IN THE NOTTINGHAM CROWN COURT Case No. T20027203

The Law Courts
60 Canal Street
Nottingham

Tuesday, 29th January 2002

BEFORE

MR. JUSTICE NEWMAN

REGINA

-v-

ROBERT SUTHERLAND
GARY SELF
DANNY GRAY
JOHN SMITH
JOHN TOSELAND

MR. J. WARREN QC appeared on behalf of the Crown
MR. N. RUMFITT QC appeared on behalf of the Defendant Sutherland
MR. LATHAM QC appeared on behalf of the Defendant Self
MR. SWIFT QC appeared on behalf of the Defendant Gray
MR. JOYCE QC appeared on behalf of the Defendant Smith
MISS R. PAULET QC appeared on behalf of the Defendant Toseland

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Transcript by The Cater Walsh Partnership, Suite 410, Crown House, Bull Ring, Kidderminster DY10 2DH (Official Court Reporters to the Court)

R U L I N G
(As Approved)

MR. JUSTICE NEWMAN:

1. I have before me applications from each of the defendants to stay the indictment on the grounds of an abuse of process by the prosecution. A number of complaints have been raised, but the principal allegation is that police officers leading the investigation into the murder of Mark Corley deliberately placed a microphone in the exercise yard at both Grantham and Sleaford police stations in the course of some four days in November 2000, so that any privileged conversations taking placed between a solicitor and one or more of the suspects held at the police station would be intercepted and recorded.

The other complaints relate to late service of unused material and failures on the part of the prosecution in their duty of disclosure in connection with a major criminal investigation.

2. These defendants are charged on an indictment with conspiracy to murder. Robert Sutherland, is also charged with murder and the defendant, Toseland, is also charged with a separate conspiracy to cause grievous bodily harm. I intend to summarise the nature of the case the prosecution allege they have against them; it is essential for this ruling that at least the outlines of the case be gone through.

Mark Corley was a 22-year-old man who was murdered. He had lived in the Grantham area since he was seven years old. His disappearance was reported by his mother on 10th July 2000, and a police murder inquiry began three days later, but it was not until the morning of 13th December 2000 that two men working on farmland forming part of Sanddle Moor Farm, in County Durham, discovered the remains of a body.

A post mortem has revealed that the remains were of Corley and that death had occurred as a result of a single blast from a 12 gauge shotgun with a shortened barrel, having been fired into the rear left-hand side of Corley's head at close range. In simple terms, Corley had been executed.

3. The defendant, Robert Sutherland, comes from Scotland, as does his brother, George Sutherland, who at the time of these events was a suspect, but he is now the principal witness for the prosecution. Gary Self is 35 years old. He moved to the Grantham area, and according to the prosecution it was common knowledge in the Grantham area that he detested Corley.

Danny Gray, is a Grantham local. The prosecution maintain he, too, detested Corley. The defendant, Smith, is 27 years old. He, for some time, the prosecution say, had been in a relationship with Julie Bateman, another prosecution witness, who was Corley's sometime girlfriend, and the mother of his three-year-old daughter. He, too, the prosecution maintain, hated Corley.

The defendant, Toseland, is older. He is 58 years old. The prosecution submit that he, too, had a strong distaste and dislike of Corley, which dated back to an assault by Corley with a house brick, which had caused him an eye injury. Toseland, it is said, had

reason to be dissatisfied with the way in which the trial was handled; he felt that justice had not been done.

4. The deceased, Corley, was known to the Courts. He had served time in prison many times. He was released from his last custodial term on 13th April 2000, and he moved back and was living in the Grantham area. He resumed a relationship with Julie Bateman. He was also seeing others.

The broad nature of the case as it then develops is that in the days leading up to Corley's disappearance the prosecution say a remarkable change of attitude occurred with, in particular, the defendants, Self and Gray. Despite their hitherto manifest hostility towards Corley, both of them, but particularly Gray, now sought to befriend him.

This came, the prosecution say, at a most convenient time for the deceased, Corley, given that the police were interested in him and a colleague of his called Bradburn, his closest friend. Corley, was, it is said, in desperate need to get out of the Grantham area and away from police investigations into crimes it was believed he had committed.

It is said by the Crown, word was put through to Corley that there was a burglary or robbery, which required the use of a firearm, in which he was invited to participate. The prosecution say that this was a useful way of getting Corley into a position where he would be with others who were armed, but would suspect nothing other than the firearm was to be used in the course of the burglary or robbery he believed he would be engaged in.

5. Between Saturday, 1st July and the night of Friday, 7th July, there were many communications between the defendants, the prosecution say, that is established by a variety of evidence emerging from the use of, in particular, mobile phones.

So far as critical matters are concerned, for example, by 3rd July or thereabouts, Smith was visiting Shirley Bateman. According to her evidence he volunteered, "He", Corley, "has got £2,000 on his head. There's two blokes coming from Scotland for him". The two blokes, the prosecution say, who were coming to him from Scotland were the Sutherland brothers, the defendant, Robert Sutherland, and the prosecution witness, George Sutherland.

On the night in question, Friday, 7th July, Corley and his friend, Bradburn, spent the night of a friend at home where Gray, it is said, arrived. After he left Corley and Bradburn visited another friend and subsequently they made their way to the home of one Louise Bostock, who lived with Gray. Gray was at the flat and he spoke about the job they were planning to do that night. Gray explained that the intended victim of the robbery and the burglary was his crippled uncle, who lived out of town and had a lot of money. The need for guns was explained by saying that his uncle had shotguns.

6. Thereafter, on 8th July, the last telephone call made on Corley's mobile phone was timed at about midnight. Corley, in fact, visited a number of addresses that night. Gray has accepted, the prosecution say, having gone to one of them trying to find him.

Eventually, Corley arrived at Bostock's and Gray's flat and he spent the rest of the night on the mattress on the floor.

He spent the day in Gray's company, Gray taking him to another address in Grantham. Throughout the day Self and Smith were in frequent telephone contact. As a matter of detail, Julie Bateman's evidence is that she was under the impression and had the firm belief that some harm was likely to come to Corley.

7. The police received information leading to some of the defendants and others who had been suspects in connection with Corley's disappearance. As will be now apparent, by November 2000, the body had not been located. Thus, no cause of death had been established and it thus could not be said for certain to be a murder investigation.

Having regard to the absence of results from conventional policing methods, Detective Chief Inspector White, the officer heading the investigation, the SIO, caused applications for authority to be drawn up under Part 2 of the Regulation of Investigatory Powers Act 2000. The applications were for directed surveillance at Grantham and Sleaford police stations, such surveillance to commence on 21st November 2000. The applications are dated 14th November 2000.

For completeness, I should add that between 8th August and 21st November 2000, covert surveillance had been established at four domestic addresses. It had also been established in the visiting area of two prisons. I have not had to consider the legality of these other interceptions, but the very fact that extensive surveillance at domestic addresses had occurred, giving rise to an estimate of tape recording of some 700 hours, which was not disclosed until the week commencing before the week of this trial, namely in the week before the week commencing 14th January 2002, calls for comment.

8. Transcripts were then supplied to the defendants. On 14th January an unsuccessful application was made to this Court, to me, for permission not to disclose the fact and content of the prison surveillance. Disclosure was ordered by the Court, and was made forthwith.

As I have indicated, this trial was fixed to start on 14th January of this year. It has to be said that since about July 2001 it had received little or not judicial attention. By that date, in July 2001, Mr. Justice Hughes gave certain directions.

The investigation in this case has generated, as is commonly the case in major inquiries, thousands of documents, which were to comprise the unused material which was disclosed. A brief summary of the programme of disclosure can be stated as follows:

(1) 30 Lever arch files, containing about 500 pages each, were disclosed in a piecemeal way up to Christmas last year. Thus, 15,000 documents were introduced into the case.

(2) 12 Lever arch files were disclosed at the beginning of this year, containing officers' rough books and other documents. Disclosure of the rough books had in fact been requested in November, last year, but declined.

(3) On or about 7th January, Lever arch files of the transcripts of the domestic intrusion were delivered, as I have said, the equivalent or the representation in transcripts of some 700 hours on tapes.

(4) In the week beginning 26th November 2001, an open day was held at Sleaford police station, when solicitors for the defendants were invited to attend in order to view the documents which had not yet then been disclosed, but which were there available for disclosure. Nobody has given me a figure of the number of documents then at the police station on this open day, but the description I have is of a room containing many thousands of documents. In any event, it took three people, working for two weeks, not all day but on each day for some part, to go through these thousands of documents.

This exercise produced two further Lever arch files of selected documents.

9. In paragraph 163 of the recently published report called "The Review of the Criminal Court of England and Wales", at paragraph 163, Lord Justice Auld reports as follows:

> "The Crown Prosecution Service Inspectorate, in its thematic review of the disclosure of unused material, found that the 1996 Act was not working as Parliament intended and that its operation did not command the confidence of criminal practitioners.
>
> It highlighted the failure of police disclosure officers to prepare full and reliable schedules of unused material, undue reliance by the prosecutors on disclosure of officers' schedules and assessment of what should be disclosed, and 'the awkward split of responsibilities, in particular between the police and the Crown Prosecution Service in the task of determining what should be disclosed'.
>
> The Inspectorate's principal recommendations were for greater involvement of prosecutors in the collation and examination of unused material, and from the start in deciding on what should be disclosed, more involvement of counsel in the prosecution's duty of continuing review of unused material, and firmer reaction by prosecutors to know or inadequate defence statements."

10. In paragraph 164, Lord Justice Auld quotes from another report, which is to the general effect that poor practice in relation to disclosure was widespread. The study there referred to also revealed a mutual lack of trust between the participants in the disclosure process, and fundamental differences of approach to the principles which underline the 1996 Act.

Finally, in paragraph 168, Lord Justice Auld says:

> "Reform is needed but it is clear that there is no consensus as to what form it should take. One suggestion is for a reversion to the common law position immediately before the 1996 Act, of more extensive prosecution disclosure. Another and more widely supported suggestion is for automatic disclosure by prosecutors of all non-sensitive unused material held by the prosecution or to which it has access."

It is not necessary for me to go into the details there of Lord Justice Auld's proposals. They are there for everybody to read if they so choose, but if one wanted to find a paradigm case for demonstrating the difficulties, this case illustrates the faults in the system.

11. Before I turn to the principal issue and the other arguments, I feel it right to take the opportunity to an attempt to point out, pending reform, whenever it may come, or whatever it may produce, some matters which seem to me should be routine in the process of disclosure.

(1) Whenever a disclosure officer has made an assessment that privilege should be claimed in relation to any material, the claim must be subjected at some stage to critical scrutiny by the Crown Prosecution Service If it is not considered upon such initial scrutiny as then occurs to be a straightforward matter, then as a matter of course the Crown Prosecution should submit the difficulty to counsel. The exercise by way of scrutiny must commence at the earliest possible stage, namely as soon as the material is received from the police disclosure officer. Somebody must, within a reasonable period of time, have the task, not then, as I anticipate, of reading every single document, but at least been alert to the categories and reasons why any documents have been placed in a category for non-disclosure.

(2) A critical scrutiny of the claim for non-disclosure will not require simply a consideration of the legitimacy of the circumstances which are asserted as giving rise to privilege, but it will require a consideration of the content of the documents said to be falling within that category. Again, if that gives rise to difficulties, counsel should be instructed. As this very case demonstrates, a category such as simply "sensitive material", raises more questions than it answers. It reveals many questions for critical scrutiny. For example, by reference to this case, the technique and methodology of covert surveillance may well, and perhaps normally would, attract protection from disclosure, but as here, such a ground for protection provides no basis for not disclosing the fact that surveillance has taken place and the content. In the normal course I can see no reason why the fact of surveillance and the content of that which has been captured of a particular defendant's conversations should not be revealed to that defendant and his lawyers.

In this case it is a matter of surprise and deep regret that the material annotated by those responsible for preparing the disclosure and documents, as containing privileged material, should have survived non-disclosure for as long as it did. A mere perusal of the documents would have disclosed such a claim and such a basis

of claim. In my judgment, it should have been seen by somebody at an earlier stage.

