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JUDICATURE (NORTHERN IRELAND) ACT 1978

THE CROWN COURT (AMENDMENT) RULES (NORTHERN IRELAND) 2000

IN THE CROWN COURT SITTING AT LAGANSIDE COURTHOUSE, BELFAST

IN THE MATTER OF THE CROWN

Complainant;

-and-

ALEX McCRORY (Co-Accused COLIN DUFFY and HARRY FITZSIMONS)

Defendant.

RULING

COLTON J

[1] The defendant Alex McCrory, one of three co-accused, has brought an application pursuant to section 51A and section 51B of the Judicature (Northern Ireland) Act 1978 ("the 1978 Act") against Ms Paula Mackin, a reporter of the Sunday World Newspaper, Mr James McDowell, former editor of the Sunday World Newspaper and Sunday World Newspapers Limited. By that application he seeks an order requiring these "directed persons" to produce a list of "stipulated evidence, document or things". The material sought is comprehensive. The full details are set out in the Notice of Motion and in the affidavit sworn in support thereof.

[2] In summary, what is sought are all notes/records which relate to all meetings and communications including meetings with a "*security source*" which relate to various matters concerning the defendant and his co-accused in articles published in the Sunday World newspaper on 8 February 2015 and 8 November 2015 (respectively "the February article" and "the November article"). The defendant also seeks original versions and all copies of the "*copies of recordings*" referred to in the February article and a "*15 page disclosure document*" referred to in the November article.

[3] In addition the defendant seeks disclosure of the identity of the source or sources who provided information or materials to the Sunday World in connection with the articles.

Background

[4] On 5 December 2013 a gun attack occurred on a police land rover and other vehicles as they travelled on the Crumlin Road, Belfast towards Twaddell Avenue, Belfast. The defendant along with his co-accused Fitzsimons faces charges of attempted murder and possession of firearms and ammunition in relation to that gun attack. The defendant and his co-accused are also charged with preparation for terrorists acts, directing terrorism and membership of a proscribed organisation.

[5] The evidence against each of the accused centres on material obtained by way of covert surveillance operations. It is the prosecution case that a meeting took place between three men on Friday 6 December 2013 at the Demesne House, Lurgan. An audio recording device was deployed in the vicinity of Demesne House, Lurgan and the prosecution rely on recordings of conversations at that laneway on that date. Based on voice comparison analysis the prosecution say that the three defendants were the persons who participated in the meeting.

[6] In addition to the covert audio recordings the prosecution also rely on video recordings and other corroborative material which they say confirms that the defendants were the persons involved in the conversations.

[7] The defendants were arrested on 15 December 2013 and interviewed under caution. They remained silent during the interviews. On 17 December 2013 they were charged with the offences to which I have referred.

[8] The defendants were remanded in custody and made applications for bail. One such bail application, which was heard in open court, was reported by the BBC on its website on 18 July 2014 under the heading "Dissident Republican Suspects: Bail Refused in Belfast Case". The report stated that the High Court had heard that three alleged dissident Republicans were recorded talking about security force targets with a chance of "getting a kill". It was reported that the prosecutors claimed that the men also discussed weaponry and explosives and losing two assault rifles in an attack on police in north Belfast. The report named the defendants and states that a barrister informed the court that the men were arrested on the basis of a secretly recorded meeting in Lurgan the day after the Twaddell Avenue attack and that this "was clearly a leadership or command discussion regarding the IRA, focusing on the attack against police and the loss of two assault rifles". That bail application is but one example of the numerous court hearings in which details of the case have been brought to the attention of the court in a public forum.

[9] On 12 December 2014 committal papers were served on all of the defendants. These committal papers included a transcript of the covertly recorded conversation

to which I have referred. On 26 January 2015 copies of the covert audio recording on disc were served upon the respective legal representatives of the defendants.

The articles

[10] On 8 February 2015 an article was published in the Sunday World under the heading "**Sold Out by Own Words**. **The Dissidents' Desperate Dash to Cover their Tracks**". Another article was published on 8 November 2015 under the heading "**Down to the Wire Talks. Shootings and Bombings were Recorded. Spooks Bugged Baby Buggy to Nab OnH Suspect**". Both articles named the defendant and his co-accused. The first article purported to quote from the covert audio recordings. The second article asserted that highly sensitive security documents seen by the Sunday World proved "*A Trio of Alleged Terrorists were Bugged*" and that the Sunday World had obtained a 15 page disclosure document produced during interviews of the defendants by the police.

[11] The committal proceedings commenced in Belfast Magistrates' Court in January 2016 and on 21 March 2016 and all three defendants were returned for trial in the Crown Court.

[12] In the course of the committal proceedings the expert (Professor French) relied upon by the prosecution who identifies the defendants by way of comparative speech recognition gave evidence in relation to the contents of the recordings. The proceedings were in open court.

[13] "No Bill" applications were made by the defendants in relation to all the counts on the indictment under section 2(c) of the Grand Jury Abolition Act (Northern Ireland) 1969. Although partially successful in respect of the defendant Duffy, the applications were refused, on 23 January 2017. Since that time there has been a protracted disclosure exercise conducted by the court under section 8 of the Criminal Procedure and Investigations Act 1996 ("the CPIA") which has involved consideration of substantial written material, reports and submissions augmented by oral evidence from experts retained by both the prosecution and the defendants.

