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*(subject to editorial corrections)**

IN THE CROWN COURT FOR THE DIVISION OF LONDONDERRY

THE QUEEN
–v-

R M

RULING: THIRD PARTY DISCLOSURE

McCLOSKEY J

[1] In moving the application on behalf of the Defendant for third party disclosure, pursuant to Section 51A and 51B of the Judicature (NI) Act 1978, the Defendant's legal representatives sought disclosure of the following materials:

(a) All "*relevant*" medical notes and records of the four complainants/injured parties viz. the four children of the family.

(b) "*All notes and records in respect of the complainants held by Social Services*".

The rationale of the application was expressed in the following terms:

> "*The said material is likely to be material evidence because, insofar as any of the material relates directly to the allegations that gave rise to the present charges, it might reasonably assist the defence case in providing information that casts doubt on the account given by the complainants in respect of the alleged incidents.*"

As this formulation makes clear, the moving party was not privy to the contents of the material in question and, understandably, in consequence, was driven to advance the speculative assertion that it *might* have content relating directly to the case against the Defendant which *might* undermine the Crown case and promote the Defendant's case.

[2] The court duly acceded to the application and an order was made on 9th May 2008. The order required production of the following documents:

> "*All notes and records relating to the family of children R … P … J … and A …*".

[I have simply deleted the full names and dates of birth].

Subsequently, compliance with the order was purportedly effected by the Western Health and Social Care Trust ("*the Trust*"), the sole agency to which it was directed. This resulted in the court considering a variety of materials, consisting mainly of medical records and including a small quota of Social Services records.

[3] This is a matter of third party disclosure, to be contrasted with disclosure by the prosecution. Notwithstanding, I consider that the overarching test governing the latter informs the approach which the court should adopt. Such test is enshrined in Section 3(1) of the Criminal Procedure and Investigations Act 1996 ("*the 1996 Act*"):

> "*(1) The prosecutor must –*
>
> *(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused* ***and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.***"

[My emphasis].

The prosecutor's duty of disclosure in a criminal trial was considered extensively by the House of Lords in ***Regina –v- H and C*** [2004] UKHL 3: see especially per Lord Bingham, paragraphs [17] and [35] and the following passage in particular:

> "[35] *If material does not weaken the prosecution case or strengthen that of the Defendant, there is no requirement to disclose it. For this purpose the parties' respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the prosecution seek to establish and the specific grounds on 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 to make them good. Neutral material or material damaging to the*

> *Defendant need not be disclosed and should not be brought to the attention of the court.*"

As Lord Bingham further emphasized, "*full disclosure*" (within the boundaries outlined above) constitutes the "*golden rule*", from which derogation is permissible only in very limited circumstances. This prompted the following additional observation:

> "[37] … *There will be very few cases indeed in which some measure of disclosure to the defence will not be possible, even if this is confined to the fact that an ex parte application is to be made*".

[4] Where third party disclosure arises in the context of a criminal trial, the governing statutory provisions are those contained in Sections 51A and 51B of the Judicature (Northern Ireland) Act 1978 ("*the 1978 Act*"), inserted by paragraph 28 of Schedule 4 to the 1996 Act, in operation from 21st August 2000. Section 51A(1) provides:

> "*This Section applies where the Crown Court is satisfied that:*
>
> *(a) a person is likely to be able to give evidence likely to be material evidence, or produce any document or thing likely to be material evidence, for the purpose of any criminal proceedings before the Crown Court, and*
>
> *(b) it is in the interest of justice to issue a summons under this Section to secure the attendance of that person to give evidence or to produce the document or thing*".

[In passing, subsection (1)(b) is a substituted provision, traceable to Section 169(5) of the Serious Organised Crime and Police Act 2005 and in force from 1st July 2005: see SI2005/1521, Article 3(1)(bb)].

Where the Crown Court considers that the conditions specified in Section 51A(1) are satisfied, it "*shall*" issue a witness summons to a named respondent requiring attendance before the Court to give the relevant evidence or produce the relevant document or thing: per Section 51A(2). Subsection (7) makes provision for Crown Court Rules. Section 51(B) establishes a somewhat different mechanism, whereby a witness summons issued under Section 51A may *also* require the Respondent to produce a document or thing at an earlier time, "*for inspection by the person applying for the summons*".

[5] These statutory provisions were considered by Hart J in ***Regina –v- Hume and Another*** [2005] NIJB 147 and [2005] NICC 30, where his Lordship

examined the question of whether the disclosure available through the medium of Section 51A is of greater reach than the disclosure which the prosecutor must make under the 1996 Act. Addressing this question, his Lordship observed that the Defendant in a criminal trial does not enjoy "*… a right to general disclosure against third parties in cases which allege that the complainant has been the victim of sexual abuse*": see paragraph [14]. His Lordship answered the question in the following way:

> "[16] *… Unless there is clear justification for interpreting the concept of materiality under Section 51A as imposing a more generous test of what requires to be disclosed than that which applies when the prosecution is considering its obligations under the 1996 Act, I see no reason why the test should be different if the prosecution has obtained the documents with, as here, the consent of the complainant. The objective remains the same in either event, namely whether the material being considered might assist the Defendant by undermining the prosecution case or strengthening the defence case. That is exactly the same concept as underlies the concept of 'material evidence' under Section 51A*".