On the evidence, the material came into the hands of the Crown Prosecution Service in April 2001. It survived disclosure right up to 14th and 15th January of this year. It was made subject of an application to the Court for non-disclosure at that date.

(3) As a general rule, as I have said, I can see no sound basis for withholding the fact of, and content of, covert surveillance of a defendant's activities and conversation. Why they should be withheld from a defendant and his advisors puzzles me.

The failure of the surveillance, if it be the case, to yield anything of significance to the prosecution does not affect its relevance as a fact to the defence. The very fact that there has been extensive surveillance, which has not resulted in anything incriminating, is in itself a matter of which the defence are entitled to be informed.

Further, it seems to me to be highly desirable, if not essential, to ensure that a solicitor for a defendant is properly instructed in connection with his client's case, that he be made aware of what his client has said to others when he, the solicitor, has not been present. Without being fanciful there could be lines of defence, or matters upon which advice is needed, which may not have come into the possession of the solicitor in the course of his interviews with the defendant which could be revealed by such material.

12. I come back to the course taken in this case. Prior to the PII application defence counsel helpfully made observations in open court about matters to which it wished the Court to pay particular regard on the application.

Mr. Rumfitt QC, for Robert Sutherland, stated that the relationship of the chief prosecution witness, George Sutherland, and the police was a matter into which he desired to inquire. In particular, he wished the Court to be alert to any material which might be the subject of the application, which could shed light on the circumstances in which George Sutherland ceased to be a suspect and became a prosecution witness; for example, whether any form of immunity from prosecution had been offered to him, whether any favours or promises had been offered to him.

I can add, since it is material to the matters I have to consider, that as a result of the PII application and to what I had been alerted by Mr. Rumfitt, I informed Mr. Warren in the course of the PII application that after due consideration by me to the statement of George Sutherland, whether or not the prosecution asked that he be warned of his privilege from incriminating himself in the witness box, the Court would of its own motion so warn him. I informed all counsel, after the PII application and its result, that that was a course which I intended to take.

13. The defence submissions, so far as the process of disclosure in this case is concerned, is that it was abysmally late and had been improperly withheld. I have said enough to indicate the matters to which they drew attention.

The Court rejected the claim for privilege which had been made in respect of the covert surveillance at the police stations and at the prisons. As had been confirmed by the evidence in the course of the inquiry which I have had to conduct, the basis of the claim for privilege advanced to the Court was that the material was not going to be relied upon as part of the prosecution's case, that it had not been used in the course of the inquiry, and that to give disclosure would reveal the techniques in relation to the covert surveillance, which could compromise future inquiries in which the use of such covert surveillance might be required. In my judgment, none of the grounds for non-disclosure were well founded.

14. The material made available to the Court in the course of the application with regard to the covert surveillance at the police stations included sheets referred to at times as logs, being the annotations or reports made by officers who had listened to the conversations as secondary listeners. The Court was not informed of the existence of, nor was it shown, logs amounting to contemporaneous documents made by police officers who were the first-hand listeners. They, of course, emerged after disclosure had been ordered of the covert surveillance.

The logs, or documents, seen by the Court revealed the identification of tapes by initials of the relevant officer, the time covered by the tapes and then various marks upon logs, which I need not refer to, but attached to the list. I take first of all, Grantham cell block between 21st November and 24th November 2000. At Grantham 36 tapes were recorded. Each tape lasted two hours. There were 72 hours of recording at Grantham police station.

15. So far as the Court became aware, and as far as counsel, as I take it, was aware at that time, what was known about those tapes was as follows. A document existed in relation to each, called a transcription of the working copy, the identification of the officer transcribing it, and then in relation to all but eight of those 36 tapes there was nothing other than the statement, "Nothing of relevance on tape", or some other words to the same effect. But in relation to the eight tapes, the Court was became aware in the course of the PII of this annotation, and I quote:

> "On instructions of the SIO this tape is not considered appropriate for transcription. No secondary listening and/or transcription has been completed on this tape, as it would appear that it may contain inadvertent recording of matter subject to legal privilege."

At Sleaford six out of the 24 tapes carried the same annotation, thus it follows that 14 out of a total of 74 tapes carried the annotation about inadvertent recording of matter subject to legal privilege.

So far as the manuscript notes made by police officers who constituted the first-hand listeners to the intercepted conversations are concerned, those sheets emerged after the Court had attempted to lay down some sort of timetable as to how the matters then formulated by the defence were to be dealt with. The sheets in relation to Grantham

police station then became available. I am told that similar sheets exist for Sleaford. I have not seen them. Mr. Rumfitt has a copy, and it may be others do.

16. The fact that the sheets were disclosed gave rise to complications to which I shall come, but before I do I should express my conclusion in relation to the disclosure matters. In my judgment, there was very grave and serious delay in the progress and manner in which disclosure was made. Mis-judgments of a major nature were made. As I have said, covert surveillance had taken place at both the police stations and at the prisons which should have been disclosed. The fact that privileged conversations had been listened to and recorded, manifestly called for disclosure.

I have concluded that inadequate attention was given to all this material. Had it received proper attention, I cannot conceive that it would have been concluded that the fact that covert surveillance had captured privileged conversations gave rise to no issue and that disclosure of what had been obtained was not required. The application for non-disclosure was misconceived.

These matters, namely the whole course of the disclosure, have been relied upon by the defence as confirming what they say has been the bad faith at play from the outset. I shall return to this.

17. As I have indicated, once seen by the defence, it was inevitable that the documents I had ordered to be disclosed would give rise to the need for further inquiries and for the production of further documents. It was to be expected that the defence would see that questions arose as to whether an abuse of process had occurred. After consideration of their position notice was given that each defendant desired to make an application to stay the indictment on such a ground. The Court ordered and permitted a process of investigation by oral evidence, and that has taken place over a number of days.

18. As I have recorded, the covert surveillance at the police stations generated 74 tapes. Defence counsel provided a useful chronology of these matters and other details, which are not contentious. For convenience, that chronology should be attached to this ruling and it will form appendix 1 to this ruling.

Primary listeners were installed at the police stations in a room above and away from the intercepted areas. The listeners were equipped with microphones, and as they listened to the captured conversations each kept a log. Each tape lasted two hours. At each police station there were two devices placed to pick up conversations. When the tapes had run, each tape, in every case a master and a working tape, was sealed and identified.

As I have mentioned, a copy of the contemporaneous logs kept at Grantham police station has been provided to the Court and to some defence counsel. Mr. Latham QC, for Self, declined a copy. Mr. Joyce QC, for Smith, elected not to read his copy after Mr. Swift QC, for Gray, had revealed that it contained the content of privileged conversations.

The logs should not have been distributed. The Court had already given directions that counsel for the prosecution should not listen to the tapes, and thus become informed of any privileged conversation. It was imperative that no defence counsel should become aware of the privileged conversations of a co-defendant when that privilege had not been waived. Thanks to the intervention of Mr. Swift further damage was avoided.

Cross-examination has proceeded by reference to those parts of the logs which contained no privileged material, and when cross-examination has taken place by reference to the logs, great care has been taken to ensure that none of the content has come into evidence. So far as the Court is concerned, it has seen it but it has now, and for the purposes of this ruling, has completely ignored it.

This episode, and the care with which it has had to be handled, demonstrates only some of the complexities which arise in a multi-handed criminal case if privileged material still subject to privilege comes into the possession of the prosecution and all of the defence. It is, of course, elementary that the privilege is that of the defendant and it is a privilege which he enjoys, not simply as against the prosecution, but as against his fellow defendants as well. Save for the content revealed by the contemporaneous logs, the prosecuting team - counsel team - are not aware of any content of the privileged material since they have not listened to the tapes.

19. The principal issue. The covert surveillance at Grantham and Sleaford police stations led to the recording of conversations between suspects and their solicitors whilst in the exercise yards at the police stations. The prisoners were at the police stations as a result of a planned series of arrests with planned interviews, which were to take place over four days at the respective police stations.

The suspects were there to be interviewed by the police, and it is obvious the solicitors were there to advise them in connection with their arrests and the interviews. There can be no question that the occasions of the conversations, albeit not occurring in the privacy of an interview room, are to be regarded as occasions which attracted privilege (See the statutory definition of privilege in Section 10(1) of the Police and Criminal Evidence Act 1984).

No one has argued to the contrary. It follows that privileged conversations have been listened to by the first-hand listeners, have been recorded on tapes and subsequently listened to by second-hand listeners. At all material times the police have had at their disposal tapes containing information of a privileged nature. In addition, the first-hand listeners compiled logs recording the time in connection with the intercepted conversations.

20. An issue has been raised as to whether all of the conversations were listened to, or whether the first and second-hand listeners only listened to so much as they needed to hear in order to be in a position to determine that the conversations were subject to legal privilege. The defence have suggested the former, and the listeners allege the latter.

In my judgment, the issues I have to resolve do not turn to any significant degree, if at all, on resolving this detailed issue. As I have said, the content has not been put into evidence. None of the defendants have waived privilege.

21. It is, in the nature of covert surveillance, that it cannot be known what will be intercepted. Covert surveillance is an important tool at the disposal of investigating officers, but its use is subject to statutory regulation. Circumstances can arise in which the police come into possession of privileged material by mistake. For example, it is not unusual for a solicitor to attend at his client's home to tender advice. If the home is subject to covert surveillance, accidental recording will occur.

The interception in this case of the cell passageways could have unintentionally picked up a conversation by a detained person with his solicitor as they were about to enter, or as they were about to leave, an interview room. A solicitor might have gained access to the cells to have a word with his client. These circumstances could have arisen, but it has not been submitted, in my judgement rightly so, that whenever the prosecution come into possession of privileged material, by accident or mistake, a prosecution must be stayed.

These applications are not made upon the basis that the conversations were listened to by mistake, but they were listened to and noted, and recorded on tape, not by accident or mistake, but intentionally. The case is that the senior investigating officer, a Mr. White, his deputy, Mr. Bannister, and at least one other officer in the inquiry team, deliberately and intentionally set out to intercept privileged conversations taking place in the exercise yard.

22. In my judgment, there can be no contest to the fact that once the first-hand listeners knew that the device was picking up privileged conversations they continued to listen, on their evidence, only to such extent as they thought necessary, but that is not to the point. On their own evidence they had to revert to the conversation in order to ascertain whether or not it was continuing and thus to listen to more.

More than that, even if they did cease to listen to the conversation for such period of time as they thought, in their own judgement, might see the end of it, and only then reverted to it, at no time was the tape itself turned off. The recordings were made even though it was known that privileged conversations would be recorded. Those tapes were then listened to in January or thereabouts of 2001.

23. Detective Constable Hanson, who was one officer who had listened and heard the tapes, told the Court that he had identified a privileged conversation which had not been logged by one of the first-hand listeners. Thus it is that even if it was not intended from the outset, in this case there can be no answer the proposition and contention that it was deliberately and intentionally continued after it was known that there was a risk that the microphones would pick up privileged conversations.

24. The only relevant circumstance giving rise to an exception where the police could obtain authority to intercept privileged conversations would be that they had grounds to

believe that communications would be made to facilitate crime or fraud (See R v Cox & Railton [1884] 14 QBD 153). As the Court heard, in that event the authority who would have to consider the application would not be at the superintendent level. Thus the principal submission for the defendants is directed to the circumstances which gave rise to the interception.

25. The covert surveillance was, according to the evidence of Mr. White, Mr. Bannister and Detective Sergeant Thom, first discussed at a management meeting of the inquiry team on or about 13th November 2000. The defendants allege that each of these officers was party to the plan to intercept privileged conversations taking place in the exercise yards. Apart from being at the meeting, each played a part in setting up the surveillance.

Mr. White signed and approved two applications draw up by Mr. Thom to obtain authority for directed surveillance at the police stations. Mr. Bannister was informed by Mr. Thom that authority had been granted and he instructed an operations officer, Mr. Cooper, to install a microphone in the cell passageway serving the cell areas at each police station, and in the exercise yards at each police station.