[14] Much of that exercise has focused on requests by the defendants for access to, and information, on the audio devices used to capture the recordings of the conversations and the procedures and methodologies involved in the production of the evidential discs relied upon by the prosecution.

[15] In the course of the disclosure exercise the prosecution has disclosed details of documentation and correspondence relating to the instruction by the PSNI of forensic voice experts. In addition to the transcripts and report relied upon by way of evidence further disclosure has included correspondence with that expert, notebook entries and details of communications with another expert (Mr Alan Hirson who provided a "*micro*" report), not relied upon by the prosecution.

The civil actions

[16] Before considering this application I should refer to an application brought in the Queen's Bench Division of the High Court of Justice in Northern Ireland in the course of civil proceedings brought by the defendant and his two co-accused seeking relief against a number of defendants including the three directed persons in this application and the Chief Constable of the Police Service for Northern Ireland and "a person or persons unknown".

[17] The action relates to the articles which are the subject matter of this application and the defendant contends, inter alia, that the publication constituted a misuse of private information, and breaches of the Data Protection Act 1998.

[18] In the course of those proceedings the defendant sought an order compelling the directed persons to produce the material which is sought in this application.

[19] That application was refused by Stephens J (as he then was) in a written judgment dated 19 July 2017. That decision is under appeal but stands adjourned.

[20] In the course of a written argument on behalf of the directed persons in this application it was submitted that in relying on "the interests of the justice" to support the application in the civil action the defendant did not assert that it was in the interests of justice that disclosure be made of the materials on the grounds that such material would be material evidence for the purposes of the criminal proceedings. It was argued therefore that, having failed to make such an assertion in the civil application, it would be an abuse of process within the rule in **Henderson v Henderson** [1843] 3 Hare 100 for the defendant to make such an assertion in this application. It was suggested therefore that it was an abuse of process to raise an issue which was or could have been determined in the earlier proceedings, the purpose of which rule is that there should be finality in litigation and that a party should not be twice vexed in the same matter.

[21] Furthermore, it was pointed out that in written submissions in the civil action counsel on behalf of the defendant argued that "*it is difficult to comprehend any risk of inconsistent findings as between the High Court and the Crown Court*".

[22] I do not consider that there is merit in this submission. The test that I have to apply in this application is different from the one to be applied in the civil action, although clearly there are overlapping considerations. This application must be considered in the context of the criminal proceedings which the defendant faces. Depending on the circumstances it is conceivable that disclosure might be ordered in the particular context of a criminal case, but not in a civil case and vice versa.

[23] I am obliged to counsel who appeared in this application for their detailed written and oral submissions. Mr McDonald QC led Mr Dessie Hutton for the

defendant. Mr Arthur Harvey QC led Mr Richard Coghlin for the "directed persons". Mr Murphy QC appeared with Mr David Russell for the Crown.

The application

[24] Essentially the application is made on three grounds.

[25] Firstly, it is argued that the contents of the articles suggest that the transcripts relied upon by the prosecution differ in significant respects from what is reported in the articles which suggest that there are different transcripts/recordings of the alleged conversation in the possession of the PSNI/security services/prosecuting authorities.

[26] Secondly, it is argued that the contents of the articles suggest that there is another expert's report or assessment in the possession of the police/security services which differs from the expert reports served as evidence or disclosed in the case.

[27] Thirdly, it is argued that the articles raise an issue as to whether or not the police/security forces have acted improperly in the course of the investigation. It is alleged that this has an impact on the integrity of officers involved in the investigation and prosecution.

[28] In particular Mr McDonald drew my attention to some specific features of the articles to which I have referred.

[29] The February article is written by Paula Mackin. The copy in the front page under the heading to which I have already referred reads:

> "*This week the Sunday World blows open the deadly dossier in the hands of the security services and the frantic plans of rebel bosses Colin Duffy and Alex McCrory to plug the gaps.*
>
> *It's a battle for survival and with exclusive access to extracts from more than 100 hours of bugged dissident meetings we reveal the dissidents fight for life."*

[30] In the inside pages the story is developed and again refers to the 100 hours of taped conversations and suggests that in order to prevent the contents being made public "*rebel bosses*" have issued a "*plead guilty*" order for members currently on remand.

