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REGINA

-V-

BRIAN NELSON

Before

THE RIGHT HONOURABLE LORD JUSTICE KELLY

On

WEDNESDAY, 29TH JANUARY 1992

At

BELFAST CROWN COURT

Certified a true copy of the original filed in
the Appeals and Lists Office on the

.....day of.....19.....

EVIDENCE OF WITNESS : COLONEL

PLEA IN MITIGATION BY MR BOAL QC

273(a)T

1 Wednesday, 29th January 1992

2 R v Brian Nelson

3 MR BOAL: I propose. my Lord, first to call a witness and.

4 because of the highly sensitive nature of the witness and
5 his present and past activity, I would ask leave that he
6 should not in fact be required publicly to give his name,
7 that he should write his name, hand it to the Court and it
8 should be available to the Court and to nobody else.

9 LORD JUSTICE KELLY: Very well.

10 MR BOAL: Would you come forward, please?

11 Witness 'Colonel'. Sworn

12 Examination in chief by MR BOAL:

13 Q. I will call you Colonel, all right? A. Thank you, yes.

14 Q. You are a Colonel in the Army? A. I am, yes.

15 Q. In 1985, in 1986, '87 what was your position? A. I was
16 in 1986 or from '86 to '89, I was commanding a unit of the
17 British Army in Northern Ireland engaged in agent handling.

18 Q. In that position did you come to be aware of the existence
19 of Brian Nelson the accused? A. Yes, I did. In January
20 1987 we were reviewing our current agent coverage and we
21 identified a gap in our coverage of the Loyalist

22 paramilitaries and we examined the case of Brian Nelson and
23 decided that we would try and re-recruit him.

24 Q. Where was he at that time? A. He was in Germany at that
25 time.

26 Q. Doing what to your knowledge? A. He was, he had
27 employment I believe as a roof tiler.

28 Q. Had you been aware of his involvement in UDA activities
29 before he went to Germany? A. Yes. When his name was
30 first disclosed to me obviously we looked at the past files

1 so I was, therefore, made aware of his previous activities.

2 Q. What did you do as a result of your decision to re-recruit

3 him? A. Well, I first had to consult with the security

4 service, but having done that and gained permission to go

5 ahead with the recruitment, or the re-recruitment, we then

6 initiated the procedures and brought him back from Germany

7 and continued with the case from then on.

8 Q. To your knowledge did he have employment in Germany at that

9 time? A. Yes, he did.

10 Q. Was that lucrative employment? A. I believe he was well

11 paid, yes.

12 Q. And was he settled there with his wife and family?

13 A. He was indeed.

14 Q. In order to encourage his return what did you do? A. We

15 discussed the matter with him and explained to him our aims.

16 our aims being that we wished to ~~infiltrate~~ infiltrate him into the

17 Loyalist paramilitaries in order to gain inside knowledge of

18 their workings and in order to prevent or at the very least

19 limit their murderous activities. Having explained that we

20 then said that we would obviously make recompense for the

21 disruption of his life-style, the consequent disruption to

22 his family and the difficulties they were going to incur and

23 that we would help him to settle in Belfast and make sure

24 that he had enough money to look after and support his wife

25 and his sons.

26 Q. From what you say your arrangements, financial arrangements

27 would involve two matters, his transfer from Germany to

28 Northern Ireland? A. That is correct.

29 Q. And the consequential expense that would be for him, and

30 secondly his financial maintenance from there on?

1 A. That is correct, yes.

2 Q. What arrangements were made for his financial arrangements
3 from then on? A. From then on he was paid a retainer or
4 a salary if you want to call it that, which was aimed purely
5 at helping him support his family. He was not paid by
6 results. That's the single most effective way of running
7 agents.

8 Q. How much was he paid? A. He was paid approximately £200
9 a week.

10 Q. Was it to your knowledge that that was considerably less
11 than he was earning in Germany in the position he was in?

12 A. I think bearing in mind the disruption to his previous
13 life-style and the difficulties the move placed him in, he
14 was not placed at an advantage by that sort of payment. I
15 don't believe he gained materially at all from his time
16 cooperating and working with us.

17 Q. Did you ascertain directly what he had been earning in
18 Germany? A. No, but I believe it was in comparative
19 terms more than the £200 a week.

20 SB TO AS 11.10

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1 Wednesday, 29th January 1992

2 R.v. Brian Nelson

3 AS FROM SB 11.10

4 WITNESS 'COLONEL'

5 (Cont'd) Examination in Chief MR BOAL:

6 Q. Now, you have already said that, in fact, he was not paid by
7 results, was he ever paid a retainer more than two hundred
8 pounds a week? A. From my memory of our files in which
9 we record all these matters I don't believe so.

10 Q. Now, the general purpose of re-recruiting him you say has
11 been explained to the Court when he was brought back from
12 Germany in the manner you described. Did he, in fact, join
13 the UDA again? A. Yes, he did, yes, but we had a
14 difficulty here, our aim was to gain inside knowledge and at
15 the same time we did not want him to get involved in the
16 murder gangs associated with the UDA or the other Loyalist
17 paramilitaries therefore we had to decide where he could
18 best be infiltrated in order that we could gain information
19 about possible targets for assassination and pass them on to
20 the RUC in the shape of warning reports without getting him
21 involved in the murder gangs themselves and so for
22 that reason -----

23 Q. What was the best niche as you saw for him? A. The
24 best niche at the time we could see was to infiltrate him
25 into the intelligence structure.

26 Q. Of course I'm sure it was to your knowledge that he had been
27 involved in the intelligence structure before he went away
28 in 1985? A. Yes, it was and therefore he had some
29 credibility with his associates.

30 Q. Yes.

1 LORD JUSTICE KELLY: Well, was it your intention he should get in
2 touch with the RUC and be in contact with them throughout?

3 THE WITNESS: No Sir, the system we use is that we would run the
4 agent and that we would be responsible for passing on his
5 information to the RUC which we did, of course, in all
6 cases.

7 MR BOAL: He was your agent? A. He was our agent.

8 Q. To whom was his identity known? A. His identity was
9 known to a very small circle of people. They included
10 senior Special Branch officers at Regional and Headquarters
11 level and two senior members of the security service. They
12 were not incidentally known to senior officers in the Army.
13 His identity was not known apart from myself and my own
14 colleagues in my own unit.

15 LORD JUSTICE KELLY: Were they known to the RUC?

16 THE WITNESS: Yes, sir they were, ~~yes~~ my Lord.

17 MR BOAL: When you say 'they' that is his identity.

18 LORD JUSTICE KELLY: His identity?

19 THE WITNESS: His identity was known to the senior Special Branch
20 officers at Regional and Headquarters level in the RUC.

.1 MR BOAL: Now you have indicated to the Court what your purpose
22 was and the difficulty that you saw in achieving that
23 purpose, that is not to involve him in murder gangs. What
24 instructions would he have been given at that time in order
25 to effect your purpose? A. This was a very difficult
26 matter because there are no really laid down guidelines that
27 are applicable to the situation in Northern Ireland where
28 we're talking about infiltrating terrorist organisation.

29 Q. Just stop there. Are there, in fact, guidelines at all
30 issued by the Home Office for such a situation?

1 A. There are Home Office guidelines that I'm aware of.

2 Q. What are they appropriate for? A. In my opinion
3 they're more appropriate for dealing with the criminal
4 fraternity in the East End of London rather than the reality
5 of the terrorist situation in Northern Ireland.

6 Q. Why do you say that? A. I say that because in order to
7 gain inside knowledge which we desperately need of the
8 terrorist organisations in order we can save life, that we
9 can prevent attacks taking place, that we can prevent
10 assassinations that we can make arrests, that we can get
11 recoveries of weapons and explosives you must have an agent
12 who is in a terrorist organisation. Now, the current Home
13 Office guidelines from my memory of them make it quite clear
14 that any such activity by an agent is, in effect, a criminal
15 act.

16 Q. If, for example, the Home Office guideline were that the
17 agent should not commit a criminal offence by being a member
18 of the IRA or a member of the UVF or such proscribed
19 organisation he would be committing a criminal offence?

20 A. Absolutely, yes.

21 Q. And therefore he would be debarred from being used if the
22 Home Office guidelines were followed rigidly?

23 A. Correct.

24 Q. That's really what you're saying? A. Yes .

25 MR BOAL: My Lord, I'm sorry I've got to put it in this way I
26 haven't got the Home Office guidelines. The defence has
27 asked the Home Office for it in order that the Court may be
28 properly advised as to the framework within which in fact
29 the agents should have been working, we were not granted
30 them and I've got, therefore, to put the questions in the

1 rather speculative way that I do I'm sorry about that.

2 LORD JUSTICE KELLY: He seems to imply that they're rather
3 irrelevant in this case.

4 MR BOAL: Not so much irrelevant as inappropriate. That's what
5 you're saying? A. Yes, I am, yes.

6 Q. Do you find any help from them at all in the Northern
7 Ireland terrorist situation? A. I think they make
8 things very difficult for anyone who is trying to run agents
9 or infiltrate agents into a terrorist organisation in the
10 midst of the terrorists in order to get the information we
11 require.

12 Q. Can you observe the guidelines and have an agent in the IRA
13 or UVF? A. No, not in my opinion.

14 Q. Do you know as a matter of interest if any attention has
15 been paid to this problem? A. This problem, to the
16 best of my knowledge, was actually raised at the outset of
17 the Stevens' Inquiry or around that time, I can't remember
18 the exact date, and we did raise concerns up until then I
19 hadn't actually, myself, been made aware that too closely of
20 what the guidelines had been they were not something
21 regularly used and it was not until around that stage Home
22 Office guidelines were shown to me. We raised concerns
23 obviously straight away and it was my understanding that
24 something was going to be done about this. I really do not
25 know whether since then anything has been done about it.

26 Q. It hasn't reached you anyway? A. No.

27 Q. Or this Court. Now, to go back to his return and
28 reinvovement to your knowledge what did he, in fact,
29 involve himself in, when he returned? A. What he did,
30 and he had a very difficult problem here because we had to

1 get him into a position where he had the confidence and
2 trust of his associates among the paramilitary groupings
3 and, therefore, we tried to get him to get involved in the
4 intelligence structure to make it clear that he was an
5 efficient collator, he was a person that could be trusted
6 and that would be able to research the intelligence records
7 that he already had and had come into his possession the
8 minute that he became involved again. And we really tried
9 to get into a position whereby any targets for assassination
10 were being discussed with him and his system so that he
11 could then inform us so we, in turn, could inform the RUC
12 and indeed that happened on many occasions. We were quite
13 clear that we could never guarantee one hundred per cent
14 that he would be privy to life-saving information all of the
15 time, that he would be privy in advance to the paramilitary
16 plans.

17 Q. I'll come to that in a moment. It's very useful that you
18 should say that, but just for the moment as an intelligence
19 officer he would be required to have a number of documents?

20 A. Yes he would, yes.

1 Q. You knew that? A. We knew that because once he had
22 managed to gain the confidence of his associates over the
23 first few weeks and months, he was given charge of a large
24 amount of material that was already in the UDA hands.

25 Q. What did he do with that? A. He brought it to us, we
26 studied it, photocopied it where necessary for reporting,
27 passed parts of it to the RUC that was relevant for their
28 comment and then generally, for security reasons obviously
29 for his security and gave them back to him and he took them
30 to where he would have them.

1 Q. So there's no doubt about what you were saying, that was a
2 bulk transfer that he made to you initially? A. Yes,
3 it was it was quite a large amount of documents that he
4 showed us.

