Neutral Citation No. [2005] NICC 47

Ref:	**2005NICC47**
Delivered:	**13/10/2005**

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

R-v-Fulton & Others (No.3)

BILL NO 150/03

RULING ON APPLICATION FOR A STAY ON DISCLOSURE GROUNDS:

MR JUSTICE HART: Applications have been made on behalf of each of the defendants that I should order a stay of these proceedings on the grounds of an abuse of process.

As will be apparent from the matters I consider in this ruling the application relates to the prosecution's duty to make disclosure, and specifically to the statement by Mr Kerr QC on behalf of the Crown that it is now accepted that the authorisations which resulted in 37 of the 99 evidential transcripts upon which the Prosecution rely were not in accordance with the statutory procedures applicable to them. This was because they were not returned directly to the Chief Constable of Devon and Cornwall as they should have been, but were sent to the officer conducting the surveillance who then notified his office that the approvals had been granted by a surveillance commissioner.

Before dealing with the submissions in the evidence I propose to consider the principles governing the granting of a stay and then the prosecution's duty to make disclosure.

Principles governing the granting of a stay on the grounds of abuse of process.

These are well settled, although their application depends on the circumstances of each case. In this jurisdiction the starting point remains the decision in the DPP's application for judicial review [1999] NI 106 where the court concluded that:

> "At common law there are only two main strands of categories of cases of abuse of process.
> (a) those where the court concludes that because of delay or some factor such as manipulation of the prosecution process the fairness of the trial will or may be adversely affected;
> (b) those, like *ex parte Bennett* where by reason of some antecedent matters the court concludes that although the defendant could receive a fair trial it would be an abuse of process to put him on trial at all."

The test was formulated in similar terms by Lord Bingham in the *Attorney General's Reference (No2 of 2001) [2004] 1AER at 1061 [24]* where he said,

> "It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing, or
> (b) it would otherwise be unfair to try the defendant."

In this context it is appropriate to bear in mind the following passage from the decision in *R (on the application of Ebrahim)-v-Feltham Magistrates Court [2001] 1AER 831 at [25]:*

> "Two well known principles are frequently invoked in this context when a court is invited to stay proceedings for abuse of process.
> (i) The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as those about whose guilt there is any reasonable doubt should be acquitted.

> (ii) the trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded."
>
> .

The reference to the ability of the trial process being equipped to deal with the bulk of the complaints on which application for a stay are founded is significant because the trial process includes the power to exclude unfair evidence by virtue of Article 76 of the Police and Criminal Evidence (Northern Ireland) Order, 1989.

In addition, in DPP's application, Sir Robert Carswell LCJ (as he then was) at page 116 recalled that when considering a stay there are three matters which the courts have been enjoined to bear in mind:

> "1. The jurisdiction must be exercised carefully and sparingly and only for very compelling reasons: see the *ex parte Bennett* case [1994] 1 AC 42 at 74, per Lord Lowry.
>
> 2. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the Court's disapproval of official conduct: See Lord Lowry's dictum referred to above.
>
> 3. The element of possible prejudice may depend on the nature of the issues and the evidence against the defendant. If it is a strong case, and a fortiori if he has admitted the offences, there may be little or no prejudice: See the *ex parte Brooks* case [1984] 80 Cr App R 164 at 169, per Sir Roger Ormrod."

The reference to possible prejudice no doubt was derived from the extract from the judgment of Lord Lane CJ, in Attorney General's Reference (No 1 of 1990) [1992] QB 630 at 644 where it was stated that a stay should not be granted,

> "Unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial could be

> held, in other words that the continuance of the prosecution amounts to a misuse of the process of the court."

Finally, there is the question of bad faith. In my brief ruling as to whether the prosecution should be allowed to call evidence in relation to the applications for a stay I referred to Feltham Magistrates Court at [23] where Lord Justice Brooks said,

> "In one of the unreported case we were shown, it was said that there had to be either an element of bad faith or at the very least some serious fault on the part of the police or the prosecution authorities for this ground of challenge to succeed."