[31] In the context of "*members*" being told to plead guilty the article refers to the following quote from an unnamed "*security source*" as follows:

> *"This has been carefully thought out … 'by McCrory in particular, it would be highly embarrassing for him if the full recordings were made public, he said everything bar raise the white flag of surrender in the recordings' revealed one security source."*

[32] The article goes on to say:

> *"The Sunday World can reveal the main bulk of the recordings will be used in the case against McCrory and fellow suspected IRA men Duffy and Harry Fitzsimons.*
>
> *All three have been charged with membership of the organisation. McCrory and Fitzsimons are both charged with attempting to murder members of the PSNI and aiding and abetting the possession of a firearm.*
>
> *The Sunday World has obtained copies of the recordings which have already dealt a heavy blow to the movement with a number of suspects already arrested …*
>
> *… The Sunday World can reveal that Alex McCrory is clearly audible. Duffy's voice is heavily distorted despite the fact that both were recorded on the same tape at the same location and in the same conditions."*

[33] The article then goes on to specifically discuss forensic voice analysis evidence and it continues:

> *"According to police experts no two individuals sound identical based on their vocal tract shapes, larynx size and other parts of their voice production organs which differ. This is better known as 'voice printing'.*
>
> *Speaker Recognition Technology refers to recognising an individual from their voice. Taking a digital recording and parse it into small recognisable speech bits called 'phonemes" via high level audio analysis software and where necessary cross-referencing it with other patterns of the individual speech and word phrasing taken from phone recordings etc.*
>
> ***Panicking***
>
> *In the case of Colin Duffy and Harry Fitzsimons the speech recognition identified to them falls in the scale of 1 to 10 as 3. One being unrecognisable – 10 being clearly associated*

to the individual. In the case of Alex McCrory his speech recognition is classified as 8 out of 10."

[34] The item then goes on apparently to refer to extracts from the recordings by setting out what was allegedly said in quotation marks.

[35] The November 2015 article begins by referring to another individual not connected to this case and to a conversation of his having been covertly recorded in his accommodation within HMP Maghaberry.

[36] In a reference to the defendants in this trial the article goes on to state:

> "*In a mirror case, all three alleged New IRA terrorists were also caught by covert surveillance and recordings. Last year the Sunday World exclusively revealed the full extent of the undercover intelligence operation against renegade Republicans which resulted in the arrest of Duffy, Fitzsimons and McCrory who deny all terrorist charges against them.*
>
> *Highly sensitive security documents seen by the Sunday World proved the trio of alleged terrorists were bugged.*
>
> ***Park***
>
> *One conversation involving the trio of accused Republicans was recorded by police in a park area close to Duffy's Lurgan home. That conversation led to a 15 page disclosure document that was obtained by the Sunday World and produced during interviews by the police.*
>
> *They discuss concerns that the dissident terror campaign is in crisis suffering a chronic shortage of weapons and Semtex.*
>
> *They also expressed scathing views on collective leadership members Brian Arthurs and Frankie Quinn – two of the four man ruling body of the New IRA and their dismay of trying to run a terrorist campaign with a pathetic arsenal of six rifles and 12 ozs of Semtex …"*

[37] In relation to the first argument the defendant points to matters which are referred to in the articles which are not included in the transcripts of the tapes relied upon by the prosecution. Alleged examples include the following references in the February article:

- "(McCrory) is heard to be highly critical of those who carried out a gun attack on the PSNI in Ardoyne last December. He accuses those involved of panicking and throwing away two AK weapons, claiming the job was a waste of time.

- "I pulled the f**king operation five times I just knew it wasn't worth it".

- "Now I have to go to the south at the weekend and try and get another two rifles into Belfast. Seven we have lost, you can count on two hands what we've fucking left."

- "He (McCrory) also names a man from the bone area of north Belfast who had control over the two AKs prior to the attack, one of the rifles had been tampered with rendering it useless during the botched attacked."

- And most shockingly, apart from the identification of a handful of 'operatives' is their admission that the New IRA has a 'shelf life' and 'sell by date' that they are going nowhere and soon to be finished.

- "You can count on one hand what we have available to us".

[38] In relation to the November article the applicant refers to the following example:

- They also express scathing views on collective leadership members Brian Arthurs and Frankie Quinn – two of the four man ruling body of the New IRA and their dismissal of trying to run a terrorist campaign with a pathetic arsenal of six rifles and 12 ozs of Semtex.

[39] As to the 15 page disclosure document, it is pointed out that the actual document (which is presumed to relate to Exhibit DL1 which is the transcript of the alleged conversation) is in fact 14 pages in length and not 15. It is suggested again that this gives rise to a concern about whether the Sunday World reporter has been briefed with a different transcript from what is alleged to have been transcribed and recorded in the 14 page DL 1 document upon which the prosecution rely.

[40] In relation to the second argument the applicant focuses on the reference in the February article to the descriptions of McCrory being clearly audible with Duffy's voice "heavily distorted". In none of the collected statements of all the experts instructed by the prosecution in this case is there any reference or comment to Duffy's voice being "distorted". This gives rise to a concern that the original recordings may have been materially manipulated, altered or enhanced.

[41] In relation specifically to the expert evidence the applicant focuses on the references in the February article as to how speaker recognition technology works. In particular, reference is made to the specific assertion that in the case of Colin Duffy

and Henry Fitzsimons the speech recognition identified to them falls in the scale of 1 to 10 as 3 with 1 being unrecognisable and 10 being clearly associated to the individual. In the case of this applicant his speech recognition, according to the article, was classified as being "8 out of 10".

[42] It is pointed out in this regard that the expert reports do not make reference to the comments in the two paragraphs concerning voice printing and speaker recognition technology. In relation to the strength of the attributions the initial report from French and Associates of 6 May 2014 categorised the comparisons in terms of "consistency". The report also provided conclusions on "distinctiveness" which did involve a scale of 1 to 5 with 1 being not distinctive, 2 being moderately distinctive, 3 being distinctive, 4 highly distinctive and 5 exceptionally distinctive.

