IN THE COURT OF APPEAL

CRIMINAL DIVISION

BETWEEM

MICHAEL SMITH

-v-

REGINA

GROUNDS OF APPEAL AGAINST CONVICTION AND SENTENCE

ABBREVIATIONS

References to "SOURCES" refer to evidential sources.

References to "BLUE" and "RED" refer to the two jury exhibit bundles.

References to S/- refer to the bundles of witness statements

References to I/- refer to the interview bundles.

References to "PHOTOS" refer to the Green flie of photographs.

PRELIMINARY

(1) On the 18th November 1993 at the Central Criminal Court before Mr Justice Blofeld and a jury the appellant was convicted of 3 counts of espionage under Section 1 of the Official Secrets Act 1911 (OSA) and was sentenced to a total of 25 years imprisonment.

(2) The counts,verdicts and sentences on the indictment were as follows:

COUNT 1: Communicating material to another for a purpose prejudicial to the interests of the state contrary to s 1(1)(c) of the OSA 1911 between the 1st January 1990 and 1st January 1991.

VERDICT: Guilty.

SENTENCE: 8 Years imprisonment.

COUNT 2: Communicating material to another for a purpose prejudicial to the interests of the state contrary to s 1(1)(c) of the OSA 1911 between the 1st January 1991 and 1st January 1992.

VERDICT: Guilty.

SENTENCE: 8 Years imprisonment consecutive.

COUNT 3: Making a sketch or note for a purpose prejudicial to the interests of the state contrary to s 1(1)(b) of the OSA 1911 between the 1st January 1991 and 1st January 1992.

VERDICT: Not Guilty.

COUNT 4: Obtaining or collecting material for a purpose prejudicial to the interests of the state contrary to s 1(1)(c) of the OSA 1911 between the 1st January 1991 and 1st January 1992.

VERDICT: Guilty.

SENTENCE: 9 Years imprisonment consecutive.

PROSECUTION CASE

(3) The agreed case chronology which was put before the jury is annexed at Appendix 1.

(4) The essence of the Crown's case was that whilst employed in the Quality Assurance Department (QA Dept) at

GEC Hirst Research Centre (HRC) as a Quality Systems Audit Manager the appellant was an agent of the Russian Intelligence Service (RIS) and that between September 1990 and his departure from HRC in July 1992 he communicated to his KGB controllers and their successors,technical material and information from HRC relevant to this country's actual and potential defence capability intending it to be useful to the Russians and acting for a purpose prejudicial to the interests of the state.

(5) In addition to events between 1990 and 1992,the Crown were permitted to call evidence of events in the 1970's and the Crown put their case on the following basis.

(i) From 1972-1976 the appellant was a communist activist and sometime in the early 1970's he was recruited as a Soviet agent by a KGB officer in London called Victor Oschenko who was posted to the Russian Embassy in London and who recruited agents with access to scientific and technological information;

["THE 1970'S RECRUITMENT EVIDENCE"]

SOURCES

Interviews (re communism) I/196;205

Richards (S/225); Mrs C (S/187) and Mr E (S/278,282)

(ii) After being recruited and because of being recruited he severed his links with the Communist Party;

["THE COMMUNIST PAST EVIDENCE]

SOURCES

Interviews I/153,197

(iii) In July 1976 he joined EMI (Feltham) as a test engineer and obtained security clearance to secret. He began working on a secret weapons project until 1978.

["THE EMI EVIDENCE"]

SOURCES

RED p277
Ley S/162; Beauchamp S/183: Rennie S/184

(iv) In August 1977 he travelled to Oporto in Portugal on a KGB training mission utilising exhibit 46- a map of Oporto with 4 crosses on it. The Crown called Mrs C and Oleg Gordievsky who both said that the map could be capable of being evidence of KGB instructions to an agent

to follow a particular route. Moreover Mr E gave evidence that he had met Victor Oschenko whilst working at a Hi-fi shop in London in 1977 and started receiving payments from Oschenko after having expressed interest in Oschenko's proposal of supplying information in return for money. In July 1979 he was sent to Lisbon in Portugal by either Oschenko or George his successor with instructions to deliver an envelope which he duly did

["THE TRIP TO PORTUGAL"]

["THE EVIDENCE OF MR E"]