5 LORD JUSTICE KELLY: Can you say when he did it, when he gave it
6 to you?

7 THE WITNESS: My Lord, from memory I think this was in the first
8 half of 1987. I think perhaps May 1987

9 MR BOAL: Pretty well as soon as he got his feet in the
10 organisation? A. Yes.

11 Q. And that was passed to you in bulk? A. Yes.

12 Q. It was analysed by you, some copies were taken? A. Yes
13 there was a large amount of material that was duplicated.
14 The sort of things we're talking about are photo montages,
15 reports from sectors of the security forces and all sectors
16 of the security forces and a large amount of material that
17 they themselves had researched and it was brought to us and
18 we looked at it and we reported on it.

19 Q. Now, that's the bulk transfer? A. Yes.

20 AS TO SB 11:20

1 Wednesday, 29th January 1992

2 R v Brian Nelson

3 SB FROM AS 11.20

4 Witness 'Colonel'

5 (Contd) Examination in chief by MR BOAL:

6 Q. Thereafter, that is after the 1987, the latter part of 1987,
7 1988, '89, were you aware that he received further
8 documents? A. Yes, we were, and in almost every case
9 when it was conveniently safe for him to do so he brought
10 them to us and we would photocopy them and then pass them on
11 in the form of reports and then he would take them back to
12 his safe hiding place.

13 Q. And if at any time you required sight of a document, either
14 initially or a second sight of it, were you always able to
15 obtain that from him? A. From memory, I cannot remember
16 ever having difficulty getting documents from him. If there
17 was a difficulty or a delay it was because we had serious
18 security considerations for his own safety, but generally
19 speaking if we wanted the documents we got them and that was
20 of course exemplified when finally the whole of the
21 intelligence records within his personal possession were
22 brought out and we asked him for them and he gave them
23 willingly and we took them into our care.

24 Q. At one time the intelligence documents, we will call them
25 the intelligence documents of the UDA, were transferred from
26 one physical place in Belfast to another? A. Yes, they
27 were. And this was really -----

28 Q. Were you told about that beforehand? A. Yes, we were
29 and indeed we helped to facilitate this transfer by giving
30 him a sort of secure passage. And the reason we wanted him

1 to move them was because he had, I think I believe, them in
2 his own house and we wanted him to move them to another
3 house where they would be safer. And in doing so we tried
4 to make the position as safe as possible by informing the
5 RUC that we had an interest in that address, the new
6 address, I can't remember myself exactly how that was
7 briefed to the RUC, I can't comment on that, but we did tell
8 them this was a normal practice. If there were houses of
9 interest to either my own organisation or to Special Branch
10 or any other organisations, it was normal for the Special
11 Branch to keep a watch on these addresses so that if other
12 elements of the RUC, uniformed branch or the CID wished to
13 do a search for any reason, at least Special Branch
14 interests and our interests could be looked after in advance
15 and this was all for agent protection obviously.

16 Q. Does it just mean so that they ~~wouldn't~~ be searched?

17 A. Yes, unless absolutely necessary. It was to allow us to
18 maintain the agent's security.

19 LORD JUSTICE KELLY: You didn't consider the documentation was
20 enough, you wanted something more from him, did you?

21 MR BOAL: I'll be dealing with that, my Lord.

22 LORD JUSTICE KELLY: May I ask a question now?

23 MR BOAL: I'm dealing with documents at the moment.

24 LORD JUSTICE KELLY: What more did you want from him apart from
25 passing the documentation?

26 THE WITNESS: My Lord, we wanted as much information as we could
27 from him about the inner workings of the Loyalist
28 paramilitaries, his associates at the top level in the UDA,
29 what their plans were, what their policies were, anything he
30 could tell us about the workings, but most of all of course

1 we wanted to find out from him what their intentions were
2 with regard to murderous activities. And by placing him in
3 that position of course, and because he was in charge of the
4 records, this meant that if planning was going on in many
5 cases they would come to him or come to his structure and
6 say what do you know about this, what do you know about that
7 and that gave us an immediate clue as to the sort of people
8 that they were planning to assassinate or they were thinking
9 about planning to assassinate. And, therefore, that was
10 potentially life saving information.

11 MR BOAL: Now, you knew about the documents, you knew where they
12 were, you had copies of them when you wished them.

13 A. Yes.

14 Q. What use was he making of the documents to your knowledge?

15 A. Well, he of course is the senior intelligence officer,
16 as he eventually became, but as an intelligence officer had
17 to obey the orders of his superiors in the organisation and
18 they would be the ones that would come to him and say:

19 Right, we're interested in such and such a personality, have
20 you got any information on him, have you got a photograph of
21 him, have you got an address for him? In many cases he did,
22 in some cases he didn't and he would obviously give the
23 information if he had it, but at the same time he was then
24 telling us and we were passing it on in the form of reports
25 that there was an interest in this particular person.

26 Q. So first you knew that he was making use of them in this
27 way? A. We did indeed, yes.

28 Q. Secondly when he made use of them in this way how did he
29 convey that to you? A. He was normally met on a regular
30 basis and that sort of information would normally be passed

1 on when he was met. Occasionally, if it was a pressing
2 point and there was a worry that some action might be going
3 to take place in a short space of time, he would telephone
4 in. But telephoning is a particularly dangerous means of
5 passing information, it wasn't something that was
6 necessarily encouraged.

7 Q. How often would these regular meetings take place?

8 A. It's difficult to be precise because there would be no
9 pattern for obvious security reasons, but perhaps if I say
10 on a regular, almost a weekly basis.

11 Q. You, because of your position over the years, have some
12 understanding as to how these paramilitary organisations
13 work. There is a principle which is known colloquially as
14 the 'need to know' principle. Would you just explain that
15 to his Lordship? A. Yes, my Lord. The need to know
16 principle is quite clear. We wish to restrict knowledge of
17 the agent's identity to -----

18 Q. No, sorry, within the paramilitary organisation how do they
19 operate the need to know principle? A. Quite clearly
20 because they work in compartments and, therefore, in
21 relation to the intelligence structure, for instance, a
22 murder gang or a leader of a murder gang might well come
23 along to the intelligence officer and say what have you got
24 about a particular personality and would get the answer. He
25 wouldn't say any more necessarily. He could go away then
26 and plan whatever he had to plan or to take the thing
27 forward, and the intelligence officer was not really in a
28 position to know who was going to be involved or when
29 attacks were going to take place or how the planning was
30 going to be carried out. In some cases he might find out,

1 but by no means in all cases and there were many occasions
2 when Brian Nelson, as an intelligence officer, found out
3 only that there was an interest in a particular name or a
4 particular personality and he passed that on, but we weren't
5 in a position to find out any more about it. Whenever we
6 could we did or he did.

7 Q. There would be occasions, would there, when he would be
8 indicating to you, when I mean you I mean the intelligence
9 structure, that interest was being expressed on a number of
10 occasions against a particular person? A. Yes, indeed,
11 and there were several cases where targets for assassination
12 were brought to our notice by Brian Nelson and we produced
13 reports. I think in all, if you wish me to quote
14 statistics?

15 Q. Yes, could you give us some numbers? A. Yes. I think
16 in the period from 1985 to 1990, ~~or~~ until his arrest, we
17 produced on Brian Nelson's ~~information~~ something like 730
18 reports concerning threats to 217 separate individuals.

19 Q. That's threats to the life of you mean? A. Yes, threats
20 to the life of individuals. In all cases these were passed
21 on for action. Of the 217 of interest, that of the 217
22 personalities that were named in his reports and our
23 reports, five of them died. One at the hands of the
24 security forces in Gibraltar, one from natural causes and
25 three at the hands of the Protestant paramilitaries, and I
26 think I'm referring to three names Siane, Davidson and
27 Craig.

28 Q. And another. In your view what is that indicative of?

29 A. In my view it's indicative that he was a prolific
30 provider of information, that although there were occasions

1 when Loyalist attacks did take place, where murders did take
2 place, he was not privy to advance information about these
3 activities, but he did produce a tremendous amount of
4 information referring to their plans and their targets for
5 assassination and this was of course of life saving
6 potential.

7 Q. In the case of two of them, that is McDaid and Slane,
8 Mr Kerr's already dealt with that in opening, in fact I
9 understand he did provide information on a number of
10 occasions about both those people before their deaths.

11 A. Well, in the Slane case certainly. In the McDaid case
12 of course there was a mistaken identity. He had been
13 reporting on a number of occasions the possible threat or
14 the threat to Declan McDaid.

15 Q. That's his brother. A. He was not aware that there was
16 any interest in Terence McDaid and, therefore, when Terence
17 McDaid was killed he was shocked, the fact was that there
18 had been a dispute over addresses and he had made it quite
19 clear that the address at which Terence McDaid was staying
20 was not the address that Declan McDaid was staying. And
21 afterwards he took his associates to task and said, to the
22 best of my memory, my Lord, I did not tell you that that
23 address was Declan McDaid's address. I did not give any
24 clearance for further action.

25 SB TO AS 11.30
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Wednesday, 29th January 1992

R.v. Brian Nelson

AS FROM SB 11:30

WITNESS 'COLONEL'

(Cont'd) Examination in Chief MR BOAL:

Q. To remedy a clear misunderstanding that is publicly entertained apparently, does your knowledge allow you to say that although he gave information about McDaid he gave information about Slane that that information was not specific enough to prevent the deaths of either Slane or McDaid?

A. No, he was not aware, as far as I can remember from my recollection of the facts, he was not aware that there was a particular imminent threat to Slane, he knew that Slane was, I think, one of about four targets that were being considered and he passed that to us, and we in turn passed it on.

Q. Quite frankly or quite bluntly are there a number of people who owe their lives to him at the present time?

A. Indeed they are, including some very well known personalities.

Q. Some perhaps who have been complaining about his activities?

A. That might well be the case, certainly in early '87 around May 1987 the then President of Sinn Fein, Mr Adams, came under threat and on this occasion we were able, through Brian Nelson, to gain quite a lot of knowledge about their plans to assassinate him.

Q. It was quite specific on this occasion? A. Yes, it was indeed, we knew where they were going carry out the assassination.

Q. And the time? A. And when.

1 Q. And the manner? A. That's correct.

2 Q. And then? A. And then as a result of that we were able
3 to pass it on to the police. We were able to plan an
4 exploitation operation to prevent it happening.

5 Q. I don't particularly want to go into personalities but the
6 one you gave it us is a good example. Have you any doubt
7 that his life was saved by Nelson? A. I have no doubt
8 whatsoever that that attack might well have taken place
9 without anyone's knowledge.

10 Q. It was, I think, proposed to be done by a particularly
11 effective and deadly way? A. Yes, it was going to be
12 carried out by a limpet mine attack, my Lord, on Mr Adam's
13 car.

14 Q. On the roof of his car? A. Yes.

15 Q. He was passing this sort of information to you over a very
16 significant period of time, as you have said, and in a very
17 significant volume of cases. From your understanding of his
18 position, of your understanding of the workings of the UDA,
19 can you explain to the Court the difficulties that he would
20 have had in respect of his own security in doing that?

