surveillance is proportionate to what is sought to achieve by its use.*

It is against the backcloth of those thresholds or stringent conditions, coupled with

Codes of Practice issued by the Home Secretary pursuant to Section 71 of the Act, that the intention of section 91(10) of the 97 Act in ousting any right of appeal or questioning in any court in relation to such approvals should be considered.

So far as the statutory authorisations under the Police Act 1997, and under the Regulation of Investigatory Powers Act 2000 are concerned, part of the procedure was that the authorisation had to be approved by a Surveillance Commissioner and did not take effect until the authorising officer had been given written notice of that approval. See section 97(1)(b) and section 97(4)(b) of the 1997 Act, and section 36(2)(b) of the 2000 Act. That written notice was not given to the authorising officer in this case because the notification went to the officers carrying out the surveillance on the ground. They say that the authorising officer was informed orally, that depends largely on the evidence of Mr Mawer, Mr Provoost, Mr Leitch and Miss MacMurdy. I say largely because Mr Toyne said that there was a system of oral notification in place when he arrived in September 2000, and Sir John Evans said that he not only considered each application against the appropriate criteria before granting an authorisation, but that at the monthly reviews he "*needed to be informed of what had transpired as a result of the previous authority and what developments there had been in terms of the authority which was in being*". Evidence of the 27th October 2005. One might therefore infer from his evidence that he must have known, albeit sometime later, that his previous authorisation had been approved by a Surveillance Commissioner. But even if he did not know, what was the effect of his not being notified either in writing or orally?

The failure of the police to ensure that the authorising officer received either written or oral notice, if that was the case, does not appear to have deprived any defendant of any of the protections comprised in the regulatory schemes under either the 1997 or 2000 Acts. The evidence is that the authorising officer, either Sir John Evans or Detective Superintendent Pike, considered each application and I am satisfied they did so conscientiously and thoroughly. Then the authorisations were considered by a Surveillance Commissioner and each one

approved. In those circumstances what Lord Justice Auld referred to in GS as

"*the significant thresholds to be surmounted by authorities before they may employ the 2000 Act is as a means of intrusion on an individual's private life*",

were surmounted for both the 1997 and 2000 Act applications and the defendants privacy rights were thereby considered and protected.

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.

Important though it is that the statutory procedure is complied with, when one bears in mind the considerations as described by Lord Steyn and Lord Hutton in Attorney General's Reference (No 3 of 1999), 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. To exclude the transcripts because notification was not properly given after each of the procedures designed to ensure that the defendants' position was properly considered before surveillance was carried out would be to elevate a procedural requirement to an unwarranted degree of significance. As Lord Steyn in Allie Mohammed -v- The State, "potential breaches can vary greatly in gravity", and if one considers the notification failure in that light, I am satisfied that I should not exclude any of the evidential transcripts under Article 76 because there was a failure to notify the authorising officer that the authorisations had been approved by the Surveillance Commissioners and I refuse the applications so far as they rely on this ground.

A matter relied upon in the written submissions prepared by Miss Quinlivan on behalf of Muriel Gibson, and also advanced by counsel for the other defendants, was that the transcripts revealed that what had occurred was "*the functional equivalent of an interrogation*" and that as a result the protections conferred by the 1989 Order were circumvented. It was therefore argued that the

defendant's privilege against self-incrimination was infringed and so it was not possible to have a fair trial and the transcript should be excluded under Article 76 for that reason.

The concept of covert surveillance amounting to the functional equivalent of an interrogation originated in the decision of European Court in Allan -v- UK [2003] 36 EHRR 12, and the subsequent consideration of the same case by the Court of Appeal in R -v- Allan [2004] EWCA 2236. In Allan -v- UK, the European Court considered the application of Article 6 to circumstances where admissions were elicited from an accused by an informant and concluded that where the conduct of the informant in asking questions amounted to what was described as the functional equivalent of an interrogation, the admissions could be said to be obtained in defiance of the will of the defendant in so far as any admissions were not voluntary, spontaneous and unprompted because they were induced by persistent questioning carried out at the instigation of the police.