Thus His Lordship was prompted to conclude that there is no difference between the duty imposed on the prosecution as regards documents obtained by it with the permission of the complainant and the duty which would arise if a relevant third party were the subject of a witness summons under Section 51A. In such a case, the Defendant should seek secondary disclosure under Section 8(2) of the 1996 Act, rather than moving an application for a witness summons under Section 51A of the 1978 Act.

[6] More recently, in ***Regina –v- Fox and Others*** [2009] NICC 30, Hart J, revisiting this subject, identified the following guiding principles:

> "[11] …
>
> *(1) 'Material evidence' is evidence which might assist the Defendant by undermining the prosecution case or strengthening the defence case.*
>
> *(2) Material is disclosable by a third party (unless it is otherwise excused from production) if it is (a) relevant and (b) could potentially assist the Defendant in the defence of the charge in accordance with (1) above even if (c) it could lead to a line of enquiry, but would not be admissible.*
>
> *(3) In order to decide whether the material sought is likely to come within (2) above it requires the court to examine*

> *the nature of the charge and its factual content and context*".

The equivalent English statutory provisions – Section 2(2) of the Criminal Procedure (Attendance of Witnesses) Act 1965 and Section 97(1) of the Magistrates Courts Act 1980 – were reviewed by Simon Brown LJ in ***Regina –v- Reading Justices, ex parte Berkshire County Council*** [1996] 1 CAR 245, at p. 246 especially. In ***Regina –v- Brushett*** [2000] All ER(D) 3432 and [2001] Crim. LR 471, the English Court of Appeal rejected the argument, formulated by reference to the developing breadth of the prosecutor's duty of disclosure in a criminal case, that a less exacting test of materiality should be applied to applications for third party disclosure, per 0tton LJ:

> "*This is not a submission that I can accept. It seems to me that quite different considerations arise with regard to the production of documents by third parties. Orders under Section 97 may well cause witnesses to be summoned quite unnecessarily to court with all the attendant inconvenience, expense and delay which that involves*".

[7] I observe that, in the submissions which have been advanced to the court, no issue of confidentiality or public interest immunity has been raised. However, it is clear that such issues can potentially arise and, further, that the court must be alert to them, where private materials such as medical records and Social Services records are concerned: see ***Brushett*** (*ibid*), where the issue concerned disclosure of Social Services records in a case of alleged sexual abuse of children. Further, it is well established that the existence of an issue with PII characteristics is not contingent upon its ventilation by one party or the other. Rather, the court, of its own motion, must be alive to this possibility. Where such an issue arises, the court must conduct a balancing exercise. This entails consideration of whether the public interest in maintaining the confidentiality of the documents in question is outweighed by the public interest in the administration of justice viz. in ensuring that a fair trial occurs.

[8] Where issues of third party disclosure are concerned, the rights of individuals under Article 8 of the Convention can potentially arise, particularly in relation to materials normally protected by confidentiality, such as medical records and Social Services records. Considerations of this kind are identifiable in the recent decision in ***Council –v- A and Others*** [2007] 1 All ER 293 and [2006] EWHC 1465 (Fam) where the interaction between information generated in the course of family proceedings and its disclosure for other purposes, including criminal investigation, was considered. Sumner J observed:

> "*[35] Questions involving disclosure to the police of information and documents connected with family cases are of great importance. The difficulties arise from the conflict between two important principles.*
>
> *[36] The first is the need for confidentiality in children cases …*
>
> *It is also based on the need for frankness from an individual in matters relating to children and a requirement that confidences given will be maintained …*
>
> *[37] The second no less important principle is the need to investigate and where warranted to prosecute all those who are or may be criminally involved with children*".

Of course, the right protected by Article 8(1) of the Convention is not absolute in nature. Rather, it is subject to the limitations enshrined in Article 8(2), which include the objectives of "*the prevention of disorder or crime*" and "*the protection of the rights and freedoms of others*".

[9] The various public interests potentially in play include the public interest in the prosecution of serious crime and the protection of offenders, together with the more general public interest in the due administration of justice. These were highlighted by Swinton Thomas LJ in ***Re EC (a minor)*** [1996] 3 FCR 521, at p. 563:

> "*In the light of the authorities the following are among the matters which a judge will consider when deciding whether to order disclosure. It is impossible to place them in any order of importance, because the importance of each of the various factors will inevitably vary very much from case to case:*
>
> *(1) The welfare and interests of the child or children concerned …*
>
> *(2) The welfare and interests of other children generally.*
>
> *(3) The maintenance of confidentiality in children cases.*
>
> *(4) The importance of encouraging frankness in children's cases…*
>
> *(5) The public interest in the administration of justice. Barriers should not be erected between one branch of the*

> *judicature and another because this may be inimical to the overall interests of justice.*
>
> *(6) The public interest in the prosecution of serious crime and the punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children.* ***There is a strong public interest in making available material to the police which is relevant to a criminal trial. In many cases, this is likely to be a very important factor.***
>
> *(7) The gravity of the alleged offence and the relevance of the evidence to it …*
>
> *(8) The desirability of co-operation between various agencies concerned with the welfare of children …*"

[Emphasis added].