21 A. Yes absolutely. He was placed in a most difficult
22 position. Terrorist organisations in the U D and UVF and
23 other paramilitary organisations, they're all the same on
24 this, they are very mindful of their own security, they're
25 very conscious of the fact that they might have agents
26 within their midst and they're constantly on the look out
27 for them. Therefore, Brian Nelson, as an agent within their
28 midst, was in a particularly hazardous position. Meeting
29 his handlers was a very hazardous activity. There are known
30 incidents of agents being follow to a meeting, being

1 identified with their handlers and being compromised as a
2 result. Telephone calls are even risky. There are known
3 incidents of the agents being compromised through cross line
4 situations, even being seen in a public telephone box and
5 even telephone calls at home are risky because the danger of
6 being heard by children who might pass it on, pass some
7 information on. So he was in a particularly vulnerable
8 position there and he, of course, faced almost certain
9 brutal interrogation and an equally brutal death if he were
10 even compromised the slightest slip could have led to his
11 being compromised. He, therefore, was in a position of
12 great strain. His health suffered, I know, as a result of
13 the strain he was placed under over the three year period.
14 He was -- he had a Schizophrenic existence. He was torn
15 between the requirements of his terrorist associates, his
16 need to allay their suspicions at all times, to gain their
17 confidence and at the same time he had to satisfy the
18 requirements of his handlers to provide as much information
19 as he could. This was a very difficult thing for him to do
20 and we must remember, my Lord, that for ninety-five per cent
21 of the time he was on his own. Certainly he met his
22 handlers regularly but we're only talking about a few hours
23 a week where they could counsel him and help him and try and
24 instruct him. The rest of the time he was on his own. The
25 rest of the time he was, to quote a cliché, 'out in the
26 cold'. He was responsible for making the decisions about
27 the information. He had to rely on his own judgment. He
28 had to decide whether information was so important that it
29 needed to be passed immediately at risk to himself or
30 whether it could wait until the next meeting. He had to

1 decide whether he should go along with his paramilitary
2 associates in their activities because his life would be in
3 danger and he would come under suspicion if he didn't. He
4 had to decide whether to encourage them or to try and
5 discourage them by, for instance, saying: "No I don't think
6 that target is worth while because it's too dangerous", or
7 give some other excuse. He was responsible for making all
8 these decisions himself and it's no surprise. it's certainly
9 no surprise to me, that he didn't get it right all of the
10 time. He was in an extremely difficult position. I don't
11 believe there is anyone in this Court room here who would
12 want to be placed in that position, who would be as
13 courageous as Brian Nelson was in that position. He was
14 bound to make mistakes and undoubtedly he did. There were
15 times when he did not pass on the information quickly
16 enough, when he didn't telephone ~~when~~ when he should have
17 telephoned. There are times when he perhaps got too
18 involved with the paramilitary associates, where he forgot
19 temporarily his true role but they're all very explainable
20 as far as I'm concerned because of the strain and the
21 dangers, the strain that he was under and the dangers he
22 lived with day in and day out. He is actually a very
23 courageous man.

24 LORD JUSTICE KELLY: In what way did he get too involved at
25 times?

26 THE WITNESS: There were times, my Lord, when he was asked to try
27 and provide information about people and he would get
28 involved in trying to find out where they lived, he would
29 take a personal interest in finding out where they lived so
30 he could tell the terrorist associates or try and find out

1 about a person's movement in order so he could tell the
2 terrorist associates and, of course, he did tell us as well,
3 and normally, in fact in all cases afterwards and for that
4 reason he was taken to task by his handlers but I go back
5 again to what I say, it was his judgment at the time and we
6 had to rely on his judgment and we could try and counsel him
7 as much as possible and say: You must not get too much
8 involved, you must play a neutral line, keep their
9 confidence and get the information to us. It was extremely
10 difficult for him, I do understand that.

11 MR BOAL: You recognise it was almost impossible to play a
12 neutral line and at the same time get information that was
13 worthwhile passing to you? A. I think it's worthwhile
14 saying there's absolutely no doubt in my mind that Brian
15 Nelson was not loyal to the UDA, Brian Nelson was loyal to
16 the Army. He wished to help the Army in its attempts to
17 counter terrorism and to save ~~life~~ life, he wished to do that.
18 That was his prime motivation. He wanted to save life, he
19 wanted to make up for the past misdemeanours, he wanted to
20 help bring down the Loyalist paramilitary organisations and
21 he wanted to help the Army. He was a soldier by tradition
22 we shouldn't forget that and we wanted to continue to be a
23 soldier.

24 Q. It's an exemplification perhaps of the dangerous life he was
25 living, did you become aware of one occasion in which he, in
26 fact, came under suspicion and was interrogated in a brutal
27 way? A. He was indeed interrogated. He came under
28 suspicion, he was subject to brutal interrogation. He was
29 electrocuted with a cattle prod on a number of occasions,
30 and he survived through really the courage that we had come

1 to expect of him.

2 LORD JUSTICE KELLY: Can you say when this was?

3 THE WITNESS: My Lord, from memory I think it was in 1988.

4 MR BOAL: In case of misunderstanding you said electrocuted on a
5 number of occasions, it was one occasion but electrocuted on
6 a number of times? A. It was one occasion but the
7 cattle prod was used a number of times.

8 MR BOAL: August 1988 it was. A. Is it possible for me to
9 have a glass of water?

10 Q. Certainly. The Court has asked the date and you have heard
11 the date it was August 1988. Despite that he continued with
12 his work after that time? A. Oh yes, he did and he
13 survived that occasion really through courage and I remember
14 afterwards not surprisingly he had rather too much drink and
15 I remember that he phoned in on the records fairly drunk but
16 after that that released tension and he got on with it and
17 he survived and regained the ~~confidence~~ confidence of the associates
18 and continued to report to us.

19 AS TO SB 11:40

1 Wednesday, 29th January 1992

2 R v Brian Nelson

3 SB FROM AS 11.40

4 Witness 'Colonel'

5 (Contd) Examination in chief by MR BOAL:

6 Q. I would now like you to tell the Court the value that you
7 placed upon the reports and information you got from him and
8 the use that you made of it. A. Yes. In judging the
9 value of any intelligence reports there are two things that
10 we have to consider. First of all, the reliability of the
11 agent and secondly, the likelihood or not of the
12 information. And we went to a great deal of trouble to
13 assess the reports in that manner, and all reports, all
14 intelligence reports that we sent out were graded
15 accordingly. As far as the reliability of the agent was
16 concerned, my Lord, we had to ~~examine~~ ^{examine} whether he was by
17 nature reliable, whether there was any history of him having
18 lied to us, whether there was any history of him having held
19 back information, whether he recalled names and dates and
20 places accurately or whether he had a bad memory. We had to
21 assess how he had got the information, had he got it himself
22 or had he got it from someone else and in what
23 circumstances. Was it, for instance, a pub conversation or
24 was it at a formal meeting? All these factors were
25 applicable to our assessment of the reliability of the
26 agent. When it came to the information we had to obviously
27 judge the information against information from other sources
28 to see if there were any corroboration. We had to judge the
29 reports, the likelihood of the reports against what we knew
30 to be the general intelligence picture. We had again to go

1 into the detail of how he had actually found out the
2 information, who had told him, what were the circumstances,
3 exactly what was said. And having done that we would
4 produce an intelligence report with an assessment of his
5 value. Now, having said all that the assessment of these
6 reports was carried out on a number of stages. It was
7 carried out by the handler himself. It was carried out by
8 his immediate superiors. It was then carried out by myself
9 and by my senior colleagues in my headquarters.

10 Furthermore, it was carried out by the recipients of the
11 information which would be Special Branch, RUC Special
12 Branch at regional and headquarters level, security service
13 desk officers, military civilian and police assessments
14 staff. All these people would have a say in commenting on
15 the report.

16 Q. In a sentence how did you regard the quality of the material
17 that you obtained from him? A. Well, as far as we were
18 concerned, and I had no reports from anyone else to the
19 contrary, the reports were of a high value, they were
20 accurate and they were passed on in that spirit and were
21 received in that spirit.

22 Q. Perhaps to illustrate the quality that you attributed to
23 these reports, to whom did you in fact pass them on?

24 A. Well, the reports were passed on in a variety of ways
25 and this was common to most of our reporting. As a routine
26 measure the essentials of the information were always passed
27 to RUC Special Branch in intelligence reports. They were
28 also passed to military addressees, to civilian addressees
29 in the security apparatus. In addition to that with an agent
30 of his standing and access, we would often produce extra

1 reports which were much more detailed and these reports
2 would go to people who knew his identity, i.e. we're talking
3 about senior Special Branch officers, security service
4 officers. In addition to that regular verbal briefings were
5 carried out on his information.

6 Now, I myself gave monthly briefings to GOC, to the
7 CLF, to the director and coordinator of intelligence and his
8 senior security service officers. And it would be quite
9 normal for Brian Nelson's case and his information to be
10 referred to in these monthly briefings. Furthermore we
11 would have further dissemination of these reports was
12 possible through these other agencies. For example, the
13 Chief Constable would have been made aware, it would have
14 been the Special Branch responsibility to inform the Chief
15 Constable, for instance, there was information relating to
16 leaks of information from the ~~security~~ forces to the
17 Loyalist paramilitaries and I know that that was brought to
18 the attention of the Chief Constable. At the same time
19 there was information produced that referred to possible
20 Loyalist attacks in the Republic of Ireland and Special
21 Branch would have been responsible for disseminating that
22 further to Dublin. As far as Stormont is concerned, and
23 obviously the Secretary of State might have an interest in
24 some of the reports. In other words Brian Nelson's product
25 and his reporting was passed throughout the intelligence
26 community and at a high level, and from that point of view
27 he has to be considered a very important agent, certainly as
28 far as we were concerned and certainly as far as I'm
29 concerned he was a very important agent of some standing and
30 his product was appreciated.

1 LORD JUSTICE KELLY: Do I take it that you had personal knowledge
2 of all these five conspiracies to murder that I am dealing
3 with?

4 THE WITNESS: I am aware, yes, my Lord, I am aware of the
5 information that was passed relating to these conspiracies
6 to murder. He in fact reported the threats to the
7 individuals concerned on more than one occasion, in some
8 cases, I think in the case of Mr Gillen there were at least
9 12 reports before the incident which led to the conspiracy
10 charges. I think there was something like 12 reports, but
11 in all there was something like 28 reports produced about a
12 threat to
13 Mr Gillen's life.

14 LORD JUSTICE KELLY: He seemed to initiate some of these himself
15 or with others.

16 THE WITNESS: My Lord, he was working within a structure and he
17 was the intelligence officer ~~and~~ and he was expected to produce
18 intelligence that would include targeting intelligence or
19 targeting information.

20 LORD JUSTICE KELLY: But from your point of view was he supposed
21 to do this, to start a conspiracy off by furnishing a name
22 or possible target?

23 THE WITNESS: Sir, to the best of my knowledge I can't remember
24 him actually initiating something. There would be
25 discussions with his terrorist colleagues or his
26 paramilitary colleagues at which names would come up. It
27 was never our intention, nor indeed his intention, to
28 initiate procedures at any stage of the game and from my
29 recollection of the files I do not believe that that was the
30 case.

1 LORD JUSTICE KELLY: He was asked to provide a name or someone,
2 as the word was used, and he would choose a person as a
3 possible target.

4 THE WITNESS: Well, he was in a position, my Lord, where he was
5 the intelligence officer and they were saying to him: Right,
6 we want a target, you are the man with the records, you
7 produce a name. He wasn't really in a position for his own
8 security to say: No, I'm not going to give you any names.
9 So he would give a name, but then he would tell us if that
10 were the case and if that's the way it happened.

11 MR BOAL: Arising out of that, I will be telling the Court, in
12 light of questions the Court has just put to you presently,
13 I will be telling the Court that on one occasion a person
14 who was known by him to be a murderer took a card from him,
15 that's a personality card, looked at it and put it back in
16 the file again without telling him who it was. He reported
17 this to his handlers and his handlers said do your best to
18 avoid that sort of thing happening again, because now we
19 don't know who they're targeting, which led him then when he
20 was asked for a target, bearing in mind the advice of his
21 handlers, to give them a target and pass on that information
22 to the security services. Would you agree that that was a
23 proper way for him to act in the circumstances? A. Yes.

