Neutral Citation No. [2011] NICA 35 | *Ref:* **MOR8263**

Judgment: approved by the Court for handing down | *Delivered:* **12/8/11**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

LIAM HOLDEN (Disclosure)

Defendant/Respondent

Before: Morgan LCJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the court)

[1] On 19 April 1973 the appellant was convicted of the capital murder of Private Frank Bell on 17 September 1971 and possession of a firearm and ammunition with intent. His death sentence was commuted to life imprisonment and he received a sentence of 10 years imprisonment on the firearms charge. In exercise of its powers under the Criminal Appeal Act 1995 the Criminal Cases Review Commission (CCRC) has decided to refer the appellant's conviction to the court of appeal. The CCRC has concluded that there is a real possibility that:

(i) the court will be unable to conclude that new evidence would not have made any difference to the ruling on the admissibility of the admissions to the army and/or the confessions to the RUC;

(ii) the court will be unable to conclude that the confessions to the army and/or the RUC, if admitted, would have resulted in a verdict of guilty had the jury been told of the evidence; and

(iii) the court will consider that the new evidence and the circumstances of Mr Holden's arrest and detention provide prima facie grounds for concluding that his convictions are unsafe and that there are not sufficiently substantial countervailing factors to displace this prima facie conclusion.

The appellant now seeks disclosure of 15 items of sensitive information which were made available to the CCRC on a confidential basis. Some of that information forms the basis for the conclusions that the CCRC has reached as set out above.

[2] The respondent is resisting the appeal and initially resisted any disclosure of any of the sensitive items. Subsequently the respondent made disclosures under cover of a letter dated 2 February 2010 and further disclosure under cover of a letter dated 5 March 2010. These documents raise issues about the lawfulness of the interviews conducted by the army with the appellant and the circumstances in which his statement of admission was obtained by the RUC. The respondent contends that the remainder of the documents disclosed on a confidential basis are not relevant and that there is, therefore, no duty of disclosure attaching to them.

The test for disclosure

[3] The respondent submits that the leading authority on the obligation to disclose material in the hands of a prosecutor in a criminal trial is R v H and C [2004] UKHL 3. Delivering the opinion of the committee Lord Bingham said at paragraph 14 that fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant should be disclosed to the defence. The corollary is set out at paragraph 35 that if the material does not weaken the prosecution case or strengthen that of the defendant there is no requirement to disclose it. In examining this issue the court must be careful to recognise that the cases made by each of the parties ought not to be restrictively analysed.

[4] The appellant submits that the test set out in R v H and C above applies only to those cases affected by the provisions of the Criminal Procedure and Investigation Act 1996 (the 1996 Act). This was a case which predated that legislation and disclosure ought, therefore, to have been made in accordance with the wider test set out by the English Court Of Appeal in R v Ward [1993] 1 WLR 619. That case provided that disclosure should be made of all material matters affecting the prosecution case whether those matters strengthen or weaken prosecution case or assist the defence case. It was subsequently followed in R v Keane [1994] 1 WLR 746.

[5] R v H and C was a case in which the issue for the House was whether the procedures for dealing with claims for public interest immunity complied with article 6 of the ECHR. In order to deal with that issue Lord Bingham stated that the approach of the House had to be governed by the cardinal and overriding requirement that the trial process as a whole must be fair. It was in that context that he introduced his comments about fairness at paragraph 14 of his opinion set out in paragraph 3 above. Those comments preceded his review of the history of the development of the law of disclosure and at the

end of paragraph 14 he asserted that the golden rule was that full disclosure of such material should be made.

[6] It seems to us, therefore, that in these passages Lord Bingham has identified fairness as the touchstone for the test for disclosure in criminal cases. He has then gone on to identify the requirements of fairness without reference to any previous common-law test or the statutory regime. That suggests strongly, therefore, that he was setting out a test of general application irrespective of the previous law.

[7] In the next portion of his opinion he describes how the law developed historically. He stated that domestic practice had not always developed consistently and noted the decision in Ward and the test subsequently prescribed by the 1996 Act. He subsequently examined the PII issues before returning to the general issue of disclosure in particular at paragraph 35.

[8] When Lord Bingham asserted in paragraph 35 that there was no requirement to disclose material that did not weaken the prosecution case or strengthen that of the defence we do not consider that he was confining his comments to those cases to which the statutory regime applied. His earlier analysis supports the view that these comments were of general application. That is reinforced by his subsequent statement within paragraph 35 that the trial process is not well served by far reaching disclosure ordered in the hope that something may turn up. Neutral material or material damaging to the defence need not be disclosed.

[9] We consider, therefore, that the test for disclosure in any criminal appeal whether heard before or after the commencement of the 1996 Act is that set out in R v H and C.

[10] Even if wrong on this the appellant submits that there is a line of European jurisprudence starting with Rowe and Davies v UK (2000) 30 EHRR 1 and including Atlan v UK (19 June 2001) and Dowsett v UK (24 June 2003) which requires disclosure of all potentially relevant material at the appeal stage where there has been a failure of disclosure at first instance. Since all of the confidential information was made available to the CCRC who thereafter formed their views and came to their conclusions on the basis of that material it is submitted that the entirety of the confidential material should now be made available to the appellant.

[11] The cases referred to in paragraph 10 above were all cases in which PII issues were in play. Even in those cases it has been consistently recognised by the ECHR that the entitlement to disclosure of relevant evidence is not an absolute right. There may be competing interests such as national security, the need to protect witnesses or the need to keep secret police methods of investigation of crime. Even in cases where there has been a failure to make

disclosure at first instance, the ECHR has recognised that the issue is one of fairness. Where the court of appeal is able to consider the impact of the new material on the safety of the conviction in light of detailed argument from defence, the failure to place the undisclosed material before the trial judge can be remedied (see Botmeh and Alami v UK [2007] ECHR 456).

[12] In this case, however, the first issue that requires determination is the relevance of the material to the issues which are presently before the court. None of the European authorities cast any doubt on the approach set out in R v H and C which requires the court to determine the issue of relevance before moving on to PII. Indeed many of the European authorities were considered by the House of Lords in that case.

[13] We have carefully considered the entirety of the confidential information. In respect of the issues surrounding the admissibility of the appellant's alleged confessions we are satisfied that the documents which have now been disclosed comprise all of the relevant material within the sensitive material made available to the CCRC. We also consider that the first 28 paragraphs of the Confidential Annex made available to us by the CCRC which sets out the reasoning for the conclusions reached at paragraph 1 above should now be made available to the appellant. We do not consider that any further disclosure is required.

[14] We recognise that disclosure is a continuing obligation throughout any criminal trial and appeal so the determination made in this application may have to be reviewed in light of any issues emerging on the hearing of the appeal.