Prior to the authority being granted Mr. Cooper had carried out, at the invitation of Mr. Bannister, a preliminary survey of the police stations. From the outset, he was in no doubt, it seems, having received his instructions from Mr. Bannister, that there was to be a device, not only in the cell passageway, but in the exercise yard.

26. I now turn, therefore, to the applications for authority. I do so having in mind that the Act had only just come into force, and that the applications must have been, if not the first, some of the first made by the police force, who would not be familiar with the procedure for such applications.

I emphasise that each of the three officers who initiated the surveillance gave evidence to the effect that from the outset it was their intention to place a microphone in the exercise yard.

A document was disclosed in the course of the inquiry, which is only capable of being identified as some evidence, or a record, of what was discussed at the management meeting to which I have referred. It is identified as one sheet, policy no. 52, it being, as I understand it, a sheet taken from a policy log kept by the senior investigating officer. It emerged as relevant from the evidence of Mr. White.

Under the heading "Policy", the document records:

> "To facilitate cell area covert recording: Sleaford and Grantham police stations during anticipated detention periods for Corley murder suspects: week commencing 20th November 2000: Reason - primary suspects will be re-arrested or arrested for interview at Grantham and Sleaford in two phases: I intend to capture out of interview conversations, as I believe the Corley murder will be discussed".

If the exercise yards were referred to at the meeting, which is their evidence, it is plain that the policy record, when it was drawn up, was not drawn up so as to reflect that intention.

The exercise yards, in my judgment, could not reasonably be regarded as within the cell area. That can be seen from the plans of the police stations, which have been put into evidence, which should be attached to this ruling and marked "appendix 2".

27. Having regard to the terms of the applications for authority, each of the officers was forced to accept that the applications did not give effect to their intentions. The authorisations contain the following. In the box "Brief description of investigation/Activity to be undertaken and what information is expected to be obtained", the following appears:

> "The offence under investigation is one of murder. This application is for the use of covert audio surveillance in the communal area of the cell area situated at Sleaford police station."

The application for Grantham was in identical terms:

> "This application is for the use of covert audio surveillance in a communal cell area of Grantham police station."

Paragraph 7 of the applications, or box 7, in answer to the requirement to explain why the directed surveillance is proportionate to what it seeks to achieve, including the information sought and an assessment of the likelihood of acquiring confidential material, contains the following words which are relevant:

> "This audio surveillance equipment will only listen to conversations which take place between persons in separate cells via the communal passageway. It will not pick up conversations of persons in the same cell and does not therefore constitute intrusive surveillance. This action is highly unlikely to result in the acquisition of confidential material."

Both applications contained the same assertions and words.

28. The expression "communal area of the cell area", in box 3, seems plain enough, and it is not immediately obviously an expression having more than one plain meaning, but I am prepared to accept that if read in the context of a person having knowledge of the layout of the particular police station and the use to which the constituent parts of the police are put, a question really could arise as to whether the actual area to be covered was qualified by the word "communal" as opposed to the specific words "cell area", or whether in parlance at the police station "cell area" extended beyond the normal meaning which could be attributed to those words.

That said, none of the protagonists for such a wide interpretation appeared to the Court to reach their conclusion, on the phrase actually used, on such a basis, but more by

reference to the words which were not used, namely that the avowed intention was to include the communal areas. Obviously, if the words "communal areas" had been used the exercise yards had the potential for inclusion, as indeed would any other part of the police station which was used for communal purposes.

29. When Mr. White gave evidence he was at first minded to argue for an interpretation of the words used which embraced the exercise yard on the ground it was a communal area, and one sufficiently close to the cell area passageways as to be within the communal cell area, as mentioned in the application for authority. He became less and less comfortable with that interpretation as the evidence continued.

The difficulty to which this intended meaning gives rise is that it is flatly contradicted by block 7 of the authority, which I have already read. Not to mention the difficulty to which even the short entry on the policy document creates, for it does not even use the word "communal" at all, but simply "cell area".

It follows, and this is not in dispute, that the applications as made, in the terms in which they were made, did not seek authority to place a surveillance device in the exercise yards at these police stations, nor was authority granted for such. The authority granted was in terms, "directed surveillance in the communal passage area of the cell complex at the respective police stations in respect of conversations from one cell to another via the communal passage area between the surveillance subjects".

It follows, therefore, that two of the three officers who were present at the original meeting, and who are to be regarded as the instigators of the covert surveillance, must be regarded as knowing parties to an application for an authority to carry out a surveillance, which did not include a request to carry out the surveillance in an area of the police stations where they intended to intercept conversations.

The explanation given by each, in slightly differing terms, is that they each made an error, Mr. White, in his reading of the form when it had been drawn up by Mr. Thom, and Mr. Thom, in his drawing-up of the form. As to the third officer, Mr. Bannister, whilst I accept that there is no evidence he was a party to the actual drafting of the applications, he was the author of material which was put into an operational order, which was drawn up. The operational order was for limited distribution. The operational order, in its part material to the issues raised before me, under the heading "detention" in paragraph 4, stated as follows:

> "Covert technical surveillance, namely listening devices, are authorised and will be in use in the cell passages at both Grantham and Sleaford police stations. In order to eliminate collateral intrusion, visits to detainees must only take place in private interview rooms and not individual cells, or the cell passage. Those officers employed to monitor such equipment are shown on appendix D."

Mr. Bannister provided no satisfactory explanation for the discrepancy between that paragraph and what he understood to be the intention and purpose of the surveillance, nor any satisfactory explanation as to how the expression "cell passages", in paragraph 4 of

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the operational order, bore such a resemblance to the terminology which had been used by Messrs. White and Thom in the applications for authority under the 2000 Act.

30. There were two important issues addressed by the applications, which could only be addressed properly by reference to the specific areas to be made subject to interception. They were (1) whether the proposed interception was proportionate and (2) whether there was a risk that privileged material might be intercepted or collateral intrusion might take place.

Both these concepts, of course, reflect the impact of the passing of the Human Rights Act. They are related issues. A slight chance of obtaining information could well be outweighed by a greater risk of obtaining confidential information. A risk of obtaining confidential information, as I have indicated, could not have been dealt with at the superintendent level, and for the reason I have already stated no exceptional circumstances justified privileged conversations being obtained.

The issues were addressed in the applications for authority, but it is obvious from what I have already read that the issue was only addressed by reference to the cell area, or cell areas. The judgment appearing on the application for authority was that, "This action is highly unlikely to result in the acquisition of confidential material".

This judgment on the risk of confidential material being obtained is important. First, it establishes that the solicitor/client privilege was in the minds of those responsible for the application. Secondly, according to the evidence of Mr. White, and Mr. Thom in particular, the judgment was reached on the basis of specific factors being considered.

31. Mr. White gave evidence, as I have indicated, and on this topic he said, "A number of factors led me to conclude that the risk of confidential information being obtained was low". He said, "The operation was planned for the arrest of eight people, two police stations, and therefore there were meant to be four prisoners on occasions less likely to be present at each police station. I'd made arrangements for other prisoners at those police stations to be reduced. That meant", he said, "that there was a high availability of private consultation rooms to be expected".

He went on to add, "That meant, in my view, there was no reason for solicitors to consult with their clients, other than in the private consultation rooms". He said, "Interview advisors", they were police officers, "were to be present to ensure that the facilities by way of interview rooms were available". Then, as in my judgment, turns out to be of some significance, he went on to add, "In addition, my understanding of the policy of the Force was that solicitors should not be allowed free, unescorted access to the communal areas".

He stated that he was aware that that had been laid down by discussion. The matter had been dealt with at divisional management level, and a letter had been sent to solicitors for dealing with such matters. He said, "I was aware at the time", namely, in November, "that letters had been sent to solicitors before November 2000". The letter, I interpose, the letter to which Mr. White was there referring, appears to have been a letter, on the

evidence I have, written in July 1997. He went on to add, "I believe the solicitors in this case received letters. For those reasons", he said, "my belief in the likelihood of the privileged conversations being picked up was low".

32. It follows that both Mr. White and Mr. Thom maintained that the basis upon which their judgment had been expressed was significantly influenced by an intention to ensure, so far as possible, that collateral intrusion by visits being made to prisoners or other prisoners entering into the cell areas were to be prevented. So far as preventing visits to detainees in the cell areas, that was, of course, as I have already indicated, actually dealt with by Mr. Bannister. He covered that matter in paragraph 4 of the operational order.

Each of the officers, the three officers, emphasised that they had no reason to anticipate that solicitors would consult or have conversations with their clients other than in the interview rooms which were to be available.

Having regard to the contents of the custody logs, both Mr. White and Mr. Thom were forced to accept that their judgment in this regard must be treated as having been flawed by the reality of the position existing at each police station. The custody logs record, almost as a matter of daily routine, that detained persons went to the exercise yards to smoke, in company with their solicitors.

33. The evidence of Sergeant Atherton, who at the material time had experience of both police stations, but was one of the custody sergeants at Grantham, was that interview rooms had, on the direction of Chief Superintendent Barber, been designated as a no-smoking area in or about January 2000. The consequence of that no-smoking designation had been that a practice had grown up for custody sergeants (including himself), but not all of them, to permit the exercise yard to be used as a place where a solicitor and prisoner could consult, and according to their taste, smoke.

Mr. White, who was the first witness to give evidence, maintained in oral evidence and in his witness statement that his judgment was made, as he asserted, upon the basis of a state of affairs which had prevailed since directions were given to solicitors, as he understood it, to use interview rooms some years back.

There can be no dispute that at or about the time to which I have already referred a letter was written. In a letter dated 9th June 1997, solicitors were written to in these terms:

"I feel the time is right to clarify our policy in relation to solicitors attending Grantham to provide legal representation. The first point taken is that too often solicitors arrive unannounced at the rear entrance, despite the sign saying, 'No admittance to the public'".

It was pointed out that that created a security matter and a safety matter, "and solicitors are directed that your future visits to Grantham must be by the main entrance, from where you will be escorted to the custody area to consult with your client. Then I must ask that you pay particular attention to the following points", and then a point about leaving a detained person in the interview room on his own, which was undesirable, and

could damage equipment. "If the officer in the case is not ready to interview, you will be escorted back to the foyer to wait or return to the office for the time being, if you wish".

Next, a notice was given that the canteen is not available to them, and then this, "Grantham police station is a no-smoking building and smoking is only permitted in the interview room during consultation and by consent of the parties involved. Smoking within other areas is not permitted".

34. Thus, it can be said that the letter, insofar as it talked about escorting solicitors to the custody area, was seeking to lay down a policy so far as interviews were concerned, but that letter, written in June 1997, had plainly been superceded by the change in the smoking provision, which Chief Superintendent Barber had instigated in January 2000.

I shall have to consider what credibility can be attached to the assertions of Messrs. White and Bannister, and Thom, that they believed there was little likelihood of solicitors conferring with their clients outside interview rooms, which judgment was made by reference to a state of affairs which prevailed in 1997 through to 1999, when, according to the evidence of Sergeant Atherton, whatever may have prevailed up to that time since the ban, the situation, at the police station had radically changed.

35. I have said it enough for it to be convenient to identify the evidential steps of the defendants' argument, which it is said established that a deliberate interception took place in the exercise yards.

(1) From the outset Messrs. White, Bannister and Thom intended to intercept communications in the exercise yards and that White and Thom deliberately failed to make reference to the exercise yards in the applications for authority.

(2) Mr. Bannister deliberately failed to make any reference to the exercise yards in paragraph 4 of the operational order.

(3) Since at least the beginning of 2000 the exercise yards had been used on a regular basis as a place where detained persons and solicitors consulted, and this practice was well known to each of them.

If each of the three propositions above is made out to the required standard of proof, namely on the balance of probabilities, it is submitted the Court should conclude that the interception of the privileged conversations was deliberate. Alternatively, but not in any way forming part of the thrust of the submissions, it was submitted that if it was not deliberate from the outset it was undoubtedly deliberate after it first became known that privileged conversations were being intercepted, and that was on the very first day the interception began. There can be no dispute that the first-hand listeners knew that privileged conversations were being intercepted. They accepted that they knew.

