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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **27/10/2005**

R. v Fulton, Gibson, Landry & Landry (No.5)

RULING ON AUTHORISATION (3)

MR JUSTICE HART: Mr Treacy QC, supported by Mr Macdonald QC, Mr Lyttle QC and Mr McCollum QC, have submitted that as Sir John Evans has said in his statement of additional evidence that he has refreshed his memory of each of the covert operations to which he refers,

"*...by examining all of my authorisations, reviews, renewals and cancellations for the covert activity emanating from Operation George*",

the Defence are entitled to call for and examine and inspect the documents to which Sir John Evans refers.

A further submission is that the authorisations must be proved in the ordinary way and Sir John Evans cannot prove authorisations submitted by others such as Detective Superintendent Pyke, or the approvals granted by the Surveillance Commissioners. This argument was mainly dealt with by Mr Macdonald, who also returned to his earlier, unsuccessful, argument about the approach of the disclosure judge. However, all I propose to say about that is that if he wishes the Disclosure Judge to review any aspect of his earlier rulings, the proper course is to apply to that judge who is charged with keeping disclosure under review.

Mr Miller, for the Crown, stated that Sir John Evans is entitled to give evidence that he granted the authorisations and the criteria he applied, but that it was not intended that he would give evidence about the material placed before him. That is the effect of his original submission as clarified this morning.

The first question therefore is, are the Defence entitled to call for the entire

document comprising the authorisations made by Sir John Evans?

Mr Treacy relies upon the principle set out in Senat -v- Senat and Owen -v- Edwards as approved by Sir Brian Hutton, Lord Chief Justice, in Re McKerr's Application [1993] 5 Northern Ireland Judgment Bulletins, page 19. It is sufficient for present purposes to quote the principle laid down at page 33:

> "*If the evidence of a witness is based, not on his present recollection, but on what is contained in a document in which he recorded what had happened soon after the event and from which he has refreshed his memory, then the reality is that his evidence is based on that document. It follows that as the document is vital to his evidence, counsel examining him and seeking to test his evidence should be able to inspect the document to see whether the evidence of the witness differs from what is recorded in it*".

The principle in Senat -v- Senat, Owen -v- Edwards and Re McKerr's application relates to a situation where the reality of the witness's evidence is that it is based on the contents of the document from which he has refreshed his memory. However, what is in issue here is what is the evidence Sir John Evans is to give?

As I have already ruled on the 25th October, the Defence are precluded from cross-examining as to the lawfulness of the statutory authorisations. For the reasons I gave in that ruling the court is precluded from an inquiry into the lawfulness of an approved authorisation. That being so, the material upon which the statutory authorisations were based is irrelevant to the issues which this court has to determine as the tribunal of fact. Not only is it irrelevant, but the disclosure judge has refused to order disclosure of the redacted portions of the authorisations, although in some limited respects some redacted matters such as the identity of the commissioner approving the authorisations has been disclosed in the abstract prepared and served on the Defence as a result of my first ruling on this issue.

The still undisclosed material can only be withheld from the Defence because either it is subject to PII or it does not assist the Defence. I use the term

"assist the Defence" as shorthand for the test laid down by Lord Bingham in R -v- H&C, namely that there is no requirement to disclose material which does not weaken the Prosecution case or strengthen that of the defendant. Whether it is subject to PII or does not assist the Defence, it is not part of the Prosecution case, and therefore does not, it appears to me, form any part of Sir John Evans' evidence.

Were the Defence submissions correct, then the ruling of the Disclosure Judge that material subject to PII could be circumvented by the Defence calling for parts of a document which were not part of the Prosecution case and which the court has ruled cannot be examined for the reasons I gave in my ruling of the 25th October.

In Phipson on Evidence, 2005 Edition, paragraph 12.62 it is stated:

"*If the document is made available the opponent has a right to inspect those parts only which refer to the subject matter of the case and of course to examine thereon*".

One of the authorities cited in support of that principle is R -v- Bass [1953] 37 Criminal Appeal Reports 51, where a very strong court consisting of Lord Goddard, Lord Chief Justice, Mr Justice Byrne and Mr Justice Parker (later Lord Parker Lord Chief Justice), contemplated that only the relevant pages of a policeman's note could be read. See page 60.

It is very common, as Mr Miller pointed out, for only the relevant portion of an officer's notebook to be provided in redacted form.

In Allsopp only the redacted authorisations were provided, see paragraph 22. At the end of paragraph 26 Lord Justice Gage observed:

"*On the face of the documents the authorisations were properly granted*".

In that case it does not seem that it was suggested that the Defence could circumvent the ruling by calling for the documents, but had such an expedient been possible one might have expected it to have been attempted.

Mr Treacy has referred me to the decision of the Appeal Court, High Court of Judiciary in Henderson -v- Her Majesty's Advocate. This is a very recent decision given on 14th April of this year. At paragraph 4 of his opinion Lord

Marnock said:

"I am myself clearly of opinion that production of the written authority was the "best" and prima facie, the only admissible evidence of the granting of the authority in question".

Lord Marnock was not addressing the issue which arises here where the Defence submit that they are entitled to see the entire, unredacted authorisation. It is noteworthy that he did not say that the authorisation could not be proved in some other way, although it is clear, and not disputed in the present case, that it is necessary for the Crown to prove that there was an authorisation.

