Neutral Citation no. (2002) NICC 9

Ref: **NICC 9**

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

Delivered: **24/10/2002**

BELFAST CROWN COURT

BILL NO 64/02

THE QUEEN

-v-

JASON PETER BALANDOWITZ

RULING OF

HIS HONOUR JUDGE HART QC

RECORDER OF BELFAST

24 OCTOBER 2002

BELFAST CROWN COURT

BILL NO 64/02

THE QUEEN –v- JASON PETER BALANDOWITZ

1. This is an application by the defendant under Section 8(2) of the Criminal Procedure and Investigations Act 1996 (the 1996 Act) for an order requiring the prosecutor to disclose to the defence prosecution material which the defendant submits might reasonably be expected to assist his defence as disclosed by the defence statement, which is resisted by the Crown on the basis that it is not in the public interest to disclose the material which is sought under Section 8(5) of the 1996 Act.

2. The defendant is charged with scheduled offences under the Firearms (NI) Order 1981 and the Theft Act (Northern Ireland) 1969 arising from the discovery of a stolen shotgun during a police search of his house at 45A Gough Avenue, Armagh on 28 June 2001. The shotgun, which had been stolen during a burglary on 30 January 2001, and was now in a sawn-off state, was found on top of a water tank in the hot press in the hallway after the search started at 4.40 a.m. Various other items of a possible terrorist nature, such as UVF memorabilia, were found during the search.

3. The defendant was present during the search, and when cautioned under Article 5 of the Criminal Evidence (NI) Order 1988 and asked to account for the presence of the shotgun he replied "I do not know. My flat's been broken

into many times". When questioned in the presence of his solicitor during interview the defendant amplified this denial somewhat by saying that he had lived in this NIHE dwelling for some three years and was the sole tenant. He maintained that he never seen the gun, and had no idea how it came to be in his house, although he implied that someone else had put it there without his knowledge when he said that his house had been broken into a couple of times.

4. The defendant was committed for trial on 21 February 2002, and on 18 March 2002 his solicitor wrote to the DPP about a number of matters and in particular in relation to disclosure. In that letter the defendant's solicitor said

"Secondary Disclosures are obviously a crucial matter and the Defence statement will be with you when you are considering this. The key issue of Secondary Disclosure will be the source, nature and contact *(sic)* of the information received by the Police and in particular Sergeant O'Connor. Any documentation pertaining to the initiation of the search of the Defendant's flat is also crucial. Full Disclosure is sought of all this information and the material authorising a search. I look forward to hearing from you."

5. The reason why the defendant's solicitor asserted that secondary disclosure would be crucial became clear when the defence statement was delivered under cover of a letter of 19 March 2002. The defendant denied any knowledge of the presence of the gun, and at paragraph 4 of the defence statement stated

"The Defendant believes that he may have been entrapped by a person known to and/or working with the Police, either for the purpose of incriminating the Defendant or of exculpating himself or herself. In consequence *(sic)* this Defendant requires disclosure of all information and material touching upon this issue and informing the state of knowledge of the Police prior to the search of the Defendant's premises and arrest of the Defendant. All such material should be disclosed as failure to do would mean unfairness to the Defendant and would also be in breach of Article 6 of the European Convention on Human Rights."

6. Although the Crown made secondary disclosure in respect of various items, no disclosure was or has been made to the defendant in relation to the material sought in the quotations above. By letter of 12 April 2002 Mr Irwin of the Department of the DPP dealt with this request in the following terms.

"If you consider that there is other prosecution material which might assist your defence, and which has not already been disclosed, please let me know and I will reconsider my decision in the light of any further information that you provide. Alternatively, you may wish to apply to the Court under Section 8 of the Criminal Procedure and Investigations Act 1996. The court will assess your application in the light of your Defence Statement."

7. By notice dated 3 May 2002 the defendant then applied to the Crown Court for an order under Section 8(2) of the 1996 Act in accordance with Rule 7 of the

Crown Court (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules (Northern Ireland) 1997 ("the Crown Court Disclosure Rules 1997)".

8. The material part of the notice was as follows.

"TAKE NOTICE that the accused hereby applies to the Crown Court for an Order under Section 8(2) of the Criminal Procedure and Investigations Act 1996 in accordance with Rule 7 of the above Rules.

This application relates to the following material.

(a) Other information tending to be inconsistent with the Defendant's guilt including the names of any other suspects.
(b) Evidence that the items in question may have been handled by others.
(c) Evidence known to the prosecution or police or any other agency of the prosecution.
(d) Any information indicating that the Police may have received information about the Defendant from others and further any information as to the reliability [and] integrity of any such informant.
(e) Any material revealing activity which is inconsistent with the particular allegations against the Defendant in particular any examples of comparable behaviour by others against whom no allegation is made and in particular any police informant.

(f) Material demonstrating how the Police have conducted their investigation in this case including all operational documents not disclosed to date and in particular:

(i) Copies of the originals of all witness statements and all statements, notes, memoranda in this case.

