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Judgment: approved by the Court for handing down | *Delivered:* **3/3/2008**

*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

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THE QUEEN

-v-

FRANSCISO NOTORANTONIO AND OTHERS

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RULING ON APPLICATIONS FOR DISCLOSURE

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HART J

[1] Applications have been made by the defendants under Section 8(2) of the Criminal Procedure and Investigations Act 1996 (the 1996 Act) for orders directing the prosecution to disclose certain material to the defendants. The application in respect of Francisco Notorantonio has been adjourned to enable Mr O'Donoghue QC for the defendant to prepare a revised and more specific series of requests in relation to the outstanding issues involving his client.

[2] So far as the remaining defendants are concerned, several requests have been either conceded or abandoned and I therefore propose to refer in detail only to those which are still in dispute.

[3] Before doing so, it is necessary to identify the relevant principles and the background to the charges and the requests. The defendants are charged with the murder of Gerard Devlin, with making an affray and with various assaults. Francisco Notorantonio is charged with malicious wounding of Anthony McCabe and with attempted malicious wounding of Thomas Loughran. Paul Burns is charged with assault occasioning actual bodily harm of Thomas Loughran and of Anthony McCabe. These offences are alleged to have occurred on Friday the 3rd February 2006 in the course of fighting in Whitecliff Parade, Belfast, between the complainants and the defendants. Central to these events is a previous history of animosity between two factions in the area. One was comprised of members or associates of the Notorantonio family. The other of members of, or associates of Gerard Devlin's family. Such was the intensity and history of this animosity that the prosecution response to the Section 8 applications states that:

> "The prosecution acknowledge that there was an ongoing 'feud' between the Notorantonio and Devlin 'factions' since circa 2002. In connection with this there has been a vast number of incidents occurring, both before and since the murder of Gerard Devlin. Such have involved, on occasions, members and associates of the immediate and extended families of both factions."

[4] When considering these applications for disclosure, there are a number of principles that are relevant to the circumstances of the present case.

(1) The prosecution is only required to disclose material that may weaken the prosecution case or strengthen that of the defendant. R-v-H [2004] 1 AER 1284.

(2) Whilst the respective cases of the parties should not be restrictively analysed to ascertain the specific grounds the prosecution seek to establish, and the specific grounds upon which the charges are resisted, "...the trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far reaching disclosure in the hope that material may turn up and make them good." (R-v-H)

(3) Section 8(2) of the 1996 Act enables a defendant to seek an order for disclosure if he has "...reasonable cause to believe that there is prosecution material which is required by section 7(A) to be disclosed to him and has not been."

(4) "Reasonable cause" is not established by a bald assertion that there may be material in existence which might be reasonably expected to assist the accused's case or undermine the prosecution case as disclosed by the defence statement. R-v-McCrory and Others, [2006] NIJB 219.

(5) Whether material might be reasonably expected to assist the defence case or undermine the prosecution case must be considered in the light of the facts of each case, including whatever concessions are made by the prosecution.

(6) It is also of fundamental importance that material can only be subject to an obligation of disclosure if it is relevant. Relevance may be established in many ways depending upon the issues defined by the allegations made by the prosecution and defence.

(7) The concept of relevance in this context must be defined with regard to the rules of evidence. Thus where the credibility of a witness is in issue, material which properly has a bearing on that issue is plainly disclosable, such as previous convictions, or discreditable material such as the content of domestic violence

registers, non-molestation orders and ASBOs.

(8) However, the further removed in time or in gravity from the issue it relates to is the material, then the less relevant it will be. For example, if A has several convictions for offences of violence, the additional relevance of allegations that did not result in prosecutions may be minimal. Similarly, if allegations of a motive for bearing a complainant ill-will relate to episodes that occurred years before when there were more recent episodes, then the older episodes will be of little, if any, value. Just as where the general rule is that answers given to questions dealing with collateral matters are final, in order to prevent the attention of the court being devoted in a measure disproportionate to their importance to a series of facts not directly relevant to the issues between the parties, so, in my judgment, must disclosure be confined to requiring material to be considered for production which is directly relevant to the issues in the case. Whether something is directly relevant must, of course, depend on the circumstances of each case.