36. Messrs. White, Bannister and Thom deny that they knew such conversations were being intercepted. Indeed, the general effect of their evidence is that they took but a general interest as to whether anything of interest had been intercepted and made no

specific inquiries at all, and certainly they maintained they never looked at the contemporaneous logs being kept by the first-hand listeners.

It was neither the position at the time, nor is now the practice, as I understand it, that the applicants for authority receive a copy of the authority. I am bound to say I consider this an unsatisfactory state of affairs. It seems to me that, when in a chain of command, people are asked, for example, Mr. Cooper, was asked to use his technical skill in placing devices at a police station, it would be an elementary precaution for the officer asked to carry out that particular task to see the authority to ensure that he is not unwittingly doing something which is not in accordance with the authority which has been granted.

Had Mr. Cooper seen a copy of the authority as part of his routine task in carrying out the operational aspect of his duty in this case, he would have read it and he would have seen at the outset that although he was being asked to put a device in the exercise yard the authority granted did not extend to the exercise yard. This would never have happened.

37. The chain of communication for each of the officers appears to have been as follows. A Mr. Krister, police officer, speaking for the superintendent, informed Mr. Thom that the application, as made, had been approved. I need not repeat what I have already said about the communication of the actual authority. Thom then informed Bannister, and Bannister instructed Mr. Cooper to install the devices. This, apparently, took place on 17th November.

Superintendent Tapley, who granted the authority, gave evidence. He provided the Court with a copy of an extract from a booklet issued by the National Police Training Authority, headed, "Regulation of Investigatory Powers Act 2000". The application referred to confidential material. The booklet, which is by way of guidance only, makes it plain when it defines confidential material that it extends to privileged conversations between a defendant and his solicitor.

It has to be said that neither Mr. White, Mr. Bannister nor Mr. Thom stated that they were unaware of the need to avoid intercepting solicitor/client communications. On the contrary, they asserted that they asserted that they had taken steps to prevent it, and relied upon the arrangements and the practice as they understood them to be at each police station, namely that solicitors were not allowed into the communal area unless accompanied, and were to hold interviews in the interview room.

38. Their asserted confidence in the arrangements being implemented, however, is undermined by their expressed efforts to avoid interviews with detainees in the cell areas. If their confidence justified no suspicion or awareness of a risk in connection with the exercise yards, I fail to see how they felt it was not necessary to have that included in paragraph 4 of the operational order. Again, I fail to see how the issue as to risk in relation to the exercise yards, since it had been specifically addressed in relation to the cell passageways, was not considered by them at the time.

If it was necessary to do something to prevent chance solicitor/client conversations taking place in breach of the best practice of the police stations in the cell passageways, which they manifestly recognise by including paragraph 4 in the operational order, why on earth were they not addressing the issue as to the possibility of chance solicitor/client conversations taking place in breach of the best practice as they understood it at the police stations in the exercise yards?

None claimed, when in the witness box, to be unaware of the gravity of what had occurred. Each, as I have said, stated that they had actually considered the risk and regarded it as low for the reasons they gave. If either one of them or all of them now regarded the fact that it had occurred as grave that is not, in my judgment, how they behaved in relation to the applications for authority and the operational order.

It is obvious that if the exercise yard was to be included in the surveillance it had to be assessed independently of the cell passageways for the risk of unintentional collateral intrusion taking place, and it had to be the subject of preventative measures to exclude that chance occurring. Nor, in my judgment, is the importance which they now suggest should be attached to what has occurred and, of course, accept should be attached to the prevention of privileged conversations being intercepted in any way consistent with the steps which were taken at the material time.

39. The first-hand listeners were given no specific instructions by Mr. White or Mr. Bannister as to what to do in the event that they did listen to a privileged conversation. When the first-hand listeners realised that they were listening to privileged conversations none of them reported the matter to anybody. On the contrary, they noted the events on the log, continued to listen to conversations to a greater or lesser degree and drew nobody's attention to the log or the fact that it was happening. No one had been given instructions to stop the tape in the event that such conversations were heard. The conversations were therefore intentionally recorded and taped. They were intentionally listened to by the secondary listeners.

Neither Mr. White nor Mr. Bannister made any inquiries as to how the operation was being conducted, and according to their evidence heard nothing more than general accounts as to whether or not any valuable product had been maintained by these hours of surveillance. That, they said, was not from the first-hand listening officers but from others, and their interest did not extend to seeing the contemporaneous logs.

40. Once the covert surveillance was over the tapes were sealed and kept for secondary listening, as were the logs. DC Hanson, who was a principal secondary listener, had the logs, and despite the contents of them and the entries on the logs which made it plain that there had been interceptions of privileged conversations, nevertheless went on to listen to the tapes. It is to be noted that according to his evidence he immediately reported the matter to Mr. White, who told him to stop listening to the tapes.

I accept that Mr. Hanson told Mr. White and that at that stage Mr. White responded, but Mr. Hanson had been given no particular instructions to respond in this way in the event that he found privileged conversations, and it seems remarkable that the first-hand

listeners should have behaved in a way which was so unlike the way in which Mr. Hanson responded when he came to secondary listening.

41. The avowed purpose of the operation was to listen to conversations between detainees. The concept of intercepting conversations between detainees in the exercise yard was, if it ever featured, wholly undermined by the evidence as to the policy at the police stations, that unless escorted by a police officer no two prisoners would be in the yard at the same time. Thus, on analysis, the only possibility of attracting a prisoner's conversation was when the prisoner was in the exercise yard, shouting from the exercise yard to another prisoner in the cells, and that prisoner in the cells was responding to what was being shouted to him from the exercise yard.

Since there was an intention to intercept any communication in the exercise yard but not to intercept privileged conversations, it is therefore material to consider the evidence going to what conversations in the exercise yard could reasonably have been expected to yield any information which was not privileged.

42. Messrs. White, Thom and Bannister accepted that conversations between two prisoners in the exercise yard were not likely to take place. Therefore, it is not to be regarded as having been within their contemplation as a source of information when they decided to place a microphone in the yards. Each acknowledges that two prisoners would not be together in the exercise yard unless supervised by a police officer.

The avowed purpose of the operation, consistently with the application, was expressed to be to capture what one prisoner, therefore, might shout from the exercise yard to another inside the building, it has to be said, and emphasised, a prisoner in a cell with his door closed, and what he might shout through the door to the exercise yard, which is beyond the cell passageway. That prisoner's shout from one cell to another at police stations appears to have been accepted as the general experience of those who gave evidence.

I place particular reliance upon Mr. Atherton in the whole of this part of the case, but there was no need for a device in the exercise yard to pick up conversations between prisoners in their respective cells. That was the purpose of the microphone in the communal passageway in which the cells are situated.

43. It has to be noted that Mr. Atherton had no personal experience of a prisoner attempting to shout from the exercise yard to a fellow prisoner in a cell. He did not suggest it was fanciful to envisage it occurring, but he recognised the force of the point that was put to him that since to gain access to the exercise yard and return to his cell the prisoner would be bound to use the passageway. It would seem more likely that instead of attempting to shout from the exercise yard a prisoner desiring to communicate with someone in a cell would be more likely to shout when he was in the passageway. I agree entirely.

To these considerations must be added the fact that the exercise yards were shut off from the passageways by doors. At one of the police stations there were two doors.

There was at least one door at another. Although the exercise yards are covered and surrounded by walls they are nevertheless also subject to noise from traffic and other outside noises.

It would, of course, have been quite impossible for the Court to take time to gather evidence from innumerable witnesses who could speak as to their experience at police stations, and whether or not they had ever heard of a prisoner shouting from the exercise yard to a prisoner in the cell, but I am entirely satisfied, on the weight of the evidence I have had, that it should be regarded as something which was a rare occurrence. A common occurrence, as I find on the evidence, is communication between prisoners in cells.

44. On analysis, therefore, the microphones in the yards were only likely to intercept prisoners communicating with one another if the following set of particular circumstances prevailed.

(1) The prisoner was in the exercise yard with a police officer to exercise or to have a smoke.

(2) He wished to communicate with a fellow prisoner in a cell and rather than doing that by shouting in the passageway or from his cell he chose to do it from outside.

(3) That circumstances existed which were seen by him at the time to be sufficiently favourable to him shouting to someone so that he could be heard in a cell, and his assessment that for the prisoner in the cell to whom it was directed being able to shout back in a way which could be heard by the prisoner in the exercise yard.

(4) That unless he chose to do this at a time when the door or doors to the exercise yard were open, the chances of it being of any use and conversations ensuing were significantly decreased.

(5) That there was an absence of extraneous noise at any one time when this might have occurred which would have limited the purpose of the exercise.

I have to weigh these factors too, in the light of the evidence I have had from the first-hand listeners. They record that background noise in the exercise yard made their task of listening through a device which was in the exercise yard that much more difficult. Admittedly, they did not appear to be listening to shouted conversations.

45. I have concluded that even allowing for the obvious unlikelihood that a prisoner would shout anything of value, whilst in the presence of a police officer from the exercise yard to a prisoner in the cell, the chances of someone shouting back from the cell to him and being heard by him, whilst it cannot be eliminated, make this contemplated set of circumstances highly unusual and not those which could be reasonably the subject matter of an application of this sort for authority.

Again, perhaps, more conclusively in the sense of the application of logic, if he was shouting from the exercise yard to the cells on the suggested set of circumstances his voice would be carried through the passageways. If his voice was carried through the passageways from the exercise then it would be picked up by the microphone in the passageways, and it follows, so would any reply from the cell to the yard.

Common sense dictates, in my judgment, that the device which was deliberately placed in the exercise yards can only have been placed there in order to pick up conversations in the exercise yard. I regard the suggested justifications for it to attract the conversation as I have described as tortuous, highly unlikely and they me leave wholly unconvinced that anyone would have decided to place a bug in the exercise yard to cover the suggested chance or contingency which has been put forward.

46. Thus, it is convenient now for me to summarise the position so far:

(1) No steps were taken to ensure that the surveillance of the exercise yard did not give rise to the interception of privileged material.

(2) No action was taken when privileged material was obtained other than to continue recording on further occasions as they arose.

(3) No procedures existed for a review or re-assessment to be made of the risks attendant on privileged material being obtained.

(4) No directions were given to personnel involved as to what to do in the event that privileged material was obtained. As to the documentary evidence:
(i) The policy note referred to cell area.
(ii) The applications referred to communal area of the cell area.
(iii) The operational order only related to cell areas.

(5) The supervision of the intended direction depended not upon the custody sergeant, who was not informed about the surveillance, but upon the advising officers who did. Neither officer, Bennett nor Jackson, the advising officers, did anything other than to escort solicitors when they were told by the custody sergeant that the solicitors were ready to interview, to the interview rooms.

(6) Neither observed the frequent occasions which occurred in the course of each day when solicitors and detainees obviously were going to the exercise yard and were in the exercise yard together. Neither of those officers took any opportunity to look at the custody log kept by the custody sergeant. Had they done so it would have been obvious what was happening.

(7) No account appears to have been taken of the possibility that a solicitor and a prisoner might enter the exercise yard. Even if there was no depth of knowledge of the past practice, it was no more unlikely that solicitor and client would be in the exercise yard than it would be if they were together in the passageways.

(8) Mr. Thom knew that solicitors and prisoners might want to smoke in the exercise yard. He said so out of his own experience. That had been his experience at Sleaford. He, too, said he himself had smoked in the exercise yard. That, of course, was quite contrary to other evidence which indicated that the practice, in accordance with the direction from Mrs. Barber, was that smoking should not take place other than outside the building, either at the entrance way or the back entrance.

47. I am bound to say that I am wholly unimpressed by the reliance which was placed by each of those three officers in what I regard as the out-of-date directions which had been given in 1997, which had ceased to prevail on the ground commencing January 2000. I find it incredible that officers of the seniority of Messrs. White and Bannister, and Mr. Thom with his knowledge of the police stations and as an interviewing officer, had no knowledge of what was going on at the police stations in consequence of the no-smoking ban which had been imposed.

