

Neutral Citation No: [2019] NICC 10

Ref: COL10927

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 4/4/2019

THE CROWN COURT SITTING AT BELFAST

THE QUEEN

v

COLIN DUFFY, ALEXANDER McCRORY AND HENRY FITZSIMMONS

RULING

COLTON J

Introduction

[1] The prosecution in this case have brought an application to the court for an order under Section 8(5) of the Criminal Procedure and Investigations Act 1996 in accordance with Rule 2(2) of the Crown Court (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules (Northern Ireland) 1997.

[2] The application relates to evidence from a witness identified as PIN 3931.

[3] The prosecution propose to call that witness in relation to conversations he is alleged to have had with the defendant, Duffy, in his role as a Covert Human Intelligence Source which were recorded covertly.

[4] The defendants dispute the admissibility of that evidence. As Mr Mulholland QC who appears with Mr Joseph O'Keefe on behalf of the defendant, Duffy, made clear the credibility of this witness is at issue in this trial.

[5] In the course of its disclosure obligations in this trial counsel for the prosecution Mr Ciaran Murphy QC, Mr David Russell and Mr Sam Magee, considered material arising from a routine screening interview with PIN 3931 conducted by MI5 officers responsible for the handling of undercover agents.

[6] That material raised a discrete issue about the credibility of PIN 3931.

[7] Consistent with the prosecution's obligations under the Criminal Procedure and Investigations Act 1996 prosecuting counsel considered that the material relating to the witness's credibility met the test for disclosure in that it was of potential assistance to the defence.

[8] The prosecution, having reviewed the material, considered that issues of public interest immunity arose and therefore brought the application currently before the court.

[9] Before considering the application I received submissions from Mr Mulholland on behalf of Mr Duffy. Obviously, he could only make limited submissions in light of the information available to him. He stressed the importance of the credibility of PIN 3931 to the defence and drew my attention to passages of evidence from the committal proceedings relating to a crucial passage of the disputed conversations of which I was previously aware from other applications in the case. He submitted that there was an enhanced obligation for disclosure in circumstances where the witness was anonymised and screened from the defendant when giving evidence.

[10] He accepted that the appropriate principles to be applied were well established and set out in the case of **R v H** [2004] UKHL 3.

[11] He further argued that given the very limited information available to the defence that the court should give consideration to the appointment of a special counsel to make informed submissions to the court on the question of disclosure.

[12] Having heard Mr Mulholland's submissions the court then sat in Chambers to hear the ex parte application.

[13] In support of the application I received a certificate from the Minister of State for Northern Ireland dated 5 March 2019, which I admitted under the provisions of Article 18 of the Criminal Justice (Evidence) (Northern Ireland) Order 2009.

[14] In addition to that certificate I received a schedule to the certificate which sets out the material which is the subject matter of the application.

[15] Finally I received a draft annex which it was proposed would be disclosed to the defendant.

[16] The court has had the opportunity to fully consider the material which forms the subject matter of the application.

[17] I propose to deal with the application in accordance with the directions of the House of Lords in **R v H**.

[18] In relation to the series of questions which are set out at paragraph [36] onwards of the judgment I answer as follows:

1. I have considered the material which the prosecution seek to withhold in detail. It relates to material produced pursuant to screening interviews carried out by MI5 officers in relation to PIN 3931 on 30 January 2017 and 27 February 2017.
2. Some of the material may be of assistance to the defendant Duffy's case insofar as it relates to the credibility of PIN 3931. Subject to my answers to the subsequent questions that material should be disclosed.
3. If full disclosure of the material is ordered I have no doubt that this would represent a real risk of serious prejudice to an important public interest.

In the court's view that prejudice is well summarised in paragraph 10 of the Minister's certificate which I set out in full:

"10. In relation to the damage described above, I am advised that disclosure of the documents would reveal sensitive information relating not only to the real identity of ... (PIN 3931) and intelligence officers, who might be at risk if identified, but also information of one or more of the following kinds:

- (a) information relating to methods, techniques or equipment of the security and intelligence agencies, disclosure of which would reduce or risk reducing the value of the method, technique or equipment in current or future operations;*
- (b) information relating to persons providing information or assistance in confidence to the security and intelligence agencies, disclosure of which would endanger or risk endangering the persons concerned or other persons that would impair or risk impairing their ability or willingness to continue providing information or assistance, or the ability of the security and intelligence agencies to obtain information and assistance from the person concerned or other person;*
- (c) information relating to operations of the capabilities of the security and intelligence agencies, disclosure of which would jeopardise present and future intelligence gathering operations and capabilities;*

- (d) *information relating to the identity, appearance, deployment or training of current and former members of the security and intelligence agencies, disclosure of which would endanger or risk endangering them or other individuals or would impair or risk impairing their ability to operate effectively as members of the security and intelligence agencies or the ability of the security and intelligence agencies to recruit and retain staff in the future;*
- (e) *information received in confidence by the security and intelligence agencies from foreign liaison sources, disclosure of which would jeopardise or risk jeopardising the provision of such information in the future;*
- (f) *other information likely to be of use to those of interest to the security and intelligence agencies in pursuit of its functions, including terrorists and other criminals, disclosure of which would impair or risk impairing the agencies performance of their functions."*

4. In my view the defendant's interests can be protected by the disclosure of the gist or summary of the material which was considered by the court and in respect of which an amendment was ordered.

I am satisfied that the disclosure of this summary will give adequate protection to the public interest I have identified but also afford adequate protection to the interests of the defendants.

In particular, the material which the prosecution seek to withhold has absolutely nothing to do with the operation which gave rise to the evidence in this trial. None of the material bears on the investigation or evidence in this case. It is primarily for this reason that I do not consider that a special counsel is required. The material withheld essentially relates to the identity of PIN 3931 and other agents and MI5 officers together with methods, techniques and equipment used by the security and intelligence agencies which have no bearing on the trial of this case.

The only matter that might be of assistance to the defendant in the material I have considered relates to the potential credibility of PIN 3931. The disclosure ordered adequately provides the necessary information to the defendant in a way which does not damage the public interest. Overall, this is a straightforward application and not one of exceptional difficulty.

5. I consider that disclosure of the gist or summary does represent the minimum derogation necessary to protect the public interest in question.
6. I am satisfied that the disclosure ordered will not have the effect of rendering the trial process, viewed as a whole, unfair to the defendant.
7. I confirm that this answer should not be treated as a final once and for all answer. The matter should be kept under review. However, given the nature of the material not disclosed it is difficult to envisage how it might become relevant but obviously the prosecution will be obliged to keep the matter under review. The court will also be alive to this issue as the trial unfolds.

[19] Overall, the fact that this matter has been dealt with in this way gives the court confidence that the prosecution is attending to its obligations of disclosure.

[20] Accordingly, I grant the order sought by the prosecution but direct that the certificate of the Minister of State for Northern Ireland in support of the application dated 5 March 2019 and the summary or gist of the material as amended and approved by the court be disclosed.