Neutral Citation Number: [2019] EWHC 767 (Admin)

Case No: CO/4002/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2019

Before :

LORD JUSTICE COULSON

MR JUSTICE EDIS

- -

Between :

THE QUEEN on the application of THE DIRECTOR OF PUBLIC PROSECUTIONS	**Claimant**
- and -	
THE CROWN COURT AT CAERNARFON	**Defendant**
-and-	
NICHOLAS PATRICK DAVIES	**Interested Party**

- -
- -

Simon Heptonstall (instructed by **CPS Appeals and Review Unit**) for the **Claimant**
The **Defendant** did not appear and was not represented
Mark Ford (instructed by **Brian Koffman & Co**) for the **Interested Party**

Hearing dates: 27th March 2019

- -

Approved Judgment

Mr Justice Edis:

Introduction

1. This claim for judicial review challenges a decision made by His Honour Judge Huw Rees sitting at the Caernarfon Crown Court on 3rd October 2018. On that date, the judge determined an application for disclosure under s.8 of the Criminal Procedure and Investigations Act 1996 (**CPIA**) made in the context of an appeal against a conviction for a speeding offence contrary to s.89(1) of the Road Traffic Regulation Act 1984. The Interested Party (Mr Davies) had been convicted of driving at 38mph on a 30mph zone of the A546 at Deganwy. The trial had taken place on 18th July 2018, and had been preceded by a disclosure application similar to that which HHJ Rees allowed during the appeal proceedings, which had been rejected by the District Judge (Crime) who dealt with it.

Facts

2. The evidence on which the prosecution relied came from a speed enforcement session on the 31st August 2017 when designated civilian officers observed a stretch of the road and used an approved measurement device, an LTi 20.20 Ultralyte 1000, with a Ranger system to make a video record of the use of the device and its results. It appears that two different people were able to say they had observed Mr. Davies' car and formed the view that it was exceeding the speed limit. The device was then targeted on his car and produced the speed reading of 38mph. The justices having heard the evidence of one of them, a Mr. David Hoole, convicted Mr. Davies. They also heard evidence from Mr. Stephen Langdon, an expert called on behalf of the prosecution. He was called as an expert in the use and reliability of the Ultralyte device, and in response to the service of an expert report from Mr. William Campbell on behalf of the defence. In the event, Mr. Campbell was not called at the trial.

3. The application for disclosure decided by HHJ Rees was made in writing and sought, so far as relevant:-

> "A copy of the DVD of the full deployment of the device on the day in question including the start and finish of the site alignment checks and any documentary evidence relating thereto".

4. The speed enforcement session had taken some hours and involved observing and filming a number of vehicles, in addition to that of Mr. Davies. The whole of the video footage of the 12 seconds or so when his car was filmed had been disclosed, and was viewed by HHJ Rees during the hearing of the disclosure application. In addition, the report of Mr. Langdon contained stills from that section, and also two stills from a section about an hour before the appearance of Mr. Davies which he said contained "some evidence of a fixed distance check/0mph check, cross hair alignment and scope alignment". Apart from that, despite repeated requests from the solicitors for Mr. Davies communicated in various ways, the prosecution had refused to disclose any more of the recording. This is the dispute which HHJ Rees resolved in his ruling which is now the subject of this challenge.

The rules relating to evidence

5. It is necessary first to set out something about the statutory warrant for the admissibility of "speed gun" evidence, which is found in s.20 of the Road Traffic Offenders Act 1988. This provides, so far as relevant:-

> **20.— Speeding offences etc: admissibility of certain evidence.**
>
> (1) Evidence …… of a fact relevant to proceedings for an offence to which this section applies may be given by the production of—
>
> (a) a record produced by a prescribed device, and
>
> (b) (in the same or another document) a certificate as to the circumstances in which the record was produced signed by a constable or by a person authorised by or on behalf of the chief officer of police for the police area in which the offence is alleged to have been committed;
>
> but subject to the following provisions of this section.
>
> ……..
>
> (4) A record produced or measurement made by a prescribed device shall not be admissible as evidence of a fact relevant to proceedings for an offence to which this section applies unless—
>
> (a) the device is of a type approved by the Secretary of State, and
>
> (b) any conditions subject to which the approval was given are satisfied.
>
> (5) Any approval given by the Secretary of State for the purposes of this section may be given subject to conditions as to the purposes for which, and the manner and other circumstances in which, any device of the type concerned is to be used.
>
> (6) In proceedings for an offence to which this section applies, evidence—
>
> (a) of a measurement made by a device, or of the circumstances in which it was made, or

> (b) that a device was of a type approved for the purposes of this section, or that any conditions subject to which an approval was given were satisfied,
>
> may be given by the production of a document which is signed as mentioned in subsection (1) above and which, as the case may be, gives particulars of the measurement or of the circumstances in which it was made, or states that the device was of such a type or that, to the best of the knowledge and belief of the person making the statement, all such conditions were satisfied.
>
> (7) For the purposes of this section a document purporting to be a record of the kind mentioned in subsection (1) above, or to be a certificate or other document signed as mentioned in that subsection or in subsection (6) above, shall be deemed to be such a record, or to be so signed, unless the contrary is proved.