24 Q. I'm not saying whether it's legal or legalistic, but in your
25 context was that a proper way for him to act?

26 A. Bearing in mind the difficult position he was in,
27 bearing in mind the fact that he was constantly under
28 threat, that he was never sure of his associates, there was
29 always a doubt in his mind as to whether they really trusted
30 him. He had to be very careful as to how he played them

1 and, therefore, if they were asking him for information and
2 asking him to do his job as an intelligence officer within
3 the UDA, he had to show willing. And the key was that
4 whenever he could, and in as timely a fashion as possible,
5 he would then report that to us so that we were in a
6 position to issue warnings and could take counter action.

7 SB TO AS 11.50

1 Wednesday, 29th January 1992

2 R.v. Brian Nelson

3 AS FROM SB 11:50

4 WITNESS 'COLONEL'

5 (Cont'd) Examination in Chief MR BOAL:

6 Q. As to whether that could be said properly to initiate a
7 conspiracy or not I will deal with perhaps presently but did
8 you see from your point of view anything wrong with his
9 coping with that situation in the way I have described?

10 A. No, I believe he had very little alternative without
11 drawing attention to himself and without coming under
12 suspicion. They were too willing to jump on him from that
13 point of view if he had stopped co-operating and if he had
14 not passed information on -----

15 Q. If he had said: No I'm not going to give you one, what would
16 have happened? A. Well, he might well have got a clout
17 round the ear, on the other ~~case~~ it might have been a lot
18 worse than that, he would have come under suspicion.

19 Q. Would he have remained intelligence officer very long?

20 A. I doubt it very much.

21 Q. On one occasion, as an example of the sort of information
22 that you're talking about, do you recall one occasion in
23 which you were told by him that he had been asked by a named
24 person, a known killer, to provide him with a photograph and
25 that photograph contained two people? A. Yes.

26 Q. And both he and his handlers were misled into thinking that
27 the interest of the paramilitaries was directed to one of
28 them whereas in the event it turned out to be the other?

29 A. That's correct, yes.

30 Q. Would you explain that to the Court? A. To the best of

1 my memory, my Lord, there was paramilitaries wanted to
2 retaliate for a murder of one of their own, I can't remember
3 all the details I'm afraid. And they said they were
4 interested in a particular person and they said to Brian
5 Nelson did he have a photograph of that particular person.

6 Q. Coming out of the courthouse? A. Coming out -- well
7 they asked him for a photograph he said yes, he did. He
8 produced a photograph of this particular individual coming
9 out of the courthouse and showed it to them and then he
10 reported that to us and we had every reason to believe, as
11 he did, that that was the target they were aiming to
12 assassinate.

13 Q. But in the event it turned out to be the other person?

14 A. Indeed, it was, yes.

15 Q. But -----

16 LORD JUSTICE KELLY: Sorry, to interr~~rupt~~^{rupt}. Did Nelson only have
17 possession and custody of the photographs and information
18 about these possible victims? Did the rest of the
19 organisation not have copies?

20 THE WITNESS: Yes, indeed they did and, of course, we have to
21 remember that there were othr paramilitaries, the
22 paramilitaries were in other regions and they had
23 sub-groupings as well as a main group. He was at the top
24 level and, therefore, he had what were really supposed to be
25 the central files but we were aware that there were other
26 files or other photographs and other information held by
27 other sections of the paramilitaries. We could only do what
28 we could within the area of his concern. For instance,
29 murders or attacks that took place really outside Belfast or
30 on the outskirts of Belfast, he would have no access to that

1 sort of information.

2 LORD JUSTICE KELLY: I would have thought there would have been
3 copies of the information and photographs available to other
4 members of the organisation apart from Nelson?

5 THE WITNESS: Well, of course, if he were asked to pass on
6 photographs and came under orders and was told by his
7 immediate associates we want photographs for so and so, or
8 for such and such a region, he would not really be in a
9 position to refuse that order.

10 MR BOAL: That was his position? A. Yes, that was his
11 position.

12 Q. Would you have been pleased if he had refused?

13 A. Well, if he had refused there is no doubt that his
14 position as the intelligence officer would have been
15 considerably eroded and therefore, in the long term we would
16 have lost out on his intelligence and at the same time he
17 would himself have been placed in danger.

18 Q. Lastly, I would like you to deal with your assessment of his
19 motivation; money, are you satisfied that money had nothing
20 to do with it? A. Brian Nelson's motivation was much

21 more honourable and reliable than money, than financial
22 motivation. There were two factors in determining his
23 motivation really. The motivation was something that we
24 looked at in all our agent case work in some depth as we did
25 all manner of other things to do with the personality of the
26 agent. We would often discuss with the agent family
27 problems, his worries, his anxieties, his aspirations, and
28 we would be constantly looking to assess and reassess his
29 motivation and that was done at various levels not just by
30 the handler often the handler wasn't in the best position to

1 judge that, he was often too close it had to be done further
2 back, by those sitting looking further back at reports with
3 a more objective view just to try and judge the man. Now,
4 as far as he was concerned I have no doubt in my mind that
5 his motivation was to make up for his past misdemeanours to
6 save life, and to bring down, eventually, the terrorist
7 organisations, but I think probably the biggest motivation
8 of all was team spirit and his loyalty to the Army. As a
9 matter of course it was our policy with Army agents to
10 encourage them in this business of team spirit. We wanted
11 to make clear to them that it was a team effort and they
12 were probably -- or they were the most important elements of
13 the team, the agent was at the sharp end and the handlers
14 were supporting them as they could and Brian Nelson took to
15 that, I believe, very clearly. He wanted to be a member of
16 the team and he wanted to to continue to work with the Army
17 and, as I have said already, his loyalty was to the Army and
18 to the security forces and the security system not to the
19 UDA. He actually put country before family, I believe,
20 because of the risks he took and the disruption to his
21 family life. He put country before family and to that
22 extent he was very loyal to the system and it embarrasses
23 me, personally, that the system, and we've already discussed
24 the business of guidelines, has been unable to recognise the
25 real difficulties of running agents within a terrorist
26 organisation, has been unable to recognise the dichotomy
27 between terrorist or counter terrorist situation and a law
28 and order situation and as a result Brian Nelson is a victim
29 of the system to which he was actually very loyal. I feel a
30 personal moral responsibility to Brian Nelson because

1 whatever he might have done or not have done, he wouldn't
2 have done it if I hadn't been responsible for ordering his
3 re-recruitment in January 1987. I believe, however, that
4 the real moral responsibility doesn't lie with individuals
5 or any organisations that are involved in this business, but
6 within a system that hasn't been able to come to terms with
7 the peculiarities and the difficulties of the agent work in
8 Northern Ireland.

9 MR BOAL: Thank you.

10 LORD JUSTICE KELLY: Mr Kerr?

11 Cross-examination by MR B KERR:

12 MR B KERR: Colonel, has the acute moral responsibility that you
13 feel for Brian Nelson influenced the perception that you
14 have reached about the offences to which he has pleaded
15 guilty? A. No, I was in the business of running agents
16 and trying to recruit and ~~infiltrate~~ ^{infiltrate} agents into terrorist
17 organisations in order that we could save life and bring
18 down and disrupt these terrorist organisations. I know that
19 the only way to gain inside knowledge that we desperately
20 need is by running and recruiting agents and infiltrating
21 them into the organisations and I believe that entirely and
22 we have got a situation here where we are trying our best to
23 save life in Northern Ireland, where we're trying to disrupt
24 these terrorist organisations and at the same time, when we
25 put someone into that situation, the most dangerous and
26 difficult situation, we don't have a system that allows us
27 to operate fully without the law.

28 Q. May I take it that the value that you obviously place on the
29 running of agents and your well developed sense of the
30 danger into which those people are placed, does not lead you

1 to the view that agents can involve themselves in criminal
2 activity? A. I think we've already covered this.
3 Agents by their very nature if they're in a terrorist
4 organisation are committing criminal acts just by membership
5 alone and, therefore, it is very, very difficult well nigh
6 impossible to avoid for an agent to avoid some sort of
7 criminality. Now, as I have already said in Brian Nelson's
8 case perhaps there were errors of judgment and I have said
9 there were mitigating circumstances for these errors of
10 judgment in my opinion. But generally speaking we have to
11 be realistic and realise that an agent in the midst of that
12 sort of murderous type of organisation is bound to get
13 himself involved in some degree of criminality.

14 AS TO SB 12:00

Wednesday, 29th January 1992

R v Brian Nelson

SB FROM AS 12.00

Witness 'Colonel'

(Contd) Cross-examination by MR B KERR:

Q. Well now, in characterising those as errors of judgment, on what material did you rely in reaching the view that these offences to which he has pleaded guilty could be put down to errors of judgment on his part? What was the material that you used to reach that judgment? A. The material I used were the reports on our own files, the reports that the handlers had received from Brian Nelson, his description of how events had unfolded and what he had done. He was, to my mind, very honest in that. He admitted things that he had done wrong. He didn't try and hide them from us to the best of my knowledge and, therefore, I base my opinions only on the written records, my Lord, that we have and the very extensive records we have recording our meetings with him.

Q. Well, before you came to Court today, knowing that you were, presumably knowing that you were going to be asked for your judgment about his involvement, did you refresh your memory from those records? A. It would have been difficult for me to come into Court without having done so because after all it's really two years since I had any real sight of these records.

Q. I see. A. I have to say that in the time that I had I was able to do that only on a cursory basis.

Q. I see. A. And what I did was that I looked through the files very quickly and a summary of the files just to remind myself of the general trend in the case.

1 Q. So the judgment that you bring to bear on his involvement
2 and the evidence that you give is based on a cursory
3 reminder through the files before you gave evidence, is that
4 right? A. Yes, but a reminder is a reminder. I still
5 had a lot of knowledge in my brain and I still remembered
6 the case. There were instances and dates and places and
7 times that I couldn't remember and that was the sort of
8 thing that would concern me. Even now if you ask me for
9 detailed answers I would have to refer to the files to be
10 able to give a truthful and honest answer. But my feeling
11 for the case, my feeling for Brian Nelson was as a result of
12 living with his case over a three year period.

13 Q. Well, you use a telling word there when you say your feeling
14 for Brian Nelson and your feeling for the case, do you
15 accept the possibility that your feeling for Nelson has
16 clouded your judgment about this? A. Perhaps I misled
17 you when I talk about feeling, I mean an overall assessment
18 really. My overall assessment of the case and of his
19 performance. That is based -- you've got to remember that
20 over that period we received lots of reports from Brian
21 Nelson, we discussed his case often and, therefore, in my
22 mind I would have formed opinions as I went along. When I
23 talk about feeling for a case I really, I'm really
24 indicating what I believe to be the general run of the case,
25 his general motivation and the way in which the information
26 was passed over.

27 Q. Did you know, for instance, in relation to the murder of
28 Terence McDauid, did you know that Nelson had made statements
29 about that to investigating police officers? A. I was
30 made aware of that by the investigating officers, yes.

1 Q. But no doubt you're not privy to the information that Nelson
2 gave to the investigating officers? A. No, I'm not, no.

3 Q. Do you know that McDaid, Mr McDaid was murdered on the 10th
4 of May 1988? A. I couldn't swear that I already knew
5 that, if you tell me that's the date then I'm sure it is.

6 Q. Do you know or can you confirm that the last meeting that
7 Nelson had with his handler before the murder of Mr McDaid
8 was the 19th of April 1988? A. If that is what is on
9 our record then I'm sure that is the case.

10 Q. Do you know that between the last meeting on the 19th of
11 April 1988 and the 10th of May 1988 Nelson conducted
12 surveillance and established visual sightings of Declan
13 McDaid on several occasions? A. I'm sure that that
14 would have been reported on our records and, as I've already
15 indicated, he did and we did indicate that Declan McDaid was
16 under threat.