(ii) Copies of all entries in Police notebooks and journals which have been blanked out which specifically relate to the events leading up to and the search of the Defendant's premises.

(iii) Copies of all entries in Police Occurrence books/telephone records, books for the evening prior to and the morning of 28 June 2001 prior to the search of the Defendant's premises.

(iv) Copies of all notes, records, memoranda, documentation relating to Police or Army briefings in respect of this case and in particular briefings referred to in the papers already disclosed.

(v) Any material relevant to the credibility of any proposed Crown Witness and in particular any previous convictions or disciplinary findings in the case of Police Officers.

(vi) Any material relating to the search of 56 Gough Avenue, Armagh and its occupant Thomas Tucker.

The above material has not been disclosed to the accused.

The above material might be expected to assist the accused's defence as disclosed in the Defence Statement and in particular at paragraphs 2, 4 and 6."

9. The Crown responded to this application under Section 8(2) by applying for an order under Section 8(5) of the 1996 Act in accordance with Rule 2(3) of the Crown Court Disclosure Rules 1997.

10. However, although Rule 2(3) provides that such a notice should not be served on the defendant "where the prosecutor has reason to believe that to reveal to the accused the nature of the material to which the application relates would have the effect of disclosing that which the prosecutor contends should not in the public interest be disclosed .." the notice was served on the defendant for reasons which I shall explain later in this judgment.

11. Whilst these procedural exchanges were taking place about disclosure, the accused had been arraigned on 14 March 2002 and pleaded not guilty to the charges. At the arraignment a date for trial as a standby trial was fixed for 17 April. However, in view of the procedural exchanges which were taking place the matter was then adjourned from time to time to enable the disclosure issue to be dealt with, and as this was a pre-trial application I was designated by the Lord Chief Justice to hear the application by virtue of Rule 2(5)(a) of the Crown Court Disclosure Rules 1997. The matter then came on for hearing before me on 7 June 2002 when I heard argument from counsel and reserved judgment. Before I could deliver judgment I was informed by counsel that

there had been a further development in the case of Murphy and McKeown to which I shall refer in greater detail later, developments which suggested that the possibility of the appointment of special counsel to appear on behalf of the defendant in circumstances such as had arisen in the present case was being explored. I therefore decided that it would be appropriate not to proceed further in the matter until the outcome of those developments in Murphy and McKeown was known. Following the ruling of Campbell LJ in that case of 1 August 2002 I listed the matter for mention on 28 August 2002, and having heard counsel for both the defence and the prosecution ruled that I would proceed to hear the prosecution evidence in the absence of the defendant, which I did on 19 September 2002.

12. As I have already pointed out, because the Crown invoked Rule 2(3) of the Crown Court Disclosure Rules 1997 the defendant should not have been given notice of the hearing, which should have been ex parte and at which only the prosecutor would be entitled to make representations. In this case, as I have already stated, the Crown gave notice to the defence and did not object to an inter partes hearing, thereby following the procedure adopted before McCollum LJ in R –v- Murphy and McKeown (as yet unreported). At page 3 of his judgment McCollum LJ set out Rule 3(5) and commented:

"Rule 3(5) appears to be mandatory in nature. However failure to comply with it has not prejudiced the defendants in any way and in fact has given the defence the opportunity of making representations in advance of the ex parte hearing, which had been of value to the court. It may be that the rule

dispensing with notice when Rule 2(3) of the Rules applies will have to be reviewed in the light of recent views expressed in the European Court of Human Rights but considerations of the propriety of the procedure do not arise in the circumstances of the present case."

13. I respectfully agree with the observations of McCollum LJ. It is undesirable that the practice being adopted by the parties should be at variance with the express provisions of the rules, but it may be that recent developments in this field required the rules to be reconsidered by the Crown Court Rules Committee. The advantage of the course adopted by the parties in the present case is that it enabled Mr Allister QC (who appeared on behalf of the defendant with Mr Kane) to make detailed and helpful representations to the court explaining why the material sought by the defendant might be expected to be of assistance to him, and opposing the application by the prosecution for an ex parte hearing.

14. As Mr Allister's principle submissions were those which he advanced to McCollum LJ in Murphy and McKeown, and as I respectfully agree with the reasons why McCollum LJ rejected those submissions, I think it is unnecessary for me to revisit this area at any length. However, there is one matter which I should deal with and that was Mr Allister's argument that by invoking Section 8(5) of the 1996 Act the prosecution were impliedly accepting that there was material in existence which might otherwise be subject to a duty of disclosure. He argued that as the defendant had served a defence statement this gave rise to an obligation on the prosecution to disclose

"any prosecution material which had not already been disclosed" and "which might reasonably expected to assist the accused's defence as disclosed by the defence statement" under Section 7(2)(a) of the 1996 Act. He then argued that the effect of Section 7(5) was such that the court should conclude that the prosecution had such material.

