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(subject to editorial corrections)**

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IN THE CROWN COURT SITTING IN BELFAST

R -v- SEAN HOEY

RULING

WEATHERUP J

[1] As disclosure Judge in this trial I make the following ruling. The defendant faces charges that are at hearing before Mr Justice Weir, the trial Judge, in connection with the bombing in Omagh on 15 August 1998. This is one of a number of applications made by the defendant for disclosure of documents. This application by the defendant is for a witness summons pursuant to section 51A and 51B of the Judicature (Northern Ireland) Act 1978 against the Police Ombudsman, requiring her to make disclosure of and deliver up to the defendant all material in the possession of her office concerning the explosion in Omagh on 15 August 1998 and any other terrorist incident considered at any stage as being possibly linked to the Omagh incident.

[2] Section 51A applies where the Crown Court is satisfied that a third party is likely to produce "any document ... likely to be material evidence" for the purpose of any criminal proceedings before the Crown Court. In such a case the Crown Court shall issue a witness summons directed to the person concerned requiring him to attend before the Crown Court at the time and place stated in the summons and produce the document.

The terms of section 51A(1) and (2) are as follows -

"(1) 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 interests 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.

(2) In such a case the Crown Court shall, subject to the following provisions of this section, issue a summons (a witness summons) directed to the person concerned and requiring him to-

(a) attend before the Crown Court at the time and place stated in the summons, and

(b) give the evidence or produce the document or thing."

[3] Section 51B provides that a witness summons which is issued under section 51A and which requires a person to produce a document, may also require him to produce the document, at a place stated in the summons and at a time which is stated that precedes that stated under section 51A, for inspection by the person applying for the summons. Accordingly section 51B provides for preliminary production of the documents for inspection.

The terms of section 51B are as follows -

"A witness summons which is issued under section 51A and which requires a person to produce a document or thing as mentioned in section 51A(2) may also require him to produce the document or thing-

(a) at a place stated in the summons, and

(b) at a time which is so stated and precedes that stated under section 51A(2), for inspection by the person applying for the summons."

[4] The general procedure for disclosure of documents by the prosecution is set out in the Criminal Procedure and Investigations Act 1996. Section 3 provides a test for disclosure in different terms to that which applies to a witness summons under section 51A. Under section 3 the prosecutor must 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".

The terms of section 3 are as follows -

"(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, or

(b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

(2) For the purposes of this section prosecution material is material-

(a) which is in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the accused, or

(b) which, in pursuance of a code operative under Part II, he has inspected in connection with the case for the prosecution against the accused."

[5] In the present case the Police Ombudsman has delivered to the prosecution the material which it has been assessed might assist the defence or undermine the prosecution. In so doing the prosecution disclosure test has been applied and in turn the prosecution has examined this material and indicated that the majority of the material would be subject to a claim for Public Interest Immunity. The remainder of the material disclosed to the prosecution that will not be the subject of PII will be disclosed to the defence, if it has not already been disclosed under earlier prosecution disclosure.

[6] Against that background the defendant makes a number of submissions in relation to this application under sections 51A and 51B. First of all it is said that

there are two different tests applied by the two statutes. The test that applies under the Judicature Act for a witness summons is wider than the test that applies under the Criminal Procedure and Investigations Act for prosecution disclosure. Whereas the test for prosecution disclosure is concerned with documents that might assist the defence or undermine the prosecution the test for third party disclosure on a witness summons may also extend to documents that are neutral or documents that are positively adverse to the defence. On that approach there may remain with the Police Ombudsman certain documents that have not been disclosed to the prosecution.

[7] Further the defence say that it is for the Court and not the third party to assess the materiality of the documents, so that once it has been established that the third party has documents that are likely to be material evidence the obligation will fall on the third party to disclose all documents in their possession.