17 Q. No, I'm putting to you that after the 19th of April 1988,
18 the last meeting with the handler before the murder of
19 Mr McDaid on the 10th of May, after that meeting he
20 conducted surveillance and established visual sightings of
21 McDaid. A. Yes, but there's a Declan McDaid and Terence
22 McDaid.

23 Q. Quite so, but no information was relayed to the handler
24 about his activities during that time, that's what I'm
25 suggesting to you. A. My Lord, I would have to check my
26 own records to be absolutely sure whether he reported this
27 or not. I feel sure that in all cases where he was
28 indulging in intelligence activity he would tell us about
29 it, but without consulting the records I couldn't at this
30 moment say.

1 Q. But the question is, how sound is that conviction that you
2 expressed? This is the point that I want to put to you,
3 Colonel. You see, I understand that from your earlier
4 evidence that you had understood that Mr Nelson told his UDA
5 associates that Mr McDaid, that is Declan McDaid, did not
6 live at Newington Street, is that right? A. The address
7 at which Terence McDaid was killed he said that that address
8 was not Declan McDaid's address and he was intent on, he was
9 being asked what the address for Declan McDaid was, he was
10 passing on information to us that there was a threat to
11 Declan McDaid and, therefore, he was establishing that his
12 terrorist associates knew where Declan McDaid lived and he
13 reported that to us.

14 Q. Would your judgment about this matter change, Colonel, if
15 you discovered, as I suggest to you was in fact the case,
16 that Nelson admitted to police officers that between the
17 time of his last contact with his handlers and the murder of
18 Terence McDaid that not only had he conducted surveillance
19 and established sightings of Declan McDaid, but had reached
20 the view himself that he was living at four Newington Street
21 and that he told Winkie Dodds that he was sure that he was
22 living at Newington. A. I have no recollection, my
23 Lord, of that on our files and I would have to consult them
24 to be sure of giving a truthful answer, but I certainly,
25 what I remember from our files is that he did not know of
26 the, he did not know that that attack was going to take
27 place and he did not know that that address was the one that
28 they were interested in.

29 Q. But what I suggest to you, what I've just suggested to you
30 is quite contrary to the impression that you had about the

1 matter and that you relayed to the Court earlier, isn't that
2 right? A. Well, I can only give my opinions and I can

3 only say what I believe to be the case from my own

4 knowledge. My own knowledge is based on our files, my Lord.

5 LORD JUSTICE KELLY: Well, I think what counsel is putting to you
6 has been taken from Nelson's own statement to the police.

7 THE WITNESS: Yes, I understand that, my Lord.

8 LORD JUSTICE KELLY: And the facts that he's putting to you so
9 far were in fact stated by Nelson in his statement to the
10 police: I'm sure that he's staying at Newington Avenue.

11 THE WITNESS: My Lord, if that is the case then obviously I was
12 not privy to that information and didn't know about it. And
13 I would have to know more about the circumstances in which
14 he carried out this surveillance and know more about what he
15 himself has reported, sometime afterwards of course, to be
16 able to give a judgment on it.

17 MR B KERR: And it follows, does it not, from that that at the
18 very best you are making a judgment from incomplete
19 evidence, isn't that right? A. Well, if you tell me
20 that Brian Nelson has made statements to the police of which
21 I am not aware then you must be correct in saying that, but
22 that doesn't take away from my conviction which is based on
23 my own knowledge of the case.

24 Q. Well, let me then turn to your own knowledge of his
25 participation in the attempt to murder Alex Maskey.

26 A. Yes.

27 Q. Do you accept that at no time before -- yes, I'm sorry
28 conspiracy to murder Alex Maskey, do you accept that at no
29 time before the conspiracy was hatched and Nelson's
30 participation in it was complete did he make contact with

1 his handlers? A. In the events which led up to the
2 conspiracy from what he told us afterwards and we recorded
3 on files, it is clear that there were possibly occasions
4 when he might have telephoned us. I do believe that he may
5 well have tried to telephone us, that the telephone box was
6 broken, that he didn't wish to do so from his home because
7 his sons were in the vicinity and these are reasons which
8 actually I accept in part. I've said there were errors of
9 judgment and I do believe in this particular case he could
10 well have made more of an effort to contact us beforehand.

11 SB TO AS 12.10

1 Wednesday, 29th January 1992

2 R.v. Brian Nelson

3 AS FROM SB 12:10

4 WITNESS 'COLONEL'

5 (Cont'd) Cross-examination by MR B KERR:

6 Q. Now, you say that you accept these explanations in part, do
7 you accept that it was an excuse or an acceptable excuse
8 that he didn't telephone you, didn't make contact with his
9 handler from his own home? A. I think that it may have
10 been difficult for him to do so, I think probably he could
11 have done and that was an error of judgment.

12 Q. Well you see, I have to suggest to you that it goes far
13 beyond an error of judgment and the evidence for that comes
14 from the words of Mr Nelson himself because when he admitted
15 his involvement in this, he told the interviewing officers
16 he couldn't phone his handlers ~~from~~ the house because his
17 sons were knocking about the house which, in reality, was a
18 poor excuse. Those are his words and I have to suggest to
19 you that there is no acceptable excuse for his failure to
20 contact his handlers in relation to what he knew was planned
21 for Mr Maskey? A. Well, when you say he knew what was

22 planned there was a lot of comings and goings that night as
23 I remember from his files, nothing ever actually came of it.

24 Now, there were occasions, and I think he has already
25 entered a guilty plea to this offence, he has already
26 entered a guilty plea so he obviously accepts his guilt in
27 this matter and I have to go along with that. He is the man
28 who makes the plea. What I'm saying, in mitigation, and
29 remember I have been asked to give evidence in mitigation,
30 I'm saying that he didn't get it right all the time, but he

1 got it right an awful lot of the time.

2 Q. You see, it's not simply a question of not getting it right,
3 I have to suggest to you, that his failure to contact his
4 handlers in relation to Maskey and his admitted
5 participation, not only in contacting people whom he knew to
6 be killers, but also in helping -- in returning to a number
7 of people and going to see whether Mr Maskey was still at
8 the Gregory Restaurant, that that all admits of only one
9 interpretation and that is that he was a willing participant
10 in the conspiracy to murder Mr Maskey? A. I can't

11 comment on whether he was a willing participant or not. If
12 I were to give an opinion on that it would be based on what
13 he told us on the files. I can't say that, only he can say
14 whether he was a willing participant or not. He has pleaded
15 guilty, he entered a guilty plea to this offence. What I'm
16 saying in mitigation is there were a lot of other things he
17 did and there were a lot of other potentially life-saving
18 information that he gave and lives were saved, so how do we
19 balance this off against this particular incident?

20 Q. Well, you see, what I'm suggesting to you is that you don't
21 balance it off by seeking to diminish or characterise his
22 errors of judgment, his obvious criminal activity in the
23 offences to which he has pleaded guilty and that's what you
24 have sought to do? A. No, I haven't sought to diminish
25 his guilt in any of these cases that he has already entered
26 a guilty plea for. I have said it's a very understandable
27 situation when you're living day to day when your life is at
28 risk and you're putting your life on the line. It's a very
29 understandable situation where you get drawn into activities
30 that you shouldn't get drawn into and that is the position

1 that we place these people at when we're running those
2 agents. I'm not seeking to diminish his guilt in this
3 thing. He has entered a guilty plea he accepts that he was
4 wrong.

5 Q. Do you know that in the case of Gillen, the conspiracy to
6 murder Brian Gillen, that he went of his own accord to carry
7 out a reconnaissance of the bar which Gillen frequented?

8 A. Again, I can't necessarily recollect that from the files
9 I'm sure I could confirm it if I had. If you're telling me
10 that's what he did and you have evidence on which to base
11 that, fine, if did he that but he was an intelligence
12 officer for the UDA I've already said that he carried out
13 the surveillance. In fact, in that particular case we were
14 highly dubious about the whole of the information. We were
15 highly dubious that Mr Gillen was ever going to drink in the
16 Sports Bar in Lisburn, he may have done but we were highly
17 dubious of all of that stuff and as I have already said he
18 reported on about twelve occasions before that incident that
19 Mr Gillen was being targeted and warnings had been issued.

20 Q. Do you know that he collected a home-made submachine gun for
21 use in the proposed murder? A. No, I don't and I'm not
22 sure that anybody does because my recollection of that
23 particular incident was that he got into the car with
24 someone else and there was a bag or some sort of receptacle
25 in the car and he asked what was in the receptacle and he
26 was told there was a machine gun he did not see a machine
27 gun to the best of my knowledge. He was told there was one
28 in the receptacle. He was not then in the position to
29 actually get out of the car.

30 Q. And is it not right, Colonel, that of the handlers under

1 your command, at least two of the handlers under your
2 command expressed concern to you about the activities of
3 Nelson? A. We have very extensive case files and
4 handlers when they write their notes, write it in a variety
5 of ways. They not only recording the information that was
6 given they're recording all sorts of personal details about
7 the source they're recording all the details about how the
8 meeting took place and where it took place and when it took
9 place and they are recording anything that is of real
10 relevance. And so, we were aware, yes, through the handlers
11 notes when they had worries.

12 Q. And an aspect of that worry was, wasn't it, that he was
13 going beyond what was required of him as an agent and
14 participating willingly in these events, isn't that right?

15 A. I don't believe that that was, in my reading of the
16 files, that actually it was said like that. I believe that
17 what the handlers were saying was: We must watch him, he's
18 getting himself into a situation here where he's been drawn
19 into terrorist activities, he's allowing himself to become a
20 little too enthusiastic. They were saying this and they
21 were telling him and they were saying to him: Look you have
22 to watch this, you condition not get yourself drawn in but
23 remember protect your own position as well. We go back to
24 the very difficult situation and the very fine line that I
25 talked about earlier on between him looking after himself
26 and at the same time allaying the suspicions of his
27 associates and at the same time trying to get information
28 from them.

29 Q. Well, is it not right that he was reprimanded on occasions
30 because he had gone beyond that line that you have

1 described? A. Yes absolutely we would not have been --
2 we would have been remiss in our duties if we had not done
3 so.

4 Q. But notwithstanding the fact that he was reprimanded he
5 continued to cause concern on the part of the handlers,
6 isn't that right? A. Because he continued to be in a

7 very difficult situation, he continued to be in the same
8 situation I have referred to time and time again

9 MR B KERR: Thank you.

10 LORD JUSTICE KELLY: Mr Boal, re-examination

11 MR BOAL: No thank you, my Lord.

12 LORD JUSTICE KELLY: Thank you very much.

13 (THE WITNESS WITHDREW)

14 MR BOAL: It would be the intention of the witness to leave not
15 only the Court but the country, my Lord, would that be with
16 the agreement of the Court? ~~--->~~

17 LORD JUSTICE KELLY: Yes, of course.

18 AS TO SB 12:20

1 Wednesday, 28th January 1992

2 R v Brian Nelson

3 SB FROM AS 12.20

4 Plea in mitigation by MR BOAL:

5 MR BOAL: My Lord, I indicated to the Court last week, I asked
6 the Court's indulgence to sit today instead of last week.
7 This was an important witness and in effect the plea would
8 be made through his mouth. And your Lordship now
9 appreciates why in fact I made the remark that I did. It's
10 been a very lengthy examination and cross-examination and I
11 want to submit, my Lord, that everything that that witness
12 has said is pertinent, is telling, is relevant to the case
13 in the sentencing of Brian Nelson and is appropriate to be
14 taken into account by the Court in doing that. None the
15 less, my Lord, there are a number of other matters which
16 should be taken into account ~~in~~ my submission and I would
17 propose shortly to address the Court on them.