[43] Applying this 5 point scale the experts assessed Duffy as being on point 2, Fitzsimons being on point 2 and McCrory being on point 4. Even if this scale was extrapolated to a 10 point scale the values of McCrory might have a score of 8 out of 10 but Fitzsimmons and Duffy would have a score of 4 out of 10 which results in a different category than 3 out of 10 which was the score reported in the article. The concern for the defendant is that there is in existence a separate expert report or other assessment which has not been disclosed to the defendant and which expresses less confidence about the nature of the attributions to Duffy and Fitzsimons than that of French and Associates in their 6 May 2014 report.

[44] French and Associates provided a further report dated 1 June 2015 in relation to 6 December 2013 recordings which expresses their conclusions in different terms by reference to various degrees of support for the proposition that the defendants are the persons identified in the recordings. There is no reference to any scale of 1 to 10.

[45] The question of whether some other forensic expert has had involvement in the case was raised with the prosecution in the course of the disclosure process. It was disclosed by the prosecution that another voice analysis expert Mr Allen Hirson was approached. All communication between the PSNI and Mr Hirson has now been disclosed. It is apparent from the disclosure that he provided a "micro report" but that no reference is made to any 10 point or other scale of attribution.

[46] In relation to the third argument the defence say that the fact that highly sensitive security documents and exhibits were allegedly disclosed to the Sunday World raises a serious concern about persons involved in the prosecution of this case. Mr McDonald points to the judgment of Mr Justice Stephens in the civil matter where he indicated that if this material has been provided by a security source this may amount to a criminal offence and that such conduct would certainly be unlawful. If PSNI officers or MI5 officers have been involved in discreditable conduct then this has implications for the entire integrity of the prosecution particularly when the defence say there are concerns over the possible editing of materials in this case. It is argued that there have been opportunities for the

manipulation or alternation of the evidence whilst these tapes were in the possession of the PSNI or security services.

[47] Reference is also made to a query, without the knowledge of the Chief Constable, in relation to legal aid payments made to lawyers in this case, the enquiry being sent from an e-mail address. Against that background the defendant argues that he should be made aware of the identity of the person who engaged in the discreditable conduct referred to by Stephens J. Having identified that person it is then necessary in the interests of justice to consider the role of that person or person in this investigation or prosecution, particularly if that person was involved in the on-going disclosure process.

The directed persons' response

[48] It is accepted that the author of these articles is indeed Ms Paula Mackin who is employed as a journalist by the Sunday World newspaper. The court had access to an affidavit she swore in relation to this matter in the civil proceedings dated 12 May 2016.

[49] In relation to this application, pursuant to the direction of the court, she swore an affidavit on 10 August 2018 in response to the defendant's notice.

[50] At an oral hearing on 14 November 2018 I granted leave to counsel for the defendant to cross-examine Ms Mackin (refusing an application by Mr Harvey to postpone consideration of leave). Ms Mackin did in fact give evidence and was cross-examined.

[51] In her affidavit of 10 August 2018, which was amplified in her oral evidence, she explained that in her role as a journalist she has been involved in an on-going investigation into the activities of dissident Republican organisations since 2012. As a result she has written a number of articles concerning such organisations that have been published in the Sunday World in addition to the articles that are the subject matter of this application.

[52] In the course of this investigation she has developed a working knowledge of the structure of such organisations, of the personalities involved in such organisations and of the attempts to investigate and prosecute such personalities. This knowledge has been gained as a result of inter alia:

(1) Contacts with sources who are willing to provide information that is relevant to the investigation.

(2) Consideration of court hearings.

(3) Research from sources such as internet publication and other news reports.

All sources who have provided information to her have done so strictly on conditions of anonymity and confidentiality and have not been paid to provide information.

[53] Dealing specifically with the February article she avers that she was contacted by a confidential source who claimed to be in possession of information that was relevant to her investigation into dissident Republican organisations.

[54] She arranged to meet the source at a "safe place".

[55] In order to limit the risk of inadvertently disclosing the identity of the source she attended the meeting without a mobile phone, writing materials, dictaphone or any other recording device. She indicated that in her experience this is a requirement made by sources providing information relevant to such sensitive investigations.

[56] She claims that at the meeting she was shown a copy of a document which the source claimed was a disclosure document which had been shown to the defendants when they were interviewed by the police. In the course of the meeting she was permitted to read the document but she did not take it away with her, copy it, or take notes on its contents.

[57] In the course of the meeting the source told her the level of certainty with which the source believed the police or prosecution authorities had identified each voice on the recordings transcribed on the disclosure document. She said that the source used a scale of 1 to 10 for this purpose but did not indicate that this was the scale adopted by the police or prosecuting authorities or provide or refer to any documents containing any analysis of the recordings transcribed on the disclosure document. The only document that was shown to her at the meeting or to which the source referred was the disclosure document.

[58] She confirmed that she was not played any recordings of conversations transcribed in the disclosure document at the meeting.

