Neutral Citation No. [2015] NICC 13 | *Ref:* **COL9772**

Judgment: approved by the Court for handing down | *Delivered:* **22/10/2015**

*(subject to editorial corrections)**

THE CROWN COURT SITTING AT BELFAST

THE QUEEN

v

PAUL DUFFY, DAMIEN DUFFY AND SHANE DUFFY

CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996 SECTION 8 3(6), 7(5) AND 8(5)

CROWN COURT (CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996) (DISCLOSURE) RULES (NORTHERN IRELAND) 1997 RULE 2

COLTON J

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

[2] Section 8(5) states as follows:

> "Material must not be disclosed under this Section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and order accordingly."

[3] I want to say something about the background to the case before considering the application.

[4] This prosecution arises out of an investigation into alleged terrorist activity relating to the defendants and the alleged planning of terrorist attacks. The case focuses on the methods used by the defendants for the purposes of their surveillance

and preparations, the vehicles they used and the persons allegedly targeted in the areas in which attacks were planned.

[5] The evidence arises from audio recordings and from vehicle tracker data. The alleged targeting relates to members of the security forces and prison service. The prosecution say that the data arising from the audio recordings and vehicle tracker device when properly analysed supports the charges preferred against each of the defendants.

[6] Therefore an essential proof in the prosecution case must be that the data concerned has been accurately captured, transmitted and recorded. The defence say that they must be able, if they are to have a fair trial, to test whether the processes and methodologies adopted by the relevant authorities/agencies were capable of, and did in fact accurately capture, transmit and record the said data. A central and fundamental issue in this case will be the reliability and accuracy of the data to which I have referred and upon which the prosecution rely.

[7] In that context the defendants have engaged an expert, Professor Last, to investigate this issue and provide expert evidence.

[8] In correspondence both Professor Last and the defendants' solicitors have set out the material he says he needs to investigate this issue properly and provide appropriate expert evidence. This is crystallised in his letter of 14 October 2015 from which I quote the following paragraphs:

> "This complex system has many parts each of which can be (and in my experience sometimes is) imperfect. In reporting upon a tracking system, therefore, an expert needs to at least understand the whole system. Simply examining the records it has produced is quite insufficient to give an informed view as to the accuracy of those records and their reliability.
>
> I have examined and reported on tracking systems, principally for law enforcement agencies but also for defence teams and in civil cases, for 10 years. I undertake multiple such cases per year. I am expected to enquire into and describe in my report the hardware and software of the on-board and other part of the system and the nature of all processing of the data. In many cases tracking devices are of a known and well documented commercial make and model that is familiar to me. Where that is not the case, I enquire into these matters in order to get a good understanding of how the data has been acquired and how it has been processed and to describe these aspects fully in my report. In consequence

> I now have a detailed knowledge and understanding of many common kinds of tracking and telematics system and I am able to confirm their correct operation.
>
> This case is unique in that the evidence sent to me consists solely of the results of the use of tracking equipment of which I know nothing whatsoever.
>
> I am thus unable to complete my examination of the evidence."

[9] The previous correspondence has in effect led to this application by the prosecution. which seeks to limit the disclosure of the material sought in accordance with Section 8(5) which I have already cited. The terms of the Section 8(5) application are as follows:

> "The prosecution seeks an order that it is not in the public interest to disclose the following material save to the extent that it has already been disclosed and save to a defence expert in accordance with the confidentiality agreement attached:
>
> (1) Details of any relevant device and its accessories used to record the location and activities of any vehicle or person in order to provide tracking evidence.
>
> (2) Details of the installation of any relevant device from any vehicle. Where and how the relevant device was installed including where any GPS or other antenna was located.
>
> (3) Details of the procedures used to download and restore all data from any relevant device."

As is apparent the application refers to a confidentiality agreement under which Professor Last is asked to agree and undertake as follows:

> "(1) On receipt of the information I will ensure that it is not disseminated, whether in writing, verbally or otherwise, to any other person whatsoever without the express consent of the Public Prosecution Service of Northern Ireland ("the PPS").
>
> (2) I will make no photocopies or copies of the information.

(3) The information, and any notes, draft reports, reports or other documents of any kind in relation to the information that I produce will be stored securely in secure premises and in such a way that they can only be accessed by me.