SOURCES

RED exb 46,p547

PHOTOS Divider 11

Mrs C S/181,340; Gordievsky S/189; Mr E S/278,282: Moreira S/332,335

(v) In 1978 his communist past came to the attention of the authorities so he was moved to a non-military branch of EMI -EMI Medical- and lost his security clearance;

(vi) In November 1979 after a discussion with Mr McMichael head of security at EMI (see Red p350 for interview transcript) he sought an interview with the MOD to discuss why he had lost his security clearance and in February 1980 he signed a security questionaire denying his communist past. In June 1980 he was interviewed by

Mr D of the British Security Services (BSS) posing as an MOD official. He initially denied his communist past but then made full admissions concerning his background.

["EFFORTS TO RETRIEVE HIS SECURITY CLEARANCE"]

SOURCES

RED p350-9
RED p281-323;372a,b
McMichael S/163; Taylor S/165; Mr D S/167.

(6) In September 1985 he was made redundant at EMI and in November 1985 began working for GEC at HRC. In July 1986 he was given clearance to confidential on a need to know basis and signed an OSA declaration.

(7) In respect of events in the 1990's: the Crown's case was that in September 1990 the appellant received a letter from a KGB source which re-activated his relationship with the KGB which had commenced in the 1970's. The letter mentioned that "A lot of water has passed under the bridge after our latest appointment. I am sure we should have a chat in the nearest future. I would be happy to meet you as previously at the recreation in October" and was signed "Williams". (Blue p271/2). Gordievsky told the jury that the type of letter was an extremely familiar document to him and was a usual way of re-establishing communication with a

contact who has been put on ice for some time and was an invitation to re-establish contact. Mr Avery a Russian Language expert told the jury that in his opinion the use of the capital R and N; the use of "nearest" and "recreation" and the unadorned surname "Williams" were examples of linguistic interference ie the writer's mother-tongue breaking through and influencing the writing of the "foreign" language. He had a strong "feeling" that the writer's first language was cryllic and that the examples of linguistic interference were not inconsistent with the letter being written by a writer whose mother tongue was Russian.

SOURCES

Gordievsky S/175; Avery S/341

(8) From that date until July 1992, it was suggested that the appellant had clandestine meetings with a Russian handler who gave him instructions about places to meet; the way meetings should take place; fall-back arrangements and signs and signals to be used in case of danger or meeting cancellation. The appellant made notes of those meetings which,it was said,included shopping lists of requirements.(Blue p273-276). During these meetings the appellant handed over scientific and technical information and received sums totalling

£20,000. Mrs C told the jury that the appellant's notes contained Soviet tradecraft and bore all the hallmarks of KGB tradecraft. She said that only Soviet Russia and other hostile intelligence agencies would use this elaborate tradecraft which was designed to avoid their detection by the British Security Services. Mr Gordievsky, a former KGB agent who had defected to the West in 1985, said that although individually the elements of tradecraft in the notes were common to all intelligence services,the combination of the elements had the KGB stamp on them. He had no doubt that the notes were dictated to a well-disciplined agent working well for the KGB.

SOURCES

Gordievsky S/175; Mrs C S/62

(9) In May 1992 the appellant was notified that he was to be made redundant with 3 months notice.(RED p378,482). The 31st July 1992 was the appellant's last day at work. He collected together two files of documentation each relating to a 1984 British Standard BS9450 Capability Approval Exercise conducted by his pre-decessor DT Lewis. The first file (BLUE 51-175) contained processing plans,specifications and other documentation concerning two surface acoustic wave filters (SAWS) -a 120mhz device and a 200mhz device. The file contained a restricted document (BLUE p51) relating to the 120 Mhz SAW which

referred to it's use "as part of an IF Receiver incorporated in an airbourne guided weapon" During the trial on being recalled to give evidence, Dr Lewis for the first time, identified the missile as the Alarm anti-radar missile. The second file (BLUE p188-269j) contained detailed plans,specifications and blueprints for a delay line made for incorporation into the Operators Confidence Facility (OCF) of the Rapier missile system.

(10) The significance of this processing information from a military point of view was that firstly an enemy could learn the detail and rigour of Quality control processes and checks used by a leading British electronics company and secondly by knowing the frequency of the SAW device or the frequency range of the delay line an enemy could utilise this information when devising counter-measures such as jamming against the weapon system of which it was a small component.

