Neutral Citation no. (2002) NICC 11 | *Ref:* MCCB3152

Judgment: approved by the Court for handing down | *Delivered:* 18/02/2002
(subject to editorial corrections)

IN THE CROWN COURT OF NORTHERN IRELAND

THE QUEEN

v

ROBERT ANDREW MURPHY & CLIFFORD GEORGE McKEOWN

McCOLLUM LJ

The accused are jointly charged with the following offences –

1. Possession of firearms and ammunition with intent on 29th March 2000 contrary to Article 17 of the Firearms (Northern Ireland) Order 1981;
2. Possession of firearms and ammunition on the same date contrary to Article 23 of the Firearms (Northern Ireland) Order 1981; and
3. Possession of articles for a purpose connected with terrorism on the same date contrary to Section 32(1) of the Northern Ireland Emergency Provisions Act 1996.

The two accused were travelling in a motorcar in the Craigavon area on 29th March 2000.

When followed by police vehicles, items were thrown from the car which were afterward recovered and proved to be firearms; after it stopped the car was searched and two black balaclavas, dark woollen gloves and one round of ammunition were found in the car together with a blue plastic container or bottle containing petrol.

The defence statements furnished by the Defence allege, inter alia, that each defendant believes that he was entrapped by a person known to and or working with the

police either for the purpose of incriminating this defendant or his co-defendant. In consequence each defendant requires disclosure of all information and material touching upon this issue and informing the state of knowledge of the police prior to the stopping and arrest of each defendant.

The statement on behalf of the accused Murphy was received on the 14th June 2001 and that on behalf of McKeown on the 21st June 2001.

As I understand the position arrangements have still to be finalised for the production to the defence of items such as police notebooks and other records of a non-sensitive nature.

On the 21st of September 2001 the Department of the Director of Public Prosecutions ("the Prosecutor") served an application on the accused for an Order under Section 9(8) of the Criminal Procedure and Investigations Act 1996 in accordance with rule 2(3) and (5) of the Crown Court (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules (Northern Ireland) 1997 ("The Rules").

A letter accompanying the notice said that the application was pursuant to rule 2(2) of those rules.

Rule 2 provides as follows:-

> *Public interests: application by prosecutor*
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> "2 - (1) This rule applies to the making of an application by the prosecutor under section 3(6), 7(5), 8(5) or 9(8) where Part I applies by virtue of section 1(2) (trial on indictment).
>
> (2) Subject to paragraphs (3) to (5) below, notice of an application to which this rule applies shall be served on the chief clerk and on the accused and shall specify the nature of the material to which the application relates.
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> (3) Where the prosecutor has reason to believe that to reveal to the accused the nature of the material to which the application relates would have the effect of disclosing that which the prosecutor contends should not in the public interest be disclosed, paragraph (2) above shall have effect as if the words from 'and shall specify' to the end were omitted.

> (4) Where the prosecutor has reason to believe that to reveal to the accused the fact that an application is being made would have the effect of disclosing that which the prosecutor contends should not in the public interest be disclosed, paragraph (2) above shall have effect as if the words from 'and on the accused' to the end were omitted.
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> (5) Where an application to which this rule applies is made under paragraph (2) above as it has effect in accordance with paragraph (4) above, notice of the application instead of being served on the chief clerk may be served –
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> (a) where the offence charged is a scheduled offence, on such judge as has been designated by the Lord Chief Justice for the purposes of hearing the application;
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> (b) in any other case, on the trial judge, or if the application is made before the start of the trial, on the judge, if any, who has been designated to conduct the trial or to hear the application".

It can be seen that rules 3 and 5 qualify rule 2 and that rule 3 dispenses with the need to specify the nature of the material to which the application relates in the application.

The letter referring to Rule 2(2) gave the defendant's advisers the impression that the nature of the material should have been disclosed to them.

Some correspondence followed in relation to this point but the matter was finally clarified in a letter from the prosecutor dated the 10th October 2001. It is clear now that the application is under Rule 2(3) and that the nature of the materials is not to be specified to the defence.