18 There must be few cases, my Lord, in which there has
19 been more unmerited speculation in the public and in the
20 Press than the case of Brian Nelson. One has read and one
21 has seen the television over the last number of weeks
22 speculation upon speculation. A speculation which when
23 repeated over and over again then becomes a fact, and then
24 that fact is repeated as if it's historically and factually
25 true and becomes the basis for another assumption which then
26 becomes the basis of another speculation. And so at the end
27 of the day the public must, through the good offices of the
28 speculative journalists and interviewers who have thought it
29 proper to comment about a matter which they don't know
30 anything about, the public must be in a very bemused state

1 and must quite frankly not know exactly what the facts are.
2 In such circumstances it is very tempting, my Lord, for
3 somebody appearing for Nelson to seek to put right some of
4 these matters in an address to the Court. That would be
5 quite inappropriate and I hasten to say straight away, my
6 Lord, that I propose to discipline myself and to deal,
7 difficult though it may be, with matters which, in my
8 respectful submission, would be appropriate for your
9 Lordship to consider in the sentencing of Brian Nelson and
10 to ignore all the other matters.

11 What are those matters, my Lord, that are appropriate
12 to be considered in these circumstances? The first most
13 obvious one is the pleas of guilty, and indeed it might have
14 been forgotten by those who were in Court, although oddly
15 enough not by the witness, that this man Nelson has in fact
16 pleaded guilty to five conspiracies to murder. He has
17 recognised his fault and those who have advised him have
18 recognised that the facts being as they are in those cases
19 the only appropriate legalistic response is a plea of guilty
20 in respect of them. And, as I said, it needed the lay
21 witness to remind us of that in the course of his
22 cross-examination. But it mustn't be forgotten that he has
23 pleaded guilty, and my respectful submission is that the
24 first matter that the Court should take into account is the
25 fact that he has pleaded guilty to those charges.

26 My Lord, I'm not suggesting that there is a
27 relationship of inverse proportion between the difficulty of
28 a case that is presented to a man and the discount that he
29 obtains for pleading guilty to it, in other words I'm not
30 suggesting that the more difficult the case for him to face

1 the less discount he ought to get. The less difficult it is
2 for him to face a case the better defence and the more
3 discount he ought to get. I'm not suggesting that there's a
4 relationship of inverse proportion in that sense at all.
5 None the less the Court, as I understand it from the Court
6 of Criminal Appeal in England says, should take into account
7 the strength of the case against the accused and the
8 likelihood or otherwise of success if the accused were to
9 contest the case. And it's because of that that I ask the
10 Court to say that it's appropriate very shortly to have
11 regard to what might be the basis of a working defence at
12 least in the cases of the conspiracy to murder and the
13 possession of the documents without lawful authority or
14 reasonable excuse. And I assure the Court that I will deal
15 with that very shortly only to establish that, in my
16 respectful submission, the accused had in fact a working
17 defence to both those sets of charges.

18 First the conspiracies to murder; very shortly, my
19 Lord, the basis of such an offence would have been contained
20 and conveniently contained in the paragraph of the opinion
21 of Lord Bridge in the leading case of the Queen against
22 Anderson in 1985. My Lord, the matter can be conveniently
23 dealt with if I would ask your Lordship to hear the
24 paragraph that I am referring to, page 259. The first whole
25 paragraph at page 259: Lord Bridge says:

26 "There remains the important question
27 whether a person who has agreed that a
28 course of conduct will be pursued which,
29 if pursued as agreed, will necessarily
30 amount to or involve the commission of

1 an offence is guilty of statutory
2 conspiracy irrespective of his
3 intention, and, if not, what is the mens
4 rea of the offence. I have no
5 hesitation in answering the first part
6 of the question in the negative. There
7 may be many situations in which
8 perfectly respectable citizens, more
9 particularly those concerned with law
10 enforcement, may enter into agreements
11 that a course of conduct shall be
12 pursued which will involve commission of
13 a crime without the least intention of
14 playing any part in the furtherance of
15 the ostensibly agreed criminal
16 objective, but rather with the purpose
17 of exposing and frustrating the criminal
18 purpose of the other parties to the
19 agreement. To say this is in no way to
20 encourage schemes by which police act,
21 directly or through the agencies of
22 informers, as agents provocateurs for
23 the purpose of entrapment. That is
24 conduct of which the courts have always
25 strongly disapproved. But it may
26 sometimes happen, as most of us with
27 experience in criminal trials well know,
28 that a criminal enterprise is well
29 advanced in the course of preparation
30 when it comes to the notice either of

1 the police or of some honest citizen in
2 such circumstances that the only
3 prospect of exposing and frustrating the
4 criminals is that some innocent person
5 should play the part of an intending
6 collaborator in the course of criminal
7 conduct proposed to be pursued. The
8 mens rea implicit in the offence of
9 statutory conspiracy must clearly be
10 such as to recognise the innocence of
11 such a person, notwithstanding that he
12 will, in literal terms, be obliged to
13 agree that a course of conduct be
14 pursued involving the commission of an
15 offence".

16 My Lord, I don't need to refer at any greater length to
17 that judgment, but your Lordship will see immediately that
18 in fact there is there the legal basis of a defence in the
19 case of a conspiracy to murder. Now, that's not, my Lord,
20 to take away a concession, an acknowledgment of the fact
21 that some of the facts would have been difficult in the case
22 of Maskey, to put it mildly would have been difficult to fit
23 into that legal dictum, but none the less my respectful
24 submission is that that indicates very plainly a working
25 defence to those charges, and that working defence the
26 accused in fact has not availed himself of.

27 In respect of the other category of charges, namely the
28 possession of the documents without lawful authority or
29 reasonable excuse, the defence is pretty obvious, my Lord,
30 because I've stated it. Lawful authority doubtful,

1 reasonable excuse far from doubtful. What is, my Lord,
2 reasonable excuse? It's an excuse which appeals to a
3 reasonable man, and the reasonable man, it has been held, is
4 the embodiment, the personification of a juror or a Court's
5 social judgment. What would a jury's social judgment be of
6 a man who has documents in his possession as the result of a
7 course proposed by somebody in authority, as described by
8 the witness who has just given evidence, and who has those
9 documents and is using them for the purpose that is
10 described by the witness?

11 Now, that obviously, in my respectful submission, again
12 is a working defence, but again as I've made an
13 acknowledgment in the case of Maskey, I want to make an
14 acknowledgment in the case of the documents. That would
15 have been difficult to sustain, and I acknowledge it, in the
16 case of some of the documents which were handed by the
17 accused to people outside the organisation of the UDA. And
18 it was felt by his advisors, and accepted by himself, that
19 whatever defence of reasonable excuse was available to him
20 in respect of the other documents, such a defence could not
21 be maintained or probably could not be maintained, I like to
22 put it rather more speculative than that, in the case of
23 documents that he didn't retain and use for the purpose
24 described by the witness who has just given evidence, but in
25 fact deliberately handed over to representatives of another
26 organisation.

27 SB TO AS 12.30
28
29
30

1 Wednesday, 29th January 1992

2 R.v. Brian Nelson

3 AS FROM SB 12:30

4 (Cont'd) Plea by MR BOAL:

5 MR BOAL: That's why, my Lord, he has plead guilty in respect of
6 both, those sets of charges, but my submission is that there
7 was had he chosen to avail himself of it, there was in fact
8 a working defence to a great number of those, if not all of
9 those charges and that being so, my respectful submission in
10 final on this part is that he is entitled to a liberal
11 discount for his plea of guilty in respect of those charges
12 for that fact alone.

13 My Lord secondly, it will be obvious from what has been
14 said by the last witness that the Court will take into
15 account the fact that this man was invited, encouraged into
16 the area of criminality by those who he saw to be the people
17 in authority. This is not a case where a man is pleading
18 guilty to a number of conspiracies to murder, who coldly and
19 deliberately in the full sense, popular as well as legal,
20 with malice aforethought decides to entertain the death of
21 another person and enters into with a number of other
22 people, in the course of conduct which is calculated to
23 effect that end. This is not such a case. That's the sort
24 of case that the Courts normally have to deal with.

25 LORD JUSTICE KELLY: It wouldn't be possible for him to then
26 infiltrate without committing crime apart from membership?

27 MR BOAL: Indeed, my Lord, I'm coming to that. That will be
28 another point I hope your Lordship will regard in
29 mitigation. Just at the moment I am dealing with the rather
30 coarser point that he was invited to, as it were, the scene

1 of the crime. The idea was promoted in his mind that he
2 should come and perform these acts in an area in which, as
3 your Lordship has just said, it would have been impossible
4 for him to act had he not been committing a crime. But,
5 my Lord, he comes to the place of the crime having been
6 invited to do so and that too makes the difference, in my
7 respectful submission when one comes to regard his moral or
8 his legal culpability. Then, when he comes to the place of
9 the crime having been invited - my Lord not just invited but
10 plucked out of a secure environment, encouraged, persuaded
11 to come, although he had in fact settled down in Germany for
12 a period of two years, I'm able to tell the Court from 1985
13 to 1987, he was in a very good job, was a foreman earning a
14 very respectable salary which I will come to presently when
15 I'm dealing with money and was in a secure, not only
16 financially secure, but personally secure environment and
17 living in very comfortable circumstances. He was plucked
18 out of this, not at the whim but at the decision, no doubt
19 the considered decision, of a member of the security forces
20 who feels that the interests of the community as a whole
21 will best be served by his doing that. And he answers the
22 call that is directed to him and he comes into this area of
23 actual or potential criminality and he comes there,
24 my Lord.

25 My third point is he acts for a period of round about
26 three years in a way that has been described very
27 graphically, and I couldn't improve upon it, by the last
28 witness, but the least that can be said about it is that he
29 was in not continual danger but continuous danger; at any
30 moment these thugs that he was associating with could by

1 their process of reasoning, which encompassed just the
2 public media which encompassed speculation as part of its
3 rational thinking could come to the conclusion, without any
4 real justification at all, although incidentally there was
5 plenty of justification for that, this man was a traitor in
6 their midst, at any given moment he could slip, a word, a
7 wrong answer, a failure to answer, an act, an omission to
8 act, something overheard, an imprudent word perhaps when he
9 was understandably the worse for drink, the sight of him in
10 a telephone box in circumstances which perhaps would be
11 difficult to explain, he wasn't going, my Lord, to get the
12 luxury of even a Kangaroo Court before he would be
13 convicted, and sentenced and executed, in such
14 circumstances. It would simply be done in a way that the
15 thugs do matters of that sort without warning, in the back
16 of the head he would get a ~~bullet~~. He was under no illusion
17 but that that would happen to him in such circumstances and
18 is it to be wondered that the Colonel in giving evidence
19 pays tribute to the extraordinary courage of a man who for
20 the purposes that he accepts he did it, is prepared to live
21 in those circumstances? And so, my Lord, he continues not
22 just for a day or two but he continues for three years or
23 thereabouts, living with the threat of death ever present
24 over him every minute of the day and night.

25 And then fourthly, my Lord, that threat of death is
26 given physical exemplification by the day he's taken to a
27 house on the outskirts of Lisburn and he's confronted by a
28 number of men who interrogate him, who assault him,
29 brutalise him, and actually who electrocute him on three
30 occasions by the pressure of an electrified cattle prod on

1 the back of his neck throwing him each time in physical
2 convulsions on the floor. Is it to be wondered that he
3 seeks solace in drink immediately after that in order to
4 settle himself? How many men, my Lord, in this court, how
5 many men in this community, would be prepared, not only
6 before that but after that experience, to have continued in
7 the work that he was doing? Your Lordship asked the
8 question, which I should have and I'm grateful for the
9 reminder, the date of that was August 1988, which means that
10 for a very substantial time after that, despite those
11 warnings and despite that constant threat, and despite that
12 brush with death, because it could have ended in death, this
13 man continues in the work for the community that has been
14 indicated by that witness. What was he doing it for?