SOURCES

SAWS:

SAW documentation - Blue p2-175

Dr Weatherley

Dr Lewis S/111,113,263,313

DELAY LINES:

Delay Line documentation - Blue p188-269J

Dr Weatherley; Mr Weatherley S/125,267,325;
Bagley S/102-104,253,326; Swallow S/87-90;

(11) On the day he left the appellant also took with him a bundle of documentation concerning silicon on sapphire (SOS) wafers (Blue p269/10-69 {excluding 269/37-40}); a bundle of documentation concerning Gallium Arsenide monolithic microwave integrated circuits (MMICS) (Blue 269/70-87); a production flow chart for infra-red detectors to be used in thermal imaging equipment. (Blue 269/1-2) and a process identification document for SAW filters. (Blue 2-50)

SOURCES

SOS

Dr Hodge S/120,259,315
Dr Weatherley

MMIC'S

Allenson S/123,256,316

Dr Weatherley

THERMAL IMAGING

Lamberton S/119,312

Professor Elliot S/309

Dr Weatherley

(12) The documents concerning the SAWS,Delay Lines,SOS, MMICS and the flow chart were placed in a blue holdall together with assorted components (7 SAWS,3 SOS and 5 MMICS): (JS/14 see PHOTOS). Also in the holdall were some notes concerning leading edge technologies which formed the subject of count 3, the count on which the appellant was acquitted.

(13) It was the Crown's case that on Thursday the 6th of August 1992, the appellant drove to a place near Harrow with the intention of handing them over to a Russian handler. But the handler had been frightened off due to the defection of a KGB officer to this country a few days before. That officer was Victor Oschenko the same Victor Oschenko who had recruited the appellant 20 years before. The appellant therefore returned home with the bag to await further instructions.

SOURCE

Blue p276

Interview I/474-485; 628-661; 703-705

(14) On Saturday,8th of August 1992 a MI5 officer Mr B rang the appellant's home,the call was tape recorded (see RED p552 for transcript). Mr B, speaking in a Eastern European accent,introduced himself as George and said, inter alia,

MR B: "..I am a colleague of your old friend Victor,do you remember him?
A: Yes"

Mr B told the appellant that it was very urgent for him to talk to the appellant and suggested that the appellant go to a telephone kiosk at the corner of Durlstan Road and Cardinal Avenue Kingston, where he would ring the appellant.

(15) The appellant went to that telephone kiosk but was late arriving and he missed the call which was made. He hung around the area of the kiosk and eventually walked back home. During his walk to and from the telephone kiosk he had been under observation by Special Branch officers (PHOTOS Divider 2 and 3) and as he walked towards his house he was arrested.

(16) Over the next 3 days his home was searched by Special Branch and many documents not of evidential value were seised. But in a drawer in a dressing table in his bedroom police found £2000 in £50 notes most of which were serialised (RED p551; PHOTOS Divider 4));the Williams letter and the so-called "tradecraft documentation"(BLUE p271-276). Also found in a sideboard in the hall was the map of Oporto with crosses on it (RED exhibit 46).

(17) The appellant's car was searched and in the boot they found the holdall containing the technical documentation and the components. (PHOTOS Divider 5)

(18) The appellant was interviewed over 4 days and told many lies. His final position was:-

(i) Between the Spring of 1990 and April 1992 he had been engaging in industrial espionage with an Englishman called Harry whom he believed was acting on behalf of a commercial competitor of GEC in this country. He was therefore not acting for a purpose prejudicial to the interests of the state;

(ii) The information supplied was low grade information concerning SOS and MMICS and would not be useful to a potential enemy: it was just "money for old rope";

(iii) The documents found in the holdall were there because he had cleared his desk in great haste. It was not intended that they be passed on to anyone. He had looked at the material and realised there was a restricted document in there which he shouldn't have had. He was going to dump or destroy the material. The components were basically "junk"

(19) The Crown's case presented to the jury concerning the appellant's finances was summarised in an agreed document headed "Unexplained Cash Income": in essence it amounted to £20,588.70 from the 17/10/90 to the date of his arrest.