Feltham Magistrates Court was applied *in R-v-Dobson [2001] EWCA Crim 1606*, see [34] to [37]. In Dobson the court concluded that,

> "There was no question or suggestion of malice or intentional omission, as opposed to oversight, on the part of the police and therefore no element of bad faith or serious fault sufficient to render it unfair that the appellant should be tried at all."

The decisions in Feltham Magistrates Court and Dobson recognise that bad faith may render it unfair that a defendant should be tried, but it is clear that it is not necessary that there should be a finding of bad faith because "serious fault" may also render it unfair that a defendant should be tried irrespective of whether the fault is due to bad faith.

As I indicated earlier, the applications on behalf of Fulton and Muriel Gibson in particular are based on the revelation by the prosecution that 37 evidential tapes were unlawfully obtained because the authorisations did not comply with the statutory

procedure contained in S36(2)(b) of the Regulation of Investigatory Powers Act 2000. The application is supported by counsel for Rain Landry and Talutha Landry. It will be necessary to examine the circumstances leading to the concession by the prosecution that the tapes were unlawfully obtained later, but before considering them and the submissions of counsel it is appropriate to consider the duty of the prosecution to make disclosure as this lies at the centre of these applications for a stay.

<u>The prosecution's duty to make disclosure.</u>

The prosecution is placed under a duty to make disclosure by the provisions of the Criminal Procedure and Investigations Act, 1996 (the 1996 Act). S.3(1) requires the prosecutor to make primary disclosure of any undisclosed material "which in the prosecutor's opinion might undermine the case for the prosecution against the accused". When the defendant delivers a defence statement under S.5(5) or S.6(4), then S.7(2) requires the Prosecution to make secondary disclosure of any undisclosed prosecution material "which might be reasonably expected to assist the accused's defence as disclosed by the defence statement". These provisions are those which apply in this case as it predates the amendments of the 1996 Act by the Criminal Justice Act 2003.

How the disclosure provisions are to be operated have been the subject of judicial consideration on several occasions in recent years, notably in the oft quoted passage from Lord Bingham's speech in *R-v-H & C [2004] 1AER 1269* at [35] where he referred to the disclosure test being "faithfully applied". In *R-v-Early & others [2004] EWCA Crim 1904* at [18] Rose VP emphasised that "it is a matter of crucial importance to the administration of justice that the prosecution authorities make full relevant disclosure prior to trial". Cases such as *Early, and R-v- Patel and others [2001] EWCA Crim 2005,*

demonstrate how the integrity of the trial process can be undermined if law enforcement agencies do not make the true state of affairs known to counsel. In *Patel* at [49] Longmore LJ pointed to the need for such agencies to put their own counsel or the court fully into the picture to enable the relevant matters to be properly determined. This is essential because "judges can only make decisions and counsel can only act and advise on the basis of the information with which they are provided". See Rose VP in Early at [10].

The duty to make full disclosure is of particular importance where an ex parte application for public interest immunity (PII) is being made by the Prosecution. In *R-v-Jackson (unreported 9/11/1999)* at p.5, Alliot J referred to the need to be "scrupulously accurate" in the information provided in ex parte hearings in the course of the following passage:

> "Modern practice imposes an ever increasing burden upon judges in respect of disclosure. It is imperative that in all cases the Crown is scrupulously accurate in the information provided in ex parte PII hearings. This case is disturbing because incorrect information was provided after, unusually, the defence had publicly aired the true position. Normally the defence can only guess what topic is being ventilated in chambers."

As Mr MacDonald QC pointed out, similar emphasis has been placed by the Attorney General on the need for the disclosure systems to be operated "with scrupulous attention" in paragraph 3 of his introduction to the Attorney General's Guidelines on Disclosure issued in April 2005.

The prosecution concede that the authorisations resulting in 37 of the 99 evidential transcripts relied upon were obtained in breach of the statutory procedure under S.36(2) of RIPA and therefore breach the Article 8 Convention rights of the defendants to whom they refer.

It is upon the disclosure that these 37 transcripts were obtained in breach of RIPA, and the failure to disclose this earlier, that the defendants base their submissions. I do not propose to rehearse each and every detail of the comprehensive and well-marshalled arguments that have been put before me. They are contained in the extensive written submissions and were amplified in the oral submissions. However, before considering the factual and legal issues I propose to refer to the principal submissions made in support of these applications.

