Neutral Citation No. [2009] NICC 39 | *Ref:* **HAR7526**

Judgment: approved by the Court for handing down | *Delivered:* **04/03/2009**

*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

THE QUEEN

-v-

SANDHU

RULING

HART J

[1] The defendant is a solicitor charged with six counts, five of which involve allegations relating to perverting the course of justice and the remaining count is of incitement of others to murder Jonathan Hillier. These counts are based upon conversations between the defendant and his clients and others recorded whilst his clients were detained in Antrim Serious Crime Custody Suite on various dates in 2005 and 2006.

[2] This is the second application by the defendant to stay these proceedings on the grounds of an abuse of process, as I refused an earlier application for the reasons set out in my judgment of the 5th of September 2008. As is apparent from that judgment, a major issue in the case concerns the legality of the covert surveillance carried out by the police which led to the recording of the various conversations giving rise to the charges. Mr Harvey QC, who appears for the defendant with Mr Peter Irvine, now renews the application for a stay based upon the manner in which disclosure has been made by the prosecution of various documents relating to the authorisations for the surveillance, both contemporaneously with the surveillance and in response to requests made by the defendant's solicitors for the disclosure of these documents. I have had the benefit of comprehensive and well-marshalled written and organised submissions on behalf of the defendant and on behalf of the prosecution by Mr Kerr QC who appears with Mr David Russell.

[3] I have carefully considered these and whilst it will be necessary to refer to some of these matters in greater detail in due course, the essence of Mr Harvey's submission is that the conduct of the prosecution to date has shown what he termed "a manipulation of the prosecution process", in the manner in which disclosure has been

made, and that this represents "a grave and serious failure by the Crown" which is "indicative of bad faith" and inimical to the interests of justice.

[4] He alleges that the prosecution have persistently denied both the defendant and the court access to the documents, and by doing so the conduct of the prosecution constitutes "so egregious a case of prosecutorial abuse that a stay should be granted at this stage".

[5] In order to consider whether Mr Harvey's submissions are well founded it is necessary to describe in some detail the course of the surveillance itself and then consider the course taken by the prosecution in respect of the disclosure process itself. The disclosure issue stems from the various authorisations that were obtained by the police in order to carry out their surveillance and the locations which were or were not covered by them during the period from the 7th of February 2005 onwards, and Mr Harvey took the court through a meticulous examination of each authorisation. However, for the purposes of this application I believe it is possible to state the relevant matters in a more general way. For all or part of the period until the 29th of September 2005, authorisations were granted for either directed or intrusive surveillance under the Regulation of Investigatory Powers Act 2000 (RIPA). In the circumstances of this case, directed surveillance within s. 26 of RIPA was covert surveillance which was likely to result in the obtaining of private information. Although intrusive surveillance was also authorised from time to time, it was then appreciated that intrusive surveillance could not be authorised because s. 26(3)(a) of RIPA provides that covert surveillance only relates:

"To anything taking place on any residential premises".

[6] As the consultation rooms which were subject to covert surveillance could not be said to be "residential premises", intrusive surveillance could not be authorised. Although the observations of Girvan LJ in 2007 in Re C and Others [2007] NIQB 101 provide judicial authority for the proposition that the definition of residential premises within s. 48 (1) of RIPA "would not appear to include a room in a police station in which a defendant is consulting his solicitor prior to interview, or during a break in interview", this limitation was recognised during the surveillance in the present case.

[7] It emerged on the 17th of June 2005 when one of the Surveillance Commissioners ruled an application for intrusive surveillance invalid on the basis that RIPA only provided for intrusive surveillance of residential premises and private vehicles, and does not mention office premises.

[8] Such authorisations had earlier been granted by another commissioner, and this difference of interpretation was not finally resolved until the Chief Surveillance Commissioner notified the Chief Constable by letter dated the 25th of August 2005 that intrusive surveillance approval was not required because the room did not constitute residential premises or a private vehicle.

[9] As I understand the sequence of events, the position can therefore be broadly stated from the defence perspective to be as follows so far as the covert surveillance which produced the evidence relied upon by the prosecution to ground the present charges is concerned.

(a) Until the 21st of September 2005, whilst there were in existence authorisations for directed surveillance relating to video and audio recordings by use of the existing CCTV system in the Antrim Serious Crime Custody Suite, there were no valid authorisations for directed surveillance in existence for consultation room three.

(b) The admissions grounding Counts 1 to 4 and part of Count 6 were made during the period until the 21st of September 2005.

(c) No argument is being advanced for the purpose of this application as to the validity of the authorisations for directed surveillance which the prosecution say were in place from the 21st of September 2005 onwards.

(d) The admissions grounding Count 5 and the remainder of Count 6 were made after the 21st of September 2005.

[10] Mr Harvey's argument, whilst dependent upon the absence of authorisations for directed surveillance up to the 21st of September 2005, is not related to such an absence, but to the manner in which the matters summarized above were revealed by way of disclosure, and it is therefore necessary to now refer to the sequence of events relating to disclosure.

