Neutral Citation No. [2005] NIMag 1

Ref:	**Mag30**

Judgment: approved by the Court for handing down

(subject to editorial corrections)

Delivered:	**21/02/2005**

HUGH ORDE, Esq.
CHIEF CONSTABLE
Complainant

Petty Sessions District of Fermanagh

PAUL MICHAEL BURNS
Defendant

County Court Division of Fermanagh and Tyrone

Ruling Upon the Defendant's Application for further Disclosure
Pursuant to Section 8, The Criminal Procedure and Investigation Act 1996

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1. The Defendant Paul Burns stands accused of assault occasioning actual bodily harm, contrary to Section 47 of the Offences Against the Person Act 1861 in concert with another. He is also charged individually with another assault, under Section 42 and, further, with assaulting a Police officer in the execution of his duty, contrary to Section 66(1) of the Police (Northern Ireland) Act 1998. The events giving rise to the complaints occurred on 22nd September 2003.

2. The Summonses were issued on 20th February 2004, as also were 2 Notices of Intention to Tender Written Statements, in accordance with Rule 149 of the 1981 Rules. These related to Statements of Constables Huey, Russell and Crowe, and of a Cyril Graham, Martin McCarney and Rodney Wilson. By letter dated 7th July 2004, the Defendant's Solicitors intimated objection to any of these Statements being so tendered without formal proof.

3. On 19th October 2004, a voluntary Defence Statement was filed and served by the Defendant's Solicitors, in accordance with Section 6 of the Criminal Procedure and Investigations Act 1996 ("the 1996 Act"). It was so filed and served out of time and without leave of the Court. By letter

dated 25th December the prosecutor confirmed that there were no further disclosable documents, other than some items then released.

4. The Defendant has now applied, under Section 8(2) of the 1996 Act, for an Order requiring the prosecution to deliver certain material to him, for the purposes of preparing his defence. The matter came before me for submissions on 31st January 2005, on foot of an Application dated 20th January and a Response from the prosecution dated 28th January. Mr. Lecky of the Western Circuit appeared on behalf of the Director of Public Prosecutions and Mr. Turkington, B.L. for the Defendant.

5. The Defence Statement had been dated 19th October 2004, filed and served under cover letter of the same date. It runs to over 3 typed pages, containing 20 paragraphs and 4 major sections.

6. A preamble, headed as "Case Statement", declares that the Statement is made "in order to satisfy the statutory requirements placed upon the Defence" by Section 5(6) of the 1996 Act. "The accused does not therefore accept that the requirements are compatible with the Human Rights Act 1998."

7. Section 5(6) of the 1996 Act provides:-
   (6) For the purposes of this section a defence statement is a written statement-
   (a) setting out in general terms the nature of the accused's defence,
   (b) indicating the matters on which he takes issue with the prosecution, and
   (c) setting out, in the case of each such matter, the reason why he takes issue with the prosecution.

8. There is no statutory requirement placed upon the Defence by Section 5(6); the provision constitutes only the statutory definition as to what constitutes a Defence Statement. That definition is adopted in Section 6, concerning summary trials, at paragraph 6(3). Section 6(2) makes plain that to give a Defence Statement is an entirely voluntary act in summary proceedings. There is no tenable Human Rights point.

9. One then proceeds to business with the "Nature of the Accused's Defence".

   Concerning the first charge

   > In general terms, the nature of the Defendant's defence is that he is pleading not guilty to the offence of assaulting Rodney Wilson and further that Rodney Wilson suffered actual bodily harm. The Defendant accepts he was present in the vicinity of the alleged assault. The Defendant denies that he was acting in concert with or contemplated the actions of his co-accused.

   Concerning the second charge;

> The Defendant denies assaulting Martin McCarney…

Concerning the third charge;

> … and denies assaulting Constable Russell. The Defendant contends that Constable Russell was not acting in due execution of his duty and had assaulted the Defendant by punching him on the nose. The Defendant challenges the Crown to prove its case in this regard and every part of it.