The essence of Mr Treacy's submission on behalf of Fulton can be found at paragraphs 34 and 49 of his written submissions:

> "34. Not only was vital information and/or documents withheld from Crown counsel and the disclosure judge, but they were both misled or deceived into believing and acting on the basis that all the authorisations had been carried out within the statutory framework. It is now clear that these representations were false and that in fact 37 evidential tapes were the product of authorisations obtained in breach of S36(2) of RIPA and Article 8 of the Convention.
>
> 49. The revelation that the 37 authorisations were unlawful is in stark contrast to earlier assertions - simply put, the Prosecution has misled various persons in a serious, irredeemable and irreparable way, and has behaved in a fashion whereby it would be unfair to try the accused. The extent of this conduct is such that the proceedings should be stayed as an abuse of process. The behaviour complained of and those misled include:
> (i) Gross non-compliance with the obligations of Primary Disclosure and Secondary Disclosure;
> (ii) Misleading the accused by virtue of the content of its reply to his Section 8 application.
> (iii) Misleading the disclosure judge by virtue of the conduct of the Section 8 application, the reply to same; the conduct of the PII application; the ex parte hearings and the inferred failure to bring the lawful authorisations to the attention of the disclosure judge (this relates to not only ex parte hearings in 2004 but also ex parte hearings in 2005);
> (iv) The trial judge by virtue of the assertions of Crown counsel that the authorisations were lawful and the court should not permit an examination of same."

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The references to Crown counsel and the disclosure judge being "deceived" and to the representations being "false" clearly imply that the police acted in bad faith as can be seen from similar terminology in paras 31 and 35 and Mr Treacy's submission that he did not accept that non-disclosure was not deliberate and that there was material that suggested that non-disclosure was deliberate. Mr Berry's cross-examination of Chief Superintendent Provoost made a similar allegation.

It was submitted that Fulton had been prejudiced in a number of ways:

(1) That he had been remanded in custody from June 2001 to August 2002 and that he did not apply for bail because of the assertion by the police that the authorisations were lawful.

(2) He was committed for trial on the assertion by Chief Superintendent Provoost that the authorisations were lawful. Mr Treacy contended that had the defendant known in advance of the committal that these authorisations were unlawful that it was highly likely that the committal would have been contested with witnesses called and cross-examined.

(3) By the misleading of the disclosure judge throughout the entire disclosure process and myself as the trial judge by the continued assertion that the authorisations were unlawful.

Mr MacDonald's submission can be summarised in the concluding paragraphs of his written submissions at paragraphs 38 to 40:

> "38. In our submission, the defendant cannot have a fair trial where it has been demonstrated that:
> (i) An unspecified number of police officers at a variety of levels ignored, either deliberately or inadvertently, statutory requirements designed as a safeguard to ensure fairness for the defendant.

(ii) The procedures adopted in this case for identifying and disclosing material that could undermine the prosecution case or assist the defence were and remain fundamentally flawed.
(iii) The personnel involved in identifying and disclosing relevant material that may assist the defence have failed to discharge their responsibilities; and
(iv) The judge responsible for monitoring disclosure of all material that may assist the defence has failed to discharge that responsibility adequately, either because of short comings in the procedures or personnel or otherwise.

39. Alternatively, it would be unjust to try the defendant in circumstances where there has been such a demonstrated failure of the disclosure process. Put simply, the court cannot be satisfied that all relevant material that may undermine the prosecution case or assist the defence has been identified and/or put before the disclosure judge and/or properly considered by the disclosure judge and/or disclosed in accordance with Article 6 of the ECHR.

40. In the premises, these proceedings ought to be stayed as an abuse of process."

At paragraphs 13 to 15 he set out the argument that the prosecution's failure to reveal that these authorisations were invalid amounted to what he termed "a systemic failure of the disclosure process".

