The Police Ombudsman for Northern Ireland Report into the Police Handling of Loyalist Murders in Belfast 1990-1998: A Lesson for Contemporary Policing in the Use of Informants

by Dr David Lowe

Introduction

This article examines the issue of collusion by counter-terrorism police officers, allowing the informants they handle to commit offences. This concern is brought about by the amendment to the Regulation of Investigatory Powers Act 2000 (RIPA) by the Covert Human Intelligence Sourced (Criminal Conduct) Act 2021 that permits in specific circumstances informants to be involved in criminal conduct. As a result, the article looks at examples of collusion by the former Royal Ulster Constabulary (RUC) officers during the 1968-1998 Irish Troubles to assess what lessons can be learnt by counter-terrorism officers today. The focus emanated from the Police Ombudsman for Northern Ireland Review into loyalist murders committed between 1990-1998 released in February 2022, and the reports and cases related to the murder of Irish solicitor Pat Finucane in 1989. While this may seem to be an examination of events that took place many years ago, they are still events subject to ongoing legal proceedings.

Police Ombudsman for Northern Ireland Review

On the 8th February 2022 the Police Ombudsman for Northern Ireland, Marie Anderson's review into the police handling of loyalist murders in South Belfast between 1990-1998 was published. The height of the murders caried out by the loyalist paramilitary group the Ulster Defence Association (UDA) under the pseudonym of the Ulster Freedom Fighters (UFF) was between 1990-1994, where 56 were murdered in the whole of Belfast. During the Irish Troubles the UDA were not proscribed as a terrorist organisation until August 1992, with the UFF having been proscribed since November 1973, where UFF terrorist activity was simply a cover for the UDA's activities. In the review the police referred to is the RUC that following the 1998 Good Friday Agreement was renamed the Police Service of Northern Ireland (PSNI). Five principal elements of the review's investigation were:

1. The RUC's response to intelligence, where it was available, that victims may have been under threat prior to their murders;

2. The RUC's knowledge of the origins and history of firearms that were used in the attacks;

3. The recruitment and management of informers by the RUC in Belfast;

4. The handling and exploitation of intelligence by the RUC; and

5. The conduct of the related RUC investigation into the murders.

The review also considered the allegations made by the victims' families that includes:
1. That the attacks were preventable;

2. The related RUC investigations were ineffective; and

3. The RUC colluded with loyalist paramilitaries, including informants, during the period 1990-1998

While this review may be seen as an investigation into events that occurred between 24 to 32 years ago in Northern Ireland, an important issue the review examined was collusion between the RUC's Special Branch officers and the loyalist informants they handled. With the UK government having introduced the Covert Human Intelligence Source (Criminal Conduct) Act 2021 that in specific circumstances is an authorisation allowing informants to commit criminal conduct, I raised a concern related to the Act regarding clear limits as to how far informants working undercover in terrorist groups could be allowed to go in relation to what offences in their criminal conduct is permissible under the Act[1].

Relevant to contemporary policing, after analysing a number of definitions of collusion, Anderson applied a broad definition where collusion is a wilful act or omission that can be active or passive, with active collusion involving deliberate acts and decisions. Passive or tacit collusion involves turning a blind eye or letting things happen without interference. As Anderson states, by its nature collusion involves an improper motive and, if proved, can constitute criminality or improper conduct and that corrupt behaviour may constitute collusion. It is accepted that the recruitment and handling of informants has changed considerably since the period the review investigated, primarily through statutory governance under sections 29–29D RIPA, with section 29B having been added through the Covert Human Intelligence Source (Criminal Conduct) Act 2021, with the accompanying Codes of Practice to guide the police through their statutory obligations. In the period the review covers the recruitment and handling of informants was governed by Home Office Circular 35/1986, which was simply a policy to guide the police. It allowed the police to use informants provided:
1. Neither the informant or the police counsel, procure or incite the commission of a crime;

2. The informant's role is minor; and

3. Their involvement is designed to frustrate the crime and arrest principals.

The condition that an informant is not involved in the commission of criminal conduct contained in the Home Office Circular was transposed into the original version of RIPA where under section 27 there was an obligation on the police ensuring the informant does not get involved in carrying out any form of criminal conduct and if they did then they would be arrested and potentially charged with offences related to the conduct they were involved in.