DEFENCE CASE

(20) The appellant gave evidence. He specifically denied:

(i) Spying for the KGB;
(ii) Knowing or having met Victor Oschenko;
(iii) Being recruited as a KGB spy by Oschenko in the early 1970's;
(v) Having dealings with Russians whilst a member of the Communist Party:
(iv) Severing his links with the Communist Party at the behest of anyone: (he asserted that he became disillusioned with the party's dogmatic approach and a

trip to the USSR brought home to him that economically the system was a disaster);

(v) That his trip to Oporto was pursuant to a KGB training mission: (he asserted that it was an ordinary holiday with a friend and that the crosses on exhibit 46 were innocent markings being bus-stops in the centre of the town for buses to and from the camp-site.)

(21) He admitted:-

(i) Lying about his communist past on his positive vetting form: (he explained he was concerned about being black-listed if he told the truth);

(ii) Lying extensively in interview;

(21) He explained the Williams letter,the tradecraft notes and the £20.000 of unexplained cash income by saying that:-

(i) He had received a telephone call in February 1990 from an Englishman called Harry Williams who wanted to put a business proposition to him. They met to discuss it in the Preston Public House. A proposal of cash in return for information concerning the work at HRC was put to him. He declined the offer. A few days later Harry telephoned again and asked him whether he had reconsidered the offer he said he had. They met again and the proposition was fleshed out. Harry indicated he had a

client interested in the work of HRC whom he (the appellant) assumed was a commercial competitor of GEC. Harry was interested in processing documentation especially in relation to Gallium Arsenode and Silicon on Sapphire. He (the appellant) indicated that he would not give Harry classified information. Harry replied that he was not interested in classified information but technical information. Harry offerred a total of £10,000 which was rejected as insufficient.

(ii) They met again at the Roxeth Recreation ground in March 1990. Whilst sitting in his (the appellant's) car, Harry taught him some signs,symbols and fall-back arrangements which were recorded on a piece of paper (BLUE p275). "Latest" was to be a specific code-word (see p275 4th line). He told Harry that he wanted £20,000 and Harry said he would contact him to let him know when the next meeting would be.

(iii) The next contact was the Williams Letter which he was shocked to recieve. The letter contained the word "latest" which was the "trigger". He went to the Recreation on the 4th October as on BLUE p275 he had recorded 4,15,22 and as the letter mentioned nearest he knew he had to go on the nearest date in October being the 4th. He took with him 30 to 40 documents dated 1986/87 concerning Gallium Arsonode processing which were all obsolete. Harry gave him £5,000 for them.

(iv) From then to April 1992 he met Harry on 6 other occasions at Horsenden Hill and Harrow on the Hill. The relationship finished because Harry became dissatisfied about the quality of the documentation being given to him. After the last meeting in April 1992 he never saw Harry again. During the relationship he had received a total of £20,000 in return for documents on silicon and Gallium Arsenode. None of the documents he gave Harry were classified and he did not think the quality of the documents handed over would have been useful to an enemy.

(iv) The so-called tradecraft notes (BLUE p273-276) contained a mixture of notes relating to his meetings with Harry and work related notes.

(22) He explained why he had taken away the various technical documents found by the police in his car by saying that:-

(i) He had left sorting out the documetation till the last moment and his last day was a busy one;

(ii) He had taken the process identification document (BLUE p2-50) and the infra-red flow chart (BLUE p269/1-2) as useful examples to write procedures and to lay out flow charts in future;

(iii) The SOS documentation (BLUE p269/10-69 {excluding 269/37-40}) were original documents removed from the

Quality Assurrance Department's reference library with a view to being passed on to Harry. He had decided against giving them to Harry. He removed them from HRC on his last day so that his employers would not find out that he'd removed the documents from the library in the first place.

(iv) The Gallium Arsonide documents (BLUE 269/70-87) were published documents and were taken because they were of interest to him.

(v) The two capability exercise files containg SAW documents and delay line documents were 10 years old and belonged to his predecessor DT Lewis. They were in his desk when he started HRC. He was going to throw them away but decided to take them home to see if there was anything of use to him in future.

(v) The components were mostly rejects collected by the QA Department and were taken as a souvenir of HRC's work.

(v) He did not believe any of the documentation found in his car would be useful to an enemy. He didn't know that the delay line was a component part of the Rapier missile system nor could he know that one of the SAW filters was a component part of the Alarm missile.