[59] In terms of the composition of the February article she did not make any notes after the meeting, again to limit the risk of inadvertently disclosing the identity of the source. Instead she composed the article relying on her memory of the contents of the disclosure document derived from her opportunity to read it at the meeting, her background knowledge relating to dissident organisations and the persons involved in those organisations derived from the investigation and from research from open sources about the nature of "voice printing".

[60] In relation to the November article, when she referred to the "*15 page disclosure document*" she was referring back to the disclosure document shown to her at the meeting with the source prior to the publication of the February article.

[61] In terms of further contents of the articles she indicates that when she said in the February article that the paper had "*exclusive access to extracts from more than 100 hours of bugged dissident meetings*" she was referring to the disclosure document that she was shown at the meeting.

[62] She was aware from previous investigations that there was a large quantity of surveillance material generated relating to a wide range of dissident activity in respect of which she had reported in an earlier article. She indicates that she understood by inference that the recordings transcribed on the disclosure document were merely part of that wider body of material. She did not have access to any part of the wider body of material and the only material disclosed to her was the disclosure document which she describes.

[63] She points out that neither of the articles suggest that the 100 hours of bugged material relates solely to these defendants and indeed points out that the thrust of both articles is that the material relates to a wide range of individuals who may be described as dissidents.

[64] When she said in the extract from the February article that the Sunday World has "*obtained copies of the recordings*" she explained that she meant that the Sunday World had obtained the access provided at the meeting described already. She said that his was to emphasise the assertion that the Sunday World had "*exclusive access*" to the extracts in question. When pressed about this in cross-examination she was adamant that all she had done was read the document which was provided to her at the relevant meeting. She said it was not her intention to mislead her readers and in her opinion she had "*obtained*" copies in the sense that she had read the document which was disclosed to her. It was simply the "*way she wrote it*". When further pressed she accepted she could see how people might have been misled and she apologised for that. It was further pointed out that anyone reading the article would have been left with the impression that she had actually listened to the tapes in question. Again she was forced to concede that that might be the impression created but that it was not her intention and remained adamant about the extent of what had been disclosed to her.

[65] It was pointed out to her that the articles, particularly the February article, were replete with the use of quotation marks suggesting that this was actually what those quoted had said. In response she said she was not purporting to provide a precise transcription of the contents of the recordings but was simply doing her best to recollect and communicate the "gist" of the contents of the disclosure document in the absence of the document or any notes about the contents of the documents. She did this some time after she had been provided with the opportunity to read the disclosure document and accepted that her quotes may not be wholly accurate. She was simply doing her best to recollect and communicate what was said to her readers.

[66] In relation to some specific matters that were put to her, in particular her reference to "*a man from the bone area of north Belfast*", in the February article she said that she was combining her recollection of the contents of the disclosure document shown to her with her knowledge about dissident organisations and the persons involved in those organisations derived from her on-going investigations. Similarly in the November article when she refers to "the collective leadership" and to "Brian Arthurs and Frankie Quinn" she felt that this was a combination of her recollection of the contents of the disclosure document shown to her at the meeting described above combined with her knowledge of dissident organisations and the persons involved in those organisations derived from her on-going investigations.

[67] Ms Mackin, when re-examined by Mr Harvey, emphasised that the November 2015 article was primarily related to a Mr Carl Reilly. The front cover article referred to Brian Arthurs and Frankie Quinn. The article has to be seen in the context of her on-going articles prior to February 2015 relating to her investigation into dissident related activity and the New IRA. A theme of those articles related to disagreements between leadership figures within these organisations. She was aware of the existence of covert surveillance independent of the surveillance giving rise to this trial and her articles relied on a wide body of material. It was her understanding that the recordings transcribed in the disclosure document were part of that wider body of material. She did not convey in either the February or the November article that all covert material related to the defendants. To the contrary the material related to a wide range of individuals who may be classed as "dissidents".

[68] In general terms, focusing on this application, she simply said that there was nothing for her to disclose. She did not have any documents or notes relating to the matter for the reasons set out in her affidavit and evidence.

[69] Specifically she does not have a copy or notes relating to the disclosure document shown to her at the meeting other than the contents of the article themselves. She affirms that she never had possession of, or access to, copies of any recording.

[70] In terms of disclosure of sources she reiterated that she was not prepared to disclose these and she referred to the contents of the affidavits she swore in the civil proceedings. She relies on the public interest in protecting journalist sources, paragraph 7 of the National Union Journalist Code of Conduct which provides that a journalist "*protects of the identity sources who supplies information in confidence and material gathered in the course of her/his work*" and section 10 of the Contempt of Court Act 1981 ("section 10").