"13. Self-evidently, material that would undermine the prosecution case and assist the defence case included material revealing that all the authorisations purported to have been given under the Police Act 1997 and RIPA 2000 failed to comply with the statutory requirements and that, accordingly, the recordings relied on by the Crown were obtained by the Crown were in breach of Article 8. The failure to disclose this material therefore constitutes
(i) a breach of the Prosecution's statutory duty under section 3 of CIPA 1996;
(ii) a breach of the Prosecution's statutory duty under section 7 of the CIPA 1996; and
(iii) a breach of the Attorney General's Guidelines.

> 14. In our submission, failure to disclose this material also constitutes a breach of Article 6 of the ECHR by virtue of:
> (i) The requirement in Rowe v. United Kingdom to disclose all relevant material; and
> (ii) the failure to comply with the domestic statutory test for disclosure.
>
> 15. The belated revelation of the material in question demonstrates a systemic failure of the disclosure process in two broad respects:
> (i) The prosecution failed to comply with the duty to pay scrupulous attention to their obligations so as to enable them to appreciate that the material assisted the defence.
> (ii) The Disclosure Judge either failed to appreciate the issues in the case or failed to examine the material with sufficient care".

He pointed to the evidence of Chief Superintendent Provost and Detective Superintendent Bailey as demonstrating the systemic failure.

(1) That there was a failure to pay sufficient and careful attention to the material in issue.

(2) There was a failure to comply with the provisions of paragraph 3.3 of the Disclosure Code.

(3) That it appeared that the Disclosure Judge did not see any original material but relied upon the schedules prepared by the police.

Mr O'Rourke for Rain Landry adopted the submissions of Mr Treacy and Mr Macdonald. He submitted that the court should be concerned by the failure to produce documentation to support the material that went to the Chief Constable. As did Mr MacDonald, he argued that there was a failure of the system. He did not refer to the skeleton argument submitted on behalf of his client but I have considered it, as I have considered the skeleton arguments submitted on behalf of Talutha Landry on the disclosure issue. Mr McCreanor also adopted the submissions of his colleagues.

Mr Kerr for the Crown, in both his skeleton argument and oral submissions, accepted the formulation the principle of the defence so far as the nature and extent of the prosecution duty of disclosure were concerned. The essence of the prosecution response to the general submission may be seen in paragraph 14 of the skeleton argument:

> "It is submitted that the reality is that in this case there has been no default in the procedure adopted, the default has arisen from a matter unknown to the judge and to the prosecuting authority, ie after taking all the necessary steps to obtain lawful authorities for the requested covert activity the police did not take the necessary step of forwarding a written copy of the authorisation to the authorising officer, ie in this case the Chief Constable of Devon and Cornwall".

So far as the conduct of the ex parte PII hearings before the Disclosure Judge was concerned he submitted that it was not evident on the face of the documents that the authorisations had not been returned to the Chief Constable by the surveillance commissioner as required by section 36 (2)(b) of RIPA, and the Disclosure Judge was only asked to look at the forms knowing that their legality was in issue and to see if the disclosure was required. The disclosure judge was not asked to go beyond the face of the authorisations or consider what happened afterwards.

<u>The factual issues</u>:

Was it appreciated by the prosecution before 28th September 2005 that the authorisations covering the 37 transcripts in question had not been obtained in accordance with section 36 (2)(b) of RIPA? It has not been suggested that either Crown counsel or the Public Prosecution Service were aware of this and so I have to consider whether the police were.

Chief Superintendent Provoost and Detective Superintendent Bailey were, it appears, two of the officers with overall responsibility at various times where disclosure relating to the covert operation which included these authorisations. Detective Superintendent Bailey and two officers performed this task between the autumn of 2001 and December 2003. Chief Superintendent Provoost was involved in the investigation from April 1999 although this investigation was part of what he described as a wider operation.

After December 2002 he assumed responsibility for the investigation. In fairness to him I should say that it appears that others were in direct command of the surveillance staff but he managed the process of applying for approvals, although the task of applying for them was delegated to others and he was therefore responsible for the process.

His evidence was that although legal issues were discussed at briefings, these related predominantly to PACE and issues such as prompting conversations with suspects. He did not believe that he specifically briefed officers on the Police Act or RIPA. He had acquainted himself with RIPA but he didn't appreciate the section 36 (2) required the authorisation to be received by the authorising officer. He accepted that, first as the deputy officer and then as the officer in overall command, he should have been more careful in scrutinising the returns from the surveillance commissioners.