(23) He denied that he drove to Harrow on the Hill on the 6/8/1992 with the intention of handing over documets to a Russian handler. He said that the 6th of August (BLUE p276) was a long term annual fall back arrangement with Harry. He had driven to Harrow on the Hill on the 6/8/1992 firstly to get an American magazine called Keyboard in WH Smiths in Harrow as it was not available at his local shop in Kingston; secondly out of nostalgia as he worked in the area and often spent his lunchhours at Harrow and thirdly to see if Harry was at the Harrow on the Hill meeting place as he wanted to tell him of his redundancy, his plans to emigate to New Zealand and his wish that Harry should not try to contact him again.

(24) So far as the telephone call was concerned he had was not listening too closely and only heard half of the conversation. The line at his end of the phone was not as clear as the tape recording. He was making "Yes,Yes" type answers and was not making a concious admission to knowing an old friend called Victor. His wife could hear what he was saying. He followed the instructions given as he was suspicious and in the back of his mind he thought the call had something to do with Harry.

(25) The defence called Mr P a former high-ranking CIA officer with 31 years service and who had received the distinguished service medal from the head of the CIA in 1986 for inter alia his extraordinary tradecraft skills.

He told the jury that the Williams letter was poorly done; the tradecraft in the tradecraft documents (BLUE p273-6) was not exclusive to the KGB: any other intelligence service or anyone engaging in clandestine arrangements could use it.

(26) He had read all the exhibited documentation and seen the prosecution case summary and had seen nothing to show the operation as specifically KGB. He gave the following 14 reasons:-

(i) After problems in the 1950's and early 1960's with agents with a communist background,the Russians would not use a former Communist Party member save for "talent spotting";
(ii) In a hostile climate such as London,sophisticated tradecraft is used,whereas the tradecraft revealed in BLUE p273-6 was basic and unsophisticated;
(iii) No spy cameras such as a minox or roll-over camera were found in the appellant's possession;
(iv) No hiding places or concealment devices were found;
(v) Russian agents are taught to destroy notes yet the appellant retained his;
(vi) The Williams letter was poorly done,was handwritten and lacked a "cover" in the script to make the letter look normal;
(vii) The leaving of a coke can at the bollard of the juction between Abbotsbury Road and Melbury Road

(BLUE p276) was too obvious. If Gordievsky had used this method the KGB would not have used it after his defection;

(viii) The use of a set time ie 12.45 (BLUE p274) sets a pattern which should be avoided;

(viv) The controller would not suggest things to an agent (BLUE p274) he would give the agent clear directions;

(x) KGB technical requirements pre-1985 would be unlikely to be the same as 1992 requirements (Gordievsky had told the jury that he had seen technical requirements similar to those on BLUE p276 when he was a KGB officer in London pre-1985;

(xi) The appellant was given no warning of his imminent arrest;

(xii) If the telephone call (made by Mr B) had been made to a Russian agent it would "scare the hell out of him" he would destroy everything and flee;

(xiii) There were no escape plans;

(xix) No intelligence service would pay new money over in serial batches as it could be traced.

(27) Concerning the Williams letter, the defence called Professor Johnson and Mrs Marsh. Professor Johnson was Director of Language studies at the London School of Economics, he thought the writer of the letter most probably did not have the English language as his mother tongue. The only indicator of Russian usage he would agree with was the use of "nearest". Unlike Mr Avery (cp paragaph 7 above) he had no experience of Russians using

capital R's and N's mixed with lower case script nor the use of the unadorned surname. He pointed out that "October" was spelt with a capital letter whereas Russians spell it with a small "c" and there was no evidence of small Russian "d's" being used - a common mistake used by Russians writing English.

(28) Mrs Marsh, a handwriting expert with many years of experience was called to give evidence about the Williams letter. She had seen the use of the capital R and N mixed in lower case script in many British writings and said that anyone could have written the envelope and letter but she couldn't say who. There was nothing in the letter forms that she had not seen before in British writing.