48. Material of a privileged nature was obtained from the outset. The fact that privileged conversations were taking place became known to the first-hand listeners, as I have indicated, nothing was done. Nobody was warned. Mr. White said in evidence that had he been told on 21st November by a first-hand listener, or indeed by anybody else what was occurring, he would have stopped the surveillance.

I find the evidence that has been given by them as to their failure to look at the contemporaneous logs or to have any direct dealings with the first-hand listeners, which would have given any information about the detail of what was occurring, to be incredible.

Mr. White was the senior investigating officer. The interviewing officers who were present at the police station deny that they knew that solicitors and prisoners were going to the exercise yard in order to smoke. They say they never looked at the log save in one exception, which is not material, neither of the supervising officers went to check to see the product.

On the evidence I have heard, therefore, an elaborate and time-consuming, if not expensive, operation was set in motion to last over four days in order to capture conversations between prisoners or detained persons who were being interviewed. Those responsible, Messrs. White and Bannister, who had responsibility as senior and deputy investigating officers in this inquiry, took no steps to seek out and assess for themselves what the quality and detail of the product of the surveillance was.

The effect of their evidence was that they were far too busy doing other things to ascertain what it was and merely relied upon the general report of others that nothing had been obtained. I regard that evidence, as I have said, as incredible. A small piece of evidence points, or confirms, what I regard as its incredibility.

49. One officer gave evidence to the effect that on one occasion, he being an interview advisor, Mr. White had troubled on one evening to tell him to tell the first-hand listeners

to stop listening at some late hour of the night. I find evidence that Mr. White had troubled himself with the detail of when to tell a first-hand listener to stop listening at a particular time of night as wholly inconsistent with the thrust of his evidence that he was taking no direct interest in what was occurring so that he did not even have any contact or learn any detail from the first-hand listeners.

50. There are another series of points to which I must make reference, which, in my judgment, lead to the conclusion I have indicated. As I have said, those in charge did not seem to be interested enough to find out what had been the product. On best estimates, though, 30 people knew of this covert surveillance. Not one of them, it seems, had either the duty, obligation or considered it part of his duties to inquire as to the progress, notice any problem when problems arose at the police station for solicitors attending for interview, pay any sufficient attention even to look at the custody logs.

Mr. White at one stage gave evidence to the effect that the listeners were passing updates to more senior officers in the course of the investigation. That, he put in evidence as a suggestion as to how he kept informed, but this evidence was contradicted by other evidence in the case from the first-hand listeners, who simply said that they did not pass up any information to anybody. They seemed to take the view that the existence of the logs themselves, which were there to anybody who wanted to look at them, was enough.

51. Having carefully considered all the evidence I am satisfied that it is more likely than not that the microphones were placed in each of the exercise yards deliberately and with the intention of capturing any conversation which might take place between the detained persons and the solicitors, either before or between the interviews which were planned to take place over those days.

In my judgment, each of White, Bannister and Thom acted with that intention. It follows that I have concluded that flagrant breaches of the law have occurred. (I shall come to the law next.) That the statutory procedure for regulation under the Regulation of Investigatory Powers Act 2000 was deliberately manipulated by an intentional material non-disclosure as to what was to occur, that no adequate comfort by way of assurance could have been given about collateral intrusion in connections with the exercise yards, that no authority would have been granted for the exercise yards in the light of the state of affairs prevailing at each of the police stations.

It follows that I have rejected the evidence of Messrs. White, Bannister and Thom to the effect that they did not know of the use of the exercise yards as a place where privileged conversations had occurred.

I propose to rise now since I need now to turn to the legal conclusions which must be determined and resolved by me to follow from this state of affairs and my findings of fact.

(Short adjournment)

MR. JUSTICE NEWMAN:

52. My note indicates that I had not quite completed the summary of my conclusions, which I had intended to record before turning to the law, so I shall just correct that position. This will overlap in the ruling with something I have already stated, but it will complete it in the context in which I had proposed it to be formulated. That I have rejected the evidence of Messrs. White, Bannister and Thom to the effect that they did not know of the use of the exercise yards as a place where solicitors and detainees were increasingly accustomed to resorting for a smoke and a consultation, that I found their attempts to explain the documentation in this case wholly unconvincing, that I find the claims by Messrs. White and Bannister to have been ignorant of the fact that at the time privileged conversations were being obtained as incredible, that I find the asserted reason for the devices in the exercise yards to be outside, so outside, the range of justification for reasonable action that I have rejected them.

53. The law. In the case of R v Derby Magistrates' Court ex parte B. [1996] AC 487 at 507 Lord Taylor, in the House of Lords, stated this:

> "Having reviewed the principles underlying the existence of unjustification for legal professional privilege, so that those listening to this ruling have some understanding of the impact that the rule can have, this case involved the murder of a 16-year-old girl. The applicant in that case had been arrested and made a statement to the police admitting being solely responsible for the murder, but shortly before his trial he retracted that statement and alleged that although he had been at the scene his stepfather had killed the girl. He was acquitted.
>
> Subsequently, the stepfather was charged with the girl's murder and proceedings were commenced before a magistrate. The applicant gave evidence for the prosecution and repeated his allegation that his stepfather had murdered the girl. In cross-examining the applicant, counsel for the stepfather cross-examined him about instructions he had initially given to his solicitors, when it was said admitting to her murder. The applicant declined to answer on the grounds of legal professional privilege.
>
> The magistrate then had to consider whether the privilege should prevail, and he concluded that the public interest in protecting solicitor and client communications was against the public interest in securing that all relevant evidence was available to the defence and issued the summons."

It was that issue, therefore, which was before the House of Lords, the context of grave circumstances in which material, the subject of professional privilege, could have been relevant to the innocence of a man on a charge of murder.

> Lord Taylor stated:
>
> "The principle which runs through all these cases and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent.

> Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of the particular case. It is a fundamental condition on which the administration of justice as a whole rests."

54. He referred to the case of R v Cox & Railton, to which I have already referred, and he went on to say:

> "Nobody doubts that legal professional privilege could be modified or even aggregated by statute, subject always to the objection that legal professional privilege is a fundamental human right, protected by the European Convention for the protection of human rights and fundamental freedoms, as to which we did not hear any argument."

It is unnecessary to say more, of course. The European Convention on Human Rights is now part of our law.

55. In a more recent case, General Mediterranean Holidays SA v Patel & Another [2000] 1 WLR 272, Mr. Justice Toulson had occasion to consider whether a solicitor faced with an application for a wasted costs order was entitled to rely upon privileged material in rebutting the claim, or contesting the claim, for wasted costs.

The learned judge refused the application. As the head note recalls, that the common law recognised the right to legal confidentiality between a person and his legal advisor as a matter of substantive law as a bulwark of the right to access to justice, that legal professional privilege was an attribute or manifestation of that right and was not merely an ordinary rule of evidence, but was a fundamental condition upon which the ministration of justice rested. Those words obviously echo the case of R v Derby Magistrates' Court.

There is, as Mr. Justice Toulson found, an abundance of guidance and jurisprudence to be contained in some of the Commonwealth authorities. The way in which it had been put was particularly helpful to Mr. Justice Toulson, and I regard the citations as particularly beneficial to this ruling, in particular, the case of Carter Northmore Davy & Leak 183 CLR 121. At pages 161 to 162, Mr. Justice McHugh, after a learned reference to much authority, put the matter thus:

> "The doctrine is a natural if not necessary corollary of the rule of law and a potent force for ensuring that the equal protection of the law is a reality. The Court has accepted that although the doctrine is based upon the requirements of the public interest, its application in particular cases does not depend upon balancing against other rights that are grounded in the public interest.
>
> Not even the public interest in Courts having all relevant evidence before them has been considered sufficient to override the public interest in maintaining the unqualified operation of the privilege."

He added:

> "The argument that any document that might assist a person to defend a criminal charge should be available to that person. It might seem instinctively to be unanswerable, but to uphold it would be inconsistent with the rationale of the doctrine of legal professional privilege, and that privilege has been recognised since the reign of Elizabeth I."

He noted the only exception, to which I have referred earlier in this ruling, namely if the privilege is used to facilitate the commission of a crime or a fraud, or the abuse of an exercise of public power for the frustration of an order of the Court.

56. Lord Bingham of Cornhill, the then Chief Justice, summarised the position in the case of Paragon Finance Plc v Freshfields [1999] 1 WLR 1183:

> "The nature and basis of legal professional privilege have been and often authoritatively expounded, most recently in the R v Derby Magistrates Court ex parte B. At its root lies the obligation of confidence which a legal advisor owes to his client in relation to any confidential professional communication passing between them.
>
> For readily intelligible reasons of public policy the law has, however, accorded to such communications a degree of protection denied to communications however confidential between clients and other professional advisors save where a client and legal advisor have abused their confidential relationship to facilitate crime or fraud. The protection is absolute unless the client, whose privilege it is, waives it, whether expressly or impliedly."

57. Now that the Human Rights Act has been passed and the Convention is part of our law, one looks for illumination to the Strasbourg jurisprudence.

I take first the case of Brennan v United Kingdom. I have it in the transcript of the judgment dated 16th October 2001. The facts giving rise to consideration of privilege in that case arose because it concerned the investigation of a murder in Northern Ireland and the prosecution under the Prevention of Terrorism Act in Northern Ireland.

The circumstances it was said amounted to violations of Article 6 of the Convention. Article 6 of the Convention provides in the part material in that case:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Then, after a break:

> "Everyone charged with a criminal offence has the following minimal rights...(c) to defend himself in person or through legal assistance of his own choosing, or if he

has not sufficient means to pay for legal assistance to be given it free when the interests of justice so require."

58. What had happened in that case, among other things, but this is all that needs to be referred to, is that a police officer had been present during some of the applicant's consultation with his solicitor. At the beginning of the legal consultation the officer stated that no names were to be discussed or information given that could be of use to others. The purpose of the officer being present was to provide for what was feared to be some form of security leak.

The Court assessed the position in these terms:

"The Court has noted above that Article 6.3 normally requires that an accused be allowed to benefit from the assistance of a lawyer in the initial phases of an interrogation.

Furthermore, an accused right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial, and follows from Article 6.3(c). If a lawyer were unable to confer with his client and receive confidential instructions from with surveillance, his assistance would use lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.

The importance to be attached to the confidentiality of such consultations, in particular that they should be conducted out of the hearing of third persons, is illustrated by the internal provision cited above. However, the Court's case law indicates that the right of access to a solicitor may be subject to restrictions for good cause, and the question in each case is whether the restriction, in the light of the entirely of the proceedings, has deprived the accused of a fair hearing.

Whilst it is not necessary for the applicant to prove, assuming such were possible, that the restriction had a prejudicial effect on the course of the trial the applicant must be able to claim to have been directly affected by the restriction in the exercise of the rights of the defence."

In the light of the arguments which I have had to consider that particular passage will have to be addressed, or at least the concept which it throws up will have to be addressed. In that case the Court went on to conclude as follows:

"Nonetheless, the Court cannot but conclude that the presence of the police officer would have inevitably prevented the applicant from speaking frankly to his solicitor and given him reason to hesitate before broaching questions of potential significance to the case against him."

59. The Court went on to consider the consequences of the breach, and under the heading "Damage" accepted the argument for the government that the Court cannot speculate on whether the outcome of the applicant's trial would have been any different if

he had obtained a private consultation with his solicitor. It agreed with the government that a finding of a violation in itself constitutes sufficient just satisfaction for the purposes of Article 41 of the Convention.

60. Next, the case of S v Switzerland 14 EHRR 670. In that case the facts are close to the facts of this case, but the detailed circumstances do materially differ. The applicant was arrested and remanded in custody. Almost all of his communications with his lawyer were overseen or intercepted by the police.

The applicant complained that his inability to confer with his lawyer out of the hearing of third persons, and in confidence, violated his right to defend himself by means of legal assistance within the meaning of Article 6.3(c) of the Convention, and prevented him from speedily being able to challenge the lawfulness of his detention within the meaning of Article 5.4.