That letter also mentioned the date for the listing of the application.

Rule 3(5) of the Rules provides:

> "Subject to rule 6(4) (which is not relevant), that where the application is made under rule 2(2) as it is affected in accordance with rule 2(3) or (4):

(a) the accused shall not be given notice as specified in paragraph 3;
(b) the hearing shall be ex-parte; and

(c) only the prosecutor shall be entitled to make representations to the Court".

Rule 3(5) appears to be mandatory in nature. However failure to comply with it has not prejudiced the defendants in any way and in fact has given the defence the opportunity of making representations in advance of the ex-parte hearing, which have been of value to the Court.

It may be that the rule dispensing with notice when Rule 2(3) of the Rules applies will have to be reviewed in the light of recent views expressed in the European Court of Human Rights but considerations of the propriety of the procedure do not arise in the circumstances of the present case.

Mr Allister and Mr Kane submitted a helpful document setting out the sequence of events, the matters relied on and a skeleton argument and also presented oral argument to the Court. They have taken objection to the ex parte hearing by the Court of the prosecutor's application.

Mr Allister commented that by bringing an application of this kind the prosecutor was in effect admitting that the material which is the subject of the application is such as might reasonably be expected to assist the accused's defence.

However, in a letter of the 4th September 2001 the prosecutor had stated that it could confirm that there was no material in the possession of the Crown which might be of assistance to the accused's solicitor regarding any issue raised in the amended defence statement.

Mr Allister therefore questioned whether the prosecutor had been acting in good faith.

However, in my view the assessment of whether material "might be of assistance" is an elusive exercise and I do not regard it as indicative of bad faith that the prosecutors opinion should change on this issue.

The important point is that the material is now being placed before the Court for its consideration and the fact that the prosecutor at an earlier stage thought that this was unnecessary need not colour the Court's approach.

Mr Allister also submitted that the right to a fair and public trial guaranteed by Article 6 of the European Commission on Human Rights imposes on prosecuting authorities the obligation to disclose all material which may assist the accused. He further submitted that the making of an ex-parte application to authorise non-disclosure is in effect to deny an accused his right to a fair trial.

These issues have been considered by the European Court of Human Rights in two cases heard in 2000 and in Rowe and Davis v United Kingdom reported at (2000) 30 EHRR 1 at paragraphs 60, 61 and 62. The principles are set out by that Court at p. 29 as follows:-

> "60 It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms before the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In addition Article 6(1) requires, as indeed does English law, that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused.
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> 61. However, as the applicants recognised, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interest, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest.

> However, only such measures restricting the rights of the defence, which are strictly necessary, are permissible under Article 6(1). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.
> 62. In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them. Instead, the European Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused".

Those principles are re-stated in the head-note to the case of Jasper v The United Kingdom reported at (2000) 30 EHRR 441. I propose to apply those principles to the application in the present case.

It is well also to bear in mind the remarks of the Court of Appeal in R v Turner (1995) 1 WLR 264 –

> "Since R v Ward … there has been an increasing tendency for defendants to seek disclosure of informants' names and roles, alleging that those details are essential to the defence. Defences that the accused has been set up, and allegations of duress, which used at one time to be rare, have multiplied. We wish to alert judges to the need to scrutinise applications for disclosure of details about informants with very great care. They will need to be astute to see that assertions of a need to know such details, because they are essential to the running of the defence, are justified. If they are not so justified, then the judge will need to adopt a robust approach in declining to order disclosure. Clearly, there is a distinction between cases in which the circumstances raise no reasonable possibility that information about the informant will bear upon the issues and cases where it will. Again, there will be cases where the informant is an informant and no more; other cases where he may have participated in the events constituting, surrounding, or following the crime. Even when the information has participated, the judge will need to consider whether his role as impinges on an issue of interest to the defence, present or potential, as to make disclosure necessary".