[8] Further, the defence say that it is for the Court and not the third party, or any other agencies, such as the Public Prosecution Service, to assess public interest issues and the third party should not use the prosecution to vet disclosure issues. Prior to the Police Ombudsman furnishing the documents to the prosecution it was stated in correspondence to be her intention that her office would not carry out any public interest assessment but would furnish the documents to the prosecution so that the prosecution would make any determination of PII.

This was a process that the defendant described as vetting by the prosecution and something to which Counsel objected.

[9] Further, the defence say that if the Court is satisfied that the third party has documents that are likely to be material, the Court should make an Order under the Judicature Act and the third party should disclose all documents to the Court. Notice would then be given to anyone who might assert any public interest claim and such persons could apply to the Court to advance any PII claim. As a result of such an application and representations the Court would Order that the documents be disclosed or withheld as the Court determined.

[10] On the other hand the Police Ombudsman contends that the statutory tests, while worded differently, are in effect the same test. Both versions of the test amount to the disclosure of such documents as might assist the defence or undermine the prosecution.

[11] Further, the Police Ombudsman contends that this application for a witness summons has been rendered redundant by the disclosure of the relevant material to the prosecution, which will in turn make the requisite disclosure to the defence.

[12] Further, the Police Ombudsman contends that if the documents had not been disclosed already to the prosecution, the issue would have arisen as to whether

the Court was satisfied, by the defendant, that the documents were likely to be material. If so determined the documents would be produced to the Court and there would then be notice to those parties who might wish to advance any public interest issue in relation to the documents. Having heard from both parties and assessed that public interest issue the Court would then and only at that stage make an order for production of documents by witness summons under the Judicature Act.

[13] A number of cases were referred to, namely R.v.ON [2001] NI 136; Butler's Application [2004] NI 93; R.v. Hewitt & Anderson [2002] NICC 12 and R.v. Hume [2005] NICC 30. There is extensive consideration of these issues by Girvan J in R.v.ON. At page 147 Girvan J recites two questions that arose to be answered. First, do the provisions of section 51A, where they refer to the likelihood of a person being able to give material evidence or produce any document or thing likely to be material evidence, fall to be interpreted differently from the way in which those terms were interpreted in the case law before 1996, whether as a result of the provisions of the Convention or as a result of change in the context of the legislation construed as a whole? Secondly, are the provisions of section 51A exhaustive of the parties' rights to gain access to third party documentation, or does the Court have any inherent residual power to direct third parties to disclose material which may be of assistance to the party to the criminal litigation but which the defendant cannot establish are likely to be material evidence?

[14] In relation to that second issue Girvan J concluded that it was doubtful whether there was any inherent jurisdiction that could co-exist with the statutory scheme. On the first issue as to the scope of the third party test it is the position that the test was formerly what might be described as restrictive. It was once limited to admissible evidence. It is not so restricted today. Girvan J, having considered the background to the matter concluded at page 152: -

"Putting the legislation in its full context and reading in the light of the Convention I conclude that the defendants are entitled to rely on section 51A to persuade a court to direct the issue of a witness summons to third parties who are likely to be able to produce documents which are likely to contain relevant evidence in the sense of relevant material of potential use to the defendants in the defence of the charge".

This is a wide-ranging description of materiality for the purposes of third party disclosure.

[15] The defendant states that such material which might be described as of potential use to a defendant in the defence of the charge should be expressed in terms of material which is not only assisting the defence and undermining the prosecution, but material which is neutral as well as material which is positively adverse

to the defence. The defendant refers to R.v.H [2004] UKHL 3 where the House of Lords at paragraph 17 stated that the scope of section 3 of the 1996 Act does not require disclosure of material which is either neutral in its effect or which is adverse to the defendant. The defendant in the present case contends that such documents should be included within the scope of materiality for the purpose of section 51A.

[16] The defendant further refers, in relation to the scope of the documents to be produced, to R.v. Mackin [2004] EWCA Crim.1607 which considered the issue of disclosure in the context of Public Interest Immunity and where at paragraph 30 Hooper LJ states the scope of disclosure as -

"...an obligation to disclose material if it assists the defence by allowing the defendant to put forward a tenable case in the best possible light or if the material could assist the defence to make further enquiries and those enquiries might assist in showing the defendant's innocence or avoid a miscarriage of justice".