It was held unanimously that there had been a violation of Article 6.3(c). It was held that it was not necessary to examine the case from the point of view of Article 6.3(b) or of Article 5.4, and it was a case in which the relief given was that the State was to pay the applicant, within three months, damages for non-pecuniary injury and for costs.

Thus, circumstances in which the consequences of the violation of the Convention fell to be considered did not approach the circumstances which I have to consider in this case, namely whether, notwithstanding that there has been a breach of the Convention, as I am entirely satisfied that there has, there should nevertheless be a trial of these defendants on this indictment, or whether the nature of the breaches which have occurred should lead to the conclusion the indictment must be stayed.

61. Next, in Strasbourg, the case of F v United Kingdom, as long ago as 1984. Again, the facts are of some interest because they come closer to the facts we have here, and indeed the surrounding circumstances come closer, but for the purpose of being a direct authority, not close enough.

In that case the applicant had been convicted on 23rd February 1982 of two offences of burglary and one of handling stolen property. He was sentenced. In the previous year, on 8th July 1981, whilst on bail awaiting for trial on those charges, he was arrested and he confessed to other offences. He was then committed for sentence in respect of those offences.

In the course of his arrest on 8th July 1981, there followed a police search of his home, the police, claiming to act in pursuant to a warrant relating to stolen jewellery, but it was said that no warrant existed. Notwithstanding, in the course of their search the police came upon 25 files and various tape recordings belonging to the applicant, all of which had been prepared for use in his defence to the burglary charges. These files and tapes were removed by the police.

The two police officers who were involved in the investigation of the burglary charges were informed that these tapes and documents had been seized, and they

subsequently visited the police station at which they were held and examined them. The fact that these items were held and examined was revealed by the solicitor for the Metropolitan Police to the applicant's solicitors.

The police officers stated at the time that they were investigating alleged interference by the applicant with witnesses. The contention was that the scrutiny of his files relating to his defence enabled the police officers to adapt their evidence at the forthcoming trial. However, the prosecution evidence in this case included the statement of two of the police officers in question, which was served on the defence before 1st September 1980, thus many, many months before 18th July 1981, when the police took the privileged material.

62. The applicant applied to the Court to have the proceedings on the burglary charges stayed on the grounds that the defence documents had been seen by prosecution witnesses, namely the police officers, who where thus able to adapt their evidence and that this constituted an abuse of the Court's process.

After two days of legal submissions by counsel for the application, the application was rejected and the trial went ahead. The applicant was convicted and sentenced. The judge dealt again with the issue of the seizure in his summing-up and pointed out at the officers' evidence had been served on the defence before the incident had occurred, and that there was no question of any adaptation of their evidence. The applicant appealed to the Court of Appeal and he was granted leave by the Court of Appeal.

The case of F, as it is reported there, is in fact the case of R v Heston Francois [1984] QB 278. I shall only deal with the appeal so far as it affected the argument on the abuse of process and the argument to the Court of Appeal as to what should have occurred.

63. The main submission advanced by counsel for the appellant was in language which all counsel in this case, and those knowing the law in relation to abuse of process, will be familiar, that the Court possesses an inherent jurisdiction to stay criminal proceedings at any time on the ground that there has been an abuse not limited to the proceedings in and about the courtroom. It extends to the whole criminal process from criminal investigation through to conviction.

It was submitted that legally privileged documents found by a prosecuting authority cannot be removed from the possession of their owner or legal representatives without consent. It was submitted that the seizure and removal, without consent, of documents that on the face of them had been brought into existence for the purpose of preparing his defence, for which he had already been committed for trial, went behind his right to silence, and it was therefore an abuse of the process of the Court.

The Court of Appeal heard a submission that what should have occurred was that there should have been a kind of pre-trial inquiry, which should have taken place in relation to the seizure of the legally privileged documents, and whether or not the defence had been interfered with.

64. The prosecution countered those arguments by submitting that to hold such an inquiry would have far-reaching implications. As the Court went on to say, page 289 at H:

> "It is important that criminal Courts are not used to discipline the police. Victims of crime and the public at large have an interest in prosecutions going on. Here, there was a proper committal. The right to silence, which counsel for the prosecution agreed, is an important fundamental right, is properly to be preserved by the discretion of a judge to exclude evidence, evidence including a confession improperly obtained may be, and sometimes is, declared to be admissible, the weight to be given to it be left to the jury.
>
> The pre-trial inquiry, such as the appellant contends the judge in this case was under a duty to embark upon, would itself be open to abuse by unscrupulous and dishonest accused persons. The criminal trial system would be placed in jeopardy. The facts of the present case demonstrated the importance of, among other things, to discovering during the trial whether alleged misconduct by the police had had any affect upon the evidence and any likely bearing on the result. It had none. Those were the submissions which counsel had made, which the Court accepted."

65. In my judgment, we have come a long way since the case of R v Heston Francois, but the real question is, have we come so far or far enough to make it the case, as the defence submit, that where no trial has taken place or any inquiry, other than the limits of the inquiry which this Court has embarked upon, should a trial on very serious crimes be stopped?

66. That brings me to the law on abuse of process. Before turning to that it is convenient to note that in addition to the breach of Article 6 of the Convention, which in my judgment has been made out, there are other statutory provisions which lay down the principle of law at issue, the Police and Criminal Evidence Act 1984, Section 58, provides:

> "A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time. The codes of practice for the detention, treatment and questioning of persons by police offices, Code C6.1 provides, 'Subject to the provisos in annexe B, all people in police detention must be informed that they may at any time consult and communicate privately, whether in person, in writing or by telephone with a solicitor.'"

By covertly obtaining private conversations taking place between detainees in between interviews, in my judgment, the officers were making a mockery of the caution which has to be administered to each and every detainee, and they undermined and infringed the obvious and stated rights of the detainees to confer privately with a solicitor, and as had been submitted in the case of Heston Francois they undermined and infringed his right to silence.

The picture does not have to be painted more than by putting in on the canvas the elaborate state of affairs in an interview room, where an interviewee is told in the presence of his solicitor that he does not have to say anything, where he exercises his right to silence by saying "no comment" and then, of course, goes out in order to confer with his solicitor before being interviewed again. His right is meaningless if the police officers who have so cautioned him can simply wait for him to go out in the hope that they can then listen to that which he declined to mention to them in implementation of his right.

67. So far as the Human Rights Act is concerned, it is, of course, provided by Section 6.1 that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. For this purpose, the police are a public authority. Section 8 provides, in sub-section 1:

> "In relation to any act of a public authority, which the Court finds is unlawful, it may grant such relief or remedy or make such order within its powers as it would consider just and appropriate."

In the case of Brennan it will be remembered that the Court accepted that the declaration that a violation had occurred was considered sufficient satisfaction.

68. So I come to some of the cases on abuse of process. It is helpful in order to set a context to take R v Togher & Others [2001] 3 All ER 463. In that case the Court of Appeal, presided over by the Lord Chief Justice, Lord Woolf, had occasion to consider the complicated interaction of various previous proceedings in order to decide whether appeals against conviction should be allowed.

It is only part of the judgment, if I for a moment read this part of the head note that matters. Much of the case turned on what had been, until quite recent cases, a controversial issue, namely, even in cases where the question of an abuse of process arose, whether, having regard to the fact that a fair trial may have taken place, whether there was nevertheless a situation in which the Court had the jurisdiction under its criminal appeal powers to allow an appeal against conviction. The head note reads:

> "The Human Rights Act 1998 emphasised the desirability of taking a broader rather than a narrower approach as to what constituted an unsafe conviction, and if a defendant has been denied a fair trial for the purposes of Article 6 of the Convention it would be almost inevitable that the conviction would be regarded as unsafe. If a prosecution should have been stopped on the basis that it was an abuse of process, but despite that a conviction followed, it was most unlikely that it would not be set aside.
>
> However, where failures on the part of the prosecution prior to trial did not amount to the category of misconduct, which had to exist before it was right to stay a prosecution, there was no justification for interfering with freely entered pleas of guilty."

The Lord Chief Justice pointed out, at page 467:

"That now that the European Convention is part of part of our domestic law it would be most unfortunate if the approach identified by the European Court of Human Rights and the approach of this Court continued to differ, unless it was inevitable because of provisions contained in this country's legislation for the state of our case law."

He then went on to refer, as I shall have to refer, to the judgment of Lord Justice Rose in the case of Mullen. He said this:

> "For this reason we endorse the approach of Lord Justice Rose in Mullen and prefer the broader approach to the narrower approach supported by Lord Justice Auld. Certainly, if it would be right to stop a prosecution on the basis that it was an abuse of process this Court would be most unlikely to conclude that if there was a conviction, despite this fact, the conviction should not be set aside."

69. Of course, none of this arises unless I am satisfied that this is a case in which this prosecution must be stayed on the grounds that it is an abuse of process. Equally, if I was wrong in not stopping the trial and the case proceeded, but it was held ultimately after conviction, if that was to result, that I had been wrong in not stopping the trial then it would follow that the conviction would be set aside. These matters only go to show how critical this sort of application is in a case of this gravity. What is it, I ask, that the Court needs to be satisfied about before staying an indictment?

70. One must go back to the real development of this learning in the case of R v Horseferry Road Magistrates' Court ex parte Bennett [1994] 1 AC 42. That was a case in which a defendant, who was a citizen of New Zealand, who was alleged to have committed criminal offences in England, was traced to South Africa by the English police and then forcibly returned to England.

The defendant claimed that he had been kidnapped from the Republic of South Africa as a result of collusion between the South African and the British police, and thus he had been brought before the Court as a result of that improper collusion. His appeals to prevent the process continuing failed until he got to the House of Lords.

In the House of Lords, with one dissent from Lord Oliver, it was held:

> "That where a defendant in a criminal matter had been brought back to the United Kingdom in disregard of available extradition process and in breach of international law, and the law of the State where the defendant had been found, the Courts in the United Kingdom should take cognizance of those circumstances and refuse to try the defendant, and that accordingly the High Court in the exercise of its supervisory jurisdiction had power to inquire into the circumstances by which a person had been brought within the jurisdiction, and if satisfied that there had been a disregard of extradition procedures it might stay the prosecution as an abuse of process and order for the release of the defendant."

71. At page 61, Lord Griffiths referred to an earlier judgment of Sir Roger Ormrod in R v Derby Crown Court ex parte Brooks [1984] 80 Crim App R 164. Sir Roger Ormrod had stated:

> "The power to stop a prosecution arises only when it is an abuse of a process of the Court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the Court so as to deprive the defendant of the protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been or will be prejudiced in the preparational conduct of his defence by delay on the part of the prosecution which is unjustifiable.
>
> The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness to both the defendant and the prosecution."
>
> Lord Griffiths went on to state:
>
> "There have, however, also been cases in which although the fairness of the trial itself was not in question, the Courts have regarded it as so unfair to try the accused for the offence that it had amounted to an abuse of process. In Chu Piu-wing v Attorney General [1984] Hong Kong LR 411, the Hong Kong Court of Appeal allowed an appeal an appeal against a conviction for contempt of Court for refusing to obey a subpoena ad testificandum on the ground that the witness had been assured by the Independent Commission Against Corruption that he would not be required to give evidence.
>
> Vice President McMullin said: 'There is a clear public interest to be observed in holding officials of the State to promises made by them in full understanding of what is entailed by the bargain.'"

Exactly the same principal was upheld in a later case of Phillips v Attorney General for Trinidad & Tobago [1995] 1 App Cas at 396.

72. The reason why I pause to refer to these examples of the exercise of the jurisdiction is that they are cases in which the fairness of trial itself, I emphasise, or the possibility of having a fair trial, was not in question, but it is to be noted that the jurisdiction depends, as I see it, upon an ingredient also being present, that the circumstances which arise for consideration of the Court themselves smack, or immediately throw up that which the Court can regard as unfair; for example, a promise to somebody that they would not be prosecuted, then breached in circumstances in which there is no good cause for such breach at all.

> Lord Griffiths went on to point out:
>
> "Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion the appellant cannot have a fair

trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures.

If the Court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike, that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law, and if it comes to the attention of the Court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it."

