

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**  
**QUEEN'S BENCH DIVISION**

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**IN THE MATTER OF AN APPLICATION BY STEPHEN ROBERT  
O'NEILL FOR JUDICIAL REVIEW**

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**WEATHERUP J**

**The application.**

[1] This is an application for Judicial Review of the decisions of the Director of Public Prosecutions and of Mr Perry, the Resident Magistrate sitting at Belfast Magistrates' Court, whereby the applicant, as a defendant in summary criminal proceedings, was refused disclosure of the notebook entries of police officers who were witnesses for the prosecution, in advance of the hearing of the prosecution.

[2] A Notice of Incompatibility was issued pursuant to Section 5(1) of the Human Rights Act 1998 and Order 121 Rule 2(1) of the Rules of the Supreme Court (Northern Ireland) 1980 that the Court was considering making a declaration of incompatibility under Section 4(2) of the 1998 Act further to the applicant's claim that Section 3 and Section 8 of the Criminal Procedure and Investigations Act 1996 were incompatible with Article 6(1) and Article 6(3)(b) of the European Convention on Human Rights. Mr Deeny QC and Mr Curran appeared for the applicant, Mr McCloskey QC appeared for the DPP and Mr Maguire appeared for the RM.

**The Summary Criminal Proceedings.**

[3] The applicant faces three charges at Belfast Magistrates' Court namely that on 29 July 2000 he used disorderly behaviour in a public place, he resisted a constable in the due execution of his duty and he assaulted a constable in the due execution of his duty.

[4] On 29 June 2001 a Notice by Complainant of Intention to Tender Written Statements at Summary Trial was issued specifying the statements of four police witnesses as the evidence against the applicant on the three charges.

[5] On 30 January 2002 the applicant was served with a Police Schedule of Non Sensitive Material which included as items 3, 4, 5 and 6 the statements of the four police officers that were evidence in the case and also included as items 7, 8, 9 and 10 the notebook entries of the four police officers with the comment that each was "Held by Officer". By letter dated 5 February 2002 the applicant's solicitor requested disclosure of the notebook entries and by reply dated 18 February 2002 the Department of the Director of Public Prosecutions stated - "None of the other items you refer to fall to be disclosed under Primary Disclosure. However should any of the police witnesses refer to their notebooks during evidence, you can of course see these."

#### Disclosure in Summary Criminal Proceedings.

[6] Disclosure is provided for under the Criminal Procedure and Investigations Act 1996. The 1996 Act introduced a new scheme for disclosure of unused material by the prosecution. The scheme of the legislation provides for -

(1) Primary prosecution disclosure (Section 3) by which the prosecutor must disclose to the accused any unused material, "which in the prosecutor's opinion might undermine the case for the prosecution against the accused".

(2) Defence disclosure (Section 5) by which, on trials on indictment the defence must, and in summary trials the defence may, serve a defence statement on the Court and the prosecutor.

(3) Secondary prosecution disclosure (Section 7) by which, after service of a defence statement, the prosecution must disclose any additional unused material "which might be reasonably expected to assist the accused's defence as disclosed by the defence statement".

(4) A prosecution application to the Court in relation to primary prosecution disclosure (Section 3(6)) and secondary prosecution disclosure (Section 7(5)) on the basis that it is not in the public interest to disclose material.

(5) A defence application to the Court after secondary prosecution disclosure (Section 8) if the accused has reasonable cause to believe that there is undisclosed prosecution material "which might be reasonably

expected to assist the accused's defence as disclosed by the defence statement".

(6) The continuing duty of the prosecution to review disclosure (Section 9), which duty arises after primary prosecution disclosure so as to disclose prosecution material "which in his opinion might undermine the case for the prosecution against the accused", and after secondary prosecution disclosure in relation to material "which might be reasonably expected to assist the accused's defence as disclosed by the defence statement".

[7] A Code of Practice was issued under Part II of the 1996 Act. It provides for the preparation by police of material for the prosecutor and for a schedule to be prepared by the disclosure officer of sensitive material and of non sensitive material (paragraph 6). Further, it provides for the revelation of material to the prosecutor. The disclosure officer must give the schedules to the prosecutor (paragraph 7.1); draw attention to any material an investigator has retained which may fall within the test for primary prosecution disclosure (paragraph 7.2); give the prosecutor a copy of any material which falls into specified categories, which include material casting doubt on the reliability of a witness or any other material which the investigator believes may fall within the test for primary prosecution disclosure (paragraph 7.3); allow the prosecutor to inspect on request any material that has not already been copied to him (paragraph 7.4).