In January 1987 the RUC corresponded the Northern Ireland Office, raising concerns that following the 1986 Home Office Circular would fetter their ability to police both the republican and loyalist paramilitaries, saying: *'The [Home Office] Guidelines take no cognizance at all of the special problems relating to Northern Ireland. They were, of course, drawn up to deal with 'ordinary' criminals in a mainland context, rather than for coping with terrorists. Given our special situation the restrictions placed upon us by virtue of the guidelines are unrealistic if we are to continue paramilitary penetration/ [informant]protection.'*

The RUC make a valid point as at that time both republican and loyalist terrorist groups were very active, with republican groups conducting terrorist activity in both Northern Ireland and England. Using informants to gain intelligence on the groups' activities they would be committing offences, mainly membership of terrorist organisations (section 2 Prevention of Terrorism (Temporary Provisions) Act 1989 – now repealed) and, at that time, conspiracy to commit criminal offences (section 9 Criminal attempts and Conspiracy (Northern Ireland) Order 1983). This situation has not changed today. Informants infiltrating terrorist groups are likely to commit the offence of membership of a terrorist organisation (section 11 Terrorism Act 2000) and in order to gain intelligence of proposed activity of the group, the offence of planning and preparing an act of terrorism (section 5 Terrorism Act 2006). Unfortunately, as Anderson's review revealed, as the Home Office Circular guidelines had been discarded some of the RUC's Special Branch officers colluded with UDA/UFF members who carried out murders, particularly during the 1990-1994 period.

In her review, Anderson acknowledges that during the troubles the RUC's use of informants resulted in the conviction of individuals involved in acts of terrorism, with firearms and other items of use to the paramilitaries removed and lives saved. The review states that risk assessments of informants must be:
1. Frequent;

2. Individually tailored to specific circumstances;

3. Fully documented in order to ensure a robust and transparent process; and

4. The quality and frequency of information supplied must be regularly reviewed.

Unfortunately, some RUC Special Branch officers did not carry this out as revealed in the investigation into murders committed by loyalists, leading Anderson to say: *'The pressure to create and maintain an extensive intelligence network within paramilitary ranks led to an environment where police, at times, failed to ensure the effective and efficient management of informants. The quality and*

quantity of intelligence obtained was disproportionate when balanced against the significant threat posed to those parties involved and wider society. In these instances, I am of the view that the risks taken by police were unacceptable.'

Sean Graham Bookmakers Attack

A good example of this contained in the review is the attack on the Sean Graham Bookmakers in the Ormeau Road on the 5th February 1992, where two UFF gunmen entered the premises and shot four men and a 15 year-old boy. Following the attack an anonymous caller using a recognised codeword contacted the BBC saying: *'This afternoon UFF volunteers carried out an operation on members of the most active unit of PIRA which is based in the Lower Ormeau/Markets area. This area has become a cesspit of Republicanism and as such the UFF targeted Sean Grahams. The UFF are confident that at least two well-known players have been executed. Remember Teebane.'*

This attack was a tit-for-tat attack by the UFF for Teebane attack carried by the Provisional IRA (PIRA) in January 1992 where they detonated a roadside bomb destroying a van carrying 14 construction workers who had been repairing a British Army base in Omagh, killing 8, injuring 6, all protestants. PIRA claimed responsibility saying the workers were collaborating with the 'forces of occupation'. In June 1992 RUC's Special Branch officers received information indicating a person to be one of the gunmen, but this was not disseminated to the senior investigating officer investigating the Ormeau Road murders. This is where the Ombudsman found potential collusion. As a result, the families wish to take further legal action that the RUC failed to discharge their duty under article 2 European Convention on Human Rights (ECHR), the right to life and this is preventing the families request to have an article 2 ECHR compliant review.