The European Court considered this issue in Allan at paragraphs 49 to 53, and it is appropriate that I should refer to these in full:

"*49. The applicant's second ground of objection, concerning the way in which the informer H. was used by the police to obtained evidence, including taped conversations with the applicant, a written statement and oral testimony about other allegedly incriminating conversations, raises more complex issues.*

50. 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 where 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 to 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 use

subterfuge to elicit from the suspect, confessions or 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.

51. Whether the right to silence is undermined to such an extent as to give rise as to a violation of Article 6 of the Convention depends on all the circumstances of the individual case. In this regard, however, some guidance maybe found in the decisions of the Supreme Court of Canada, referred to in paragraphs 30 to 32 above, in which the right to silence in circumstances which bore some similarity to those in the present case, was examined in the context of Section 7 of the Canadian Charter of Rights and Freedoms. There, the Canadian Supreme Court expressed the view that, where the informer who allegedly acted to subvert the right of silence of the accused was not obviously a State agent, the analysis should 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. Where an informer was to be regarded as a State agent depended on whether the exchange between the accused and the informer would have taken place, and in the form or manner in which it did, but for the intervention of the authorities. Whether the evidence in question was to be regarded as having been elicited by the informer depended on whether the conversation between him and the accused was the functional equivalent of an interrogation, as well as on the nature of the relationship between the informer and the accused.

"52. In the present case, the Court notes that in his interviews with the police following his arrest, the applicant had, on the advice of his solicitor, consistently availed himself of his right to silence. H, who was a long standing police informer, was placed in the applicant's cell in Stretford police station and later at the same prison for the specific purpose of eliciting from the applicant information implicating him in the offences of which he was suspected. The evidence adduced at the applicant's trial showed that the police had coached H, and instructed him to "push him for what you can". In contrast to the position in Khan, the admissions allegedly made by the

applicant to H, and which formed the main or decisive evidence against him at 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 can be regarded as the functional equivalent of an interrogation, without any of the safeguards which would attach to a formal police interview, including the attendance of a solicitor and the issuing of the usual caution. While it is true that there was no special relationship between the applicant and H, and that no factors of direct coercion have been identified, the Court considers that the applicant would have been subjected to psychological pressures which impinged on the "voluntariness" of the disclosures allegedly made by the applicant 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, whom he had shared a cell for some weeks, into his confidence. In those circumstances, the information gained by the use of H in this way maybe regarded as having been obtained in defiance of the will of the applicant and its use at trial impinged on the applicant's right to silence and privilege against self-incrimination.

53. Accordingly, in this respect there has been a violation of Article 6(1) of the convention".

From this it can be seen that the Court considered that Allan's admissions were not spontaneous, unprompted and volunteered but were induced by the persistent questioning of an informant acting at the instigation of the police in circumstances where the defendant did not have any of the safeguards which would attach to a formal police interview such as the attendance of a solicitor and a caution. In addition, there were particular features of the case which the Court considered impinged on the voluntariness of the admissions. These were described as psychological pressures. The defendant knew he was a suspect in a murder case, he was detained in custody, he was under pressure from the police in interrogations about the murder and would have been under pressure to take the informant into his confidence.

In the case of R-v-Allan, the Court of Appeal reviewed a line of domestic authorities at paragraphs 118 to 121, including R.v. Christou [1992] 95 CAR 264, where Lord Taylor CJ stated:

"*It would be wrong for police officers to adopt or use an undercover pose or disguise to enable themselves to ask questions about an offence uninhibited by requirements of the code and with the effect of circumventing it*".

At paragraph 122, Lord Justice Hooper concluded:

"*It would be strange if the law were otherwise*

than as decided by the ECHR. One of the functions of the caution is to make it clear that what a suspect says maybe used in evidence. The presence of a solicitor or friend should additionally ensure that the suspect understands the question, knows the importance of his answers and the seriousness of the occasion. The requirements of audio recordings introduced to overcome problems with actual (or unfounded allegations of) "verballing" by police officers now ensure an accurate record of questions and answers. Audio recordings have done much also to overcome problems associated with actual "inducements" (or unfounded allegations that inducements were made) see R.v. Keenan. Allowing an agent of the State to interrogate a suspect in the circumstances of this case bypasses the many necessary protections developed over the last 20 years".