10. The paragraph then closes with the assertion;

> In the event that further relevant evidence or material is disclosed, the Defence reserves the right to file a further Case Statement.

There is of course no such right, whether as contained in the 1996 Act, or otherwise.

11. So much for a statement on the nature of the accused's defence in relation to each of the 3 charges before the court. With regard to a statement of the matters on which the accused takes issue with the prosecution and, in the case of each such matter, the reason why he does so, the designated section of this Defence Statement proceeds to declare;

> THE DEFENCE TAKES ISSUE WITH THE FOLLOWING:
> Any suggestion that the Defendant was guilty of the offences of assaulting Rodney Wilson, Martin McCarney and Constable Russell. The matters which this Defendant takes issues with the Prosecution are all matters set out in the tendered evidence, additional evidence and other evidence to be adduced save and unless those matters or any of them are agreed in writing by the Defence before trial or agreed in the course of the trial.

12. This brings us only to just before the end of the first page of the Statement. For present purposes, I can disregard everything else that follows (in 2 more pages), because none of it even purports to form part of a Statement of Defence, within the meaning of Section 5(6). It is sub-headed "ITEMS THE DEFENCE REQUIRE" and has much of the shopping list about it.

13. In the case of R v Bromley Magistrates [1995] 4 All ER 146, Brown, LJ remarked (at page 151);

> The court in *R v Brown (Winston)* [1994] 1 WLR 1599 at 1609 referred to 'the undoubted fact that defence lawyers sometimes bombard the prosecution with requests for thousands of documents with little regard to their relevance' and the need for trial judges to 'firmly discourage unnecessary and oppressive requests for discovery'. That, of course, was said particularly in the context of large cases. But it would scarcely be less aptly said of summary trials before magistrates. On the contrary: it is clearly desirable that such proceedings should retain their essentially speedy and summary character and not become complicated and delayed by ill-judged applications for needless further disclosure of documents.

14. For the present, I am concerned with whether this document, or any part of it, constitutes a Defence Statement, triggering secondary disclosure under the 1996 Act.

15. In the case of R v Tibbs [2000] 2 Cr.App.R. 309, at pages 314 et sequi., there is a helpful treatment upon the nature of a Defence Statement, in view of the terms of Section 5(6);

> … Mr Turton argues that to comply with section 5(6)(a) an accused need only describe his defence in very general terms: for example, "self defence", "no intent" or "mistaken identification" … We recognise that, as the provisions in both the Criminal Justice Act 1987 and section 5 of the 1996 Act diminish the accused's right to silence and his privilege against self-incrimination, they should be strictly construed, but we are unable to give the provisions Mr Turton's very restricted meaning. In the first place such a restricted meaning would mean that the purpose for which the provisions were enacted was virtually unattained. The aim of the 1996 Act was to introduce a procedure to ensure that the defence and the prosecution should have the opportunity to investigate facts relied on by the opposite party and so to reduce the risk of a miscarriage of justice by wrongful conviction or wrongful acquittal. It seems to us that the phrase "a defence statement" is a convenient expression used to include the nature of the defence, the matters on which issue is taken and the reasons for taking issue. *All of these matters have to be included in the "defence statement"*. In short, it is a statement by the accused of the matters to be relied on in his defence. If "defence" was, by a purely linguistic interpretation, to be given the very restricted meaning argued for by Mr Turton, there would be little, if any, scope for comparing the degree to which it differed from the defence set out in the defence statement. The defence put forward would either be the same as or different from the defence in the statement. Yet under section 11 (4) the court has to have regard (a) to the extent of the difference in the defences and (b) to any justification for it. Further, unless the defence is regarded as including the matters on which the accused takes issue with the prosecution and the reasons for doing so, no change in them, however significant, could be subject to comment or the drawing of inferences under section 11(4). We can see no reason why Parliament should confine the power of the court or jury to draw inferences simply to a change in the general terms of the nature of the defence. A change in such matters put forward at trial could be most significant, and on Mr Turton's interpretation would be exempt from any comment or adverse inference. In our view the word "defence" cannot be restricted to its general legal description. *A defence depends on the facts which an accused intends to prove. Where those facts differ from the facts on which the prosecution case is based, issues will be raised and the object of the section is to ensure that the prosecution have a proper opportunity of investigating the facts giving rise to those issues*. So construed, the extent of the difference in the defences under section 11(4)(a) can properly be considered by the court in deciding what action to take under section 11 (3). The interests of an accused are safeguarded by this subsection, which leaves the judge with a discretion to decide whether the difference in the defence put forward is