Pat Finucane Murder

Linked to other murders committed during the Irish Troubles where it is alleged that RUC Special Branch officers acted in collusion with the UDA/UFF is the murder of the lawyer Pat Finucane in February 1989 by loyalist paramilitaries from the UFF who shot him 14 times in front of his wife and three children while having supper. Since the murder, Finucane's family have been requesting an article 2 ECHR compliant review, a legal issue that is still ongoing. In 2011 Sir Desmond de Silva QC was appointed by former Prime Minister, David Cameron, to head a Review into the collusion by MI5 and the RUC into Finucane's murder as through their handling of loyalist informers they were seen as complicit in the murder. The Finucane family described the report as a 'sham' because they had no input and it blamed dead witnesses and defunct military organisations. The UK's Supreme Court recognised De Silva's Review was not an effective article 2 ECHR compliant review as the Review does provide pertinent evidence related to the murder. The main issue is allegations that RUC officers encouraged the UDA/UFF to murder Pat Finucane. Finucane was a criminal lawyer who regularly represented PIRA members that included representing them during their police detention and subsequently in court proceedings, as a result, evidence was produced that Finucane received death threats from certain RUC officers. (It is worth noting that Finucane also represented loyalist paramilitaries suspected of terrorist activity.) In 2004 UDA member, Kenneth Barrett was convicted of Finucane's murder.

While RUC officers made no direct threat to his life to Finucane, the allegations of the threats RUC officers made towards him came via Finucane's clients who had been arrested for terrorism offences that he was representing. In his Review, de Silva felt there was a degree of unreliability regarding the allegations over Finucane's safety as they were uncorroborated. Also, as they were made my PIRA members, who being part of an organisation that would readily distort the truth to support their broader objective, he claimed these men: *'…would not have hesitated to either invent or exaggerate allegations against the police if they felt by doing so, they would discredit the RUC as an organisation.'*

However, the day after Finucane was murdered the Irish Ambassador met the Secretary of State for Northern Ireland where, based on information the Irish government had received, he raised concerns the RUC were encouraging loyalist paramilitaries to attack republican lawyers, including Finucane. This claim was supported by loyalist paramilitaries who claimed two RUC detectives were complicit in Finucane's murder by encouraging loyalists to carry it out. This included Barrett, who claimed that some RUC officers were 'putting the word out' to loyalist paramilitaries that Finucane 'should be hit'.

In 2019 in a judicial review of the murder (In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland) [2019] UKSC7), the UK's Supreme Court was asked to consider whether an article 2 ECHR compliant review be held. The first issue the Court considered was with the murder taking place in 1989 and the UK introducing the Human Rights Act in 2000 (where the Act incorporated the ECHR into UK law), could the Act's provisions apply. In Brecknell v UK (2007) 46 EHRR 42 the European Court of Human Rights (ECtHR) heard a similar application with similar facts, where a widow claimed her husband was killed by a UDA gunman in 1975 following collusion with RUC officers. The Court held that it could be heard due to new evidence coming forward after 2000. In relation to Finucane, in his 2003 enquiry, the former Commissioner of the Metropolitan Police, Sir John Stevens concluded he had uncovered 'enough evidence' that the murder could have been prevented and the investigation into the murder should have resulted in the early arrest and detection of the killers. He also concluded there was evidence of collusion in the murder between RUC officers and loyalist paramilitaries with that collusion taking the form of:

1. 'wilful' failure to keep records;
2. absence of accountability;
3. withholding intelligence and evidence; and
4. extreme [informer] being involved in the murder.

As this enquiry claiming there was new evidence was published in 2003, the Supreme Court stated they could hear the case. The Court also held that from de Silva's Review conclusions that one or more RUC officers 'probably' did propose Finucane as a target for loyalist terrorists, it, '…bears directly on the proper investigation of his murder'. As such, the Court held as the police source escaped any sanction and not been held accountable, the murder has avoided all the legal consequences that should have followed from that officer's activity. This resulted in the finding in Lord Kerr's judgement who held there has not been an article 2 ECHR compliant inquiry into Finucane's death, adding it is for the state to decide if a public inquiry should follow the Court's decision. Lord Kerr added: '…in light of the incapacity of Sir Desmond de Silva's review and the inquiries which preceded it to meet the procedural requirement of article 2, what form of investigation, if indeed any is feasible, is required in order to meet that requirement.'