[71] She also raises the issue of the engagement of the Article 2 rights of her source/sources given the on-going threat from what she describes as "dissident republicans". In this respect she says in paragraph 19 of her affidavit of 12 May 2016:

> *"It is also clear that a threat from 'dissident Republicans' in general has not diminished since the last substantive report of the International Monitoring Commission in 2010. The report concluded at paragraph 2.3 that various dissident groups do continue to pose a threat against members of the security forces and against members of their own communities whom they suspected of anti-social behaviour. The recent murder of a prison officer in east Belfast prompted the Secretary of State for Northern Ireland to remark that the attack showed 'how lethal the terrorist threat continues to be.'*
>
> *At the date of swearing of this affidavit, MI5 assessed the threat of Northern Ireland related terrorism in Northern Ireland as 'severe' meaning that an attack is 'highly likely'. In 2013 and again in September 2014, I received a police message warning that my personal security was under threat from 'dissident Republicans' on both occasions the warnings followed a series of articles about the activities of dissident groups. I believe that the foregoing should lead this court to the conclusion at this interlocutory stage that the risk to the lives of anyone identified as a source of the information in the articles or the materials referred to in the articles as present and continuing."*

Determination of the application

[72] Mr Harvey raised a preliminary point on behalf of the directed persons in terms of the timing of this application. Under the provisions of section 51A(2)(4) of the 1978 Act:

> *"Where a person has been committed for trial for any offence to which the proceedings concerned relate, an application must be made as soon as is reasonably practical after the committal."*

[73] Under 51A(2)(3):

> *"A witness summons may only be issued under this section on an application; and the Crown Court may refuse to issue the summons if any requirement relating to the application is not fulfilled."*

[74] The defendant was returned for trial in March 2016 after a public committal. The civil proceedings to which I have referred were commenced in November 2015

in respect of the same articles seeking in effect the same relief. Despite this, this application was not issued until 2 March 2018.

[75] Mr Harvey argues that on no account could the applicant be said to have complied with the requirement of the statute and the court should therefore refuse to issue the summons.

[76] The affidavit supporting the application does not put forward any reason for the obvious delay in the application.

[77] Notwithstanding this issue I have concluded that the court should assess this matter on the merits. The issues at stake, namely the right of the defendant to a fair trial and the protection of the rights of the directed persons to freedom of expression and protection of sources, point against this matter being decided on the issue of delay.

[78] In any event I considered it appropriate not to make a final ruling on this matter until the disclosure process between the defendants and the prosecution was completed and until I had ruled on some contentious section 8 applications.

[79] That process has brought some clarity or focus to the prosecution case in relation to the provenance of the covert surveillance. The on-going obligation of the prosecution to provide material in its possession is the primary and best means for disclosure of the type of material sought in this application.

[80] I turn now to the merits of the application. An initial factual issue is whether or not the directed persons have any material to actually disclose. Ms Mackin has been quite clear about that in her sworn affidavit evidence and in her oral evidence. Mr McDonald contends that her evidence is simply not convincing.

[81] Having heard Ms Mackin give her evidence I am satisfied that she has been truthful. I agree with Mr Harvey's submission that there has been a degree of overstatement in the way the article was written. Ms Mackin was forced to concede that a reader might well have got the impression that she had greater access to the material she was shown than was actually the case. However, I am persuaded on the basis of her evidence that there are no relevant documents, notes or records that she or any other directed person can disclose. I consider it entirely credible that a source wishing to disclose the material referred to in the article would insist on doing so in the manner described by Ms Mackin. Accordingly, I decline to issue a summons compelling the directed persons to disclose the various documents, notes and records set out in the notice of application. Equally I accept that none of the directed persons have recordings or copies of recordings and I decline to issue a summons compelling disclosure of such material.

[82] That leaves the issue as to whether I should issue a summons compelling the directed persons, in effect Ms Mackin, to identify the name of the "*security source*"

referred to in the February article and insofar as more than one source or sources of information may have provided information to the newspaper in connection with the February and November articles the names of all such sources.

[83] The starting point is the statutory test. Section 51A provides that:

> *"(1) This section applies when the Crown Court is satisfied that –*
>
> *(a) A person is likely to be able to give evidence likely to be material evidence or produce any document or thing likely to be material evidence, for the purpose of any criminal proceedings before the Crown Court, and*
>
> *(b) It is in the interests of justice to issue a summons under this section to secure the attendance of that person to give evidence or to produce the document or thing."*

[84] The court therefore has to be satisfied firstly that the identity of the source or sources is "*likely*" to constitute "*material evidence*" and that it would be "*in the interests of justice*" to compel the directed person to disclose their identity.

[85] The directed persons say that any consideration of the interests of justice must also require consideration of what is described as the strong presumptive right protected by law to maintain the confidentiality of their sources.

[86] That such a legal right exists is beyond dispute. Section 10 provides:

> **"***No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."*

[87] The court notes again the "*interests of justice*" test and the requirement that disclosure "*is necessary*".

[88] In addition to the statutory provision of section 10 it is also clear that the directed person's rights under Article 10 ECHR are engaged as is recognised by the ECtHR in the seminal case of **Goodwin v The United Kingdom** [1996] 22 EHRR 123. In an oft quoted passage the court said at paragraphs [39]-[40]:

> *"… The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest. These considerations are to be taken into account in applying to the facts of the present case the test of necessity in a democratic society under Article 10(2).*
>
> *[40] As a matter of general principle, the 'necessity' for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess whether there is a 'pressing social need' for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In the present context, however, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under Article 10(2), whether the restriction was proportionate to the legitimate aim pursued. In sum, limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court."*

[89] The court notes the reference in the judgment to the fact that disclosure of a journalistic source can only be justified by an "*overriding requirement in the public interest*" and that "*limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the court*".