(4) Such of the information and any notes, draft reports, reports or other documents of any kind relating to the information that I have produced will be returned to the PPS or destroyed at the conclusion of this case and I will confirm to the PPS that such return or destruction has taken place.

(5) I am to be given access to details of the device's technology to carry out my instructions. I am to prepare a report on my findings. In that report I am to specifically identify any finding or observation which could possibly undermine the reliability of the particular device and/or its downloads and to report on any matter which could impact upon the loss of data (I interject to say that as I understand it loss of data is not an issue in this case). If there is no information as to the reliability and/or loss of data there will be no need to report. When I have completed my enquiries in connection with my instructions I will provide to the solicitors of Paul Duffy, Shane Duffy and Damien Duffy ("my instructing solicitors") a report of my findings but such report will first, and before disclosing to my instructing solicitors, be submitted to the disclosure judge and I will not disclose it to my instructing solicitors unless and until I have been notified by the disclosure judge that his consent has been so given. For the avoidance of doubt the giving or withholding of such consent will be based only on an assessment of whether the content of the report is damaging to the interests of national security, law enforcement or some other public interest and will not be related to how my findings and conclusions and/or those of the named member of staff might undermine the prosecution or assist the defence in the trial of Paul Duffy, Shane Duffy and Damien Duffy."

[10] At this stage I pause to point out that this would not be the test that I as disclosure judge would apply in the event of being asked to consent to the disclosure of any report prepared by Professor Last. Rather I would apply the principles set out in the case of R v H, R v C [2004] 1 All ER 1269 (to which I refer below).

[11] In considering this application I have had the benefit of:

- Oral submissions by Mr Murphy QC on behalf of the prosecution in the presence of the defendants.

- Written and oral submissions on behalf of the defendants from Mr Mark Mulholland QC and Mr Desmond Hutton.

- A certificate from the Parliamentary Under-Secretary of State for Northern Ireland.

- In the absence of the defendants at an *ex parte* hearing – further submissions and assistance from Mr Murphy QC and Mr David Russell on behalf of the prosecution.

- A sensitive schedule referred to in the certificate which has not been disclosed to the defence.

[12] I have taken all of these matters fully into account in deciding upon my ruling.

[13] The legal framework for my decision is the provisions of the 1996 Act itself and the guidelines issued by the House of Lords in the case of R v H to which I have referred above.

[14] The parties agree that this is the leading authority on how I should approach this application and I have borne in mind the importance of the rigorous application of the principles set out in that case.

[15] Their Lordships held that where any issue of derogation from the golden rule of full disclosure comes before a court, it must address a series of questions. I propose to deal with each of those questions in turn as they apply to this application.

[16] (1) What is the material which the prosecution seeks to withhold?

This must be considered by the court in detail. I refer to the description of the material in the application taken from the express request by Professor Last on behalf of the defence. I confirm that I have considered in detail the material set out in the schedule to the Minister's certificate in the *ex parte* hearing.

[17] (2) Is the material such as may weaken the prosecution case or strengthen that of the defence?

If no, disclosure should not be ordered. If yes, full disclosure should (subject to (3), (4) and (5) below) be ordered.

My answer to this question is an unequivocal "yes". As I understand it the prosecution do not disagree. The material goes to the heart of this case and its relevance to the defence cannot be disputed in terms of, for example:

(a) Testing/challenging the prosecution evidence in terms of the reliability and accuracy of the data which forms the central plank of the prosecution case.

(b) Providing adequate facilities for the preparation of the defence case.

(c) The requirement for equality of arms.

(d) The requirement for parity of conditions for the examination of witnesses.

Indeed, the fact that the prosecution bring the application at all is an acknowledgement by them that at least *prima facie* the disclosure test is made out, subject to the public interest immunity argument.

[18] (3) Is there a real risk of serious prejudice to an important public interest (and if so, what) if full disclosure of the material is ordered?

If no, full disclosure should be ordered.

My answer to this question is yes. Having considered the material presented to me in the *ex parte* application in conjunction with the certificate from the Parliamentary Under-Secretary of State for Northern Ireland I consider that there is a real risk of serious prejudice to an important public interest. Without at this stage disclosing the material which the application seeks to avoid and even though the certificate itself does not identify the relevant public interest, I identify the public interest concerned as relating to material revealing either directly or indirectly techniques and methods relied upon in the course of criminal investigation, including covert surveillance techniques, which if disclosed could be detrimental to national security and hamper the security services ability to protect life and perform their duties.