sufficiently significant to justify comment and the drawing of an inference. For these reasons we reject the purely literal construction sought to be placed upon the provisions by Mr Turton. (*My emphasis*).

16. The present case concerns a brawl in a Taxi office and in which, it appears, the Police became involved, whether in breaking it up, or in purporting to arrest the Defendant, or in restraining him thereafter, whereby the Defendant and an officer came to blows (in one direction or the other, or both). That is as much as I know at this stage.

17. When I contemplate whether the document before me now can really be considered a Defence Statement I ask myself whether it is conceivable, having regard to the anodyne contents, that anything asserted by the Defendant at trial could be found to be inconsistent with the defence set out in this Statement, so as to trigger consideration of an inference, under Section 11(3) of the 1996 Act. This would be impossible to discern, if the Defendant is to present a defence at all. Any likely defence would fit the terms of this Statement..

18. The Magistrates' Courts (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules (Northern Ireland) 1997 ("the Disclosure Rules") deal with the procedure for a defence Application to Court under Section 8(2) of the 1996 Act.

Disclosure: application by accused and order of court
7. - (1) This Rule applies to an application by the accused under section 8(2).
(2) An application to which this Rule applies shall be made by notice in writing to the clerk of petty sessions and shall specify-
(a) the material to which the application relates;
(b) that the material has not been disclosed to the accused;
(c) the reason why the material might be expected to assist the applicant's defence as disclosed by the defence statement given under section 6; and
(d) the date of service of a copy of the notice on the prosecutor in accordance with paragraph (3).
(3) A copy of the notice referred to in paragraph (2) shall be served on the prosecutor at the same time as it is sent to the clerk of petty sessions.
(4) The prosecutor shall give notice in writing to the clerk of petty sessions within 14 days of service of a notice under paragraph (3) that-
(a) he wishes to make representations to the court concerning the material to which the application relates; or
(b) if he does not so wish, that he is willing to disclose that material;
and a notice under sub-paragraph (a) shall specify the substance of the representations he wishes to make.
(5) Subject to paragraphs (6) and (7)-

(a) the clerk of petty sessions shall give notice in writing to the prosecutor and the accused of the date and time when, and the place where, the hearing will take place;
(b) the hearing shall be inter partes;
(c) the prosecutor and the accused shall be entitled to make representations to the court.
(6) The court may determine the application without hearing representations from the accused or the prosecutor unless-
(a) the prosecutor has given notice under paragraph (4)(a) and the court considers that the representations should be made at a hearing; or
(b) the court considers it necessary to hear representations from the accused or the prosecutor in the interests of justice for the purpose of determining the application.
(7) Where the prosecutor applies to the court for leave to make representations in the absence of the accused, the court may for that purpose sit in the absence of the accused and any legal representative of his.
(8) The clerk of petty sessions shall serve a copy of any order under section 8(2) on the prosecutor and the accused.

19. Rule 7 of the Disclosure Rules makes it clear that it is for the defence Solicitors to file and serve the Application and thereafter await word from the Clerk of Petty Sessions as to whether, and if so when, an inter partes Hearing will take place. The Clerk of Petty Sessions, in turn, must allow up to 14 days for any written response from the prosecution to be filed. When that is received, or upon the expiry of those 14 days, whichever be sooner, the Clerk then consults with the Magistrate. It is for the Magistrate to determine whether any inter partes Hearing is necessary at all. He may in fact dismiss the Application, or may make an Order, simply on the basis of the papers. In particular, it requires a judicial act by a Magistrate personally to determine whether or not a Hearing is really required, in the interests of justice.