(1) Following the defendant's arrest and first remand on the 6th of February 2006, his solicitors wrote to the PPS on the 26th of April 2006 that:

> "We wish to place on record our request at this stage for disclosure of any RIPA applications and authorisations relevant to this case".

(2) After some further correspondence, the PPS responded to this request on the 19th of December 2006 stating:

> "It is not presently considered that there are any grounds for disclosure of said material to you".

(3) Undeterred, the defendant's solicitors repeated this request on the 10th of May 2007 saying that:

> "As you will be aware, the RIPA applications and authorisations lie at the very heart of this case and we can see no reason why they can not be provided".

(4) On the 17th of May 2007 the PPS reaffirmed its view that

"No duty of disclosure arises"

and referred to the case of R v GS and Others [2005] EWCA Crim 887.

(5) The defendant was returned for trial on the 10th of April 2008, and following the committal his solicitors again wrote to the PPS on the 30th of April 2008 seeking inter alia copies of applications and authorisations for directed and intrusive surveillance.

(6) On the 9th of June 2008 the PPS responded by stating, inter alia,

(a) The prosecution would provide a schedule of dates of (i) applications, (ii) authorisations and (iii) cancellations.

It was stated that:

"A schedule is being prepared and will be served shortly".

In the event it was not served until sent under cover of letter of the 1st of July 2008.

(b) No duty to disclose copies of applications or authorisations is considered to arise and that if necessary PII applications would be made in respect of that material.

(7) On the 26th of June 2008 and the 2nd of July 2008, I heard the initial abuse of process application brought by the defendant. Prior to the hearing, in its skeleton argument the prosecution asserted at paragraph two that authorisations for directed and intrusive surveillance were in operation at the relevant times during the surveillance operation.

(8) However, as my judgment of the 5th of September 2008 records, during the abuse of process hearing Mr Kerr conceded that the intrusive surveillance was not lawful because the consultation rooms were not residential premises within RIPA.

(9) On the 18th of September 2008 the defendant's solicitors issued a notice under s. 8(2) of the Criminal Procedure and Investigations Act 1996 (the s. 8 application) seeking in effect an order for disclosure of copies of the applications for, and authorisations of, directed and intrusive surveillance under RIPA.

(10) The prosecution response of the 16th of October 2008 again stated that no duty of disclosure arose, and again asserted that:

"All periods were covered by lawful authorisations for directed surveillance".

(11) The s. 8 application was listed for hearing before me on the 29th of October 2008, and on that day the prosecution made disclosure of redacted copies of the RIPA applications and authorisations. I should say that I have subsequently considered the unredacted documents and concluded that no disclosure is required of the redacted portions.

(12) On the 9th of December 2008 the PPS wrote to the defendant's solicitors providing copies of various police documents relating to the background to the application for the authorisation, as well as copies of correspondence between the Chief Constable and the Chief Surveillance Commissioner about the different interpretations by surveillance commissioners about the applicability of intrusive surveillance for consultation rooms as opposed to directed surveillance in the light of the definition of residential premises already referred to.

[11] In his response to Mr Harvey's analysis of the history of prosecution disclosure in this case, Mr Kerr candidly accepted that there had been a failure in the disclosure system. He was characteristically frank in recognising such part of the responsibility for that failing as was due to a misunderstanding on his part of the true position of the various authorisations. He was equally generous in crediting Mr Russell with the discovery upon examination of the applications and authorisations for the s. 8 application that some of the authorisations did not in fact cover the relevant areas, contrary to what Mr Kerr understood. As a result, Mr Kerr explained that he had directed full disclosure of the documents that were provided in response to the s. 8 application.

[12] Nevertheless, it remains the position that from the very beginning the defendant had been seeking disclosure of the applications and authorisations and it was two and a half years before disclosure was made. Had all the material that has now been disclosed been properly examined and considered, disclosure should certainly have been made significantly earlier than it was. It is unnecessary to decide whether it should have been made before the committal in 2008, although the issue of the validity of the authorisations was put in issue at that point, as can be seen from the defendant's skeleton argument before the Magistrates' court, notably at paragraph 35.

[13] That the issue of the validity of the authorisations was raised in such express terms in that skeleton meant that at the committal stage it was incumbent upon the prosecution, in the widest sense of the term, to review all the material relating to the authorisations, and not merely the applications and the authorisations, in order to see whether disclosure was necessary in order to comply with the prosecution's duty to make disclosure of any material that would weaken the prosecution case or assist the defence case.

[14] The defence referred me to my judgment in R v Fulton, number 3, delivered on the 13th of October 2005, in which I reviewed the authorities relating to the need for the prosecution to make full disclosure, and it is unnecessary for me to repeat what I

said in that judgment, save to repeat that, as Rose Vice-President emphasised in R v Early and Others:

> "It is a matter of crucial importance to the administration of justice that the prosecution authorities make full relevant disclosure prior to the trial".