(9) Material which casts doubt on the accuracy or credibility of a witness is disclosable, subject to (8) above. For example, police notebooks containing accounts materially at variance with the witness' evidence. Another category of such material is material which would lead to a stay of proceedings. See R-v- McCrory and Others [2006] NIJB 219 at paragraph 17, and paragraph 36 and following of the Attorney General's Guidelines on Disclosure of Information in Criminal Cases.

(10) The initial assessment of whether undisclosed material weakens the prosecution case or strengthens the defendant's case is made by the prosecutor, and only in truly borderline cases should the prosecution seek a judicial ruling on the discloseability of material in its hands. See R-v- McCrory at paragraph 9 and R -v- H at page 1384. In the present applications, a number of extremely wide requests have been made by the defendants to which the prosecution have responded by saying that the requests are "General, speculative and unfocused requests which do not give rise to a duty of disclosure", as for example, in the prosecutor's response of the 22nd February 2008 to Francisco Notorantonio's application served on the prosecutor on 24th January 2008, (and not 24th January 2007 as erroneously stated in the response).

[5] In a number of instances, therefore, it appears that the prosecution have not yet been able to consider the documents in question because of the breadth of the request. In a number of the applications my ruling will therefore require the prosecution to consider whether to disclose certain categories of documents, rather than requiring disclosure of the documents at present. If there is doubt as to whether any documents should be disclosed, or the defence wish to pursue their request in the light of the prosecutor's response, then either side can ask for the matter to be listed again and I will sit as early as possible in the week of the 10th March to deal with any outstanding matters of disclosure as this case is listed to start on the first day of next term.

[6] (11) At (8) above I refer to disclosure being confined to material which is directly relevant to the issues in the case. Where there are allegations and counter allegations in large numbers which appear to go back several years, those which are furthest removed in time and gravity from the events of the 3rd February 2006 are subject to the law of diminishing returns in terms of relevance, particularly as the prosecution concede that there was a feud, and the prosecution have undertaken to provide, or have provided, the criminal records of the complainants and other prosecution witnesses. In these circumstances, I consider it proper to limit the period for which disclosure has to be considered or made to 12 months before 3 February 2006. I consider this is reasonable in order to impose proper limits on what the prosecution can be expected to consider might be relevant. If a defendant believes there to be an incident of sufficient gravity to require disclosure which occurred outside that period, then that defendant must specify it in writing by 4.30 pm on Friday 7 March.

[7] Against the background of these principles, and the concession by the prosecution that there was a feud between the Devlin and Notorantonio factions, I now turn to consider the remaining applications in turn.

Christopher Notorantonio:

(1) Mr Brolly sought a number of documents that might be expected to contain contemporaneous records of a version of events given by a number of prosecution witnesses, namely Thomas Loughran, Anthony McCabe, Isabel McMullan and Bernadette O'Rawe. He pointed to a reference emanating from a report by a numbered (but unnamed) police officer giving a version of events by Bernadette O'Rawe that did not refer to the presence of Christopher Notorantonio.

If there exist documentary records relating to any of these four witnesses which contain descriptions of events involving Christopher Notorantonio materially at variance with their witness statements, these must be disclosed.

(2) The domestic violence register relating to Gerard Devlin. Mrs McKay said this cannot presently be found. If it is located it is to be disclosed. If not, any other records containing allegations of domestic violence by him towards Aine McCabe must be disclosed.

(3) Previous investigations in relation to Gerard Devlin's family. This does not give rise to any obligation of disclosure because it is sufficiently relevant to the issues in the case. The disclosure of Devlin's record is sufficient, together with the domestic violence record and the other documents referred to at (2) above. If a specific allegation is made of criminal activity on the part of Gerard Devlin which is not covered by the disclosure directed, then disclosure should be made of any witness statement relating to such allegation provided that the allegation relates to events within a period of one year prior to 3 February 2006. Given the concession

by the Crown that there was a feud since 2002, I consider that an allegation about events occurring outside this period is of minimal relevance and therefore, not subject to disclosure.