20. Howsoever all that may be, the Defendant's Application under Section 8(2) of the 1996 Act concerned just two items, namely;
    a. The Occurrence Book Entry. The grounds as set out for the Application in this regard are that it "… presumably contains the first report received by the Police from a member of the public who observed the alleged offences… The material … might be expected to assist the defence as disclosed in the Defence Statement as it is the first contemporaneous record or report of an assault taking place and it is thought that it will provide material for use in cross-examination relating to the question of a potentially inconsistent history or statement and the credibility of the prosecution witnesses; and
    b. The identity of the person, a female in the taxi firm concerned, who was a material witness, but who declined to give a written Statement to the Police, on the grounds that "… she may be able to support the Defence case."

21. The Notice filed by Mr. Leckey on behalf of Director of Public Prosecutions, on 28th January 2005 contained responses as follows;
    a. The C6 Occurrence Book entry, as sought in the present application, has been considered by the Disclosure Officer and by the Public Prosecution Service both at primary and secondary disclosure stages. This document

does not contain any matters which undermine the prosecution case or assist the defence as disclosed in the defence statement.

b. This witness was spoken to by the police and recounted a version of events consistent with prosecution evidence. The witness was requested to provide a witness statement but declined to do so. The witness clearly indicated to police a wish to have no further involvement in the matter. It is not considered that the disclosure of the identity of the witness will in any way undermine the prosecution case or assist the defence. It is further considered that disclosure of the identity of the witness in these circumstances would be an infringement of the witness' right under Article 8 of the European Convention on Human Rights.

22. It is the responsibility of the prosecution alone to decide what unused matter is disclosable to the defence. "Having identified what is material, the Prosecution should disclose it unless they wish to maintain Public Interest Immunity or other sensitivity justifies withholding some or all of it." (per Lord Taylor, C.J. in R v Keane [1994] 2 All ER 478 at p. 484).

23. Where the prosecution have come to the conclusion that an item is not material, due weight must be accorded to this. As was stated in Bromley Magistrates by Simon Brown, LJ (p.p. 152-153);

> I would express the hope that those representing defendants will not too readily seek to challenge a responsible prosecutor's assertion that documents are in his considered view not material. Although ultimately the defence cannot be prevented from raising such an issue and seeking the court's ruling upon it, courts should, in my judgment, treat such applications with some scepticism and should certainly decline even to examine further documents unless the defendant can make out a clear prima facie case for supposing that, despite the prosecutor's assertion to the contrary, the documents in question are indeed material.

24. The following passage appears in Mr. David Corker's *Disclosure in Criminal Proceedings* (London, 1996) at p. 93;

> Once and only if all three stages of disclosure have been completed, the defence is granted a statutory right of appeal in all cases to the court where it is dissatisfied as to the extent of prosecution primary and secondary disclosure. It may apply to the court for an order requiring the prosecution to disclose matter which the defence has "reasonable cause to believe … might be reasonably expected to assist the accused's defence as disclosed by the defence statement".
>
> The defence must therefore fulfil two reasonableness tests in order to challenge successfully a prosecution decision on non-disclosure. This would appear to be significantly more onerous tha[n] the subjective test which the prosecution fulfils under section 3 in deciding what should be included in primary disclosure. The deployment of these two tests is clearly designed to deter and thwart any defence attempt to achieve a "fishing expedition" through prosecution material; and simultaneously also to prevent any backdoor attempt by the defence, except for cause, to scrutinize the prosecutor's decisions relating to non-disclosure.

