

# INQUEST TOUCHING THE DEATH OF JEAN CHARLES DE MENEZES

## VERDICTS & CONCLUSIONS - *OUTLINE SUBMISSIONS (Red and Grey teams)*

### **Specific short form verdicts**

1. We have read the written submissions on this topic prepared on behalf of the family of Mr de Menezes ['JCM']. We recognise that these contend for no short form verdict directed at any member of the Red or Grey teams. Nonetheless we have read the written submissions from the Commissioner and C2/C12 on this same topic and, insofar as it is not impertinent to do so, we support their submissions as to short form verdicts for the reasons which they have given. We have seen no submissions on this topic from the Kingsley Napley officers.

### **Supplemental narrative**

2. Whatever short form verdict is returned, it should be supplemented by a short, non-judgmental narrative conclusion by which the jury may express its conclusions on the disputed factual issues at the heart of the case<sup>1</sup>. It is vital that such a narrative not offend against Rules 36(2) and 42. In this case the best way to satisfy both of these imperatives is by imitation of the approach adopted in the draft inquisition left to the jury enquiring into the death of the Princess of Wales. If so, this jury would be presented with simple and specific factual conclusions for acceptance or rejection. It would be directed as to the law governing each such conclusion and would be reminded of the evidence relevant to each.

### **Factual conclusions**

3. The narrative should address only causally relevant matters and should avoid any greater multiplicity of issues than is strictly necessary to satisfy Article 2. The specific factual

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<sup>1</sup> *Middleton* [20]

conclusions to be presented to the jury for its acceptance or rejection should be chosen by reference to the same criteria.

4. Now that all the evidence has been heard and can be assessed as a whole it is possible
  - (a) confidently to distinguish, on 'surveillance' issues at least, between those evidential morsels which are strays and those which form the pack, between those which are reliable and those which are not, and thus
  - (b) to recognise that no 'surveillance issue' warrants inclusion in the list of potential factual conclusions to be presented to the jury, although
  - (c) one or two of those issues might yet merit consideration under Rule 43.
  
5. Many, many 'surveillance' issues have been explored, without interruption, in the seven weeks of evidence. They include examination of such propositions as
  - (i) The Red team was not tight enough
  - (ii) There should have been two officers in the back of Frank's van
  - (iii) Frank did not press 'record' while urinating and broadcasting
  - (iv) Edward did not get out of his car amongst those going to school
  - (v) T2 was not able to get ahead of JCM in Upper Tulse Hill
  - (vi) Ken was not able get a full frontal view of JCM opposite the parade of shops
  - (vii) Ivor was not able confirm JCM's identity one way or the other on the bus to Brixton
  - (viii) Some surveillance officers did not keep the briefing image with them once deployed<sup>2</sup>
  - (ix) No officer picked up that Brixton Tube station was closed
  - (x) No officer who drove past JCM at Brixton could identify him one way or the other
  - (xi) James did not volunteer Lawrence's opinion to Pat as he had volunteered his own
  - (xii) Lawrence was not able to identify JCM one way or the other on bus to Stockwell

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<sup>2</sup> The officer who most thought that JCM looked like the briefing image was James, who had the image with him and consulted it twice during the follow.

- (xiii) Ken was not able to identify JCM one way or the other outside the Nat West bank
  - (xiv) The photocopy images provided to the Red and Grey teams were of poor quality
  - (xv) The surveillance and firearms teams were not briefed together
  - (xvi) Lawrence failed to initial his amendment of his log entry.
6. The ‘surveillance’ question which has occupied most jury time is how it came about that different officers in different roles and different locations with different access to communication came to different appreciations of the level of confidence with which JCM was being linked in identification with Nettle Tip. Even this issue does not warrant reflection in the factual conclusions to be left to the jury. This is because
- (a) it is causally irrelevant,
  - (b) it has been satisfactorily resolved during the course of the Inquiry,
  - (c) even if some crumb of fuel for conjecture remains, the process of examination has satisfactorily addressed the issue for Article 2 purposes, and
  - (d) the jury will have enough to think about without this.
7. The issue is causally irrelevant because armed intervention would inevitably have been ordered in the case of a suspected suicide bomber whether he were ‘possibly’, ‘probably’, ‘positively’ or ‘definitely’ identified. In our context that would inevitably have involved the use of the SFO team, if available.<sup>3</sup>

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<sup>3</sup> This is most succinctly established in the evidence of Mr Boucher at 8:192:13

Q: If someone came out who was a possible or a likeness for a man who the day before had tried to murder a lot of people on the Underground system, would he have been stopped by an SFO team?

A: Yes, sir, he would.

and of Mr Esposito at 17:238:11

Q: ...levels of identification...‘possible’, ‘probable’, ‘positive’. If they are being used about a man who is suspected of being the person who tried to murder a lot of people the day before, without warning, would any of those three levels of identification require in your view an armed stop to take place?

A: Yes, sir.