[90] This presumptive right of course is now part of our domestic law pursuant to the enactment of the Human Rights Act 1998.

[91] It is now recognised that section 10 has to be read and applied consistently with the **Goodwin** principles. In **Ashworth Hospital Authority v MGN Limited** [2002] 1 WLR 2033 Lord Woolf stated:

> *"… Whatever was the objective of those promoting section 10, there can be no doubt that both section 10 and Article 10 have a common purpose in seeking to enhance the freedom of the press by protecting journalistic sources. The approach of the European Court of Human Rights as to the role of Article 10 in achieving this was clearly set out by the court in* ***Goodwin v United Kingdom*** *[1966] 22 EHRR 123, 143, para [39] … The same approach can be applied equally to section 10 now that Article 10 is part of our domestic law."*

[92] Having set out the relevant statutory test for disclosure and the right asserted by the directed persons in this case it is of course essential to analyse the specific case being considered by the court. The courts are well accustomed to the potential clash between these rights and what is required is a very careful scrutiny of the circumstances of the particular application. Of necessity, the exercise must be case specific.

[93] Is the identity of the source likely to be "material evidence" in these criminal proceedings? In terms of the definition of "material evidence" I apply the test as set out in **R v O'N** [2001] NI 136 and in particular as developed by Weatherup J in the case of **R v Hoey** [2006] NICC 38. Having reviewed the authorities Weatherup J concluded at paragraph [24] of the judgment in **Hoey**:

> *"First, the same test applies to prosecution disclosure and third party disclosure. The test is that the documents are likely to be material evidence, that is, that they may assist the defence or undermine the prosecution. Assisting the defence extends to the framework that Girvan J used in* ***R v O'N****, that is, relevant evidence in the sense of relevant material of potential use to the defendant in the defence of the charge. Assisting the defence also extends to the framework used by Hooper LJ in* ***R v Mackin*** *where he stated that the obligation is to disclose documents that assist the defence by allowing the defendant to put forward a tenable case in the best possible light or if the material could assist the defence to make further enquiries and those enquiries might assist in showing the defence's innocence or avoiding miscarriage of justice."*

[94] As I have already indicated the defendant did not reply in the course of police interviews when the contents of the recordings were put to him. He did not deny

that he was one of the persons involved in the conversation. In his defence statement he does not rely on any specific defence such as alibi.

[95] The defendant in his defence statement denies that any meeting took place between three men. If any such meeting took place he denies he took part in it. He further disputes the contention of the prosecution that he is one of the speakers on the audio recordings.

[96] The defence statement essentially challenges the provenance, continuity, originality, accuracy and reliability of the audio material relied upon by the prosecution.

[97] The defendant has sought to investigate this issue through the disclosure process to which I have referred. This application is essentially another limb of that investigation.

[98] In the context of this case in summary the defendant is saying that if his lawyers are aware of the identity of the source or sources relied upon by the Sunday World this would enable them to make further enquiries in relation to whether alternative versions of the transcript relied on by the prosecution in this trial exist and also whether a further expert report or assessment exists in relation to the reported strength of the voice recognition of the various defendants. Further, it has the potential to support a complaint about prosecutorial misconduct in the case.

[99] In relation to the former suggestion it is important to actually analyse what is being said to support the suggestion about the existence of an alternative version, the existence of which might assist the defendant. In relation to the "discrepancies" or "differences" between the transcript in the disclosure document and the matters referred to in the article it seems to me that there are no significant or substantial differences which point to an alternative version. The substance of the article does not in my view depart in any significant way from the actual contents of the disclosure document. In terms of the differences identified which are set out in paragraph [37] above there are very similar allegations set out in the transcript served by the prosecution. Any differences are explicable by the circumstances in which this article was written. Ms Mackin was relying on her memory and did not have the document in front of her when she composed the articles. The two main differences identified relate to a reference to a man from the "bone area" in the February article (see paragraph [37] above) and references to Brian Arthurs and Frankie Quinn in the November article (see paragraph [38] above). In relation to the first similar comments are made in relation to a man identified as "Sean". As to the second this was explained by Ms Mackin in her evidence as set out in paragraph [67] above. In particular the references have to be seen in the context of her ongoing articles prior to February 2015 and her focus on disagreements between leadership figures within "dissident" organisations. It is clear that the articles were not based solely on the information provided by the source or sources dealing with this trial. I take the view that these articles are written in such a way as to maximise the

embarrassment to the defendant, his co-accused and all those alleged to be involved in what are described as "dissident republican" activities or organisations. Their content is full of overstatement and the use of dramatic language such as "*blows open*"; "*the deadly dossier*"; "*frantic plans*"; "*the white flag of surrender*". The emphasis is on the "exclusive" nature of the article which has resulted in references to the paper having "obtained copies of the recordings" and various "revelations" as to what can be heard on the recordings. Equally the repeated use of quotation marks emphasises the alleged extent of the papers "exclusive access". There is no room for nuance or gisting.