[17] The above statements of Hooper LJ in R v Mackin and Girvan J in R.v.ON give a broad meaning to 'assist' the defence. In Girvan J's terms it is any material of potential use to the defendant in the defence of the charge and in Hooper LJ's terms it is to allow the defendant to put forward a tenable case in the best

possible light or assist the defence to make further enquiries which might assist in showing the defendant's innocence or avoid a miscarriage of justice.

[18] The defendant's proposed approach to the test to be applied under the Judicature Act was advanced in R.v.Hume [2005] NICC 30 and it was rejected by Hart J at paragraph 16 of his judgment. He was there dealing with an application for third party disclosure from the prosecution, so both statutes applied to the Public Prosecution Service. Hart J stated: -

"Unless there is clear justification for interpreting the concept of materiality under section 51A as imposing a most 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. Were it the case that the prosecution are to apply different more

generous test of disclosure because the defence could serve a section 51A summons in respect of documents which it had obtained with the consent of the complainant the effect would be to enable the defendant to circumvent the provisions of section 8 (2) of the 1996 Act. I see no justification for such a course. It would also require the Courts to apply two different disclosure tests to the same documents, which would be difficult to do in practice".

[19] I accept the approach of Hart J. The wide interpretation of assisting the defence referred to above does not require neutral or adverse documents to the defendant to be treated as material evidence for the purposes of the statute, if they are not of potential use to the defendant in the defence of the charge or if they are not such as would allow the defendant to put forward a tenable case in the best possible light or if the material could not assist the defence to make further enquiries that might assist in showing the defendant's innocence or avoid a miscarriage of justice.

[20] The next stage is the course which the Court takes in relation to material that is required to be produced and whether it is to be produced to the Court or to some third party. In R & ON Girvan J recognised from page 152 that the rights of a defendant in the documents are being considered as well as the rights of other interested parties, for example, there may be Article 8 privacy

rights or matters of public interest. A fair balance will have to be struck between the respective interests. That is an exercise undertaken by the Court.

[21] Further, Girvan J recognised that the Court may make determinations on materiality because a third party may not be able or consider themselves able to make that judgment. If that is so the third party will invite the Court to determine whether or not the documents in their possession are material. Or it may invite the Court to carry out the balance of interests that might arise if there is a public interest issue. In each case, however, it is to be noted that it is the Court that carries out that role. It is not that the documents are sent to the prosecution or to some other agency for a decision, although it may be the case that the prosecution or some other agency has a role to play in assisting the Court to make the determination.

[22] I note a decision of the English Court in TB.v.Stafford [2006] EWHC 1645 (Admin) which gave rise to an issue about disclosure of medical records. In that case the complainant, whose medical records they were, was entitled to be heard on the issue as to disclosure of the medical records. I refer to that simply to illustrate that the Court has there introduced to the balance of all the respective interests a procedure that is fair to all the parties. It is an example of notice being given to interested parties so that the Court might determine the issue of the disclosure of documents. It is in the same vein that I envisage that when the Court is

considering documents it will be advised and will determine who are the interested parties to whom notice should be given.

[23] Contrary to the above approach is that of McCollum LJ in R.v.Hewitt & Anderson where it was concluded that the Court would refer the documents to the prosecution so that they might determine the disclosure issue. There has been a conflict between that approach taken by McCollum LJ where the prosecution determines the issue and the approach taken by Girvan J where the Court determines the issue. This matter also came before Hart J in R.v.Hume and his conclusion appears at paragraph 41:

"I respectfully agree with the views of Girvan J which I have set out earlier and I consider this represents the proper approach which the court should adopt. It is therefore for the court and not for the prosecution to examine documents produced to the court on foot of a third party disclosure summons under section 51 (A) in respect of which it is anticipated that issues of Public Interest Immunity and/or confidentiality may arise".