THE SCIENTIFIC EVIDENCE

(29) The scientific evidence on the various scientific subjects and concepts revealed in the material found in the boot of the car occupied many days of the trial. Dr Weatherley was the Manager of Missile Techniques and Countermeasures at the Defence Research Agency (DRA) and on a subject by subject basis gave evidence as to the significance of the scientific evidence, it's use to an enemy and whether disclosure to the enemy of the information would be prejudicial to national security. Groups of witnesses for each scientific area were then called. Lastly Dr Cundy, the Director of HRC gave

evidence on all the scientific categories. The defence called Dr Mayer to give evidence on all the scientific subjects.

(30) The issues explored during the scientific evidence included:-

(i) The conceptual framework of each area under discussion;

(ii) The extent,meaning and significance of the information given in the documentation relating to each area found in the appellant's car-boot;

(iii) Whether the information given in the documentation had been published or released into the public domain (it eventually became accepted that a line had to be drawn somewhere and such information could not be said to be useful to an enemy);

(iv) Whether the information given in the documentation was useful to an enemy.

(v) Whether the release of the information would prejudice the national security.

(31) The witnesses and material germane to those scientific areas which formed the subject of counts where the appellant was convicted are set out in paragraphs 10

and 11 above. The detail of the witnesses' evidence in summary form has not been set out in these grounds for two reasons:

(i) Given the fact that on count 4,the Crown had only to prove that some part of the material "might be..indirectly ..useful to an enemy" (taking the "widest pairing" and thus the lowest point of proof) and given that Dr Mayer had conceded that a part of the material found in the boot of the car (namely the SAW material at BLUE p 51-59 and the delay line material at BLUE p193) might be so useful and might prejudice national safety, the case was closed to the jury on the basis that in the light of the Mayer concessions they needn't resolve the conflicts between Dr Mayer and the Crown witnesses about the rest of the material not conceded by Dr Mayer as useful to an enemy.

(ii) The scientific evidence is tangential and irrelevant to the central issues arising from the grounds of appeal against conviction. Where it is necessary to deal with scientific matters on the issues raised in the appeal against sentence they are dealt with under that part of the grounds.

CONVICTION GROUNDS

(32) THE FIRST GROUND OF APPEAL - PREMATURE VERDICTS

(i) The final verdicts on counts 1,2 and 4 were rendered unreliable, unsafe and unsatisfactory by the premature,incomplete and provisional verdicts of guilty returned by the jury on counts 2 and 4 at around 3.10pm on the 17th November 1992.

(ii) These two verdicts were delivered in public in a case of national interest and importance. Notwithstanding that they were in fact quashed (with the direction to the jury to reconsider all verdicts afresh) any further deliberations by the jury may have been inhibited or influenced by a fear (whether conscious or unconscious) that their reversal of these verdicts in the public glare might be followed by nationwide condemnation and ridicule.

SKELETON ARGUMENT - PREMATURE VERDICTS

CHRONOLOGY

(33) (i) The jury retired to consider their verdicts just before noon on the 16th November 1992 (the 38th day of

the trial). They returned to court twice that day to receive answers to 2 questions they had asked. At or around 4.45pm they were sent to a hotel.

(ii) They resumed considering their verdicts on the 17th November 1992. At around 3.10pm the learned judge indicated that he was minded to give them a majority verdict and ask them whether they were agreed on any of the counts. Defence counsel argued that firstly it was too early to give them a majority direction and that it should be given on the next day of deliberations and secondly they should only be asked for verdicts when they had agreed on all counts. The learned judge rejected both lines of argument and indicated that the standard questions would be asked.

(34) At or around 3.15pm the jury were brought back into court and asked if they had reached any verdicts on which they were all agreed. The foreman replied,

Count 1: No

Count 2: Yes, Guilty

Count 3: No

Count 4: Yes, Guilty

After 10 hours of deliberation, the jury were then given the majority direction and were sent out to continue deliberating. Shortly before 3.44pm they sent a note which read as follows:-

"We were totally unaware that our foreman would be asked to deliver a verdict on 2 counts before a verdict had been reached on all four.
Whilst we have reached unanimous decisions on counts 2 and 4 we are concerned that these verdicts could possibly be affected by the evidence relating to counts 1 and 3 some of which is of a general nature and therefore also relates indirectly to counts 2 and 4." ["THE NOTE"]

(35) In the absence of the jury, all parties considered the implications of the jury's note and the court's attention was drawn to paragraph 4/450,455 of Archbold 1993 and the case of Andrews 82 Cr.App.R 148 summarised therein. After discussion and reflection the learned Judge brought the jury back into court at around 4.13pm and told them that one reading of their note might be an interpretation that one or more of them had reservations on the verdicts on counts 2 and 4. He then revoked the verdicts and the jury were left free to reconsider their verdicts and return whatever verdicts they wished on all 4 counts. They were then given the majority dirction again. No verdicts were forthcoming that day and the jury retired to the hotel.