[8] The Attorney General has issued Guidelines on the "Disclosure of Information in Criminal Proceedings". In relation to primary disclosure the Guidelines provide that material can be considered to have the potential to undermine the prosecution case if it has an adverse affect on the strength of the prosecution case. This will include anything that tends to show a fact inconsistent with the elements of the case that must be proved by the prosecution. Material can have an adverse effect on the strength of the prosecution case by the use made of it in cross-examination (paragraph 36). Examples of material that might undermine the prosecution case include that which casts doubt on the accuracy of any prosecution evidence, or which goes to the credibility of a prosecution witness, or which might support a defence that is either raised by the defence or is apparent from the prosecution papers (paragraph 37).

#### The approach of the Prosecutor.

[9] At the same time as he prepared the Police Schedule of Non Sensitive Material the disclosure officer completed a Disclosure Officers Report. In response to the statement "The following items undermine the Prosecution case (primary disclosure)/assist the Defence (secondary disclosure)/are

required to be supplied under Section 7.3 of the Code” the disclosure officer inserted “NIL”.

[10] Kenneth James Preston was the professional officer who dealt with the prosecution file on behalf of the Director of Public Prosecutions. With the complaint file from police Mr Preston received the schedules and the Disclosure Officer’s Report and he avers that he would have assessed the material for the purposes of prosecution disclosure.

[11] With reference to a letter from the applicant’s solicitor of 5 February 2002 requesting disclosure of the police notebook entries Mr Preston avers that “I would have concluded that, as the letter is silent on the issue of the significance of the requested items, it constituted a mere ‘fishing expedition’. As no fresh issue had been raised, there would have been no purpose served by reviewing the papers again.”

[12] With reference to consideration of the police notebooks Mr Preston states that he may have read the notebook entry of one of the constables which was included on the complaint file but he does not believe that he considered the other notebook entries as there were no copies in the possession of the Department. He refers to the Disclosure Officer’s Report that there were no items which undermined the prosecution case and in the light of that Report he did not ask to inspect any other materials.

#### The Ruling of the Resident Magistrate.

[13] On 5 September 2002 Mr Perry RM refused the application for disclosure of the notebook entries. He found that he had no jurisdiction to entertain the application as Section 3(1) of the 1996 Act places the requirement to make primary disclosure entirely within the discretion of the prosecutor and that a challenge cannot be made in the Magistrates’ Court but must be made by way of Judicial Review. He rejected the invitation to read into the legislation a right to apply to the Magistrates’ Court to review the decision made by the prosecuting authority in relation to primary disclosure in the same manner as arises under Section 8 of the 1996 Act in relation to secondary disclosure.

#### The Grounds for Judicial Review.

[14] The applicant’s grounds for Judicial Review are –

- (1) The decision of the DPP refusing to disclose the notebook entries of the police officers to be relied on by the prosecution at the trial of the applicant offends the applicant’s rights under Article 6(1) and Article 6(3)(b) of the European Convention on Human Rights.

(2) In deciding to refuse to the applicant access to the notebook entries of the police officers concerned the DPP has misdirected itself as to the nature of its obligation to make disclosure of all evidence upon which the prosecution intends to rely at trial and has further misdirected itself as to the legislative requirements of Section 3 of the Criminal Procedure and Investigation Act 1996 when read in a manner compatible with the applicant's Convention rights under Article 6.

(3) The learned Resident Magistrate misdirected himself in law in his decision of 5 September 2002 in holding that he had no power to require the DPP to make disclosure to the applicant of the notebook entries of the relevant police officers to be called as witnesses at the trial.

(4) The DPP as prosecutor failed to carry out and perform its duty under Section 3(1) of the Criminal Procedure and Investigations Act 1996 by failing to read and consider the police notebook entries requested by the defence before refusing that request.

#### Primary Prosecution Disclosure.

[15] Primary prosecution disclosure applies to prosecution material that "might undermine the case for the prosecution against the accused" (section 3(1)(a)). Under the Attorney General's Guidelines material can have an adverse effect on the strength of the prosecution case by the use made of it in cross-examination. Examples of material that has potential to weaken the prosecution case, or to be inconsistent with it, include any material casting doubt on the accuracy of any prosecution evidence or the credibility of a prosecution witness. It is apparent that if police notebooks contain material which is inconsistent with the police officer's statement of evidence or otherwise casts doubt on the accuracy of any prosecution evidence or the credibility of any prosecution witness that it falls to be disclosed under primary prosecution disclosure.