In the present case it cannot be disputed that each of the undercover officers was acting as an agent of the State at all times. However, some of the features of Allan are 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.

Where an undercover officer was not present it cannot be said that this was the functional equivalent of an interrogation. In those circumstances where one was present, it is necessary to examine all of the circumstances relating to each conversation in order to see whether there was something that can be said to be the functional equivalent of an interrogation, because as the European Court

stated in *Allan*, whether there is a violation of Article 6 depends on all the circumstances of the individual case.

I now turn to consider the submissions made on behalf of Fulton:- The principal arguments advanced by Mr Treacy in his written submissions were that a stay should be granted, as can be seen from the concluding paragraph number 59 of the written submissions on behalf of Fulton dated 28th February 2006. In so far as these were arguments that I have considered in my ruling of 23rd February 2006, I do not propose to consider them again, and I have already ruled that I would not permit Mr Treacy to advance the points he made at paragraphs 49 to 58, which were an attempt to re-argue points that had been determined against him in that ruling.

The matters relied upon at paragraphs 11 to 15 inclusive relate to Article 74 and fall to be considered when the voir dire is complete.

Paragraphs 16 to 33 in effect seek to re-argue the question of abuse of process, as can be seen from paragraph 25 in particular and relate to issues of disclosure. I have had regard to these matters in my ruling of 23rd February 2006.

At paragraph 36 of the written submissions, Mr Treacy argued that if material regarding other offences was to be relied upon by the police they were required to obtain the necessary authority, and without that authority any material obtained was unauthorised and had no legal status. This argument relates to the so-called "widening of authorities" and was developed at paragraphs 34 to 44 and in the oral submissions.

I do not consider that the admissions made by Fulton can be said to have been obtained without legal authority where they were made before the authorisations were extended to activities other than the investigation into the murder of Rosemary Nelson. The latter was an investigation into a very grave crime involving, as it did, the murder of a solicitor actively engaged in defending accused persons. It was therefore 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.

As Mr Treacy points out, there are conflicting statements as to when the authorisations were extended to cover other crimes. Mr Leitch saying in September 2000, Mr Mawer January 2001. If it was necessary to widen the authorisations, and I am not persuaded that it was, there was ample material to justify the continuation of the covert surveillance of Fulton whether the decision was taken in September 2000 or January 2001. I do not consider the prosecution are obliged to disclose that.

It is suggested that the prosecution has failed to prove the conduct was authorised. I am satisfied that the evidence of Sir John Evans and Detective Superintendent Pike has proved what was permitted and that this is clear from the terms of each authorisation. For example, on 6th March under Operation Swan an undercover officer was authorised.

It was also suggested that the authorisations have not been properly proved. I am satisfied that they have been. On 10th November 2005, I ruled that the redacted versions were provable as copies and I consider that the production of copies is sufficient as the originals cannot be produced as a consequence of the Disclosure Judge's ruling on PII.

It was further suggested that my rulings in relation to Mr Provoost impinged on the abstracts prepared by him. However, on the 19th December 2005 I was told that the Disclosure Judge had considered all of the authorisations and on the material presently before me I see no reason to doubt the accuracy of the abstracts.

So far as Fulton is concerned, whether any of the admissions fall to be excluded will be something to be considered under Article 74 in due course.

I now turn to consider the submissions on behalf of Muriel Gibson, which took the form of extensive written submissions prepared by Miss Quinlivan and

the oral submissions based upon them by Mr Macdonald QC.

There are four main headings upon which the defence rely as set out in paragraph 16:

"*The challenge to the admissibility of the evidential tapes and transcripts is based upon the following broad grounds:*

(i) The evidential tapes and transcripts were obtained illegally and in violation of the defendant's Article 8 rights.

(ii) The evidential tapes and transcripts obtained as a result of the use of undercover officers were obtained in breach of the privilege against self-incrimination in violation of the defendant's Article 6 rights as articulated in Allan v UK.

(iii) All the purported admissions were obtained in consequence of things said or done which were likely to render them unreliable.

(iv) In all the circumstances, the admission of the transcript evidence would have such an adverse impact to the fairness of the proceedings that the Court ought not to admit it".