In this jurisdiction it is notorious that parliamilitary groups are ever on the alert to identify informers from their own ranks and also public-spirited informants, with the object of discouraging co-operation by such persons with the police, and this, rather than its relevance to any issue in the case, may be the motivation of some applications of this nature.

Those considerations should not, of course, in any way inhibit the Court from ensuring that the defence has access to all the information and evidence which might be of use to it or which may undermine the prosecution case or the need to ensure that the procedures to be followed are such as to ensure a fair trial.

Having heard and considered the submissions on behalf of the defence and the prosecutor. I took the view that I should proceed to hear ex parte the Crown's application under Rule 2(2) and (3).

In doing so I have to consider, in the light of the defence of entrapment advanced on behalf of the accused, whether the material which is the subject of the application is such that it might be of assistance to the defence or in any way undermines any part of the prosecution case; whether in those circumstances it is necessary in the public interest to order non-disclosure and further, if disclosure is not to be provided, what steps are appropriate to protect the interests of the accused and ensure the fairness of the trial.

My reasons for conducting an ex parte hearing are as follows: in order to determine whether the material is such that the public interest requires its non-disclosure I must see the material and consider the evidence and arguments submitted by the prosecutor, and I must do so in the absence of the defendants and their representatives to protect the public interest until that decision is made.

There was considerable debate in Rowe & Davis v United Kingdom (supra) about the best way to deal procedurally with this situation.

The majority took the view that it was important for the trial judge to see the material personally.

This is certainly true if the material is not prejudicial to the accused and where the trial is before a Judge and jury the effect of the Judge seeing even prejudicial material may not be inconsistent with the fairness of the trial process.

However in the case a non-jury trial it is obviously undesirable that prejudicial material which is not going to be part of the evidence in the case should be seen by the Judge who will be the tribunal of fact, especially if it is not disclosed to the defence.

Non-disclosure of material, which does not relate to the accused personally, may be required simply because such material may reveal sensitive information about police methods of investigation or gathering information.

Obviously there would be no prejudice to the defendant if the trial judge were to see such material and monitor its possible use to the defence.

However, personal information about an accused may well be prejudicial and it would be unfair to reveal this to the trial judge especially when the defence might be unaware of its content.

It is unlikely that such material would be helpful to the defence in a case such as the present unless it could be related directly to the defence of entrapment.

No procedure exists to ensure that an assessment of the possible value to the defence of such material other than by the prosecutor or at his request the trial judge can be made in the light of the evidence at the trial. We do not have “special counsel” to carry out such an exercise.

In general the Court has to rely on the judgment and integrity of the prosecutor, who can monitor the issue of whether disclosure of such material to the trial judge may become necessary in the interests of justice.

The trial judge may then have to consider whether it is proper to disclose the material to the defence, and if not, whether it is fair to continue with the trial.

The danger would still remain, whether the material is disclosed to the defence or not, that its prejudicial value might exceed its probative value, although in the light of a defence that some person with some association with the material in question was trying to entrap the accused, prejudicial information provided by such a person and appearing on police files might not be unduly harmful if it could be related to the defence of entrapment.

The considerations which I applied in considering the prosecutor's application were –

1. If it is compatible with the public interest then all relevant material should be disclosed;

2. All of the material for which non-disclosure is ordered and which is not prejudicial to the defendant should be available to the trial judge;

3. The prosecutor should monitor the continuing non-disclosure of potentially prejudicial material.

In considering that matter it may be possible for the prosecutor to give some indication of the nature of the material to the defendant's advisors without disclosing that which it requires to keep secret so as to allow the latter to decide whether the material should be disclosed or not.

Having considered the matter ex parte, I have decided that in the light of the defence statement none of the material which is the subject of the application before me is such that it might reasonably be expected to undermine the case for the prosecution or to assist the accused's defence. On the evidence before me I do not anticipate any circumstances which would result in the material becoming of value to the defence. I consider that it is not in the public interest to disclose the material and have ordered accordingly.

I have prepared a statement of the reasons for my decision which shall remain confidential to the prosecutor and the trial judge.

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