It is my view that that is the correct position and I follow the approach adopted by Girvan J in R.v.ON and Hart J in R.v.Hume.

[24] My general conclusions therefore are these -

First, the same test applies to prosecution disclosure and third party disclosure. That test is that the documents are likely to be material evidence, that is, that they may assist the defence or undermine the prosecution. Assisting the defence extends to the framework that Girvan J used in R.v.ON, that is, relevant evidence in the sense of relevant material of potential use to the defendant in the defence of the charge. Assisting the defence also extends to the framework used by Hooper LJ in R.v. Mackin where he stated that the obligation is to disclose documents that assist the defence by allowing the defendant to put forward a tenable case in the best possible light or if the material could assist the defence to make further enquiries and those enquiries might assist in showing the defence's innocence or avoiding miscarriage of justice.

Secondly, when a third party forwards material to the prosecution the separate duty of the prosecution under the Criminal Procedure & Investigations Act applies to the prosecution. The exercise of forwarding documents to the prosecution is not a means by which the Court would require the third party to comply with section 51A of the Judicature Act. However, the result may be that a third party summons will become redundant if the material is produced by the prosecution to the defence.

Thirdly, I am satisfied in this particular case under section 51A that the Police Ombudsman has documents

that are likely to be material evidence under the statutory test in the Judicature Act.

Fourthly, the Police Ombudsman should apply the statutory test of materiality, that is assisting the defence or undermining the prosecution in the wide sense that I have referred to above. In general the defence will have corresponded with the third party in relation to the documents and will have given notice of the charges and of the defence. The defence must do that in order to enable the third party to appreciate the significance and application of the statutory test that they will have to apply. If the third party has doubts about materiality it should refer that issue to the Court and the Court will then determine whether or not the documents satisfy the statutory test.

Fifthly, the Court will also determine any balance of interests that have to be determined between the defendant's rights and the rights of others and any public interest. In order to do so the Court will require that notice be given to interested parties so that the relevant interests may be represented and an informed decision made by the Court. The outcome of that exercise will be that the Court will determine what documents are then to be disclosed to the defence and what documents are to be withheld in the public interest.

[25] The result in the present case is this -

First of all, if all the documents falling under the statutory test, as I have outlined it, have been forwarded to the prosecution then the third party summons in this case is unnecessary and no Order need be made.

Secondly, I therefore request the Police Ombudsman to apply the statutory test to the documents that she has in her possession. She has already undertaken such an exercise but for the avoidance of doubt as to the approach that has been adopted she should apply the wide test, as I have described it, in relation to the documents. There are two possible outcomes to that exercise. If, having applied that test, there are no further documents that fall to be disclosed then no Order is required. Alternatively, if there are further documents that would satisfy the wide test that I have described and they have not already been forwarded to the prosecution or if there is doubt about the materiality of the documents, then all such material should be referred to the Court, which will then assess whether or not the documents are material.

Thirdly, if the Police Ombudsman has material documents then they should be delivered to the Court, not to any other agency.

Fourthly, notice will be given to interested parties in relation to disclosure issues. The Police Ombudsman may indicate who may be interested parties. For example, it may be sought to argue a public interest in the protection of the Police Ombudsman system, in the

sense that easy access to documents in the Police Ombudsman's possession may interfere with the efficient working of the system of investigation. The Garda Siochana have been mentioned as having an interest in some of the material. The Police Service of Northern Ireland may have an interest if they have produced some of the material. There may be some other agency with an interest. In general the party in possession of the documents may be able to identify, knowing what they do about the documents and the source of the documents, who are the relevant interested parties whose interests may have to be considered by the Court before disclosure. Further, when the documents are produced the Court may decide that there are interested parties to whom notice should be given and representations invited before a decision on disclosure to the defence.

[26] The above describes the regime that I propose to apply to this particular case, subject to such further representations as might now be made by the prosecution or the defence or the Police Ombudsman.