8. Causally irrelevant issues should not be addressed in the jury's factual conclusions because
- (a) the matters to be ascertained under Rule 36 relate to the cause of death,
  - (b) their re-interpretation in *Middleton* does not require a verdict to include conclusions on issues not causally relevant to death,
  - (c) the investigative obligation imposed by Article 2 is directed at establishing the cause of death and is not interpreted in the Strasbourg case law as requiring findings on issues which are not causally relevant to death, indeed the effectiveness of the 'official investigation' required by Article 2 is measured precisely by its capacity to determine the cause of death (and identify those responsible)<sup>4</sup>, and
  - (d) to require a verdict to address issues not causally connected to death would be likely to invite a breach of the prohibition in Rule 36(2).
9. The issue has been satisfactorily resolved during the course of the Inquiry. On a preponderance of the evidence it is plain how 'possible', 'good possible' and 'think' turned into 'sure', 'certain' and 'beyond a shadow of a doubt'. Two separate summaries illustrate this. The first is a summary of the 'follow' between 09:33 and 10:03, during which period the Red and Grey teams had JCM under their 'control'. This summary, which is attached as Appendix A, is based upon the Red log, the Grey log, Pat's log, the CCTV (synchronised to Lambeth time), the significant telephone calls and the officers' memories of what those calls were about. The second, in Table 2 below, is a summary of the other witnesses' states of belief. Setting out these beliefs in one place of itself reveals the pattern of escalation and illustrates how the Chinese whispers developed.

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<sup>4</sup> *Jordan* [107] 'The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible... Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard'

**Table 1 - Witnesses' levels of belief about identification of JCM as being Nettle Tip**

Pat	The subject remained as 'possibly identifiable with NT' throughout	15:34:12 – 15:35:10
	I don't recall saying "they think it's him"	14:186:17
Scott	Pat said something like "they are saying that it's him"	7:94:4
Johnstone	Pat said "they are saying it could be him"	9:133:22
Lewindon	Pat said "they think it's him"	10:18:22
Brian	Kneeling beside Pat my impression was it may have been... could have been NT	14:80:18
Owen	Pat said "they can't give a percentage, but they think it's him"	16:122:22
Whiddett	My impression he was a probable for Osman or might be someone of interest	10:55:11
Cremin	My notes 'It is him, the man off the bus' and 'They think it is him and he is very very jumpy' came from Pat	13:162:1; 13:173:14
Nick	Listening to radio commentary, the strongest comment I heard was "it's a good possible"	14:144:21
Callum	His log reads at 09:52: 'possible "Nettle Tip" NT o/s Brixton tube (on bus) station "very jumpy" (Probable ident) No bags visible'	Jury tab 56 Dp352
Esposito	The surveillance chatter and/or Pat said "possibly identical with" or "they think it's him". That information from the surveillance teams led me to believe that it was NT, a positive identification, beyond a shadow of a doubt	17:119:18; 17:225:19ff
TJ84	In latter stages of follow I was almost surrounded by a sea of positive identification, but I heard no positive identification from the Cougar radio or in telephone calls to James	18:160:4 – 18:163:21
Boutcher	Pat said that they did now believe the subject to be Osman	8:86:15
	Pat said "they are saying that it's him"	8:190:24
	I took this to mean a strong likeness	8:88:21
Dick	Pat said "they think it is him and he is vv jumpy"	11:134:8
	Purser confirmed that they were sure it was him, by telephone, quite early on	11:136:8; 13:17:17
	Purser said "they are certain it's him", by telephone, quite late on, approaching Stockwell junction	11:151:8; 13:18:4
	This may have been as JCM came downstairs in the bus	11:154:16
	Pat again said "they think it's him" with some urgency	11:151:12
Purser	At 09:55 on Cougar I heard "it's him, Nettle Tip, believed him" or "believed Nettle Tip, it's him"	19:190:9
	I said to Dick that they seemed certain	20:104:6
C12	I heard "units be aware, SO19 units are moving through" on Cougar. This	25:112:2;

	meant that the subject had been positively identified.	25:114:25
	I assumed that SO12 would not follow anyone unless positively identified	24:39:21
C2	I heard over the radio that there were surveillance officers on the bus, and I heard them say that this was definitely our man	27:21:6
	Heard this towards the end of the follow	27:133:12
	I may have picked up 'definitely our man' from somewhere other than the surveillance officers	27:139:8
C5	I understood from our briefing that we would only be brought in if someone had been identified as one of the suspects	27:164:17
	I can't say whether I got my impression that the subject was one of the men from the previous day from the Cougar, from a telephone call or from the 75 channel	27:170:24
Ralph	I assumed he was one of the suspects because we were told to get behind the bus and support the surveillance team	28:94:6
	I heard 'definitely our man'. I understood that this came over the Cougar. I assumed that this came from the eyeball	28:96:21
Terry	I had not heard whether the man had been identified	29:128:21
	I certainly did not hear 'definitely our man' on my Cougar	29:158:21
C7	I heard 'definitely our man'. I believe it came from the Cougar	29:200:9
C11	I heard 'definitely our man' over the radio	31:106:5
D9	I did not hear 'definitely our man' on the Cougar. I heard someone on the Cougar say that he was pretty sure he was our man	31:184:21 – 31:185:8

10. The process whereby raw data was

- (a) broadcast by the Grey team on the Cougar radio and James's mobile telephone,
- (b) translated and/or relayed by Pat,
- (c) interpreted by others in the Control Room, and
- (d) disseminated for action by the SFO team

is probably plainest in the evidence of Mr Esposito<sup>5</sup> and TJ84<sup>6</sup>.