Detective Superintendent Bailey had read RIPA and was responsible for reviewing all the authorisations that had been approved.

Their evidence was that it was not until the authorisations were being checked on the 28th of September 2005 in order to prepare the abstract directed by the court that Chief Superintendent Provoost alerted Superintendent Bailey to the possibility that the correct procedures had not been followed. Chief Superintendent

Provoost said that what alerted him to this possibility was the endorsement on document 122 "CC info by telephone". He therefore started making enquiries and as a result of this it was discovered that these 37 authorisations had not been returned directly to the Chief Constable of Devon and Cornwall as they should have been. He denied that he had been aware of this before.

When considering their evidence it is necessary to place it in the context of the scale and nature of disclosure that was being considered. As the many volumes of evidence and the large number of charges show, this was a very large and complex investigation. For example, in addition to the committal papers it has been represented to me at review that there were 1500 pages of disclosure to be considered at one stage and that 42 lever arch files of material were being scanned onto CD Rom to assist data retrieval. The volume of material was therefore very considerable. Nevertheless, as has been emphasised in the defence submissions, not only was the legality of all of the authorisations fundamental to the case, but the authorisations were submitted by the Crown to the Disclosure Judge following the Prosecution's application under section 7 (5) of the 1996 Act of the 17th of December 2003.

In the skeleton arguments on behalf of Fulton and Gibson that were lodged in advance of the inter partes hearings before the Disclosure Judge in February 2004 it was made clear that the defence wished to be able to test the legality of the technical requirements for obtaining the authorisations under the Police Act and RIPA, see for example paragraphs 46 and 47 of the skeleton argument of the 8th January 2004 on behalf of Fulton. In addition, Fulton's section 8 (2) application of the 25th of January 2005 at A(xi) sought disclosure of "copies of all Police Act and RIPA applications, authorisations and extensions". Disclosure was being sought of many other categories

of documents as well in that notice, and other issues such as the appointment of special counsel were being raised as well.

I have carefully considered the evidence and submissions relating to whether Chief Superintendent Provoost and Detective Superintendent Bailey were aware that the 37 authorisations did not comply with section 36 (2) of RIPA before 28th September 2005, and I accept that they did not. I accept that they were unaware of the practice that had been adopted in not sending the written authorisations to the Chief Constable until the enquiries that were put in hand on the 28th of September 2005 as a result of Chief Superintendent Provoost seeing the endorsement and therefore I am satisfied that they did not act in bad faith.

That is not to say that this practice and its implications could not and should not have been appreciated sooner. The legality of the authorisations was at the forefront of the case and steps should have been taken at the beginning of the investigation to ensure that the statutory procedures were followed, whether by briefing the officers concerned or by having a compliance unit or by taking legal advice or by other means. That the procedures involved did not reveal this requires the Court to consider whether what has occurred amounts to "serious fault sufficient to render it unfair that the defendants should be tried at all", to use the test in Dobson referred to earlier. Before doing so it is necessary to consider the failure to appreciate that the 37 authorisations were invalid during the ex parte PII applications. As the police instructing Crown counsel were unaware of the procedure adopted in relation to the 37 authorisations and the documents themselves, with the possible exception of the endorsement on number 122, bore no indication of that procedure, it is not surprising that the PII hearings did not lead to the procedure being discovered. As Rose VP said in *Early:*

> "Judges can only make decisions and counsel can only act and advise on the basis of the information with which they are provided".

In every case it is the duty of the Prosecution to place before the judge documents for which PII is being claimed. With the benefit of hindsight the possible significance of the endorsement "CC info by telephone" on document 122 is apparent. But it is understandable that it did not prompt further inquiry by prosecution counsel in view of the volume of material being considered. I do not consider that this justifies the criticisms of the conduct of the Disclosure Judge in Mr MacDonald's submissions.

Nevertheless, the failure of the disclosure process to reveal at an earlier stage that the authorisations had not been returned directly to the Chief Constable is a matter of considerable concern because it meant that an unjustified and incorrect assertion as to the legality of these authorisations was maintained until the trial was already under way.