[19] (4) The fourth question is, if the answer to (2) and (3) is Yes, can the defendants' interests be protected without disclosure or disclosure be ordered to an extent or in a way which would give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?

The prosecution say that the method of disclosure sought in this application will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence.

[20] They say that if disclosure is limited to the extent sought Professor Last will have an opportunity to inspect and consider the material and come to a view on the

accuracy and reliability of the data. If he is satisfied that the data is reliable and accurate, there is no need for a report and no prejudice to the defendant. On the other hand, if he does identify any issue of assistance to the defence or which undermines the prosecution case, he can prepare a report which, before disclosure, should be considered by the court although, as already indicated, in my view this could not be done on the basis of the contents of the confidentiality agreement, but only on the basis of the principles set out in R v H.

[21] Mr Murphy also points out that the order sought is not a final stage in the process and it is open for the expert or the defence to seek further material or persuade the court to disclose any report. In bringing the application the prosecution say that their objective is a genuine attempt to devise a method by which the defendants are provided with all relevant material, whilst at the same time protecting the public interest.

[22] I accept that the proposal is made in that spirit and with that intention but I do not agree, for the reasons I shall set out, that I should make the order in the terms sought.

[23] I go back to the statute and the basic principle is that under this disclosure scheme disclosure is made "to the accused" (see Section 3(1)(a)). The definition of the accused clearly applies to the defendants in this case; see Section 2(1) and (2) of the Act.

[24] In my view disclosure to an expert witness instructed by the defendants on the envisaged confidentiality basis is contrary to this fundamental point. In my view it would be wrong in principle and I also have concerns about how it would work in practice. If disclosure is provided on these terms, in my view it would represent an unwarranted fettering of the free flow of information between expert, lawyer and client. Such an agreement would be difficult to police and would put the expert in an impossible position. Even if he provides no report it seems to me that the defendants' lawyers are entitled to pursue with him the possible types of devices used in this case and how they might operate so that the lawyers can at least understand the case made by the prosecution, let alone challenge it. This would involve the potential of his not disclosing to his clients or their instructing solicitors and counsel what he in fact would know if disclosure is provided on this basis.

[25] Further, even if no report was obtained or no expert retained, it seems to me defence counsel would be entitled to ask prosecution witnesses about the devices which provide the source of the data. Yet, if the prosecution are correct, the defence would not be entitled to ask such questions nor would the witness be obliged to provide the relevant answers.

[26] Interestingly, the issue of "confidentiality" in the context of disclosure has been considered by the courts on a number of occasions. Whilst all the cases are fact specific they do provide some guidance about how I might approach this particular

application. I refer to the summary of the cases set out in *Archbold* Chapter 12:82 of the 2014 Edition. I confirm that I have checked the 2015 Edition and the text remains the same.

[27] The Court of Appeal in R v Davis (97) Cr App R 110 agreed that defence counsel had been right not to provide an undertaking that, if shown the material that was the subject of the prosecution application, they would not disclose it to their clients. It indicated that it would wholly undermine counsel's relationship with his client if he were privy to issues in court but could reveal neither the discussions nor even the issues to his client, and that whatever happens in court with defence counsel present would have to be disclosable to the defendant. This approach was followed in R v G and B and approved in Somerville v Scottish Ministers [2007] 1 WLR 2734 HL. Hearing an application for judicial review in R (Mohammad) v Secretary of State for Defence [2013] 2 All ER 897 QBD Moses LJ (sitting alone) held *obiter* that, notwithstanding Davis, G and B and Somerville, there is no principle preventing a court from ordering disclosure to a party's lawyers but not to their client where the lawyers consent to receiving the material on that basis and are satisfied that they can continue to act for the client if they do. (my underlining)- Disclosure to "Confidentiality ring". However this view did not find favour in the context of judicial review in AHK v Secretary of State for the Home Department (Unreported) June 7 2003 QBD [2013] EWHC 1426 (Admin), and it is submitted that, in criminal proceedings at least, the approach in Davis is to be preferred.