<sup>5</sup> 17:225:1 – 228:4 includes at 17:226:5

Q: It may be as simple as this then... if you heard the words from Pat or somebody else "They think it's him", that for you constituted a positive identification?

A: That, along with everything else that was going on, yes, sir.

Q: The other things were?

A: What I perceived to be anti-surveillance, all the other issues, texting of the mobile phone – which we now know not to be the case – but all of that built up a picture in my mind as to what was happening.

And 18:50:25 – 51:15 reads

11. The parallels between those who mistakenly believed that JCM had been negatively identified and those who mistakenly believed that he had been positively identified are unsurprising. Those beliefs are summarised in Table 2 below.

**Table 2 - Witnesses' levels of belief about identification of JCM as NOT being Nettle Tip**

Scott	I understood that the surveillance team had said that this was not the subject/suspect... and consequently Dingemans was deployed	7:90:20; 7:93:6
	This negative came from Esposito	7:153:12
Boutcher	Esposito said that the man was now not believed to be Osman	8:134:24
Johnstone	Esposito, listening to someone on his mobile telephone, said "it's not the suspect"	9:129:5
Dick	I think it was Pat who said it was now realised [not to be a suspect], but it may have been Purser or Boutcher	12:137:21; 13:16:13-17:9
Pat	I was not aware that man had been discounted at any stage, certainly did not come through me	15:33:15 – 34:11
Esposito	I got the impression it was not him either from surveillance chatter either directly or on telephone from TJ84...	17:77:11
	...or from Pat	17:224:6
TJ84	Prior to 09:42 when I arrived at the TA Centre I knew the person had been eliminated	18:149:13

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Q: Just coming back to the point on identification... you had an open line to Trojan 84 after what you considered to be a positive identification?

A: Yes.

Q: And what was considered in the Control Room by a number of people to be a positive identification?

A: That's correct.

Q: Whatever he was hearing in the car on any other radio channel, you would have passed on to him what the command team considered the state of identification to be?

A: Yes.

Q: You, the command team, considered this man had been positively identified?

A: Yes, that's correct.

<sup>6</sup> 18:160:4 – 163:21 begins

Q: ...you gained an impression that the man being followed was the suspect Osman. How did you gain that impression?

A: ...it's extremely difficult to remember when that occurred. The only way I can rationalise it in my own mind was that it was a build-up of knowledge from a number of different sources, those sources being... the conversations I had with Trojan 80 or conversation I had with Trojan 80 prior to that point. The fact that Greg Purser was in the car making calls to various people and receiving calls. Again in hindsight I now know that was probably Commander Dick and/or others in the control room. Plus we had the cougar radio in the vehicle and my driver was probably shouting or giving instructions to me about what might have been going on over the radio as well. So although it's difficult to answer that question in an easy way, at some point, especially during the latter stages, I was almost surrounded by a sea of positive identification.

Purser	At 09:45 I got negative identification from TJ84 who had been on telephone, hence my note 'not ident with suspects, DS Dingemans arrest team deployed'	20:75:18
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12. That the 'negative identification' was, in the minds of those who had it only at second hand, as genuinely believed as the 'positive identification' was later to be, is plain from the deployment of Mr Dingemans and his team.

13. The net effect of this is that little mystery remains, certainly none which would merit, even if causal relevance were established, inclusion of this 'surveillance' issue as a distraction underneath a list of more deserving candidates.

14. So far as 'surveillance' issues are concerned, any purpose of the investigative process<sup>7</sup> which may have been imperfectly satisfied by the IPCC investigation and reports, the CPS analysis and the criminal trial (in which the surveillance officers also gave evidence)<sup>8</sup> has certainly been more than satisfied over the seven weeks of evidence to this Inquiry. The full facts have been brought to light. Questionable conduct has been exposed and brought to public notice, for instance Lawrence's failure to initial his log amendment. Any suspicion of deliberate wrongdoing has been allayed. And if the learned Coroner has any lingering concern about 'surveillance' practices or procedures which might be dangerous, he can and will address them under Rule 43.

14<sup>th</sup> November 2008

Patrick Gibbs QC

Hugh Davies

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<sup>7</sup> *Amin* [31]

<sup>8</sup> The criminal trial process (and its verdict) is part of way in which the Article 2 obligation will in this death have been satisfied.

Reynolds Dawson