[16] The process involved in the disclosure of such material by the disclosure officer to the prosecutor is set out in the Code of Practice. The disclosure officer furnishes schedules to the prosecutor and he must draw attention to any retained material that may fall within the test for primary prosecution disclosure and must also give to the prosecutor a copy of material casting doubt on the reliability of a witness or which may fall within the test for primary prosecution disclosure. Further the prosecutor may inspect any material that has not been copied to him. It is implicit in this process that the disclosure officer will make an assessment of the material which has the potential to fall within the test for primary prosecution disclosure and that the prosecutor may inspect material not copied to him. It is apparent that the

prosecutor is not expected to inspect every item of material retained by the investigator.

[17] The process of primary prosecution disclosure is determined by the opinion of the prosecutor. The legislation does not assign to the Court a role in determining the extent of primary prosecution disclosure, other than in relation to considerations of public interest. In R v B [2000] Crim LR 50 the Court of Appeal allowed an appeal where the prosecutor had applied to the trial Judge for a ruling on primary prosecution disclosure. The trial Judge ruled against the disclosure of a social worker's report that would have provided material for cross-examination of the complainant. It was held that questions of disclosure had to be decided by the prosecution and that the assistance of the Judge should only be sought if the questions could be properly decided by him, most obviously where questions of public interest immunity were involved.

[18] In the present case the disclosure officer has furnished a schedule listing the police notebook entries. Further the disclosure officer has furnished his Report to the prosecutor indicating that there are no items undermining the prosecution case that would be subject to primary prosecution disclosure. Accordingly the disclosure officer has concluded that the test for primary prosecution disclosure has not been satisfied and the police notebook entries are not such as might undermine the prosecution case.

[19] The prosecutor did not ask to inspect the police notebook entries in the light of the Disclosure Officer's Report. No ground has been identified on which the prosecutor might have had a particular reason to question the conclusion of the disclosure officer or otherwise consider it appropriate to inspect the notebook entries. In relation to the applicant's solicitor's letter requesting disclosure of the police notebook entries the prosecutor states that as the letter is silent on the significance of the requested items the request was a mere fishing expedition and as no fresh issue had been raised the papers were not reviewed. It is implicit in the prosecutor's remarks that had a significance been attached to the requested items or a fresh issue raised, further consideration would have been given to disclosure of the police notebook entries under the test for primary prosecution disclosure. In any event the prosecutor has a duty of continuing review of prosecution disclosure under section 9 of the 1996 Act.

#### Secondary Prosecution Disclosure.

[20] Secondary prosecution disclosure applies to prosecution material "which might be reasonably expected to assist the accused's defence as disclosed by the defence statement." In the absence of a defence statement, as in the present case, there is no obligation to make secondary prosecution

disclosure. The applicant has the option of serving a defence statement and triggering the prosecution duties under secondary disclosure.

Article 6 of the European Convention.

[21] The applicant contends that the process of disclosure is not compatible with the European Convention and amounts to a breach of the applicant's right to a fair trial under Article 6. In particular, reliance is placed on Article 6(1) which provides –

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Further, reliance is placed on Article 6(3) which provides –

“Everyone charged with a criminal offence has the following minimum rights –

(b) to have adequate time and facilities for the preparation of his defence.”

[22] In R v Stratford Justices ex parte Imbert [1999] 2 CrAppRep 276 it was held that the provisions of the 1996 Act as they applied in summary trials were not incompatible with the right to a fair trial under Article 6 of the European Convention. Subsequent considerations of the disclosure issue, including that of the European Court of Human Rights in Edwards & Lewis v UK on 22 July 2003, have not indicated that the scheme of the 1996 Act is incompatible with the right to a fair hearing.

[23] The issue of disclosure is an issue that can be raised in the criminal proceedings and on appeal. In all criminal proceedings the requirements of fairness and justice on the issue of disclosure can be addressed. In R v DPP ex parte Lee [1999] 2 All ER 737 the Divisional Court considered the requirements for disclosure in offences triable on indictment prior to committal. Kennedy LJ stated –

“The 1996 Act does not specifically address the period between arrest and committal, and whereas in most cases prosecution disclosure can wait until after committal without jeopardising the defendant's right to a fair trial the prosecutor must always be alive to the need to make advance disclosure of material of which he is aware (either from his own consideration

of the papers or because his attention has been drawn to it by the defence) and which he, as a responsible prosecutor, recognises should be disclosed at an earlier stage.” (page 749b)

“Clearly any disclosure by the prosecution prior to committal cannot normally exceed the primary disclosure which after committal would be required by section 3 of the 1996 Act.” (page 749e)

Fairness may require the prosecutor to make disclosure beyond the strict demands of the 1996 Act.