In November 2020 the UK government decided a public inquiry into the murder would not take place. Brandon Lewis, the Secretary of State for Northern Ireland, as he saw as important the ongoing Police Service of Northern Ireland (PSNI) and the Police Ombudsman processes and they should be allowed to move forward, but he did say the possibility of a public inquiry was 'not off the table'. Clearly, this is a political decision, not one based in law and Lewis' decision was seen as making a mockery of the Supreme Court's decision. As a result of this decision, in March 2021, Europe's leading human rights body, the Council of Europe (from which the ECHR and the ECtHR emanates) announced it will re-open its supervision of the Finucane case. Driven by the Republic of Ireland government, there is no doubt there is a likelihood of the UK government having to meet its obligations under article 2 and have a compliant review. This is due to the Council of Europe stating it will supervise the ongoing measures to ensure they are adequate, sufficient and proceed in a timely manner, requiring the PSNI and the Ombudsman reviews proceed promptly in line with ECHR standards. No doubt the Council will refer to the earlier case of Finucane v UK (2003) (Application 29178/95) where the ECtHR held unanimously there was a violation of article 2 as the proceedings for investigating Finucane's death failed to provide a prompt and effective investigation into the allegations of collusion. As the Police Ombudsman process is now completed, the Secretary of State for Northern Ireland should consider revising his decision as it is surely now 'back on the table'.

Conclusion

It is acknowledged that the incidents and cases from the Irish Troubles referred to in this article occurred during a time an extremely violent conflict that has also been referred to by loyalists as the 'long war'. During this conflict there were periods where attacks carried out by dissident republican and loyalist groups was virtually on a weekly basis, which put unparalleled pressure on the RUC to not only investigate the attacks, but to also prevent further attacks. In addition to this, during this conflict dissident republican groups like PIRA targeted RUC officers, killing 300 officers. Even though the current terrorist threat level is at severe in Britain (mainly from Islamist and Extreme Far-Right groups) and severe in Northern Ireland (mainly from dissident republican group activity) the frequency of attacks is nowhere near the intensity seen during the Troubles. It is also acknowledged that the statutory governance of informants under RIPA ensures a much tighter control in the recruitment and handling of informants compared to the 1986 Home Office Circular. These are key points raised in the reports, cases and the Police Ombudsman for Northern Ireland review. Returning to the Covert Human Intelligence Source (Criminal Conduct) Act 2021 that introduced section 29B RIPA, the question remains, what allowance will informants have in relation to their involvement in criminal conduct? Should the intensity of plots to commit and the actual commission of terrorist attacks increase, the lesson for contemporary counter-terrorism policing who are tempted to deal with terrorist activity similar to the situation some RUC Special Branch officers carried out by colluding with terrorists to get results and hide behind section 29B RIPA, even if it is under the misguided altruistic view of such action being taken to serve a greater good, should be avoided.

References

1. 'Covert Human Intelligence Source (Criminal Conduct) Act 2021: Making Lawful Criminal Conduct', The Expert Witness Journal, Issue 39, October 2021, pp.121-124

Dr David Lowe is a retired police officer and is currently a senior research fellow at Leeds Law School, Leeds Beckett University researching terrorism & security, policing and criminal law. He has many publications in this area including his recent books 'Prevent Strategy: Helping the Vulnerable being drawn towards Terrorism or Another Layer of State Surveillance?', 'Terrorism and State Surveillance of Communications' and 'Terrorism: Law and Policy', all published by Routledge. Routledge will be publishing the 2nd edition of his book 'Terrorism Law & Policy: A Comparative Study' in May 2022. David is regularly requested to provide expert commentary to UK national and international mainstream media on issues related to his research areas and he provides an expert witness service.