15. I consider that this argument is misconceived. As the correspondence which I have quoted earlier makes clear the prosecution has asserted that it has already complied with its duty to make secondary disclosure. Section 8(1) therefore applies, the defendant has made an application under Section 8(2) to challenge the prosecution's assertion that it has made all necessary disclosure, and in response thereto the prosecution has invoked Section 8(5) because it is resisting on public interest immunity grounds the disclosure of material which it says does not come within the scope of Section 7(2)(a). I am satisfied that in the light of the procedural history of this case the invocation by the prosecution of Section 8(5) does not imply that it seeks to withhold material which might reasonably be expected to assist the accused's defence.

16. Mr Allister's principle submission was that the defendant was being deprived of his right to a fair and public trial guaranteed by Article 6 of the European Convention on Human Rights because the prosecution was making an ex parte application to the court to authorise non-disclosure of material to the defence, thereby denying him a fair trial. This argument was considered at length by McCollum LJ at pages 5-7 of his judgment in Murphy and McKeown and I adopt his reasons and conclusions.

17. I was satisfied that it was necessary to conduct an ex parte hearing to determine whether the material which the Crown argues should not be disclosed to the defendant under Section 8(5) because this can only be determined by the court in the first instance considering the material and the evidence and arguments submitted by the prosecutor in the absence of the defendant and his representatives to protect the public interest until that decision is made.

18. When considering the material I considered that, as McCollum LJ put it in Murphy and McKeown,

> ".. I have to consider, in the light of the defence of entrapment advanced on behalf of the accused, whether the material which is the subject of the application is such that it might be of assistance to the defence or in any way undermines any part of the prosecution case; whether in those circumstances it is necessary in the public interest to order non-disclosure and further, if disclosure is not to be provided, what steps are appropriate to protect the interests of the accused and ensure the fairness of the trial."

19. When applying that test to the material which has been placed before the court in the ex parte hearing I have considered it in the light of the case made by the defendant when questioned by the police, the content of his defence statement and all of the factual and legal submissions made on his behalf by Mr Allister during the hearings which have taken place in relation to this matter. I have

concluded that none of the material placed before the court is material which might be reasonably expected to assist the accused's defence nor might it undermine the case for the prosecution against the accused. I am further satisfied that it is not in the public interest that this material should be disclosed to the defence and I order accordingly.

20. Rule 4 of the Crown Court Disclosure Rules 1997 requires the court to state its reasons for making an order under Section 8(5) of the 1996 Act and requires a record to be made of that statement. In the circumstances of the present case I do not consider that it is appropriate to say anything more in this judgment about the reasons why I have made an order as requested by the prosecution. I propose to comply with the requirements of Rule 4 by providing a separate statement of my reasons which will be furnished to the prosecution to enable it to keep the question of disclosure under review, and a copy will be kept as part of the court record together with copies of the documents placed before me at the ex parte hearing. The statement and the documents will not be provided to the trial judge, but will be kept in a sealed envelope not to be opened without an order of a judge of the Crown Court other than the trial judge, the Court of Appeal or other superior court.

21. Section 9(2) of the 1996 Act requires the prosecution to keep under review the question whether at any time there is prosecution material which is not being disclosed and which might undermine the case for the prosecution, and by Section 15(3) of the 1996 Act the court is required, where it has made an order under Section 8(5) to keep under review the question whether that at any given

time it is still not in the public interest to disclose material affected by its order. By Section 15(4) not only must the court keep the question under review without the need for an application, "but the accused may apply to the court for a review of that question."

22. I consider that in the circumstances of the present case the proper procedure to be adopted is for this issue to be kept under review by a judge other than the trial judge. If an application is made before the trial commences, as it would not be proper for the trial judge to review the material it would seem appropriate that any review should be conducted by the judge who has heard the disclosure application. At present Rule 5(5)(a) requires such an application which is received after the trial has started to be referred to the trial judge. However, I am satisfied that in the circumstances of the present case it would not be proper for the trial judge to consider this issue, and the appropriate course would be for the trial judge to refer to the disclosure judge any further disclosure questions and it would then be for me, as the disclosure judge, to determine any further application. No doubt this would be a somewhat cumbersome process in that it would involve an interruption of the trial and the opportunity being given to the defence to make submissions to the disclosure judge prior to that judge considering whether or not any further ex parte hearing is required. Nevertheless, to adopt the words of Campbell LJ in his ruling of 1 August 2002 in Murphy and McKeown, "I am satisfied that it must be part of the inherent jurisdiction of the Court at all times to ensure that the accused has a fair trial and to do so it must to the best of its ability keep under review whether it's in the public interest that material should be

disclosed to the defence." I am confident that in the circumstances of the present case it would be possible for the parties to inform me as the disclosure judge of the relevant issues and, if necessary, the trial judge could formulate questions for me to consider as the disclosure judge.