Paul Burns

[8] Mr Sheils confined his submissions to items 4 and 6 in the Section 8 application. I order that disclosure be made of any documentary record relating to any description of events involving Burns by a witness which is materially at variance with their witness statements.

William Notorantonio:

[9] I shall deal with the outstanding items by reference to the headings in the Section 8 application.

(1) A(i) - documents D10 to D109. Mrs McKay said that these were preparatory notes usually made before a witness started to make a video recorded ABE, that is achieving best evidence, interview. These need only be disclosed if they contain any material materially at variance with the accounts of the witnesses listed at A(i).

(2) A(i) - notebook entries in documents D304 to 536. I make the same Order as at (1) above.

(3) A(i) - documents relating to police speaking to witnesses. I make the same order as at (1) above.

(4) A(ii) - notebook entries and original notes made by Andrew Workman, Darren McCartney, Robert Beggs and Susan Moore who dealt with ABE interviews. I make the same order as at (1) above.

(5) A(ii) - notebook entries re Deborah McMaster, Barry McGrogan and Patrick Sloan. They were involved in the arrest of the defendant. Unless these contain any entries materially at variance with witness statements of the officers concerned, they need not be disclosed.

(6) A(ii) - Constable Graham. It is said he was an interviewer. I fail to see at present how his notebook entries could be relevant because there is no explanation of its potential relevance. Disclosure is refused.

(7) A(iii) - rough notes of interviews with witnesses who did not make statements. It was suggested that this may help the defence, particularly by identifying witnesses who may be of assistance. If the witness did not make a statement it can only be (a) because they witnessed nothing of relevance, (b) they did witness something but they were afraid to give evidence against the defendants, or (c) they

were afraid to give evidence against the complainants. Only notes in category (c) could assist the defendants and any such notes must be disclosed.

(8) A(iv) - D302. Given that the deceased's record will be disclosed, the prosecution's concession that there was a feud, and the information to be disclosed relating to the domestic violence register, the only material should be disclosed is anything that relates to complaints against Devlin by any of the defendants within the period of 12 months before 3 February 2006. Anything outside this category is of insufficient relevance unless William Notorantonio identifies in writing any specific allegation relating to criminal conduct against him by Gerard Devlin in the 12 months before 3 February 2006. If any such allegation is made, material relating to it should be disclosed.

(9) A(vii) and (viii) - documents relating to the searches of 99 Ballymurphy Road, 4 Whitecliff Parade and the arrest, detention and charging of the defendant. Nothing has been suggested to show any of these categories of documents are relevant to any issue in the case, and disclosure is refused.

(10) A(iv) - document D302. Miss Quinlivan says this relates to previous injuries sustained by Gerard Devlin. I consider this is analogous to his criminal record in that it may demonstrate a propensity to violence and should be disclosed.

(11) A(iv) - document D382; history of the feud. Given the prosecution concession that there was a feud, this should be disclosed.

(12) A(iv) - document D571. As Gerard Devlin's criminal record has been disclosed, this should be disclosed also.

(13) A(iv) - R2 and R3 are said to be reports regarding the feud. Unless they add anything material to D382, they need not be disclosed.

(14) A(v) and (vi) - the defendants seek documents relating to whether William Notorantonio's consultation with his legal advisors were monitored whilst he was being questioned at Antrim Serious Crime Suite or HMP Maghaberry.
The application at A(v) and (vi) is for disclosure of the following:

> "(v) All notes, records, minutes, memoranda or documentation of whatever kind relating to any decision to monitor or tape the defendant's consultations with his legal advisors whilst a detained person at Antrim Serious Crime Suite, including any unedited transcripts, tape recordings or audio recordings (whether or not covert)
>
> (vi) All notes, records, minutes, memoranda or

> documentation of whatever kind relating to any decision to monitor or tape the defendant's consultations with his legal advisors whilst a detained person at HMP Maghaberry, including any unedited transcripts, tape recordings or audio recordings whether or not covert.
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> The basis upon which disclosure of these documents is sought is as follows:
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> (v)&(vi) It is known that consultations between solicitors and detained persons at Antrim Serious Crime Suite are being monitored and/or taped in breach of their Article 8 rights. In the event that there has been monitoring and or taping of the defendant's consultations, this material has the capacity to support submissions in relation to:
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> - The admissibility of evidence;
> - the exclusion of evidence;
> - an application that a public authority has acted in contravention of the defendant's rights under the ECHR;
> - an application for an abuse of process;
>
> and can reasonably be expected to undermine the prosecution or assist the defence".