It is submitted that these have to be viewed against the background of the Court's ruling of the 23rd February as to the evidence of the managers, and it is further suggested that the inability of the prosecution to rely on the evidence of the managers of the covert surveillance operation taints the entire process.

The first submission is that the admissions were obtained illegally and in breach of Article 8. In Muriel Gibson's case there are 28 evidential tapes, 14 of which were non-statutory and 14 statutory. (See paragraph 4 of the written submissions). I have already ruled that I do not consider it appropriate to exclude transcripts even if no notification is given to the authorising officer and I do not consider it necessary to refer to the detailed submissions made on this issue up to and including paragraph 59 of the written submissions.

At paragraph 59 and following a further submission under the heading that the admissions were obtained in breach of Article 8 was developed. This has two parts; first, that there is no evidence as to the provenance of either the Home Office or ACPO Guidelines. So far as the Home Office Guidelines are concerned I am satisfied that I can take judicial knowledge of these because they are discussed

in R.v. Khan at [1999] 3 AER 294, where they were quoted in part. It was stated that they had been issued by the Home Office to police authorities in 1984 and I am satisfied that they were in effect at all material times in this case.

Sir John Evans uncontradicted evidence on 29th October 2005, was that the ACPO Guidelines came into effect on 1st January 2000. (See his evidence in chief and his cross-examination by Mr Lyttle QC at page 62 of the cross-examination transcript).

So far as the effect of these guidelines are concerned, as in Khan v UK, the Home Office Guidelines were not law in that they were not promulgated by a law making authority. (See Khan -v- UK at paragraph 27). So far as the ACPO guidelines are concerned, although they were stated to be publicly available (see the front page which bears the legend "Public statement on standards in covert law enforcement techniques"), and to that extent are distinguishable from the Home Office Guidelines, nevertheless they too were not promulgated by a law making authority. They therefore fall foul of the reasoning in Khan -v- UK because they were not sanctioned by law. However, that is not a reason for excluding any transcripts obtained either under the ACPO or Home Office Guidelines. It is noteworthy that in *Khan* the evidence had been obtained in accordance with the Home Office Guidelines and the European Court found that the admission of the evidence did not render the trial unfair under Article 6, despite being obtained in breach of Article 8.

I see no reason to take a different view of any admissions obtained under either the Home Office or ACPO Guidelines in this case. Both sets of Guidelines, although not law, are relevant because they are declarations adopted by the police as to how they will perform their functions. A failure to comply with those guidelines is, for the reasons I develop later in relation to Rain and Talutha Landry, a relevant consideration when considering whether evidence should be excluded under Article 76.

Mr Macdonald also argued that the ACPO Guidelines appear to apply a lower standard than the Home Office Guidelines before covert surveillance can be

authorised. (See the quotation at paragraphs 61 to 63 of the written submissions). That maybe so in the sense that the ACPO Guidelines may permit considerations such as "*national security*" or "*significant public interest*" to be taken into account. In the present case the investigation concerned "*serious crime*" so in the circumstances I do not consider that there was any material difference between ACPO and Home Office Guidelines, but if I am wrong I do not consider that operating under the ACPO Guidelines in the circumstances of the present case was substantively unfair, and I do not consider that it requires any of the evidence obtained as a result to be excluded under Article 76.

The submissions on behalf of Muriel Gibson made similar points to those advanced by Mr Treacy in respect of the extension of the authorisations and for the reasons I have already given I do not accept them.

I now turn to the submissions based on Allan -v- the UK, in the light of the earlier discussion of this decision. When considering whether there was direct questioning, it is necessary to consider the circumstances of each episode, but there are some further general issues. To maintain his or her credibility with a suspect during a conversation in which the suspect is talking about criminal activities is a role which requires considerable care and subtlety on the part of the undercover officer. He or she must not impair the confidence of the suspect, yet at the same time must avoid prompting or questioning the suspect in a way which circumvents the protections conferred by the 1989 Order.