Lord Hamilton dealt with the production of the authorisation in greater detail. As can be seen from the following description of the course of events of the trial contained in paragraphs 25 to 27, no written authorisation had been produced.

"Mr Dogood for the first appellant, submitted before us that the writing itself was the best evidence of the terms of any authorisation, and in the absence of proof that the writing had been destroyed or was for some sufficient reason unavailable was the only admissible evidence of its terms. No competent evidence had been adduced by the Crown that a relevant authorisation in writing in respect of the telephone interception had been granted, nor had it led evidence that the preconditions for an oral authorisation had been satisfied or that an authorisation by that mode had been granted.

In response to the Advocate, Depute submitted in the first place that on the evidence led at the trial the interception had been duly authorised and thus lawful. On that basis the tape recording being the product of duly authorised interception had been properly examined. She relied on the evidence of Detective Inspector Pervis, elicited in cross-examination, that he had seen the authorisation in writing and had acted under it.

In my view that submission is unsound. Whereas ultimately emerged the authorisation relied on what is in writing the only admissible evidence as to its terms

was in the circumstances the writing itself. While the fact that some writing existed might be provable by evidence from a person who had seen it, in the circumstances of this case it was in my view necessary for the Crown to prove at least that the authorisation related to specific investigation or operation, 2000 Act Section 26.2, that the authorisation conferred on the relevant person an entitlement to engage in the relevant conduct. Section 27.1. And by reference to its date that it was in force at the relevant time. Section 43.3.

Proof of the terms of the document was necessary for that purpose. It maybe that further terms also require to be proved. For example, Section 28.2 provides that the person granting the authorisation must believe that the authorisation is necessary on certain specified grounds and authorised surveillance proportionate to what is sought to be achieved by carrying it out.

The grounds for such belief may require to be stated on the face of the authorisation, the validity of which may, in some circumstances, be open to challenge. Gilchrist -v- Her Majesty's Advocate 2004 SCCR 5, 95 at paragraph 13, where the equivalent provisions of the Scottish legislation are noted.

Accordingly, to prove that the surveillance was lawful the Crown required in my view to produce, if it was available, the authorisation in writing and its proof on that matter failed."

It is significant that Lord Hamilton contemplated that in some circumstances the authorisation might be proved other than by production of the original. Therefore, on the issue of whether it is necessary for the Prosecution to produce the unredacted version of the authorisation, Henderson does not advance the matter.

I drew attention to Gain -v- Gain [1962] 1 AER page 63. I believe that when one examines the facts of that case the ruling of Mr Justice Wrangham does not conflict with R -v- Bass. In Gain the witness wished to refresh his memory by looking at the medical reports and records for which PII had been established. This course was not permitted because it would have resulted in what Mr Justice Wrangham described as:

"*At least an implicit if not explicit disclosure of the contents of these records and reports in oral evidence*".

However, whereas here, the witness does not seek to give evidence about matters which are not the subject matter of the case, the objection in Gain does not arise. I therefore conclude that the principle in Senat -v- Senat does not extend to those parts of the document which are not part of the subject matter of the case, and as the redacted portions are not part of the subject matter of the case the Defence do not have a right to call for or to examine the documents in their unredacted form.

At present I can see no objection to the Prosecution placing only the redacted versions before the court because these, coupled with the abstracts, give the Defence all the information to which they are entitled. If the authenticity of the originals, or the accuracy of the redacted copies, is raised in evidence then it maybe necessary to consider that matter further.

So far as the non-statutory authorisations are concerned, for the same reasons the Defence are only entitled to the redacted versions, although they are entitled to cross-examine about the criteria that applied under the appropriate guidelines.

I now turn to the second question, namely can Sir John Evans prove authorisation submitted by others, such as Detective Superintendent Pyke, or the approvals granted by the surveillance commissioner?

Mr Miller concedes that Sir John Evans cannot prove Detective Superintendent Pyke's authorisations.

So far as the approvals granted by the Surveillance Commissioners are concerned, I have not been referred to nor am I aware of any statutory provision that would require the court to take judicial notice of the signatures of the commissioners, such as those described and discussed in Phipson at 3.13. In GS at 35 the court appears to have contemplated that production of the signed approval forms by the chief officer of police concerned, should be sufficient to prove that they had been approved if his evidence to that effect was challenged, Lord Justice

Auld stating that "such evidence should be adequate for the purpose of the Act".

That would involve a dispensation with strict proof and therefore an exception to the normal Common Law rules. Such a course maybe justifiable given the improbability that a challenge could be mounted to the authenticity of the signature itself and because the Surveillance Commissioners act in a judicial capacity. As against that Lord Justice Auld did not say "would be sufficient", but "should be sufficient", which may suggest that the court recognise that in some circumstances strict proof maybe necessary, although it is not easy to envisage what such circumstances would be unless the authenticity of the signature of a Surveillance Commissioner has been challenged.

If that should be the case, then it maybe necessary to consider whether other forms of proof are necessary, but for the present I propose to follow GS and accept that the signatures of the Surveillance Commissioners prime facie prove themselves unless and until their authenticity as recorded in the abstract is challenged.

Sir John Evans is therefore entitled to refer to the redacted version and the abstracts. If he is challenged about the authenticity of the signatures then he will have to produce only that portion of the original of the document that contains the Surveillance Commissioners' signature.