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Judgment: approved by the Court for handing down

Delivered: **20/12/2002**

(subject to editorial corrections)

IN THE CROWN COURT IN NORTHERN IRELAND

THE QUEEN

v

HEWITT AND ANDERSON

RULING

McCOLLUM LJ

[1] The defendants face a large number of charges of offences allegedly committed between 1977 and 1981 against a number of children in Barnardo's Home Belfast.

[2] In connection with the preparation of their defence their legal advisers wish to have access to the various social services and medical files relating to the complainants, with a view to discovering whether there is contained within them any material which may assist the defence case or undermine that of the prosecution.

[3] In determining what if any material should be disclosed to the defence the court must balance the parties' respective rights under the European Convention for Human Rights, the defendants' right to a fair trial under Article 6 and the complainants' right to respect for their private and family lives under Article 8.

[4] Clearly it is in the interests of justice that material which throws doubt on the veracity of the complainants' case should be available to the defence.

[5] Equally clearly material which would embarrass the complainants and which might prove to be of some value to a cross-examiner even though it

does not relate to any issue in the case is material which the complainants are entitled to regard as confidential and not subject to disclosure.

[6] The practical question which arises is how the material to be disclosed is identified.

[7] Mr Murphy on behalf of the prosecutor has argued that the investigation of all material to determine what part of it should be disclosed should not be the duty of the prosecution.

[8] However, having considered the relevant authorities, I take the view that it is part of the function of the prosecuting authority to assess such material as it is aware of, and to decide, subject to any directions of the court, what portions of such material should be disclosed to the defence.

[9] This is a function which the prosecution is required to undertake in relation to all material within its possession.

[10] Under Sections 3 and 7 of the Criminal Procedure and Investigations Act 1996, it must consider whether any prosecution material not previously disclosed to the defence might undermine the case for the prosecution against the accused, or assist the accused's defence.

[11] It has never been suggested that the statutory duty so imposed is in any way incompatible with the duty or function of the prosecuting authority.

[12] I can conceive of no principle of law or justice which would inhibit the prosecuting authority from considering material made available to it from the possession of a third party in order to determine whether the interests of justice require its disclosure to the defence.

[13] Paragraph 30 of the Code of Practice in relation to disclosure issued by the Secretary of State under Part 2 of the Criminal Procedure and Investigations Act 1996 and applicable to England and Wales provides as follows:-

> "(b) Material held by other agencies.
>
> 30. There may be cases where the investigator, disclosure officer or prosecutor suspects that a non Government agency or other third party (for example a local authority, a social services department, a hospital, a doctor, a school, providers of forensic services) has material or information which might be disclosable if it were in the possession of the prosecution. In such cases

> consideration should be given as to whether it is appropriate to seek access to the material or information and if so, steps should be taken by the prosecution to obtain such material or information. It would be important to do so if the material or information is likely to undermine the prosecution case, or assist a known defence."

[14] When read in conjunction with the following paragraphs it is quite clear that the intention is that such material should where relevant be disclosed by the prosecutor.

[15] While that Code of Practice does not apply to Northern Ireland and the duty imposed by it is not imposed on the prosecutor in Northern Ireland nevertheless there is no reason why a prosecutor should not if required by the Court carry out the exercise of considering potentially sensitive material in the possession of a third party with a view to deciding what parts of it should be disclosed.

[16] Paragraph 3.5 of the Northern Ireland Code provides as follows:

> "3.5 If the officer in charge believes that other persons may be in possession of material that may be relevant he should ask the disclosure officer to inform them of the existence of the investigation and to invite them to retain it in case of a request for its disclosure. The disclosure officer should inform the prosecutor that they may have such material. The officer in charge of an investigation is not required to make speculative inquiries of other persons."

[17] At the earlier hearing I referred the parties to the case of R v B [2000] Criminal Law Review 50 which decided that in this kind of case questions of disclosure of this sort had to be decided by the prosecution.

> "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. By taking this course the judge read material, which had not been seen by the defence, and ruled on its admissibility, and also, there was transferred to him, in effect, the responsibility for judging the weight and impact of that material."

[18] It may be of assistance to the parties if I were to define for them the matters which would trigger disclosure.

[19] I base this on the authority of the Court of Appeal in England in R v Brushett [2001] Criminal Law Review 471, together with matters that would appear to be relevant in the circumstances of this case.

[20] Matters should not be disclosed merely to provide material for cross-examination or to throw doubt on the general credibility of any of the complainants.

[21] However if there is evidence

(i) of false accusations of any significance (not restricted to a sexual connotation) having been made against any person by any of the complainants; or

(ii) that any other person is alleged to have indulged in sexual activity with any complainant; or

(iii) that any significant criminal conviction has been recorded against any complainant; or

(iv) of matters directly related to the allegations made; or

(v) which demonstrates the attitude of any of the complainants to either defendant, or

(vi) medical notes or reports which might reveal a medical condition affecting the reliability of any complainant or contain information relevant to the complaints.

then those matters should be disclosed to the defence.

[22] In his helpful and erudite survey of the law relating to this issue Girvan J in The Queen v O'N [2001] NI 136 remarked at p155 at paragraph [4]:

> "[4] Where disclosure of the documentary evidence by a third party to the defence may infringe the privacy rights of the third party or other parties such as sexual complainants the court in order to fulfil its duty to protect the Convention rights of interested persons, would have to consider the documents and decide whether balancing the interests of a fair trial for the defendant against the privacy and other interests

> of the third parties affected by a disclosure, disclosure to the defence is necessary and appropriate."

[23] Those remarks predated the decision of the English Court of Appeal in R v B (Supra) and in any event accurately set out the court's ultimate duty and function in the matter.

[24] However Girvan J was considering matters of general import relating to disclosure and was not considering the issue of the precise mechanism suitable for identifying the material.

[25] To that extent I consider his reference to the court does not imply that it is the personal duty of the trial judge to inspect the material in the first instance. If he did so intend then the remark was obiter and the situation has been clarified by the decision in R v B (supra).

[26] The procedure of the judge alone considering the documents and determining what shall be disclosed is necessary where public interest immunity is claimed and where any disclosure of contents, even to counsel, may be detrimental to the public interest.

[27] However in a case of this nature it is an invidious task for a judge to make determinations about the possible relevance, weight or significance to be attached to particular pieces of evidence and I adopt the views of the Court of Appeal as expressed in R v B (supra).

[28] The fact that counsel has raised the matter has caused me to consider whether my original proposal was likely to best protect the privacy of the complainants while ensuring a fair trial and went no further than was necessary to achieve a proper balance.

[29] I have come to the conclusion that access to the files should be limited so far as possible to the minimum number of persons and that free access to the files should not be permitted to representatives of the defence.

[30] I therefore direct that counsel on behalf of the prosecution should read all the files: he should identify all the portions which contain information relevant to the matters set out in para 18 of this judgment.

[31] He should apply the same principles as those directed by Sections 3 and 7 of the Criminal Procedure and Investigations Act 1966 and should refer the matter back to me for final resolution of the balancing exercise required by the European Convention on Human Rights between the privacy rights of the complainants and the right of the defendants to a fair trial.

[32] I shall then direct which parts of the material contained in the files should be disclosed to the defence.