25. Counsel for the Defendant invites me to go behind the prosecutor's decision in respect of the Occurrence Book entry, challenging the conclusion that there is nothing in its contents which undermines the

prosecution case or assists the defence as disclosed in the Defence Statement. I am not satisfied that neither reasonableness test has been met in this respect, having regard to the terms of the Application in these respects.

26. The matter is slightly more complex with respect to the identity of the female employee in the taxi firm. Mr. Leckey raises two distinct points. One is that it is not thought that disclosure of the identity of this witness will undermine the prosecution case or assist the defence. The second is that disclosure would infringe this person's right to privacy and family life, contrary to Article 8 of the Convention, now incorporated into domestic law. Whereas the point is not made clear in the written Response, Mr. Leckey did state in open court that the witness had been visited by the Police and that her evidence was found to be entirely supportive of the prosecution case.

27. There are, in turn, two aspects to this matter of the extra witness. One is her identity, as such – her name and address. The other is the notebook entry of the officer who did visit her, an entry which discloses her particulars and incorporates a synopsis of what she would had to say about the incident. It is to be remembered that, under Section 2(4) of the 1996 Act "material" includes both "information" as well as "objects of all descriptions".

28. Mr. Turkington has helpfully drawn my attention to the case of R v Heggart[2001] 4Archbold News 2, CA., stating;

> The identity of persons who might have witnessed an incident giving rise to criminal charges is material capable of undermining the prosecution case or supporting the defence case; those who dial 999 to report such an incident fall into that category, and therefore the duty of disclosure extends to the telephone numbers of the makers of such calls; a general practice of non-disclosure of the identity of persons making 999 calls could not be justified, there being no basis in the ordinary course of events for any expectation of confidentiality; this was, however, subject to the possibility of argument in an individual case that the particular facts gave rise to an expectation of confidentiality.

29. If this were simply a matter of the prosecution maintaining that the witness to the events giving rise to the charges of assault within the taxi firm was entitled to anonymity because the prosecution did not intend to call her and that disclosure of her identity would contravene her Article 8 rights, I would rule in favour of disclosure. Without more, the identification of the witness to the defence is "capable" of assisting the defence and of undermining the prosecution case. Anyone who has witnessed a crime, as the prosecution maintain, is a material witness. It would be entirely right that the defence should not be denied the

opportunity to interview her. If the prosecution asserted that there was a particular sensitivity surrounding the identity of the witness, the proper course would be to seek an Order of the Court under Section 3(6), viz

> (6) material must not be disclosed under this section to the extent that the court, on application by the prosecutor, concludes that it is not in the public interest to disclose it and orders accordingly.

30. However, the position here is that the Police did visit this witness after the event, so that the Disclosure Officer and Prosecution Service have determined that her evidence does not, factually, assist the defence or undermine the prosecution case. In the face of that, once more, it is for the defence to show reasonable cause to believe that access to the witness might reasonably be expected to assist the accused's defence, as disclosed by the Defence Statement.

31. This brings us back to the point that the Defence Statement is essentially vacuous. It has been conceded on the defence part that the observations by the witness relate only to the incidents giving rise to the charges of assault upon two civilians, in the taxi firm premises, and not to the charge concerning an alleged assault upon a Police officer. The only thing disclosed in the Defence Statement is that the Defendant denies the assaults and also denies that he was acting in concert or in contemplation of his co-accused's actions. The prosecution have spoken to the witness; mayhap no finer or more subtle issues, nor any ancillary matters, were raised with her in that discussion, other than what she then stated as her primary observations and opinions about the incident; but there is no basis provided to me by the defence upon which I might rule that the defence does reasonably believe and has reasonable cause to believe that "… she may be able to support the Defence case", save on the basis that anything is possible. In face of the representations on behalf of the prosecution, no effort is made to show why the Defendant would *expect* this witness to give an account which favoured his case. That is not enough. The Defence application is therefore dismissed on that account as well.

Dated this 21st day of February, 2005

Signed:…….
(John I. Meehan, R.M.)
Enniskillen.