This is not an easy task, and inevitably the undercover officer will have to express interest in or respond in some fashion to what has been said by the suspect. There maybe occasions when individual remarks appears to be a direct question yet when looked at in the context of the conversation as a whole, it may not be objectionable provided that as in the Canadian case of *Liew*, the officer did not initiate the conversation but "*picked up the flow and content of the conversation without directing or redirecting it in a sensitive area*" to use the phraseology in Allan -v- UK at paragraph 32.

I now turn to consider the individual transcripts referred to in the written

submissions:

(1) B81 - Although Muriel Gibson had raised her situation in Northern Ireland by referring to death threats, the questions Liz asked at page 1068 and 1073, were direct questions designed to elicit admissions. I exclude this transcript.

(2) B82 relates to an occasion almost four months later. There was nothing in the transcript to suggest direct questioning. That Liz was spoken to four times about direct questioning does not in my view require this transcript to be excluded.

(3) It is abundantly clear that there were concerns about the conduct of Sam and Dave S in asking direct questions. I do not consider it appropriate to speculate about what was said in non-evidential tapes. That there was concern is relevant when considering what was said on any particular occasion as it may suggest that any intervention was more likely to be deliberately intended to elicit an admission.

(4) B79 - I do not consider that this should be excluded.

(5) B73 - For reasons I will develop when considering Rain Landry's submissions, I consider that this should be excluded because of the involvement of alcohol.

(6) B74, B82, B83, B84 and B87 - I do not consider that these should be excluded.

It was submitted that all of the evidential transcripts should be excluded because there was a relationship of dependence between Muriel Gibson and the undercover officers. These submissions appear at paragraphs 117 to 112. Even if these points are taken at their height they do not create or contribute to what can be regarded as the functional equivalent of an interrogation, and at all times she was at liberty and under no pressure to speak. If it appears from the voir dire that she was obligated to the undercover officers in a way that may have caused her to volunteer material which she would not otherwise have done, then that can be addressed under Article 74. At present I do not consider that it should be inferred and therefore do not consider that I should exclude the evidential transcripts

under Article 76.

Alcohol and drug use: It is clear from the transcripts and disclosed material that the undercover officers knew Muriel Gibson was a heavy drinker. (See for example LM20). It is unclear at present whether they knew she abused prescription drugs or indeed that she did so. Mr Mawer on the 9th January 2006 knew only she was a heavy user of alcohol. (See the transcript at page 98) A medical note disclosed as part of Tab 11 to these submissions, refers to her taking various prescription drugs "*for months*", but there is presently no evidence that she may have been affected by drugs when she made any admissions. This is an issue that can be considered under Article 74.

At paragraph 128 it is suggested that her being encouraged to drink amounted to "*improper compulsion*" and so undermined her privilege against self-incrimination. Unless there is evidence of the involvement of alcohol where a particular admission was made as in B73, I do not consider that there is, at present, any material that would justify excluding all the evidential transcripts under Article 76 on this basis.

At paragraphs 130 to 135, reference is made to what is termed misconduct by Sam and Dave S. Where there is evidence that they circumvented any of the protections conferred on Muriel Gibson by the 1989 Order, that can be addressed under Article 76 as in B73. In the absence of such evidence I do not consider that it is justifiable to exclude admissions under Article 76 simply because these two officers were involved.

Fairness and reliability and the circumvention of PACE are raised in paragraphs 136 to 145. On the 29th October 2005 at page 55, Sir John Evans accepted that the purpose of the operation was direct questioning of the suspect without the suspect realising that there was a police officer asking questions. However, he said he never monitored what was being done, by which I take it he did not listen to the tapes. He was therefore speaking generally and it is necessary to consider what happened on each occasion. It is important to remember that subterfuge is not forbidden by either the Convention jurisprudence or domestic

law. What is not permitted is something that is the functional equivalent of an interrogation, that is questioning whether direct or prompting, designed to elicit admissions. There is nothing to prevent the creation of circumstances where advantage is taken of a suspect's willingness to talk, provided the methods adopted do not infringe the suspect's PACE protections. Save in the specific cases where I have excluded the transcripts, I do not consider that there are grounds upon which I should exclude the other evidential transcripts relating to Muriel Gibson under Article 76 at the present time.