[100] In relation to the existence of an additional expert report or assessment Ms Mackin was clear that the information concerning the scale of 1 to 10 in terms of voice attribution came from estimates given to her at the meeting. The source did not indicate that this was a scale adopted by the police or prosecuting authorities or provide or refer to any documents containing any analysis of the recordings transcribed on the disclosure document.

[101] She further explained that the reference to how voice recognition worked was not provided by the source but from her own research into the science involved.

[102] It is right to say that the defendants in this trial challenge the authenticity of the tapes upon which the prosecution rely. This has been the subject matter of a lengthy and detailed disclosure application between the defendant and the prosecution.

[103] As a result of that exercise, as the court has already ruled in a separate application, the defendant should have access to the best available version in terms of authenticity of the covert recordings, namely the original USB stick onto which the original recordings were downloaded and a "bit for bit copy" of that stick, namely discs described as AP20. This ruling should be considered in the context of the court's ruling in the section 8 application. I do not propose to rehearse or repeat the contents of that ruling but I refer to some relevant passages on this issue:

> "*The evidence originally relied upon by the prosecution was to the effect that the recordings were downloaded from the original devices onto a fresh (that is brand new) SD card and three USB sticks. The recordings were then cleared from the original devices for further deployment.*
>
> *One of the USB sticks was then processed through what is referred to as the Marshbrook System which ultimately produced the evidential discs DL1-15. This process was demonstrated by a number of flow charts setting out the route from capture to evidential disc.*

(I would add that from that flowchart it appears that there were different downloads being produced simultaneously)

… After I heard the evidence on this issue the court was informed by the prosecution that the original account as to the production route for discs DL1-15 was erroneous and the tapes had not been created through the Marshbrook System as suggested. …

This development resulted in further delay in the consideration of the disclosure issue. The experts had to revise their reports and further additional evidence dealing with the audit trail for the tapes was required.

The court has considerable reservations as to whether a properly corroborated explanation has been provided but the prosecution has sought to deal with the problem by reverting to the original USB stick 2083-1 which was the original and first downloading from the recording device.

A 'bit for bit' copy of that download has been produced and served as additional evidence – AP20.

The timings of the recordings are retained in the file names in AP20.

The prosecution experts have analysed AP20 and have confirmed their initial opinion re voice attribution of each of the defendants. …

In addition to the service of AP20 the prosecution has offered access to the original USB stick 2083-1 to the defence experts.

In my view issues as to inspection of the Marshbrook System and the provenance of DL1-15 have been superseded by this development.

The reality of the situation is that the defendant has been provided with a 'bit for bit' copy of the best available version of the recording (the original download from the recording device).

… I also pay weight to the assurances the court has received from senior prosecuting counsel. Specifically, Mr Murphy assures the court, based on enquiries made directly

by counsel, that the recordings relied upon have been properly preserved and that they have not been tampered with, altered or damaged. In general terms he has assured the court of his active attention to the prosecution's ongoing obligation in respect of disclosure."

This disclosure has been available to the defendants for a considerable period of time. The defendants have engaged a number of forensic voice experts and the court is unaware of any assessment carried out by those experts as to their analysis of that recording and whether any specific challenges are being made to the expert view relied upon by the prosecution.

[104] Therefore in light of the evidence I have heard, in the context of the issues in the criminal trial and the disclosure already provided I am not satisfied that the defendant has met the statutory test for disclosure of the source or sources who provided information to the directed persons based on alleged discrepancies between the contents of the articles and the transcripts/tapes served by the prosecution.

[105] As to the existence of an additional expert report or assessment or alternative transcript other than those already disclosed (one of which is not relied upon by the prosecution) it seems to me that this is a matter which falls to be disclosed by the prosecution if it exists. This is the proper means by which the material sought should be disclosed.

[106] In the course of this hearing I have specifically asked Crown counsel to review disclosure in this case. Senior Crown counsel has asserted that he has received the full co-operation of the PSNI and security services in the course of the disclosure exercise and I am satisfied that if a further expert report or assessment or alternative transcript exist that they would be disclosed under the CPIA.

[107] In any event I am not persuaded that the article meets the threshold in establishing that it is likely that such material does exist.

[108] As to the issue of prosecutorial misconduct again I am not satisfied that the threshold has been met. Essentially the submission is premised on the basis that someone involved in this prosecution in either the PSNI or security services has the potential to alter or may have altered the covert surveillance upon which the prosecution rely. Whilst in my view there is no such evidence of this the matter has been cured and superseded by the developments in relation to the production of disc AP20 which is the key material in terms of the covert audio recordings.

[109] Accordingly it is not necessary to conduct a balancing exercise between the undoubted rights of the defendants to a fair trial and the rights of the directed persons to protect confidential sources.

[110] For completeness I note that the directed persons have raised the potential Article 2 rights of both Ms Mackin and her source. Whilst I can foresee circumstances in which this could involve a balancing exercise there was insufficient evidence before me at this stage to establish the extent to which any Article 2 rights had been engaged and I make no ruling on that particular argument.

[111] Accordingly the application is refused.