

Neutral Citation no. [2004] NIMag 2

Ref: **Mag29**

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

Delivered: **25.05.04**

CHIEF CONSTABLE OF THE POLICE SERVICE OF NI

COMPLAINANT

-and-

DARREN Mc KEOWN

DEFENDANT

THIS IS AN APPLICATION BY THE DEFENDANT UNDER SECTION 8(2) OF THE CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996 SEEKING AN ORDER REQUIRING THE COMPLAINANT TO MAKE SECONDARY DISCLOSURE TO HIM OF THE MATERIAL SET OUT AT (a) TO (k) OF HIS APPLICATION

CHARGES

The Defendant has been charged with the following offences:-

1. On 17th May 2003 having entered as a trespasser a dwelling, stole two Nokia phones, vehicle keys and at the time had a kitchen knife contrary to Section 10(1) of the Theft Act (NI) 1969 and that the said knife was used to commit the offence.
2. Took a vehicle without the consent of the owner contrary to Article 172 of the Road Traffic Act (NI) 1972.
3. Obstructed a Constable in the due execution of his duty contrary to Section 71(A) of the Criminal Justice (Miscellaneous Provisions) Act NI 1966.

CHRONOLOGY

1. The Defendant accepted the jurisdiction of the Magistrates' Court in regard to charge 1 and pleaded not guilty to all three offences on 16th December 2003.
2. Primary disclosure was issued on 2nd February 2004.
3. A defence statement dated 2nd March 2004 was served on the prosecution on 4th March 2004.
4. The prosecution advised the Defendant's Solicitor by letter dated 12th March 2004 that it was not required to conduct secondary disclosure due to failure to serve the defence statement within the required time limit.

SUBMISSIONS

Mr Shields, BL for the Defendant argued that the regulations setting out the time limits within which a defence statement was to be served did not enable or authorise the prosecution to renege on its

obligation to provide full and proper disclosure. The penalty or sanction for failing to meet a time limit was set out in Section 11 of the Act and such sanction did not include the prosecution ignoring a defence statement or refusing to reply to it.

Ms Henderson, BL on behalf of the prosecution submitted that the Defendant had failed to serve a defence statement within the terms of the Act and that he could not therefore make an application to the Court pursuant to Section 8 of the Act. The Defendant “*must*” comply with the 14 day period and he had failed to do so. He had also failed to apply for an extension of time within which to serve his defence statement.

THE LAW

“Section 3

- (1) *The prosecutor must –*
- (a) *disclose to the accused any prosecution material which has not previously been disclosed to the accused and which in the prosecutor’s opinion might undermine the case for the prosecution against the accused, or*
 - (b) *give to the accused a written statement that there is no material of a description mentioned in paragraph (a)”.*

Whilst this obligation is triggered by a plea of not guilty there do not appear to be any regulations setting out time limits for primary disclosure as envisaged by Section 3(8) of the Act.

In any event, a plea of not guilty was entered on 16th December 2003 and primary disclosure as required by Section 3(1) was issued on 2nd February 2004.

“Section 6

- (1) *This section applies where –*
- (a) *this Part applies by virtue of section 1(1), and*
 - (b) *the prosecutor complies with this section 3 or purports to comply with it.*
- (2) *The accused-*
- (a) *may give a defence statement to the prosecutor, and*
 - (b) *if he does so, must also give such a statement to the court.*
- (3) *Subsections (6) to (8) of section 5 apply for the purposes of this section as they apply for the purposes of that.*
- (4) *If the accused gives a defence statement under this section he must give it during the period which, by virtue of section 12, is the relevant period for this section”.*

The Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 1997 were made pursuant to Section 12 of the Act .

“Regulation 3

Subject to regulations 4, 5 and 6, the relevant period for section 6 of the Act (voluntary disclosure by accused) is a period beginning with the day on which the prosecutor complies, or purports to comply, with section 3 of that Act and ending with the expiration of 14 days from that day”.

“Regulation 4

- (1) *The periods referred to in regulations 2 and 3 shall, if the court so*

orders, be extended by so many days as the court specifies.