(36) They resumed considering their verdicts on the 18th November 1992 and at 12.35 (after deliberating for 14 hours 59 minutes) they returned to court with the verdicts referred to at paragraph 2 above.

SUBMISSIONS ON FACT;

(37) WHAT THE NOTE MEANT:

It is submitted that the following inferences are capable of being drawn as to what the note meant:-

(i) Their verdicts on counts 2 and 4 were given prematurely at a time when the jury as a whole did not expect to deliver verdicts until they had reached verdicts on all the counts on the indictment;

(ii) There was no conclusive unanimous agreement on the verdicts for Counts 2 and 4 and the foreman lacked the authority to deliver guilty verdicts on behalf of the jury as a whole;

(iii) They had reached "decisions" on counts 2 and 4 without considering all the relevant and available evidence;

(iv) Their "decisions" were provisional and non-binding and could be "affected" (ie subject to review and/or change) when other "indirect" evidence was considered;

(v) The use of the word "affected" meant that the jury had not closed their minds to entering not guilty verdicts on any or both of counts 2 and 4.

(38) WHY THE NOTE WAS SENT:

It is submitted that the following inferences are capable of being drawn as to why the note was sent:-

(i) Delivering the note so soon after delivering their verdicts meant that the jury were expressing regret at delivering the verdicts at the time they did;

(ii) Some or all of the jury had reservations about the verdicts;

(39) LEGAL PRINCIPLES:

It is submitted that none of the authorities cited at Archbold 1993 VOL I paragraph 4/447-448 are in point and the chronology of facts recited above are almost unique. By way of general principle:-

(i) "..a jury must be free to deliberate without any form of pressure being imposed upon them,whether by way of promise or threat or otherwise. They must not be made to feel that it is incumbent upon them to express agreement with a view they do not truly hold simply because it might be inconvenient or tiresome or expensive for the prosecution,the defendant,the victim or the public in general if they do not do so."
(per Lord Lane in WATSON et al 87 Cr.App.R.1 at p7.)

(ii) "It has to be remembered at all times in jury trials ..that the appearance of things maybe as important as almost anything else. If the appearance of things was such as to give this court the feeling that the jury..may have been in some state of confusion so as not to have conducted themselves as they should,and have achieved a verdict which is unreliable for that reason,the inevitable consequence would be that we would have to set the verdict aside."
(per Watkins LJ in WILLIAMS 84 Cr.App.R.274 at p277.)

(40) ARGUMENT

In the all the circumstances the jury were, after the provisional verdicts were quashed, deliberating in self-imposed pressured circumstances which may have induced them to follow the line of the original verdicts and not to question or undermine them. Moreover their post-note deliberations had the appearance of unfairness rendering their final verdicts unsatisfactory.

(41) THE SECOND GROUND OF APPEAL - WRONGFUL ADMISSION OF EVIDENCE RELATING TO THE TELEPHONE CALL.

There was a material irregularity in the course of the trial as the learned Judge was plainly wrong in admitting into evidence the tape of the telephone conversation between Mr B and the appellant on the 8th August 1992.

The appellant's admission that he remembered an old friend Victor went to the heart of the case. This admission was obtained by an unfair trick. It was the cornerstone on which the Crown built their case that the appellant was recruited by Oschenko in the early 1970's and thereby made relevant (on the Crown's case) the EMI evidence; the trip to Portugal and the efforts to retrieve his security clearance.