[15] As I have already stated, Mr Kerr recognizes that there has been a failing in the disclosure process by the prosecution, and the question is, therefore, whether that failure requires the court to stay the proceedings upon the grounds of an abuse of process.

[16] From my survey in R v Fulton number 3 of the relevant authorities governing a stay, the following principles can be stated.

(i) The defendant has to show on the balance of probabilities that a stay should be granted.

(ii) It is not appropriate to stay the proceedings unless:

(a) there can no longer be a fair hearing or;

(b) it would otherwise be unfair to try the defendant.

(iii) The ultimate objective of the discretionary power to order a stay is that there should be a fair trial according to law, which involves fairness to both the defendant and the prosecution.

(iv) One of the factors that may adversely affect the fairness of the trial is manipulation of the prosecution process.

(v) Bad faith or serious fault on the part of the prosecution may render it unfair that the defendant should be tried.

(vi) The trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded.

(vii) The discretion to order a stay is not a disciplinary function and ought not to be exercised to express the court's disapproval of official conduct.

(viii) The jurisdiction must be exercised carefully, sparingly and only for very compelling reasons.

[17] In R v Murray and others [2006] NICA 33, the Court of Appeal emphasised that where a fair trial is possible a trial should proceed

"unless there are exceptional reasons that it should not".

[18] In the words of the Lord Chief Justice at [25] this reinforces the need for there to be very compelling reasons to order a stay, a requirement that can be traced through DPP's application for judicial review [1999] NI 106 to ex parte Bennett [1994] 1 AC 42 at page 74 per Lord Lowry.

[19] I have to consider whether the admitted failure by the prosecution to make disclosure of these documents in the face of persistent attempts by the defence to secure their disclosure means either

(a) that the defendant can no longer receive a fair trial or;
(b) that it would otherwise be unfair to try the defendant.

[20] As Mr Kerr observed, the defence have not submitted that the defendant cannot receive a fair trial. I accept that the documents have been disclosed well in advance of the proposed trial date and the defence are, therefore, not disadvantaged so far as preparation of their defence is concerned. However, notwithstanding that the defendant can receive a fair trial, can the failure to make earlier disclosure be said to amount to manipulation of the prosecution process, and if it does has that adversely affected the fairness of the trial? The failure to make timely disclosure was certainly a serious fault, and one that could and should have been avoided. But I do not accept that the failure was due to bad faith because when the documents were examined by junior prosecution counsel that led to their disclosure. That is a clear indication that despite the earlier failings, the prosecution is properly performing its obligation to make disclosure.

[21] A further consideration is that the failure to make disclosure does not extend to evidence which has a bearing on all of the charges against the defendant, namely Count 5 and those parts of Count 6 that relate to allegations against the defendant after the 21st of September 2005. Were I to make an order staying the prosecution, the effect of that would be to stop the court from considering other very grave charges because of a failure by the prosecution to disclose documents that are unrelated to those charges. It may be the case that if the unaffected charges were relatively minor compared to the effected charges, this consideration would not weigh heavily when the court came to consider all of the relevant factors before deciding whether or not to exercise its discretion, but I am satisfied that it is a factor that I should take into account.

[22] It is also necessary to emphasise, as I did in my judgment of the 5th of September 2008, that the trial process provides the defendant with the opportunity to explore and contest the lawfulness of the covert surveillance that resulted in the gathering of the evidence that has given rise to the present charges. In particular, the trial judge has the power to exclude evidence by virtue of Article 76 of the 1989 Order, and I consider that the trial provides the appropriate mechanism by which all the

relevant evidence bearing on the legality of the covert surveillance can be adduced and considered by the trial judge.

[23] One further matter to which I should refer is that Mr Harvey relied upon the failure of the prosecution to properly inform the court of the absence of directed surveillance authorisations for consultation room three during the first abuse of process application. As I accept that the correct position was not appreciated by the prosecution counsel at that time, I do not feel that I should speculate on why this mistake was allowed to occur without the benefit of evidence from the police or the PPS. However, the court should not have been given an incorrect description of the authorisation and that it was merits criticism. Had the outcome of that application turned upon that information, I might take a different view of the matter, but my decision did not turn on that matter because I was not required to decide, nor did I decide, whether the covert surveillance was lawful, as can be seen from [59]. That is because I concluded that the trial judge could fully consider the lawfulness of the directed surveillance. Indeed, at [60] I observed that disclosure of the authorisations may well be necessary. I do not consider that the failure of the prosecution to properly explain the position about the authorisations, regrettable though that was, amounts to a manipulation of the prosecution process.

[24] Having considered all of the submissions, I am satisfied that this is not an exceptional case where I should grant a stay of these charges. I am satisfied that the defendant can receive a fair trial and I refuse the application to stay these proceedings.