In that case, therefore, applying that approach, Lord Griffiths concluded:

"In my view your Lordships should now declare that where a process of law is available to return an accused to this country through extradition procedures our Courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party."

In his dissenting judgment Lord Oliver states (p.68 H):

"It is, of course, axiomatic that a person charged with having committed a criminal offence should receive a fair trial, that if he cannot be tried fairly for that offence he should not be tried for it at all, but it is also axiomatic that there is a strong public interest in the prosecution and punishment of crime.

Absent any suggestion of unfairness or oppression in the trial process, an application to the Court charged with the trial of a criminal offence, to which it may be convenient to refer by the shorthand expression, a criminal court, whether the application be made at the trial or at an earlier committal proceedings, to order the discontinuance of the prosecution and the discharge of the accused on the ground of some anterior executive activity in which the Court is in no way implicated, requires to be justified by some very cogent reason. Making, as I do, every assumption in favour of the appellant as regards the veracity of the evidence which is adduced and the implications sought to be drawn from it, I discern no such cogent reason in the instant case."

Next, to Lord Bridge at page 67:

> "There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do something by participating in violations of international law and of the laws of another State in order to secure the presence of the accused within the territorial jurisdiction of the Court, I think that respect for the rule of law demands that the Court take cognizance of that circumstance."

73. It is enough if I pass from that case, but noting, as it appears to me to be relevant, that the thread which runs through the reasoning of their Lordships who were in favour of allowing an appeal is that the unlawful conduct had enabled the situation to come about, namely the trial, which by permitting the trial to continue the Court would by itself be participating in the consequences of the illegality.

74. Next, then, R v Mullen [1999] 2 Cr App R 143. This was another case which involved the improper and unlawful circumstances in which somebody had been brought from overseas, in this case, Zimbabwe, to England in disregard of available extradition proceedings. Mullen was tried at the Central Criminal Court, conspiracy to cause explosions likely to endanger life or cause serious injury to property. He was involved in IRA activities. He was sentenced to 30 years' imprisonment.

It follows that in this case there had been a trial, but at the trial the defence were unaware of material which related to the involvement of the British authorities in his deportation from Zimbabwe, which had enabled him to be before the Court. Those circumstances had not been disclosed to the defence, therefore the matter went on appeal on the basis that no trial should have taken place because of the prosecution's abuse of process of the Court prior to the trial. That, of course, is the application, or format of the application, which is now made to me.

75. The Court referred to the recent decision of the House of Lords in another case, which I shall have to turn, although I am anxious to limit the amount of citation in this ruling, namely the case of Latif [1996] 2 Cr.App.R. 92. In that context I therefore go to Lord Justice Rose, at this point, on page 154:

> "We turn first to considerations of the facts and the balancing exercise identified by Lord Steyn in Latif. Having regard to the fact that the appellant, as he now concedes, was properly convicted, this Court must approach the exercise of its discretion on a rather different basis from that which would have been appropriate if an application had been made to the trial judge.
>
> In particular, there is before this Court no question of consideration of the strength of the evidence of the defendant's guilt to the offence charge. However, it appears from the passage already cited from the speech of Lord Lowry in ex parte Bennett certainty of guilt cannot displace the essential feature of this kind of abuse of process, namely the degradation of the lawful administration of justice.

> As a primary consideration it is necessary for the Court to take into account the gravity of the offence in question. In the present case the substance of the offence was the facilitation of a bombing campaign in the United Kingdom."

He then refers to the 30-year sentence and so forth. Then he considers the facts and concludes in summary, page 156:

> "Therefore, the British authorities initiated and subsequently assisted in and procured the deportation of the appellant by unlawful means in circumstances in which there were specific extradition facilities between this country and Zimbabwe. In so acting they were not only encouraging unlawful conduct in Zimbabwe, but they were also acting in breach of public international law.
>
> Finally, the events leading to the deportation is now revealed in the summary for disclosure, concealed from the appellant until last year. In all these circumstances can it now be said that the conduct of the British authorities in causing the appellant to be deported in the manner in which he was and in prosecuting him to conviction was, to use the words of Lord Steyn in Latif 'so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed'."

76. The Court then went on considering the submissions which had been made in that case to reject the submissions, and in the circumstances concluded that the court's discretion had to be exercised on the basis that, but for the unlawful manner of his deportation he would not have been in the country to be prosecuted, when he was, and there was a real prospect that he would never have been brought to this country at all.

Additionally, the need to encourage the voluntary disclosure before trial of material and information in the hands of the prosecution relevant to the defence was a further matter of public policy to which it is also necessary to attach great weight. Omission to make such disclosure, clearly, is a matter to be taken into account on the exercise of this Court's discretion following a conviction.

77. Finally, therefore, Latif [1996] 2 Cr App R 92. This is a drugs case, a case in which it was said the appellant had been inveigled to commit the offences by entrapment. I only wish to record the terms in which Lord Steyn did deal with the abuse of process issue, at page 99:

> "At first instance, in the Court of Appeal, counsel for Shahzad made much of the undoubted fact that customers officers, by deception, arranged for Honi to lure Shahzad to this country. Counsel for Shahzad drew your Lordships' attention to observation to observations of Lord Griffiths in another case."

Lord Griffiths was in that case referring to the notorious difficulties in apprehending people at the centre of the drugs trade and the need that there was to penetrate drug dealing organisations. Lord Steyn went on:

"Counsel for Shahzad concentrated his argument on two other features of this case. First, he submitted that customs officers encouraged Shahzad to commit the offence. Secondly, he argued that the customs officer who brought the drugs to England himself committed the offence of which Shahzad was convicted.

It is necessary to examine these arguments. He did so and then went on to consider whether there had been a breach of the law."

At page 100, he said:

"It is now necessary to consider the legal framework in which the issue of abuse of process must be considered. The starting point is that entrapment is not a defence under English law. That is, however, not the end of the matter. Given that Shahzad would probably not have committed the particular offence of which he was convicted but for the conduct of Honi and customers officers, which included criminal conduct, how should the matter be approached? This poses the perennial dilemma."

And he then refers to various learned writings:

"If the Court always refuses to stay such proceedings the perception will be that the Court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice system and bring it into disrepute. On the other hand, if the Court were always to stay proceedings in such cases it would incur the reproach that it is failing to protect the public from serious crime. The weaknesses of both extreme positions leave one principal solution. The Court has a discretion. It has to perform a balancing exercise.

If the Court concludes that a fair trial is not possible it will stay the proceedings. That is not what the present case is concerned with. It is plain that a fair trial was possible and that such a trial took place. In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system.

The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: R.v.Horseferry Road Magistrates Court, ex parte Bennett(1994) 98 Cr.App.R. 114.

Bennett was a case where a stay was appropriate, because the defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in Bennett conclusively establish that proceedings may be stayed in the exercise of the judge's discretion, not only where a fair trial is possible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place.

> An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful, but it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those who are charged with grave crimes should be tried, and the competing public interest in not conveying the impression that the Court will adopt the approach that the end justifies any means."

78. Lord Steyn then went on to consider the balancing exercise which the judge had performed in that case and in permitting the trial to go ahead. He approved of the position, and the kernal of his upholding of it was this:

> "The conduct of the customs officers was not so unworthy or shameful that it was an affront to the public to allow the prosecution to proceed. Realistically, any criminal behaviour of the customers officers as venial compared to that of Shahzad."

79. Thus I must come to the duty which is imposed upon the Court to exercise its discretion. Informed by the above cases, I turn now to apply the principles to this case.

(1) In the scale of assessment of the gravity of a crime the facts of this case are at the top end. A young man has been executed by a brutal shooting. If the prosecution are correct this happened for reasons of petty differences, in some way connected with the fact that one of the defendants had been assaulted at an earlier date, and it was felt that the Courts had failed to provide justice in those circumstances. Another of the defendants, it appears, might have objected to his girlfriend continuing to associate with the deceased. On any basis, if such conduct was established it would establish conduct which places these defendants way outside our civilised society.

(2) But in turn, the society which must adjudge such conduct, and if it is found proved regard it as unacceptable, also, as part of its civilisation, upholds the fundamental principle and right, which, as I have found, the police in this case deliberately contravened.

(3) Unfortunately, frequently the Courts have to consider deliberate breaches of the law by the police in the course of an investigation. By that, I should not be understood to be suggesting that it is other than the experience of the Court that in the course of countless criminal charges no such conduct becomes apparent, but there are occasions when breaches occur. They can range from breaches of the Code of Practice under PACE, the Police and Criminal Evidence Act. They can go from minor breaches to more serious breaches of a defendant's rights.

In the normal course, if the impact of the breach can be excised from the case, for example, by refusing to admit any evidence which has been obtained by virtue of the breach, then the administration of justice can, notwithstanding the degree of affront which has occurred, nevertheless continue with the mischief and the taint excised from the process. But in a case such as this and in the light of the submissions made, obvious

tension arises, where a deliberate breach of a fundamental right has occurred, and it is said in respect of that, that it has had no effect, and that no evidential reliance has been placed upon it by the prosecution.

The product of the breach having advanced the case nowhere, in effect, the Court is invited to adopt a similar approach to that which, as I have said, conventionally arises.

(4) I ask, if such an approach is adopted, is it not to treat a fundamental principle, said as I have outlined from the learning to which I have referred, to be more than a rule of evidence as though the principle was no more than a rule of evidence? Or must the approach of the Court be that where there is the breach of a fundamental principle very different considerations arise?

(5) Let me consider by way of example the possibility of adopting an approach so similar to the conventional approach, the rule of evidence approach.

The possibility that the interception of privileged conversations may yield something, in my judgment, is likely to be encouraged by the prospect that if it does not then no serious adverse consequences will follow. The principle is likely to be threatened, and by such conduct its character will be debased.

I have no doubt that the most desirable outcome, which the police officers envisaged in this case, or hoped might occur, was that by their unlawful interception they might learn where the body of Mark Corley was. Let us assume that that had been the case, then they would have been able to find the body. They would have been equipped with more evidence before their inquiry. Their inquiry would have reached a vital and important stage to which it was ultimately to come, in December.

If the discovery of the body had been as a result of the improper interception of a privileged conversation it is not fanciful to surmise that the fact that a particular defendant may have revealed this in a privileged conversation could be a completely dispensable item in the evidential trail, which would ultimately lead to the trial.

The police, as a result of finding the body and DNA evidence, or whatever, would be able upon the basis of that, perhaps, to have obtained evidence against the very person whose conversation they had overheard, but without it ever being part of their case, relied upon by them, that they had overhead that conversation.

In that case, in my judgment, the apparent absence of prejudice to the defendant so affected, because he would not be facing that evidence, would, in my judgment, be illusory. If the discovery of the body was made as a result of the breach of a fundamental right, and the case against the defendant in question depended upon the evidence which was then available from the finding of the body, and even though the privileged communications were not relied upon, I can see no distinction between the facts which that situation would throw up and the facts which led the Court in Mullen to conclude that but for the unlawful conduct in hauling the appellant from foreign territory, he would never have been before the Court in order to face trial.

In my judgment, the integrity of the principle would be threatened with consequential damage to the administration of justice. In my judgment, if meaning is to be given to its character as a fundamental rule, and not merely a rule of evidence, then great weight must be accorded to this factor in this case.

(6) Again, since the advent of the Human Rights Act the Court has a duty not to act in contravention of a Convention right. If the Court relieves a party to proceedings from the consequences of a flagrant breach of a fundamental right against the opposing party in the proceedings, which right is recognised by the Convention and the breach takes place in the context of the very proceedings before the Court, it is not difficult for it to be seen that the Court could be regarded as acting in those proceedings in a way which is incompatible with the Convention.

(7) The prosecution submitted that it was necessary for the defendants to demonstrate that any breach found to have occurred had caused prejudice, not simply to the integrity of the administration of justice, but to the defendants and the proposed trial. In the light of the authorities to which I have referred I reject that submission, but I agree that the cases do demonstrate that the Courts identify, and have identified in the past, an ingredient being a consequence of the misconduct or illegality, which can be seen as rendering the commencement of the proceedings, or the continuation of the proceedings as in some way unfair. The hallmark of the jurisdiction turns upon that fundamental concept of fairness, prejudice or unfairness in this case.