Finally, reference has been made to the issue of corroboration at paragraphs 155 and following. I do not consider that this has been established. If there is any particular instance where the admissions do not correspond with the facts relied upon by the prosecution, that is a matter that can be addressed at the appropriate stage of the trial. At present, there is nothing which I consider justifies excluding the remaining evidential transcripts relating to Muriel Gibson under Article 76.

I now turn to consider the submissions specific relating to Rain and Talutha Landry. The positions of Rain and Talutha Landry are somewhat similar in that the case against each involves distinct issues of collateral intrusion although that does not arise so far as Rain Landry is concerned in relation to transcript B75. On behalf of both defendants, it was submitted that the Court should exclude all the evidential transcripts on the basis of a breach of Article 74, but I do not consider it necessary to decide that so far as transcripts B73 for Rain Landry and B92 for Talutha Landry are concerned because of the conclusion I have reached under Article 76.

Part of the ACPO Guidelines deal with surveillance and set out what is described at 1.1 as "*a code of practice*" which is required to be "*readily available at all operational police premises*" for "*consultation and reference by police officers*" among others. It is also prescribed at 1.1 that "*copies should be available for consultation by members of the public at all police stations*".

At 1.4 it is stated that:

"*Surveillance activity which falls outside the scope of the Police Act 1997, will be*

authorised and conducted in accordance with that code of practice. (See note 1A)".

It is clear from the Guidelines as a whole and from 1.4 of the Surveillance Code, that those agencies which subscribe to the Guidelines undertook that they would conduct surveillance activity which was not provided for by statute in accordance with the Code. That being so, the Guidelines, whilst lacking any statutory foundations such as the Codes of Practice issued by the Secretary of State under Article 65 and 66 of the 1989 Order, contain the provisions to which I consider the Court should have regard because they are designed to regulate the manner in which the police conduct surveillance. That being so, it follows that a failure to observe the provisions in the relevant code, in this case the Surveillance Code, may be relevant when determining questions of admissibility. Were this not the case, the Court would be ignoring the rules which the police apply to themselves which would be illogical.

That is not to say that when considering whether to exclude evidence under Article 76 any breach of the Surveillance Code will automatically result in exclusion. That is not the case. Where the court has to consider breaches of the codes issued under the 1989 Order, where Article 66(10) requires the Court to take into account any provision of the Code that appears to be relevant "*to any question arising in the proceedings*" in determining that question. In such situations the Court has a discretion to exclude the evidence and the breach must be "*significant and substantial*". (See the discussion in Archbold 2006 at 15-15).

I see no reason to adopt a different standard when considering a breach of the Surveillance Code. However, when considering whether to apply Article 76 where there has been a breach of that code, the Court also has to bear in mind that such a breach will involve a breach of Article 8.

In the particular circumstances of Rain and Talutha Landry, the breach of the Code with which I am concerned relates to 1.8 which is as follows:

"*Before authorising surveillance, authorising officers will take into account the risk of intrusion into the privacy of persons other than the specified target of the surveillance (collateral intrusion). Measures will be taken, wherever practicable, to avoid collateral*

intrusion".

There are therefore three requirements:

(1) The risk of collateral intrusion has to be considered before surveillance is authorised.

(2) Measures have to be taken to avoid collateral intrusion. Avoid does not mean minimise or reduce, it is a more demanding requirement and means that collateral intrusion should not take place subject only to (3).

(3) The prohibition is not absolute but collateral intrusion is only permitted where it is "*not practicable*" to prevent it.

Whether something is not practicable must depend on all the circumstances relating to the collateral intrusion in question.

Sir John Evans was aware that Rain Landry had come to join this family and he had been made aware of the presence of other people although he was uncertain whether he was aware of her existence before the 4th September 2000. (See pages 63 and 64 of the transcript of 29th October). However, whilst it could be argued that the obligation to take the risk of collateral intrusion into account only arose at the time the authorisation was granted, that would be to apply an unduly restrictive interpretation. These authorities lasted for a month at a time and it would confer little or no protection on those who might be the subject of collateral intrusion during that time if the officers carrying out surveillance were not obliged to apply the requirements of Surveillance Code 1.8 as circumstances required. Indeed, in the case of Talutha Landry, Mr Mawer accepted that it was the duty of the undercover officers to notify the managers in advance of the operation if they became aware of the possibility of collateral intrusion, that before each deployment the risk of collateral intrusion had to be assessed, and if there was advanced notice the opportunity should be taken to avoid the person being present if it was reasonably practicable. (See transcript of the 10th January 2006 at pages 32 to 34).