[24] The police notebook entries will become available to the applicant at the trial of the criminal charges. That it might be more efficient for the conduct of criminal proceedings to provide copies of police notebook entries in advance of the hearing is undoubtedly the case. That the legislative scheme of the 1996 Act does not require their disclosure in primary prosecution disclosure, unless it is the prosecutor’s opinion that their contents might undermine the case for the prosecution, is clear. That the Resident Magistrate should adjourn the hearing of the criminal proceedings for a short time or to another day when the interests of fairness require that an accused and his representatives have the opportunity to consider the contents of police notebook entries is also clear.

[25] The applicant places particular reliance on Article 6(3)(b) of the European Convention that provides that everyone charged with a criminal offence has the right to have adequate time and facilities for the preparation of his defence. If it is necessary to obtain additional time for the defence to consider the contents of police notebook entries such time will be afforded.

[26] The applicant objects that the legislative scheme does not provide for an application to the Court in relation to primary prosecution disclosure or an application to the Court for secondary prosecution disclosure other than after serving a defence statement. However the Court has the power to ensure that there is compliance with the overriding requirement for fairness and justice in each case and while there may be advantages in the approach advanced by the applicant the Court will be duty bound to achieve fairness and justice in each case.

[27] The Director of Public Prosecutions contends that the application for Judicial Review is inappropriate satellite litigation and the trial process is the forum in which the applicant’s complaints about disclosure may be addressed. In R v DPP ex parte Kebeline [1999] 4 All ER 801 where the challenge to the DPP decision to prosecute had been made by way of Judicial Review Lord Steyn stated–



“While the passing of the [Human Rights Act 1998] marked a great advance for our criminal justice system it is in my view vitally important that, so far as the courts are concerned, its application in our law should take place in an orderly manner which recognises the desirability of all challenges taking place in the criminal trial or on appeal. The effect the of judgment of the Divisional Court was to open the door too widely to delay in the conduct of criminal proceedings. Such satellite litigation should rarely be permitted in our criminal justice system.” (page 835j – 836b)

[28] I accept that the disclosure arrangements in summary proceedings are not unfair in principle and any issue of fairness in particular proceedings can be determined in those criminal proceedings. Accordingly it is not necessary to have such issues determined by way of Judicial Review and this aspect of the application amounts to impermissible satellite litigation. I am satisfied that the criminal proceedings are capable of producing a trial that satisfies the requirements of Article 6 and that the statutory disclosure provisions are not incompatible with Article 6. As the provisions are compatible with Article 6 it is unnecessary to consider the obligation to read and give effect to legislation in a way which is compatible with Convention rights as required by section 3 of the Human Rights Act 1998.

[29] The applicant expresses concern that primary prosecution disclosure depends upon the subjective opinion of the prosecutor. Should consideration of the police notebook entries by the defence at the trial of the criminal charges indicate non-compliance with the test for primary prosecution disclosure the Resident Magistrate could address the issue in the conduct of the criminal proceedings. Whether primary prosecution disclosure should depend upon the objective opinion of the prosecutor is a matter for Parliament.

#### Summary.

[30] In the light of the above findings I would summarise the position as it applies to the four grounds raised by the applicant as follows.

On the applicant's first ground, namely that the DPP refusal of disclosure is incompatible with Article 6, I am satisfied that the operation of Section 3 of the 1996 Act and the DPP decision taken further to the statutory requirements are not incompatible with Article 6.

On the applicant's second ground there are two parts. On the first part, namely that the DPP refusal of disclosure is contrary to the DPP obligation to disclose prosecution evidence, the police notebook entries are not evidence

relied on by the prosecution. On the second part, namely that disclosure is required by section 3 when read compatibly with Article 6, I have found no incompatibility with Article 6 and therefore no need to interpret section 3 so as to require disclosure.

On the applicant's third ground, namely that the RM was wrong to hold that he could not order disclosure, I find that disclosure is a matter for the opinion of the prosecutor and the RM has no jurisdiction to order disclosure.

On the applicant's fourth ground, namely that the prosecutor had a duty to examine the notebook entries, I am satisfied that the prosecutor had no such duty in the absence of some basis for considering that the test for primary prosecution disclosure might have been satisfied or that disclosure might otherwise be required in the interests of the fairness of the criminal proceedings.

[31] Accordingly I am satisfied that in the circumstances the DPP was not required to make disclosure of the police notebook entries and the Resident Magistrate was correct in holding that in the circumstances he had no power to require the DPP to make disclosure of the police notebook entries. Section 3 and section 8 of the 1996 Act are not incompatible with Article 6 of the European Convention and a Declaration of Incompatibility is refused. The application for Judicial Review is dismissed.