- (2) *The court may only make such an order if an application which complies with paragraph (3) below is made by the accused before the expiration of the periods referred to in regulations 2 and 3.*
- (3) *An application under paragraph (2) above shall –*
 - (a) *state that the accused believes, on reasonable grounds, that it is not possible for him to give a defence statement under section 5 or, as the case may be, 6 of the Act during the periods referred to in regulations 2 and 3 respectively;*
 - (b) *specify the grounds for so believing; and*
 - (c) *specify the number of days by which the accused wishes that period to be extended.*
- (4) *The court shall not make an order under paragraph (1) above unless it is satisfied that the accused cannot reasonably give or, as the case may be, could not reasonably have given a defence statement under section 5 or, as the case may be, 6 of the Act during the periods referred to in regulations 2 and 3 respectively.*
- (5) *The number of days by which the periods referred to in regulations 2 and 3 may be extended shall be entirely at the court's discretion”.*

Whilst I have been told that primary disclosure issued on 2nd February 2004 time runs from the date of receipt of primary disclosure and not the date of sending - R –v- Dean (14th November 1997, unreported). Mr Shields, BL was not able to tell me the date upon which primary disclosure had been received by the defence. The Defendant accepted that it was received within a short time of its issue and the Application proceeding on the basis that the defence statement served on 4th March 2004 was not served within 14 days from the receipt of the primary disclosure.

No application under Regulation 4 has ever been made by the defence for an extension of time within which to serve the defence statement. In any event a Court may only extend the time if the application for the extension is made within 14 days from the receipt of primary disclosure.

“Section 7

- (1) *This section applies where the accused gives a defence statement under section 5 or 6.*
- (2) *The prosecutor must –*
 - (a) *disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might be reasonably expected to assist the accused's defence as disclosed by the defence statement given under section 5 or 6, or*
 - (b) *give to the accused a written statement that there is no material of a description mentioned in paragraph (a).*
- (7) *The prosecutor must act under this section during the period which, by virtue of section 12, is the relevant period for this section”.*

No regulations appear to have been made setting out the relevant period for the delivery of secondary disclosure.

“Section (8)

- (1) *This section applies where the accused gives a defence statement under section 5 or 6 and the prosecutor complies with section 7 or purports to comply with it or fails to comply with it.*
- (2) *If the accused has at any time reasonable cause to believe that –*
 - (a) *there is prosecution material which might be reasonably expected to assist the accused's defence as disclosed by the defence statement given under section 5 or 6, and*
 - (b) *the material has not been disclosed to the accused,*

the accused may apply to the court for an order requiring the prosecutor to disclose such material to the accused”.

“Section (9)

- (1) Subsection (2) applies at all times-*
 - (a) after the prosecutor complies with section 3 or purports to comply with it, and*
 - (b) before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case concerned.*
- (2) The prosecutor must keep under review the question whether at any given time there is prosecution material which –*
 - (a) in his opinion might undermine the case for the prosecution against the accused, and*
 - (b) has not been disclosed to the accused;**and if there is such material at any time the prosecutor must disclose it to the accused as soon as is reasonably practicable*
- (3) In applying subsection (2) by reference to any given time the state of affairs at that time (including the case for the prosecution as it stands at that time) must be taken into account.*
- (4) Subsection (5) applies at all times-*
 - (a) after the prosecutor complies with section 7 or purports to comply with it, and*
 - (b) before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case concerned”.*

“Section (11)

- (2) This section also applies where section 6 applies, the accused gives a defence statement under that section, and the accused-*
 - (a) gives the statement after the end of the period which, by virtue of section 12, is the relevant period for section 6,*
 - (b) sets out inconsistent defences in the statement,*
 - (c) at his trial puts forward a defence which is different from any defence set out in the statement,*
 - (d) at his trial adduces evidence in support of an alibi without having given particulars of the alibi in the statement, or*
 - (e) at his trial calls a witness to give evidence in support of an alibi without having complied with subsection (7)(a) or (b) of section 5 (as applied by section 6) as regards the witness in giving the statement.*
- (3) Where this section applies –*
 - (a) the court or, with the leave of the court, any other party may make such comment as appears appropriate;*
 - (b) the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned.*
- (5) A person shall not be convicted of an offence solely on an inference drawn under subsection (3)”.*

“Section 12

- (1) This section has effect for the purpose of determining the relevant period for sections 3, 5, 6, and 7.*
- (2) Subject to subsection (3), the relevant period is a period beginning and ending with such days as the Secretary of State prescribes by regulations for the purposes of the section concerned”.*

Section 6 has become operable by virtue of Section 1(1)(b) and by the prosecution complying with Section 3.

The Defendant has chosen to give a defence statement as entitled by Section 6(2).

Section 5(6) defines a defence statement as a written statement:-

- (a) setting out in general terms the nature of the accused's defence,
- (b) indicating the matters in which it takes issue with the prosecution,
- (c) setting out, in the case of each such matter, the reason why he takes issue with the prosecution.