That seems to be a realistic and proper recognition of the need to consider at all times how the risk of the collateral intrusion could be avoided wherever

practicable, and I am satisfied that it is the correct view to take of the obligation under Surveillance Code 1.8.

Against that background, I turn to consider the position of Rain Landry at the time covered by transcript B73 on 7th June 2000, during what has been referred to as the "Mexican meal".

I accept that it was clearly foreseeable that she would be the subject of collateral intrusion. It was known to Sam and Dave S that she would be there, and they could easily have avoided exposing her to the risk of collateral intrusion by not recording. There is nothing to suggest that they gave any thought to that risk or that the managers did either. Indeed, Mr Leitch agreed that as the officer in charge of the deployment he could not say if any steps were taken. (See transcript of the 10th January 2006 at pages 128 and 129).

Not only did they fail to give any thought to avoiding collateral intrusion beforehand, but Rain Landry's admissions were not drawn to Sir John Evans' attention within a day or two as he would have expected or even at the next review on 19th June 2000. If it had been he would have insisted that there was an order for her surveillance. Indeed, she was not made the target of such surveillance until September and Sir John was not told at the admissions at the reviews of the 14th July or 7th August. He accepted that the failure of the relevant officer to bring these admissions to his attention was "*a serious omission*". (See transcript of the 29th October 2005 at pages 67 to 74). I consider that this failure throws a very revealing light on the attitude of all those responsible for preparing the surveillance of the 7th June and suggests that they did not pay any regard to the position of Rain Landry on that occasion.

Mr Lyttle QC also placed considerable emphasis on the involvement of alcohol in the conversation at the Mexican meal. Whilst alcohol might well be an unavoidable component of such a social occasion, there is evidence that Dave S had no hesitation in trying to record drunken conversations from Rain Landry and Muriel Gibson. A week before he had met them in a pub when they were in a drunken condition and sent for Sam to bring a recorder. (See the entry for the 1st

June 2000, Defence Exhibit G2).

During the meal, there is evidence that he knew that she had been drinking earlier when he asked her "*How long have you been on the piss*", to which she replied "*I had a few before I went out*", apparently meaning before she went surfing. Occasional interjections from Dave S indicate that not only was he drinking but he was encouraging the others to do so to judge by remarks at pages 14, 15 and 32 of the defence transcript. Quite apart from the implications of Rain Landry being affected by drink under Article 74, it is wholly undesirable that admissions made in such circumstances should be admitted in evidence because there is plainly a risk that the maker has been suborned by alcohol and that the admissions are unreliable.

A further issue raised by Mr Lyttle relates to what was said to have been direct questioning. However, the questions by Dave S as to how old she was at page 28, what sort of shop it was - page 29, and what was in the shop at page 31, were part of an exchange initiated by Rain Landry and were of little significance, if any, in eliciting the information she was volunteering. I do not consider that these comments require the exclusion of the transcripts so far as Rain Landry is concerned.

I have concluded that I should exercise my discretion under Article 76 to exclude the transcript of B73 as it relates to Rain Landry. I consider that the failure to take any steps to avoid collateral intrusion in respect of her was a serious and significant breach of Surveillance Code 1.8. As well as that, the willingness of Sam and Dave S to record a conversation where there are significant concerns about the involvement of alcohol is a further consideration.

Taking these matters together leads me to the conclusion that to admit this evidence would have such an adverse effect on the fairness of the trial that I should exclude it.

I will consider transcript B75 separately but it is convenient to turn to the submissions on behalf of Talutha Landry on transcript B92 at this point.