15 And we come to the fifth point. And the obvious
16 question, particularly those ~~who~~ are less than benign in
17 their attitude to this man and his work, what was he doing
18 it for? He was doing it not for money, which might be the
19 suggestion made by such people, but he was doing it for the
20 reasons that have been explained by the witness. And I
21 could give the Court just a little more information, the
22 question of money, the Colonel has said that that it's to
23 his knowledge that he was living for a period of two years
24 in Germany in very comfortable circumstances. He was living
25 in an apartment, with his wife and children, he was employed
26 by an American company based in Germany in the position of a
27 foreman. He was well thought of and so well thought of by
28 his employers when, in fact, he did return to Northern
29 Ireland in 1987 they contacted him again and tried to
30 persuade him to go to America in a similar and better

1 position, better financially paid, and he refused. So, he
2 was in secure and attractive employment and he was earning
3 in the region of 6,000 Deutch Marks a month; which works out
4 at something like £2,000 a month and he was earning
5 therefore something like £500 a week with a bonus, a cost of
6 living bonus. Now, that means that when he was contacted by
7 the security services, as has been said, and flown by them
8 to Heathrow to have a consultation at which he was persuaded
9 to give up this way of life and come to Northern Ireland, he
10 was faced with this decision: "I'm living happily in
11 Germany. I'm picking up the language. My wife and children
12 are happy there. The children are happy at school I have
13 got a very nice apartment I'm personally secure, and
14 financially I'm very well off and what do these men want me
15 to do? They want me to go back to Northern Ireland, to live
16 in North Belfast, with all that that involves, to reinvolve
17 myself in terrorist activity and to take a drop in my money
18 of fifty per cent", and yet he did it.

19 AS TO SB 12:40

1 Wednesday, 29th January 1992

2 R v Brian Nelson

3 SB FROM AS 12.40

4 (Contd) Plea in mitigation by MR BOAL:

5 MR BOAL: The very least that can be said about that, my Lord, is
6 that whatever else he did it for, he certainly didn't do it
7 for money. In the absence of that as being his motivation
8 then one must give even greater credence to the assessment,
9 careful and considered assessment, obtained over a very
10 lengthy time, as to what his motivation was, so that he was
11 doing what he was doing at a loss to himself, and indeed to
12 his wife and children who from then on had to enjoy a rather
13 lower standard of living.

14 Next, my Lord, what was the service that he was
15 performing? Because of the evidence detailed as it is given
16 by that witness, I don't need to say what it was because he
17 has graphically described it. That was a service which
18 saved lives, ironically enough some of the lives that have
19 been screaming about his activities, as your Lordship has
20 heard in respect of one of them, inside the last while. And
21 it's just a pity, my Lord, that those who feel themselves
22 able to comment on matters of this sort, with only part of
23 the information at their disposal, don't know all the
24 information, it's just a pity that their attitude should be
25 from the very beginning a carping attitude. It's just a
26 pity that everything that they say and interpret and write
27 and speak seems to be in pursuance of an already agreed, an
28 already decided idea that they have and that everything that
29 is done by them from then on is done for the purpose of
30 approbating that preconceived idea. Just a pity that they

1 don't know the whole facts. Your Lordship has heard more of
2 them this morning that have been made public, and indeed
3 from a few of the snippets that have fallen from the mouth
4 of the Colonel your Lordship would learn and this Court
5 would learn that there are many others, if in fact the whole
6 facts were known. There is an enormous number of people who
7 have got reason to be grateful to the man standing in the
8 dock, some of them grateful to the point of their lives and
9 the community as a whole, in my respectful submission,
10 because of that should equally be grateful for the work of
11 this man and the service of this man over these three years.
12 This is not me saying it, my Lord, this is the man who knows
13 saying it. I'm simply echoing his sentiments.

14 LORD JUSTICE KELLY: I have been asking myself that question
15 really all morning, what did he really achieve at the end of
16 the day? Of course he did, and I take the point
17 immediately, save lives, but I think the intention really of
18 the Colonel was to, that he would try to bring down the
19 organisation. Were any of these men prosecuted at all?

20 MR BOAL: Yes.

21 LORD JUSTICE KELLY: For acts of conspiracy to murder or
22 attempted murder? I dealt with some of them I recall.

23 MR BOAL: Not I think for -----

24 LORD JUSTICE KELLY: But only on charges of collecting
25 information.

26 MR BOAL: I think that's right.

27 LORD JUSTICE KELLY: But were any of them at all dealt with for
28 more serious charges?

29 MR BOAL: Not that I know of, my Lord, which is another irony of
30 course. The basis for your Lordship's question, the

1 inference might be it's because of Nelson that they haven't
2 in fact been brought to book. That I can tell the Court is
3 not so. Nelson, may I say quite clearly, has never been
4 asked to give evidence against these people.

5 LORD JUSTICE KELLY: I was simply seeking information about it.

6 MR BOAL: I'm glad that your Lordship did, because it allows me
7 to say now clearly and unambiguously that he has never been
8 asked to give evidence against these people. Indeed, my
9 Lord, may I make it clear and I will be coming to that in
10 another part of my submissions, he always understood from an
11 early stage that he would be so asked and that in giving the
12 information that he did, which is encapsulated in the very
13 many statements that he made, he assumed that that was being
14 done in preparation for his giving evidence against these
15 people on the understanding that he was going to do that.
16 But he has never been asked to do that and I would ask for
17 the confirmation of my friends that that is so.

18 LORD JUSTICE KELLY: I recall two names that were mentioned by
19 him in his statements who were prosecuted, Mr Boal, for
20 collecting information and being in possession of
21 information likely to be useful to terrorists. And I recall
22 that I dealt with them perhaps earlier on this year, or
23 perhaps last year. They weren't the most serious of our
24 terrorist crimes, which I think you will appreciate.

25 MR BOAL: Yes.

26 LORD JUSTICE KELLY: But I take the point now that none of these
27 men at all, other than the two names I have mentioned, have
28 not been dealt with for any crime.

29 MR BOAL: For any crime, but the important thing is through no
30 fault of Nelson. In the statements that he made, and your

1 Lordship has seen some of them but not all of them, in the
2 statements that he made he is totally open and detailed
3 about all his activities, including the names of those with
4 whom he was involved, and those would have been, had a
5 decision been taken, those would have been in fact more than
6 enough for the prosecution of a number of those people for
7 very serious offences, had it been decided that Nelson
8 should in fact give evidence. Presumably it was decided, I
9 have no doubt for good reasons, that he shouldn't give
10 evidence, but the point I'm making is that it's through no
11 fault of his that those people aren't in the dock, or in
12 prison, and dealt with for more serious offences than they
13 have been. And, therefore, it's not at variance with his
14 perceived motivation as explained by the witness that he
15 wants to break up this organisation, it's not at variance
16 with that that these people haven't been prosecuted.

17 LORD JUSTICE KELLY: The other point that concerned me, and deal
18 with this in your own time if you wish to, was was it really
19 necessary for him to go so far in these conspiracies to
20 murder? Was it not enough for him to give to his handlers
21 the information that a certain person would be a target?
22 Why did he have to go to personally look out for them to,
23 with great determination at times to find out detail about
24 them?

25 MR BOAL: I understand that, my Lord. Your Lordship will not be
26 offended if I suggest that that's a question which would
27 occur to the mind of somebody sitting in an armchair, such
28 as myself, not your Lordship.

29 LORD JUSTICE KELLY: This is not an armchair in any sense.

30 MR BOAL: In fact, once the question is put to somebody who

1 operates, as it were, on the ground, he immediately sees the
2 frailty of such thinking that leads to that question. This
3 man is an intelligence officer. He's of service to the
4 security forces only if he remains an intelligence officer.
5 To be an intelligence officer in one of these paramilitary
6 organisations you have got to do a number of things. The
7 first thing that you have got to do is to store
8 intelligence. The second thing that you have got to do is
9 to disseminate it to the people who ask for it, otherwise
10 you are a dead-end, a cul-de-sac. Intelligence comes into
11 you and it doesn't go out. The whole purpose is that you
12 are able to make use of it on behalf of the organisation and
13 give it to those who in performing their activities, require
14 it.

15 Therefore, as an intelligence officer he has got to
16 receive and he has got to tell. In addition to that if he
17 wants to retain, as he has got to retain the good will and
18 the confidence of those with whom he's working, he has got
19 to appear to them to be enthusiastic in his occupation.
20 It's only if in fact he retains their confidence that he
21 will remain an intelligence officer. And to retain their
22 confidence he will not do that simply by sitting there like
23 a sponge soaking up everything that they tell him. He's got
24 to appear to be enthusiastically involved in what they in
25 fact appear to be intent upon.

26 LORD JUSTICE KELLY: So that, not to get mixed up with the murder
27 gangs, to use the word of the Colonel, was not really
28 realistic at all.

29 MR BOAL: Not realistic at all exactly, my Lord, not realistic, I
30 will be coming to that and that might be an appropriate time

1 for me to come to that. The Home Office rule, which is the
2 armchair rule, totally impractical in these circumstances,
3 appears to be, and I have apologized to the Court as to why
4 I have to put it in that way, is they're so happy about
5 their rules that they won't release them to us, but anyway
6 appears to be that an agent in fact should not involve
7 himself in criminal activity. But of course if you're going
8 to have an agent in the IRA or the UVF, and if they are
9 proscribed organisations, then to be in the IRA or to be in
10 the UVF or any of the other proscribed organisations, is in
11 fact a criminal act. If, therefore, the Home Office rule is
12 going to be observed in all its purity, then there will be
13 no such thing as agents in the Northern Ireland terrorist
14 scene. But has anybody, my Lord, in authority been
15 courageous enough or intellectually resolute enough to face
16 that dilemma and to say: No, ~~we're~~ we're going to have this as a
17 rule which means that agents are debarred on the Northern
18 Ireland scene. The rules are appropriate only for gangs in
19 the East End of London. Is anybody in fact in authority
20 courageous enough to deal with that problem? No, of course
21 they're not. What they say is, we keep the rule, and the
22 rule is a nice window dressing, and allow us to justify our
23 activity and when anything comes unhappily unstuck to wash
24 our hands of the consequences of it. It allows us to do
25 that, and yet at the same time turn a blind eye to the
26 breach of that rule and the understandable breach of that
27 rule in the Northern Ireland terrorist situation.

28 SB TO AS 12.50

1 Wednesday, 29th January 1992

2 R.v. Brian Nelson

3 AS FROM SB 12:50

4 (Cont'd) Plea by MR BOAL:

5 MR BOAL: There is dishonesty, my Lord, at a very high level,
6 there is, my Lord, more than that, cowardice, not just of an
7 intellectual nature but of a social and political nature at
8 a very high level because of the failure of those whose duty
9 it was to face this problem, to deal with it and it's
10 because of that failure, it's not because of it, but it
11 contributes to it, it's because of that that that man finds
12 himself in the dock today. Because that omission or that
13 failure to deal with the matter in an intellectually honest
14 way is compounded then by the advice - and this is a matter
15 that your Lordship hasn't heard - that is given to an agent
16 such as Nelson, by his handlers. And the advice that's
17 given to Nelson, and appears on more than one occasion in
18 the course of the notes, is that he must keep himself away
19 from the centre of physical activity. He must not be a
20 member of one of these killing teams.