That the assertion was unjustified and incorrect was not realised until the point in the trial when issue was being joined as to the legality of the authorisations. Had those police involved in, and responsible for, the surveillance at the time and for disclosure since directed their attention to the procedure prescribed by the statute this should not have occurred. This was undoubtedly a serious fault.

One matter relevant to the granting of a stay is whether any of the defendants have suffered serious prejudice. The only defendant on whose behalf specific prejudice has been alleged is Fulton because the question of delay in the case of Talutha Landry has been deferred by consent of those parties until the outcome of this application is known.

On Fulton's behalf is it is said that he did not apply for bail because of the police assertion that the authorisations were lawful. I have a considerable doubt as to the validity of this assertion given that the apparent strength of the prosecution case rarely deters a defendant in this jurisdiction from applying for bail, but I take it into account. I also doubt whether the form of the committal would have taken a different course. In any event, Mr Treacy did not go so far as to suggest that Fulton would not have been returned for trial had these matters been known at this stage and that is the most important consideration in this context.

A second matter relevant to the question of a stay is whether in the light of the failure of the disclosure process to reveal these matters at an earlier stage there has been what Mr MacDonald described as "a systemic failure" in the disclosure process. As he put it in paragraph 39 of his skeleton argument which I repeat,

> "It would be unjust to try the defendant in circumstances where there has been such a demonstrated failure of the disclosure process. Put simply, the court cannot be satisfied that all relevant material that may undermine the prosecution case or assist the defence has been identified and/or put before the disclosure judge and/or properly considered by the disclosure judge and/or disclosed in accordance with Article 6 of the ECHR."

That there was a failure to disclose the matters affecting these authorisations at an early stage is clear, but does that establish that the disclosure process itself has either failed to work to date or will not work in future in this case? It has to be remembered that this matter was brought to the attention of the court and the defendants by prosecution counsel who in turn had been informed of what had been ascertained as a result of the enquiries put in train by Chief Superintendent Provoost. Those enquiries were a consequence of the order I made directing the preparation of the abstracts of details of

the authorisations. Part of that order required a senior officer to examine the entirety of each unredacted authorisation and it was during this process that Chief Superintendent Provoost first appreciated the possible significance of the endorsement. All of this provides substantial reassurance that the disclosure process is working and is being conscientiously and scrupulously operated by Crown counsel and Chief Superintendent Provoost and those responsible to him.

A further matter relied upon in the defence submissions on behalf of Rain Landry and Talutha Landry is that to allow the prosecution to rely upon the admitted breach of Article 8 in respect of the authorisations would constitute a breach of the defendant's right to a fair trial under Article 6 of the Convention. In the present case I consider that this is a matter to be considered if the application for a stay is refused. At that stage the protection under Article 6 for a defendant whose Article 8 rights had been infringed is provided by the power of the court to exclude such evidence under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989. See *Khan-v-UK [2001] 31 EHR 45.*

In support of his submission that I should grant a stay Mr Treacy referred me to the decision of McLaughlin J in *R-v-Murtagh (unreported 15/03/2005)* but the facts of that case were different to those in the present case and I do not consider it to be of assistance.

Conclusions.

Having weighed all these matters I am satisfied that the failure of the police to ascertain the correct position in relation to the authorisations, whilst a serious fault, was not such as to render it unfair that these defendants should be tried. I am not persuaded that the operation of the disclosure process is not working, on the contrary the way in which this matter has been dealt with satisfies

me the Crown can be relied upon to perform their duty to make disclosure and to keep disclosure under review with scrupulous care. I am confident that the trial process can ensure that a fair trial can be held. The power to order a stay is a discretionary one which ought to be exercised sparingly and not in order to express the Court's disapproval of the failure of the police to carry out the procedure for notifying the surveillance commissioner's approvals in the correct fashion, and the failure of the police to make it clear that this was what had happened earlier, as they should have done. Were I to accede to this application I would be exercising the discretion as a disciplinary jurisdiction. I do not consider that this would be appropriate. For these reasons I refuse the application to stay the proceedings.