So far as collateral intrusion is concerned, it can be seen from the road map

summary of B88, that Dave S agreed to Talutha Landry joining Muriel Gibson and himself later. He knew or should have known that she was not the subject of covert surveillance and so he had to consider how to avoid that if practicable. A call was made between 10.30 and 10.35 am, and they were to meet at 12 or 12.15. That meant that Dave S had at least one and a half hours to consider what should be done. As I have already pointed out Mr Mawer accepted that an undercover officer should notify the managers in advance if he became aware of the possibility of collateral intrusion. In any event, Dave S could simply have turned off the recording device to avoid engaging in collateral intrusion and he did not do so.

This was not a situation where there was any apparent urgency about recording Muriel Gibson. He had plenty of time to decide how to deal with the presence of Talutha Landry because I consider it would not have been practicable for him to ask Muriel Gibson not to bring her to what was simply a social meeting. Given the failure of Dave S to take steps to avoid collateral intrusion on the 7th June, it is unsurprising that no steps were taken on this occasion as they should have been.

Mr McCollum QC also referred to the involvement of alcohol on this occasion saying that six pints had been consumed. However, neither the revised transcript B88 nor any of the disclosed documents establish that. It is the case that the expenses claim was for £28 for drink as well as £22 for what are described as meal incidentals, presumably food of some sort. The evidence at present does not show Talutha Landry had six drinks but the notes of Dave S says that the meeting lasted about three hours and "*we had a few drinks*". The tape recording only seems to have covered one hour two minutes approximately according to the road map. Nevertheless, it does seem to be the case that more than a small amount of alcohol was consumed although at present it is impossible to say more than that.

For the reasons I have already given when considering Rain Landry's submissions, the involvement of alcohol was wholly undesirable.

A third consideration advanced by Mr McCollum was that there was no

collaboration of the incident described by Talutha Landry. The evidence of evidence to support or corroborate an admission obtained by covert surveillance means that there is a risk that it is unreliable. However, the admission, although not corroborated, is detailed and therefore there is less risk of it being unreliable on that ground. As was pointed out in Khan -v- the UK at paragraph 37:

"*The relevance of the existence of evidence other than a contested matter depends on the circumstances of the case*".

I do not consider that the absence of corroboration requires the exclusion of the admission under Article 76. It was also suggested what Dave S was actively involved in prompted and direct questions but I do not consider that to have been established to any material extent.

In the case of Talutha Landry I consider that the failure to avoid collateral intrusion was a serious and significant breach of Surveillance Code 1.8. Because of this and because of the involvement of alcohol in the conversation I consider that to admit the evidence would have a serious effect on the fairness of the proceedings and I propose to exclude transcript B92.

I now return to transcript B75 so far as it concerns Rain Landry. This relates to a conversation recorded on the 2nd May 2001, as the result of a static listening device so there were no undercover officers present. Mr Lyttle relies on the breach of Article 8 because the authorising officer was not notified of the approval. However, as he concedes, his argument is weaker in respect of this recording device because none of the other factors are present that had to be considered in respect of B73. He argued that to use the evidence obtained in breach of Article 8 by admitting it in evidence would itself be a further breach of Article 8. That maybe so, but the use of evidence obtained in breach of Article 8 has been held not to automatically require exclusion of the evidence under Article 6 and that point fails.

He also suggested that B75 did not stand on its own but was informed by B73. However, as there was no undercover officer present there is nothing to show that anything was done to prompt Rain Landry's remarks so far as the police were

concerned. In any event this conversation was many months later and at present there is nothing to show that it played any part in Rain Landry's making these admissions on this occasion.

Finally I have considered whether the absence of supporting evidence requires the exclusion of B75. Although the admissions do not refer to a date or time or place, nevertheless they do contain admissions which, if true, would amount to causing an explosion Count 76, and throwing a petrol bomb Count 79. Although B75 does not identify the date or location of the incident and therefore it cannot be shown to be linked to Knox's shop. The date of the offence is not a material averment (see Archbold 1-127). I do not consider that I should exclude B75 under Article 76 so far as Rain Landry is concerned.

In summary therefore, I do not propose to rule on the admissibility of any transcripts under Article 75 until I have heard evidence on the voir dire. Save in relation to three transcripts I reject the submissions made under Article 76, I exclude B81 in respect of Muriel Gibson, B73 in respect of both Muriel Gibson and Rain Landry and B92 in respect of Talutha Landry.

MR KERR: As your Lordship pleases.