80. There are a number of important points which must be made in connection with the particular facts of this case. It has been submitted that since the prosecution are not relying upon any evidence obtained by the interceptions, no prejudice or unfairness arises.

The prosecution point to the capability of a trial on the evidence, which is circumstantial evidence arising out of, in particular, monitoring and results of telephone calls and the use of scientific methods of detecting where and to whom calls were made, and where from, and it is said that the prosecution do not rely on anything the case does not depend upon anything said by the defendants to their solicitors, or anything done by the police in reliance upon it.

The second limb of the submission is that the defendants are obliged to establish that some use has been or will be made of the material in the process of the trial.

There must some way in which the Court can be satisfied on the balance of probabilities that in the course of the investigation something occurred which was to affect each of the defendants' position. Put another way, unless the misconduct can be shown to have infected the process a stay should not be granted.

At the forefront of those submissions it is said that each of the officers stated in evidence that no use had been made of the material, thus it is said, on the evidence before this Court, an essential ingredient of the application had not been made out.

81. This case gives rise to difficulties, which so far as the Court is aware, have never been considered before. The closest case on the facts is that of Heston Francois in 1984, but in that case, it will be recollected, the Court, at the stage an application for a stay was made, was able to conclude on the evidence, which was not in contest, that the statements of the officers in the investigation had been served before the privileged material had ever been found or taken, thus the Court was able, by extraneous evidence, extraneous to the Court process, or to the trial, to be satisfied that the evidence had not been adapted in a way which had been alleged.

82. The problems in this case are:

(1) Unless there is an inquiry into the course of the police investigation, whether or not use was made of the material, cannot be ascertained. It cannot be right that this is a matter which falls to be resolved upon the assertions of the police involved in these operations. More particularly that must be the case if the Court, having heard their evidence, has concluded that they have not given truthful evidence.

(2) Unless the content of the captured material is known, no meaningful inquiry can be carried out to see what consequences have occurred. Thus, whilst the privilege prevails the suggested inquiry is non-justiciable. This, in my judgment, flows from that which was said by Lord Bingham, namely, the rule is an absolute rule.

(3) The defendants, having an absolute right not to waive the privilege, it cannot be right that the Court can force them to do so in order to prove the case for a stay, for to do so would be to effectively take away the very fundamental right which the law has conferred.

(4) If the trial is to proceed, in my judgment, the Court has to be satisfied that there can be a fair trial. It cannot be right to permit a trial to proceed so that the trial itself constitutes the inquiry as to whether or not there can be a fair trial.

83. In my concern for the outcome invited by the defence, I have considered whether the Court should examine the privileged material, on its own, in order to assess the quality of it and to form a view as to the likelihood that it might have had an effect, or to form a view as to the gravity of the consequences of what had occurred by looking at the product of what was obtained, but in the absence of waiver by a defendant, even if the Court was arrogate to itself the right to take such a course, in my judgment, it would not assist.

There could be no submissions from the prosecution, who plainly would not be able to see the material, nor any representations for the defendants. The Court would have reached the position in which it could well simply be partially informed as to matters to which the application gave rise.

In any event, in my judgment, the issue as to whether or not to permit this trial to proceed, as against a defendant, cannot, in my judgment, depend upon the Court exercising this sort of power on its own. As I have said, defence counsel could not be forced to participate. Co-defendants would not even be entitled to participate.

The position, if it were taken ad nauseam, would be in the case such as this where there are five defendants, that the Court would have to consider each defendant's position on its own. What possible course could the Court then take, having heard, having seen that material, if it came to any conclusion?

In one case, could it express the conclusion that one defendant should not have to face trial, but in another case a defendant did have to face trial, but that the defendant who did have to face trial would not know why the other defendant had been released because the Court would not be in a position to inform him? The complications are too great.

84. Even in the event that the defendants elected to permit the Court to see the material and then to make submission, but not to waive the privilege, then it would be equally impossible for the Court to engage in a useful task so far as each defendant was concerned, attaching weight to what had been disclosed.

There could be no limits to the matters to which the content of the material could give rise, an exhaustive trail through the investigation process in order to detect whether or not something which was unlawfully intercepted had in some way or another been acted upon, or influenced a particular course, or given rise to some material change in the investigation. It is simply not the Court's task on a trial to carry out such an investigation into the stages of months and months of a very serious police inquiry, involving some 30 officers or more. As I have indicated, the complications are the greater in a trial where there is more than one defendant.

85. It follows, therefore, that in my judgment the consequence of the police, having deliberately obtained confidential information in the course of an inquiry, has led to a position in which they have compromised the trial process. In my judgment, the non-justiciability of the consequences of the misconduct derive from the character of the principle at play, namely the fundamental principle that a person cannot be deprived of his right to private consultation with his solicitor in connection with threatened criminal proceedings.

It cannot therefore lie in the mouth of the police to asset that even though they have acted with flagrant disregard of the fundamental right, no harm or prejudice has ensured. By their own conduct they have put that issue beyond the Court's determination. In a case involving only one defendant, a waiver of privilege as between the prosecution and that defendant might lead otherwise, but in a case where there are five defendants the right to the privilege is as against each of the other defendants, and it is equally highly material for each.

86. So that this ruling is not misunderstood, I should like to emphasise that nothing I have said is to be taken as covering the case of inadvertent and unintentional acquisition of privileged material in the course of a properly authorised covert surveillance. The mischief in such a case, the wrong in such a case, if it occurs, will be cured by the adoption of conduct which is completely transparent.

A senior officer should be immediately informed of the mistake which has occurred. The defence solicitor should be immediately informed of the fact that it has occurred, of the details and the circumstances, and all the contents of the material which has been obtained. As necessary, any officer who has become aware of the material, who is in the inquiry, could, if the circumstances so required, be moved from that inquiry forthwith. Prompt, transparent action will obviate the difficulties. That, of course, is to be contrasted with this case.

87. Had the first-hand listeners acted promptly and properly to inform a senior officer, I emphasise even in a case where there had been deliberate misconduct, the consequences might in this case have been different.

But I return to this case and the issue of prejudice. The defence have made a number of submissions which, in my judgment, are correct. The principal prosecution witness is, as I have stated, George Sutherland. At the time of the covert surveillance he was a suspect, as was his wife. Shortly afterwards he became a witness.

The prosecution and the Court have been put on notice that the circumstances in which he became a witness will be an issue in this case. His witness statements are of such a character that I have advised all counsel, before any of these matters with which I am now concerned arose, that I should be obliged to warn him of his right not to incriminate himself in the witness box.

If this trial was to proceed, the defence would, in accordance with the issue they say is relevant, be entitled to examine each of the officers, Mr. White, Mr. Thom, Mr. Squires, Mr. Bannister. They would be entitled to question these officers with a view to establishing that the conduct of the police officers in this case was deliberately unlawful. It cannot be said that the conduct of the officers in this regard is not a matter of relevance to the case, which would be of relevance to the defence before the jury.

88. Let it be assumed the case has proceeded to that stage. The defence would be entitled, without having any ruling, of course, from the jury as to whether or not they did believe the officers had acted in a way that I have concluded, to continue to seek to advance a case that if the police had lied, and the jury were so satisfied, a mere assertion by the police that no use had been made of the material was something that had to be tested.

Thus, one comes full circle. There would be an issue before the jury, which the defendants were entitled to raise, which could not be properly examined and questioned to without the content of the privileged material being revealed. Thus, a limb in respect of the defence case - I emphasise here of each of the defendants - as one would realistically anticipate, namely that the principal prosecution witness, George Sutherland, had reason to give evidence untruthful, as the defence would maintain, had a connection with the way in which he had been treated by the police. It would all be there to be argued.

89. I ought to say that in my judgment, and it will be capable of being inferred from what I have already indicated in the warning I intended to give you, that questions do

arise, natural questions do arise, as to the circumstances in which George Sutherland became a witness and ceased to be a suspect. For the reasons given, there can be no proper trial of those questions.

90. Shortly before I was to come into court I was provided with a note from Mr. Rumfitt, which is relevant to this part of my ruling. He helpfully pointed out something which I did not know and was not informed about in the course of hearing, namely that George Sutherland has waived privilege in relation to these proceedings, and did so in the latter part of last year. As a result, all parties to the case had sight of his solicitor's file, including his attendance notes concerning his dealings with his client during the November police interviews.

Subsequent inquiries before commencement of this ruling have satisfied me, since I have all counsels' assurances, that none of the material which is in that waived material bears upon the issue upon which I am presently concentrating. For the avoidance of doubt, the issue upon which I am presently concentrating is the issue so far as George Sutherland's relationship with the police is concerned and the circumstances in which he is giving evidence for the prosecution.

In the course of informing me about this, some of the detail was given to the Court about the course of interview for George Sutherland and the way in which, according to the interviews disclosed, the matters went. Suffice it to say that on the evidence of George Sutherland, he was at all material times in the presence of his brother, who is said to be the person who committed the murder, at all material times for hours in the journey from Edinburgh down to the area near Grantham where the deceased was picked up, then with him in the car when he was taken to Saddle Moor, and on the evidence relied upon by the prosecution, he was in the car at the time that the deceased, Mark Corley, with whom he had had no conversation in the time he was in the car, left in the middle of the night to cross countryside with his brother. Twenty minutes later his brother to return without Mark Corley.

91. That was the evidence he gave ultimately, after he had initially denied being with his brother. He changed course from denial to admission that he was there, and abandoned his alibi in the face of statement which had been obtained from his wife, Heather, which was shown to him in the course of interview.

On 23rd November, at about 17.25 - 5.25 - the record shows that the interview broke and that George Sutherland went for a smoke in the exercise yard. There is no material at present available to support that he went there other than on his own. At 17.30 he was said to be in consultation with his solicitor, and that I take to be on the records, not in the exercise yard. I refer only to that detail as a simple illustration of the innumerable difficulties which this case presents in the light of the conduct which I have found.

Additionally, it has to be said both Heather Sutherland and Jane Alderton were, at the material time of these interviews, suspects. They are now prosecution witnesses.

92. I come to consider another aspect of prejudice relied on by the defence. It is the illumination the European Convention of Human Rights provides in this particular set of circumstances. Applying the principle of the equality of arms, the analysis, in my judgment, is as follows.

In a case where all the parties should be on an equal footing so far as the case against them is concerned, the prosecution have a unique position. The prosecution are in possession, and have been in possession, of evidence in connection with each of these defendants whose conversations they intercepted, which cannot be known to the other defendants. In a case such as this, allegations between defendants are run-of-the-mill, namely one defendant in the course of an interview with a solicitor, stating what his position is, and stating what he believes the position of any co-defendant might be.

The prosecution cannot cure this inequality, this lack of equality of arms. The police have created it by being possessed of material, which it should never have acquired, and which it cannot now reveal to all the defendants.

93. I thus have had to weigh all these factors, which amount to the weighing the public interest, between the desirability for these defendants to be tried for the grave and horrific offences alleged against them, and against that, the public interest in the need to uphold principles of law, for the Court not to countenance flagrant breaches of the law, and for all defendants, however serious the charges they face, to be given a fair and open opportunity of presenting to a jury and investigating before a jury any issue which may be relevant to the defence they have.

I have concluded in this case that justice has been affronted in a grave way, but it is unnecessary for me to decide whether or not to stay the matter upon that principle alone, because for the reasons I have endeavoured to set out shortly, I am satisfied that there can be no fair trial into all the issues to which this trial now gives rise.

I have come to this conclusion, as everybody will realise, and anybody would realise only after exhaustive consideration of the balance. There is no cause for triumphalism in the conclusion to which I have come, namely that the indictment must be stayed save, I hope, only the muted voice that the law and the principles of law which we regard as fundamental can seen to have been upheld.

These applications, therefore, on the grounds I have stated, succeed. I have said enough about the other matters upon which reliance was placed. Since I have concluded in the way I have stated, I need say no more about those.