The defence statement given in this case complies with the above definition.

Section 7 then obliges the prosecution to make secondary disclosure where the Defendant gives a defence statement under Section 6.

Ms Henderson, BL essentially argues that the Defendant does not give a defence statement under Section 6. A defence statement under Section 6 she submits is one which must be given within 14 days from the delivery of primary disclosure.

I do not accept this argument for the following reasons.

DECISION

1. Section 6(3) (referring to Section 5(6)) defines a defence statement. A defence statement as so defined has been given and is in accordance with Section 6. Section 6(4) sets out the time limit for "a defence statement under this section". In my opinion it does no more than that. In simple terms the Defendant has given a defence statement which has been made under Section 6 outside the appropriate time limit. It is no less a defence statement for being out of time.
2. Section 11(2)(a) confirms that a defence statement is a valid document even if served outside the relevant period to the extent that the Court or, with the leave of the Court, any other party may make such comment as appears appropriate and the Court may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned. As Mr Shields, BL puts it he gets none of the benefit of having given a defence statement but is liable to the penalties set out in Section 11(3). The logical consequence of the prosecution argument is that if a defence statement is not made under Section 6 by reason of its lateness then no such penalties as at Section 6(3) should apply. This is not however what the legislator sets out in Section 11. They have taken the view that a late defence statement is still exactly that.
3. Even if I am incorrect in this construction of the legislation a Court has a duty under Section 3 of the Human Rights Act 1998 to read and give effect to the legislation in a way that is compatible with Convention Rights.

Ms Henderson, BL laid great emphasis on the mandatory nature of Section 6(4) with the use of the word "*must*". In my opinion to construe Section 6(4) as mandatory is inconsistent with Article 6(1) of the European Convention of Human Rights. The prosecution in this case have

acknowledged the refusal to make any further disclosure or to make any further enquiries. If they are correct then a situation could arise where they have documents in their possession which meet the test of secondary disclosure but which they would not discover because they have no obligation to do so. Additionally they may refuse to make further enquiries in regard to documents which may meet the test of secondary disclosure on similar grounds. These issues may be particularly relevant in an identification case such as this. The prosecution's continuing duty of disclosure under Section 9(5) does not help the Defendant as this duty is only applicable where the prosecution have complied with secondary disclosure or purported to comply with it – see Section 9(4). The fact that the Defendant may be open to the penalties of Section 11(3) and not entitled to secondary disclosure by the service of a defence statement outside the relevant period, particularly where no prejudice has been caused to the prosecution, would constitute a breach of Article 6(1) of the European Convention of Human Rights.

4. In *Foyle, Carlingford and Irish Lights Commission –and- Paula McGillion*, Carswell LCJ (as he then was) dealt with the construction of Article 146(9) of the Magistrates' Courts (NI) Order 1981 which prior to the Human Rights Act 1998 had been deemed to be mandatory. In adopting his reasoning it appears to me that the clear object of Section 6(4) is to prevent delay and to ensure that a trial is held within a reasonable time. That is a legitimate aim. There would not however appear to be a reasonable relationship of proportionality where the Defendant is barred from receiving any prosecution material which might reasonably be expected to assist his defence as disclosed by his defence statement because it has been served a short time outside the relevant period. This is particularly so where no prejudice has accrued to the prosecution and indeed where the prosecution are not subject to similar or any time limits in complying with their obligations under the Act. I consider this would constitute a breach of Article 6(1) of the Convention.
5. In order therefore to give effect to the Act in a way that is compatible with Convention Rights I am construing Section 6(4) as directory rather than mandatory. When this is done and no prejudice has been caused to the prosecution by the delay in serving the defence statement upon it I conclude that the defence statement has been given under Section 6 and that the prosecution should have complied with their obligations under Section 7.
6. Finally it occurs to me in considering the above matters that the trigger mechanism of Section 7 may itself be in breach of Article 6 of the Convention in that an accused's right to material which might be reasonably expected to assist his defence should be unconditional and not dependent upon another event. This would appear to be strengthened by the case of *Brushett* [2000] All ER (D) where the Court of Appeal reviewed the disclosure rules without referring to the test in the Act at all. Instead the case proceeded on the assumption that the test for disclosure of prosecution unused material was that set out in the earlier case of *R –v- Keane* covering material which was relevant or possibly relevant to an issue in the case, which raised or possibly raised a new issue or which held out a real prospect of proving a lead or evidence going to such issues.

LIAM Mc NALLY