21 Now, your Lordship will see immediately what that
22 conveys to a man like Nelson. It conveys to him that's not
23 committing a criminal offence and this my Lord with respect
24 is a vital part of my submission, it conveys to him that he
25 is not, in fact, committing a criminal offence, as long as
26 his activity is restricted to something other than taking
27 part in an actual killing or in a group, being part of a
28 group that does the actual killing and conveys to him that
29 the offence and only offence that's relevant to be
30 considered is the offence of the principal perpetrator.

1 Now, those of us who have a smattering of law knows that
2 that is just not right. Criminal culpability doesn't end
3 with the activity of the principal perpetrator but, as
4 your Lordship well knows, it's trite to say it. extends and
5 extends very, very far to secondary parties

6 LORD JUSTICE KELLY: Wouldn't he have been clever enough to have
7 known that himself, he's an intelligent man?

8 MR BOAL: My Lord why? If you ask nine out of ten people in the
9 street as to whether in fact they're committing a criminal
10 offence if they make an Ulster fry for someone who is on
11 their way to commit a murder, they would laugh at you and
12 yet there's a case in these courts in which I was involved
13 where very much the same sort of facts resulted in the
14 person being charged with murder; giving an act of
15 assistance and encouragement to somebody whom she knew was
16 going to perform the act of murder how -----

17 LORD JUSTICE KELLY: Getting a home-made machine gun -----

18 MR BOAL: That's a different thing, my Lord, that's possession.

19 LORD JUSTICE KELLY: It's part of the conspiracy

20 MR BOAL: Yes, it is and it's one matter, if I may say so,
21 my Lord, a very peculiar matter and singular matter which
22 your Lordship plucks out to which, of course, I have no
23 answer. I'm dealing with the possession of the documents,
24 the conversations he is having, the answer when a person
25 known to him to be a murderer says: Have you got anything on
26 somebody, and he responds by taking out a card. Once he
27 does that, knowing what is contemplated by the murderer he
28 becomes guilty of conspiracy to murder. Once he does that,
29 leaving out of account, for the moment, the dictum of Lord
30 Bridge in Anderson's case, once he does that. What man in

1 the street, my Lord, who has got no knowledge of legal
2 education, would recognise that when that is so, he then is
3 a secondary party? And what the advice of his handlers does
4 is compound the misunderstanding that has originated from
5 the Home Office document and indeed leads him to believe
6 that this activity, as long as he restricts himself to it
7 and doesn't go into physical activity is, in fact, not
8 frowned upon by the law. Which means, immediately, that all
9 the things which would be construed in law as aiding,
10 abetting, counselling and procuring, they're all swept aside
11 and it's suggested by the handlers, without saying it in so
12 many words, that it will not lead to criminal culpability.
13 My respectful submission, my Lord, therefore is that when a
14 man therefore is brought to do the task that he is brought
15 to do, is told, in fact, that it would be in the public
16 interest that he keeps himself in the confidence of his
17 fellow thugs, he is given the advice that he is given by his
18 handlers which leads him, in my respectful submission, to
19 believe that he will get himself into a criminal difficulty
20 only if, in fact, he takes physical part in any of these
21 activities, misleads him into thinking that to engage in
22 conversations, to hand out documents, even to scout the
23 address of a house, that all those things are alright and,
24 in fact, don't bring criminal blame worthiness, then my
25 Lord, my respectful submission is that not only is he
26 brought as a victim to this scene of criminality, but he is
27 seduced into believing at that scene that what he is doing
28 is without criminal blame. And almost all the cases, my
29 Lord, to which he has pleaded guilty are cases which fall
30 into that category.

1 My Lord, one other matter I would shortly refer to,
2 Mr Kerr in making submissions to the Court last week felt it
3 appropriate to comment on the assiduous work carried out by
4 the Stevens' team, my Lord. One hears often those sort of
5 commendations made in Court and if it were just accepted in
6 the way that is very often stated as a sort of traditional
7 almost stylized encomium therefore I would be of course not
8 asked to do anything to break that tradition, the trouble is
9 my Lord, when I've thought about it, it could be interpreted
10 by the Court and by the public in a different way because it
11 could be interpreted that this assiduous investigation which
12 in the words of Mr Kerr brought Nelson to the dock, these
13 are his words, that that was made necessary by the
14 intransigence of Nelson himself, in which case the Court
15 would be entitled to look askance at the accused and wonder
16 why it is that he was so reluctant to impart with
17 information when, in fact, he eventually came into the hands
18 of police officers. My Lord, any such suggestion is totally
19 erroneous. Your Lordship will no doubt get an impression,
20 it's no more than that perhaps, from the papers, that as
21 soon as Nelson came into the hands of these policemen from
22 England, after a very short initial period in which he said:
23 "I don't want to say anything", and incidentally in saying
24 that he was carrying out the often expressed and firmly
25 expressed views of his handlers that if he comes into the
26 hands of the police he should never say that he is involved
27 in military intelligence, it said this is written by his
28 handlers alone, that themselves when they said that
29 frequently they emphasised to him the importance once he
30 comes into the hands of the police of never disclosing the

1 fact that he was acting for military intelligence. So after
2 an initial period, and a very short period, we're talking
3 about during one interview in which, bearing that in mind,
4 he says: "I don't want to say anything at all". Then
5 obviously he thinks twice about it and gives the telephone
6 number of his handler to the police. They go away, and they
7 come back and say yes, we've spoken to your handler we now
8 confirm that you are what you are. From then on that man
9 talked freely and incessantly. There was never a stop in
10 the flow of information that was coming from him. With
11 great respect, my Lord, it's not an extravagance of language
12 to say that somebody from the backward stream in a
13 Kindergarten could have obtained from Nelson all the
14 statements that are set out there. It didn't require any
15 subtlety, investigative or other ingenuity it required
16 absolutely nothing, the only intellectual effort that those
17 men needed was to decide when the next cup of coffee should
18 be to refresh the man who was talking himself hoarse in his
19 desire to divulge all the information that he did. And any
20 suggestion that these men are responsible, in that sense,
21 for putting him in the dock is totally erroneous and if it's
22 interpreted in the way that I have suggested, then it does a
23 great disservice to Nelson.

24 AS TO SB 1:00

1 Wednesday, 29th January 1992

2 R v Brian Nelson

3 SB FROM AS 1.00

4 (Contd) Plea in mitigation by MR BOAL:

5 MR BOAL: It's only for that purpose that in the interests of my
6 client that I mention that matter. My Lord, at the end of
7 the day -----

8 LORD JUSTICE KELLY: It's only right to say that I made a
9 commendation about the Stevens' inquiry and I realise it
10 assisted the administration of justice very much in the last
1 case that I recalled to you.

12 MR BOAL: That's a different thing, that's a wider thing.

13 LORD JUSTICE KELLY: I wanted to say that. I felt I should say
14 that now in case it was thought you were being overly
15 critical or wrongly critical at all of the Stevens' inquiry.

16 MR BOAL: No, I'm not referring to that at all. It's a narrow
17 issue, I'm making it clear, that they certainly didn't
18 require any ingenuity to get out of Nelson what he was only
19 too happy to divulge so that your Lordship will have a
20 proper appreciation of his willingness -----

21 LORD JUSTICE KELLY: I appreciate that.

22 MR BOAL: That's the narrow issue. Now, my Lord, at the end of
23 all that, and indeed it has been quite lengthy, your
24 Lordship has got to consider the appropriate sentence for
25 Nelson, bearing in mind everything that not only I have said
26 but has been said more pertinently by the witness. The
27 Court of Criminal Appeal in England again have said that
28 it's proper for the Court to take into account the
29 circumstances under which a man will have to serve his
30 sentence. This man has for the last almost two years been

1 living in 24 hour lock up. He can't consort with any other
2 prisoner at all. He is living a totally lone, solitary
3 existence for the last two years and it could very well be,
4 I can speak dogmatically for this position for whatever
5 prison governor is going to deal with him, could well be
6 that it could be considered just as desirable from the
7 public point of view, from the governor's point of view and
8 indeed maybe from his point of view, that whatever sentence
9 he serves should be served in exactly the same way. The
10 Court, as I understand it, would be entitled to take that
1 into account too in imposing that sentence. That, my Lord,
12 in the general context of what has been said in this case,
13 is a relatively small point, important in other cases, but
14 played as relatively insignificant in this case.

15 This man, my Lord, without being dramatic, was leading
16 a perfectly law abiding, happy and relatively affluent
17 existence. He answers a summons to his financial and
18 personal detriment, as has been explained. For three years
19 he lives a dangerous existence. As a result of that
20 dangerous existence, resulting at one stage in near death
21 and torture, many, many lives are saved and who better to
22 tell the Court that than the man who's just given evidence.
23 He has been not just of service but of enormous service to
24 the community. The extent of that service can perhaps only
25 partially be judged by the fact that since in fact he was
26 incarcerated the level of killings have increased
27 significantly, killings which one would be tempted to think
28 could have been avoided if a decision other than the one
29 that was no doubt responsibly taken had been taken. It's
30 not for me, my Lord, especially in this forum, well, it is

1 for me, but not in this forum, to weigh the relative values
2 that are attributed by those who make decisions of this sort
3 in deciding the value of human life or lives and the
4 appearance of a man in the dock. And I don't propose to
5 deal with that. But it's more than tempting to come to a
6 conclusion when one learns that since his removal from the
7 scene there has been such devastation in the terrorist scene
8 in Northern Ireland. And the ironic thing, my Lord, that
9 your Lordship on behalf of that community has so benefitted
10 from his work over the last number of years has a duty,
11 because of the rigors of the law and acting within the
12 framework of the law, has got a duty to assess the
13 appropriate punishment for him. Punishment, my Lord doesn't
14 seem an apt word in view of the encomium that one heard a
15 short time ago from the witness box. And there appears
16 indeed to be something awry, something lacking in a system
17 which allows this man to work for the community in the way
18 he did and which allows him to stand in the dock facing your
19 Lordship's decision. It's not too dramatic, my Lord, to say
20 that this man has been not just a hero, a courageous man in
21 the words of a man who would know best, but he has been
22 since then a victim, a victim of that very system.

23 My Lord, it's open to the Court acting on behalf of an
24 informed community, my Lord, not the sort of community that
25 is represented by the wild speculations of the Press, but an
26 informed community, the informed community being the
27 community who theoretically at least has heard everything
28 that's said in this Court, it's the responsibility of your
29 Lordship, with respect, to represent that informed community
30 and to decide what is the appropriate punishment. In my

1 respectful submission, my Lord, this is a proper case for
2 not just dramatic leniency, but in fact, my Lord, a case
3 that should be regarded as wholly exceptional in bringing
4 about dramatic leniency as a necessary result. My Lord, in
5 my respectful submission, this is the least that this
6 community, through your Lordship, can do for this man and it
7 is his due.

8 LORD JUSTICE KELLY: On the 18th of February 1974, Mr Boal, he
9 was convicted of carrying a firearm with intent to commit an
10 indictable offence, two offences of that kind, possession of
11 a firearm and ammunition with intent, two offences of
12 intimidation and assault, what were the details of that can
13 you tell me?

14 MR BOAL: Yes, my Lord, that arose through the kidnapping --
15 while he was originally in the UDA in its early days, that
16 arose through the kidnapping of a member of the public and
17 the abuse of that member of the public. At that time he in
18 fact took no doubt a peripheral role, but none the less a
19 legally culpable role in that kidnapping and abuse. As I
20 understand it there's been no offence since then.

21 LORD JUSTICE KELLY: I'm not asking you, or inviting you to
22 comment at all, Mr Kerr, on what Mr Boal said, but is there
23 anything else you want to say to me which might assist?

24 MR B KERR: No, my Lord.

25 LORD JUSTICE KELLY: Well, I want to think over what has been
26 said today in court. I will pass sentence later, not today,
27 but later. Will you put the accused back, please?