SKELETON ARGUMENT - TELEPHONE CALL

(42) PROCEEDINGS BELOW

Submissions were made on the 15th June 1993 (without a voire dire as the facts were clear) to exclude the telephone call under s78 PACE 1984. In essence the APPELLANT ARGUED that:-

(i) The facts showed that on 25th July 1992 Oschenko had defected to the UK;
(ii) By the 7th August 1992 Oschenko had given the police significant and detailed information about the appellant during his debriefing by Special Branch and on that day Special Branch had obtained 3 search warrants for the appellant's home and his 2 cars;
(iii) On the 7th August 1992 the police had reasonable grounds to suspect that the appellant had committed an offence under the OSA 1911.They were clearly and

obviously going to arrest him. They should have cautioned him in accordance with CODE C:10.1;

(iv) The telephone call was designed to elicit an admission that the appellant knew Victor which the police wanted to obtain. It was a naked attempt to bypass the provisions of the Act and the codes and was a trap set by the police assisted by the British Security Services (BSS).

(v) It was Mr B who engineered the whole conversation and the action which took place,he lied to the appellant by saying he was "George.. a colleague of your old friend Victor"

(vi) The police and the BSS were doing the very thing cautioned against by the Lord Chief Justice in CHRISTOU 1992 95 Cr.App.R p264 at p271 (4th para) namely adopting an undercover pose or disguise to enable themselves to ask questions about an offence uninhibited by the requirements of the Code and with the effect of circumventing it.

(vii) KOSTEN 1991/5610 (transcript) was distinguishable as in that case K was initiating all the action and the Custom's officers were acting in response to K and not playing a leading role;

(43) In reply the CROWN ARGUED that:-

(i) The codes of practice didn't apply to this situation;

(ii) The call was a ruse in the public interest with no consequent unfairness;

(iii) The appellant took the call in his own home and had the power to bring it to an end;

(iv) There was no oppression in the manner of questioning;

(v) The conversation was recorded in permanent form.

(44) The learned JUDGE RULED:-

(i) The parties were on equal terms,there was no pressure and "George" was not holding himself out to be a person in authority: accordingly the codes of practice didn't apply to this situation;

(ii) As the appellant was under no obligation to answer questions; it was a brief conversation and the conversation didn't go to the heart of the matter this was a ruse in the public interest.

(45) ARGUMENT:

C10.1

(i) CODE C:10.1 did apply. The reasons advanced during the pre-trial submissions are adopted and were sound;

(ii) The first part of the learned judge's ruling was legally and logically flawed: the police and the BSS were geared up to arrest the appellant that day (unlike CHRYSTOU or KOSTEN). The eventual arrest was delayed by the telephone call and consequently the caution was

delayed thereby. The only reason for making the telephone call was to ask questions and solicit responses uninhibited by the Code.

(iii) The parties could not be on equal terms when one was lying to the other about who he was. It is unrealistic to say that George was not holding himself out to be a person in authority when the whole object of the call was to disguise the fact that he was;

(iv) The question asked:-
"I am a colleague of your old friend Victor,do you remember him?
A: Yes"
was a key interrogation question: it was put time and time again in the interviews. The police had achieved in seconds during a telephone call what they had failed to achieve over 4 days of interviews.

Cp INTERVIEWS: p50-53; 68; 72; 102-107; 329; 531-532; 740.

(v) Although the appellant did not exercise his right to silence in the interviews he did have the advantage of knowing that "anything he did say could be taken down and used in evidence against him". The second part of the caution serves the function of telling a suspect that the questions being asked are important,significant and serious ones with any answers being seen in the same

context. Here this appellant was asked the most fundamental question in circumstances where he had been tricked into becoming his own relaxed betrayer.

(v) The appellant did not voluntarily apply himself to the trick in circumstances where George called him on an unknown pretext to obtain vital evidence by a question,response and action - unlike the appellants in CHRYSTOU.

S78 PACE AND THE TRAP POINT

(46) (i) The learned judge erred in holding that it was a brief conversation which didn't go to the heart of the matter. The brief conversation did go to the heart of the matter.It was the cornerstone on which the Crown built their case. Without the admission the Cown would not have been able to show any link between Victor Oschenko and the appellant and all evidence and assertions about:-

(a) the appellant being recruited by Oschenko in the early 1970's;

(b) working on a secret weapons project at EMI;

(c) his trip to Portugal and the evidence of MR E; and

(d) his efforts to retrieve his security clearance.

would on the Crown's case have been rendered irrelevant and inadmissible without the admission.

(ii) The guidelines of the Lord Chief Justice in SURTHWAITE/ GILL 1993 Transcript 92/6554 (not decided at