To this extensive menu must be added, of course, the Defendant's right to a fair trial, both at common law and under Article 6 of the Convention.

[10] The rights of third parties in the context of disclosure in a criminal trial also featured in the judgment of Girvan J in ***The Queen –v- O'N and Another*** [2001] NI 136 and, in particular, the passage at p. 155/156:

> "*Where disclosure of the documentary evidence by a third party to the defence may infringe the privacy rights of the third party or other parties such as sexual complainants the court, in order to fulfil its duty to protect the Convention rights of interested persons, would have to consider the documents and decide whether, balancing the interests of a fair trial for the Defendant against the privacy and other interests of the third parties affected by the disclosure, disclosure to the defence is necessary and appropriate*".

Furthermore, as emphasized in the next succeeding passage, where the court authorises the disclosure of third party materials to prosecution and defence, any further dissemination is inappropriate and would require the authorisation of the court. Thus, as emphasized by Hart J in ***Regina –v- Hume*** [2005] NICC 30:

> "*[41] … It is therefore for the court, and not the prosecution, to examine documents produced to the court on foot of a third party disclosure summons under Section 51A* [of the 1978 Act] *in respect of which it is anticipated*

that issues of public interest immunity and/or confidentiality may arise".

As appears from paragraphs [42] and [43] of the same judgment, the court must be alert at all times to the sensitivity and confidentiality normally attaching to materials of this kind. Finally, where the court is satisfied, following inspection of the materials, that disclosure is appropriate, the disclosure is made to the Defendant who brought the original application, any co-Defendant and the prosecution: see paragraph [45].

[11] In the present case, I have been helpfully informed by Mr. Hunter QC on behalf of the prosecution that the family members do not raise any objection to disclosure of the materials concerned to both prosecution and defence and do not seek to advance any representations to the court. The prosecution are to be commended for having made these enquiries. While, in principle, the subject of possible disclosure of this kind could make representations to the court (as recognised by Hart J in ***Hume***, paragraph [19]), perhaps facilitated by separate legal representation if necessary, it seems to me that, in the first place, the course which was responsibly pursued by the Public Prosecution Service here should be undertaken in the generality of cases.

[12] I have studied the files of documents made available by the Trust, in purported compliance with the order of the court. The Trust has produced (a) a slimline Social Services file and (b) four bundles of medical records, relating to each of the children concerned. While some of these were in relatively chaotic state I have nonetheless examined every document. I have then juxtaposed these materials with the amended Bill of Indictment and the other issues which, thus far, have been ventilated on behalf of both parties, in particular the Defendant. I would observe that where the court performs this type of exercise, the defence statement will have a role to play, a consideration which might usefully be borne in mind by those who devise this important document in criminal cases. At present, with two exceptions, I am of the view that these materials contain nothing which might reasonably be considered capable of undermining the case for the prosecution against the accused or assisting the case for the accused. I make this finding on the basis of the actual contents of the documents. I find that, with the two exceptions noted, the contents of these documents are remote from the issues to be explored and determined in this trial.

[13] The two exceptions highlighted above are:

(i) A record of the Fracture and Orthopaedic Department of the Altnagelvin Hospital. This contains two entries, dated 18th February and 24th March 2004 respectively. In short, these

records document that P suffered a fractured right distal humerus in mid-January 2004.

(ii) There is a medical record (evidently a hospital record) dated 25th December 2004 relating to J. Its contents are sparse and not entirely legible. However, the words clearly decipherable include "*cut to the front of head … small superficial laceration …*". It is unclear whether there was any involvement of the family's general medical practitioner in this event.

I have considered it appropriate to alert both prosecution and defence to my *provisional* view that compliance with the order of the court by the Trust may not be complete, given that one would expect other records of a similar *genre* to be included in the bundles which have been produced. My detailed examination of these bundles confirms that such records are not present.

[14] Pursuant to the order made and the purported compliance therewith by the third party concerned, the two documents identified in the immediately preceding paragraph are in the custody of the court and disclosure of them to both prosecution and defence will be effected forthwith.

[15] I am alert to the fluctuations in the present prosecution and, moreover, the organic nature of every criminal trial. Thus, *for example,* if either R or P, both scheduled to testify on behalf of the prosecution, were to claim in evidence that they had sought and obtained medical treatment on some occasion, not documented in the materials which the court has considered, this *could* stimulate further disclosure during the course of the trial. In this way, the *absence* of any material complaint to a medical practitioner or Social Services professional, coupled with the associated absence of any relevant medical examination or treatment, could conceivably become significant. However, *at this stage*, I am satisfied that the absence of entries of this kind in the records which I have studied does not warrant their disclosure, applying the test formulated in paragraph [12] above. Beyond this it would be inappropriate to venture at present. It follows that I am obliged to keep this ruling under review and I propose to do so.