[10] In support of her application Miss Quinlivan referred to the recent decision of the divisional court in Re an application for judicial review by C, A, W, M and McE [2007] NIQB 101. In that case the Lord Chief Justice and Campbell LJ refused the application for a declaration in so far as the applicants relied upon a breach of the right to a fair trial under Article 6 of the European Convention, but held that the monitoring of consultations of the applicants' legal consultations would be unlawful, and that the refusal of the police to give the assurances that no such monitoring would take place constituted a violation of the Applicants' Article 8 right to privacy.

[11] However, it does not necessarily follow that even if there has been a breach of the defendant's Article 8 rights that it will have the effect of rendering the defendant's trial unlawful. See Khan-v-The UK. In R-v-P [2001] 2AER at page 69 Lord Hobhouse pointed out that the equivalent of Article 76 of PACE "...was concerned with the fairness of the trial not with providing a remedy for a breach of Article 8".

[12] At page 70 Lord Hobhouse again referred to the significance of Article 76 in

the context of the effect of breaches of Article 8 of the convention. I have substituted references to Article 6 for section 78 of the English legislation in the following extract from his speech in which Lord Hobhouse referred to the earlier ruling of the House of Lords in Khan and to the later decision of the European Court in the same case:

> "The decision of your Lordships' house was arrived at a time before the 1998 Act had been enacted let alone introduced into Parliament. Therefore, the Convention did not then have the place it now has in English law. The importance of the court of Human Rights decision is that it confirms that the direct operation of Articles 8 and 6 does not invalidate their Lordships' conclusions or alter the vital role of Article 76 as the means by which questions of the use of evidence obtained in breach of Article 8 are to be resolved at a criminal trial.
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> The criterion to be applied is the criterion of fairness in Article 6 which is likewise the criterion to be applied by the judge under Article 76. Similarly, the Court of Human Rights decision that any remedy for a breach of Article 8 lies outside the scope of the criminal trial and that Article 13 does not require a remedy for a breach of Article 8 to be given within that trial shows that their Lordships were right to say that a breach of Article 8 did not require the exclusion of evidence. Such an exclusion, if any, would have to come about because of the application of Article 6 and Article 76.
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> The defendants' argument under Article 6 also fails and does so independently of their argument under Article 8."

[13] The application by William Notorantonio therefore raises difficult questions of the possible relevance of any breach of his Article 8 rights if there was any covert surveillance of consultations between himself and his legal advisors. On one view it may be that if there was such surveillance it is simply irrelevant as a criminal trial is not the appropriate proceeding in which to give a remedy for any such breach. It may therefore have to be considered whether disclosure could be relevant to the trial. On the other hand, it could be argued that if a breach of Article 8 could lead to the exclusion of evidence under Article 6, then disclosure should be made of material showing that there had been covert surveillance. In that case the court may have to consider what possible relevance to the conduct of the defence of William Notorantonio such issues may have, and whether any such

surveillance could have any bearing on his defence.

[14] I have merely referred to some of the complex and difficult issues that may arise in relation to this issue, it may well be that others may be raised by either side.

[15] At present I have not had the benefit of detailed arguments on the relevant law and possible significance, if any, of the issue of any covert surveillance to the defendant's case as made in interview and in his defence statement, particularly as it seems from William Notorantonio's first interview that he may have been advised about the possible surveillance of the consultation room but nevertheless wished to fully explain his part in the events about which he was being questioned. His case was that he was acting in defence of himself and others. (See section D at page 4)

[16] In these circumstances I make no ruling on this defendant's request for disclosure of the records sought as I consider that these are matters to be raised with the trial judge where they can be considered, if necessary, in the context of the actual issues at the trial.