[28] Mr Russell pointed out that the text in *Blackstone* adopts a slightly different approach and I refer to Chapter D9.61 of the 2016 Edition which contains the following passage:

> "An alternative means of ensuring that the interests of the defendant are protected in cases where material cannot be disclosed to him was recognised in R (Mohammad) v Secretary of State for Defence [2013] 2 All ER 897, a claim for judicial review. Moses LJ held that there is no principle which prohibits a court considering whether to uphold or reject the claim for PII from ordering that, while the claim should not be upheld, nonetheless the documents or material should only be disclosed to those identified within a confidentiality ring on terms to be specified in an undertaking agreed by the parties. Provided legal advisers are satisfied that they can safely continue to act under a restriction, the inability to communicate with their client would not in such circumstances undermine the fundamental principles on which a fair application for judicial review depends. Moses LJ considered a wide range of authorities in reaching his judgment including criminal cases. He specifically stated that he was proceeding on the

> assumption that there was no distinction between the principles applying to judicial review claims and civil claims. Equally there is no reason to think that his reasoning cannot also apply to criminal cases."

[29] Insofar as there is a difference between the authors I prefer the view of Archbold. In any event, as I have already indicated, these cases are fact specific and the key point in the Mohammad case, which is the high water mark for confidentiality rings, is that this was done with the consent of the lawyers.

[30] I am aware that this particular type of confidentiality agreement has been used in a previous case in Northern Ireland, namely the Wooton case. However, again in that case this was done by the consent of the lawyers. I am not fully aware of the facts of that case although I understand that, unlike the present case, there was significant evidence other than surveillance evidence. In this case the surveillance evidence is in effect the case against the defendants.

[31] In dealing with this issue Mr Murphy QC makes the point that the method suggested by him is a step back from that which has been referred to in the previous passages. However, in my view the protection for the defendants in this scenario is even less than that in a situation where disclosure is provided to the defendant's lawyers on a confidentiality basis. At the end of the day, the lawyers have conduct of the case and have a wider appreciation of the entirety of the case and act on the instructions of their client. Ultimately the expert witness stands in the shoes of the defendant who is the proper person to whom disclosure should be made.

[32] Notwithstanding what I have said, it is clear that the act envisages a situation where the courts can restrict the extent of disclosure. When one considers Section 3 it is clear that an element of judgement is given to the prosecution in terms of how disclosure is made initially. So disclosure can take the form of the provision of original documents, copy documents or, rather than documents, the inspection of material.

[33] At the stage of Section 8(5) applications clearly it is envisaged that there can be limits placed on disclosure. I return now to question (4) set out in the R v H case which discusses the potential limitations which might be permitted in terms of any derogation from the golden rule of disclosure.

> "The question requires the court to consider with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of

> documents in an edited or an anonymised form, provided the documents supplied are in each instance approved by the judge. In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and interests of the defence protected. In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4)."

[34] Whilst these are only examples what is clear is that it is not suggested, nor in my view is it permitted, that the court can place a restriction on the use that the defendant can make of disclosure when it has been ordered. The issue of the use of the material provided by the disclosure is dealt with by Section 17 of the Act, which in effect restricts the use that may be made to use in connection with the proceedings for whose purposes he was given the object or allowed to inspect it.

Again the use refers to "the accused".

[35] Turning now to question (5) of R v H. Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If no, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure. Neither prosecution nor indeed the court can think of any other measure than that suggested by the prosecution to protect the public interest that I have identified.

[36] Turning now to question(6). If limited disclosure is ordered pursuant to (4) or (5) may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If yes, then further disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.

[37] I consider the answer to this question is 'Yes'. This should be apparent from the reasons that I have set out above in analysing the proposed method of disclosure in this case and why I consider it not to be appropriate.

[38] Having taken into account the sensitive schedule which has been shown to me in the *ex parte* application, I make the following order to ensure that the trial process viewed as a whole is fair to the defendants.

[39] The prosecution shall disclose to the accused details of the manufacturer and the model number of any relevant devices used to record the location and activities of any vehicle or person involved in this case in order to provide tracking evidence and the details of the specification of the GPS components of the devices.

[40] I remind the parties that this is not a final once and for all answer but is a provisional answer which I will keep under review. It is open to the defendants to ask for further disclosure or for either party to review disclosure on an on-going basis.