6. The Ranger device produced the record permitted by s.20(1)(a), and the certificate permitted by s.20(1)(b) was signed by Mr. Overton, one of the officers involved with Mr. Hoole in the speed enforcement session. The provision makes admissible the record and certificate to prove a "fact relevant to the proceedings". The Ultralyte device is a prescribed device of a type approved by the Secretary of State, and there is no evidence that any conditions subject to which approval was given were not satisfied.

The proceedings in the Crown Court

7. It was in this legal context that the application was determined by HHJ Rees. It was dealt with in written arguments which he read and by quite brief legal submissions from counsel who prosecuted, Mr. Rothwell. The judge did not call upon Mr. Ford to supplement his written submissions, which were dated 23rd September 2018 and which we have seen.

8. It is important to record that after Mr. Campbell's report was disclosed as expert evidence, an attack on his expertise was mounted by the prosecution and supported by material in the report of Mr. Langdon. He was not called as a witness before the magistrates when Mr. Davies was convicted. His report was, therefore, abandoned. The Defence Statement had asserted an intention to rely on the evidence of Mr. Campbell and was not updated. By the time the case arrived in the Crown Court the position so far as expert evidence for the defence was concerned had changed, but there had been no new report from any other expert served. This change of position is discernible in three places.

9. First, Karen Dixon, District Crown Prosecutor with oversight of this case for the prosecution says this in her statement prepared for these proceedings:-

> "At a mention hearing in the Crown Court at Caernarfon on 17 September, Mr. Davies' representatives again sought service of the full footage: it was said that he had instructed an expert, a Mr. Watkinson, who asserted that he could not provide a

> definitive opinion until he had seen the footage in its entirety. Directions were given for the parties to file skeleton arguments and the issue to be determined by the judge who was expected to hear the full appeal."

10. Secondly, in Mr. Ford's written submissions in support of the application dated 23rd September 2019, he says

> "5. The defence sought disclosure of the video evidence in its entirety in accordance with the advice of an expert witness. The purpose was not merely to place the defence on an equal footing with the prosecution, but because consideration of the complete exhibit was necessary in order to reach a properly informed view of the reliability and accuracy of the opinion advanced by the prosecution.
>
> "7. The request for full disclosure of the recording of the incident arises because an expert witness upon whom the defence may rely cannot reach a concluded view without it. Operator error remains an area that the defence wish to consider, not least because it emerged in the trial in the lower court that the person claiming to have operated the device, Mr. Hoole, was not qualified to do so. Although he asserted that he was supervised by Mr. Overton (in respect of whom the hearsay application was made and then withdrawn) that contention is contradicted by Mr. Overton's witness statement."

11. Finally, in the Response to this claim served on behalf of Mr. Davies, it is said, at paragraph 19(ii) that

> "The application was put forward on the basis that a potential defence expert could not reach a concluded view without seeing the footage in its entirety."

12. Taking these three sources together, it appears that a decision had been taken not to rely on Mr. Campbell in support of the appeal, but to consider calling a Mr. Watkinson instead. He was therefore a "potential defence expert" only. The Defence Statement had said unequivocally

> "The defence rely upon the report of Mr. William Campbell and his interpretation of the device as set out in his report."

13. Nothing of that kind was ever said about Mr. Watkinson, and, importantly, no report from Mr. Watkinson was ever served.

14. In order to explain the terms of the judgment on the application, it is necessary also to record that Mr. Ford's submissions had said, in addition to seeking disclosure of the material under s.8 of the CPIA 1996 as unused material:

> "It is arguable that the material sought is disclosable as primary evidence, since it represents the whole exhibit from which the prosecution has selected a part."

15. The Judge when deciding the application, saw the footage of Mr. Davies' car twice, and then read a skeleton argument supplied by Mr. Rothwell for the prosecution. That had not reached him although it had apparently been emailed to the listing office on the day before the hearing. There was then this exchange between the judge and Mr. Rothwell:-

> "HHJ Rees:…..Now I have on the one hand the Appellant submitting that he's gone to an expert and the expert wants to consider the complete exhibit. Now how much more would the expert receive if I was to order disclosure here?
>
> Mr. Rothwell: As I understand it about, anywhere between an hour and three hours' worth of footage of other vehicles, the same thing Your Honour's seen but with other vehicles.
>
> HHJ Rees: Right. Now you, you make the fair point about various procedural aspects which have to be complied with and the Prosecution don't want to be criticised about this but isn't this part of the same exhibit that the expert needs to see? I have an application here for an expert wants to see the whole thing to form his opinion.
>
> Mr. Rothwell: Yes.
>
> HHJ Rees: It's not the end of the world, is it?"

16. After a discussion about the significance of the fact that the prosecution expert had formed an opinion without apparently viewing the whole of the footage, the judge said that he did not need to trouble Mr. Ford. He then gave the following ruling:-

> "I think it is relevant. It may well be relevant as primary evidence as the application makes. I'm impressed by the application made by the Appellant, and that's not to decry your response, which is very valiant Mr. Rothwell, but it seems to me that if the expert requires it to come to his decided opinion about this piece of evidence he should have it, and it should be disclosed. It'll be disclosed please by 12 October which is a week Friday."

17. There is nothing wrong with very brief rulings in applications of this kind, but they must make clear what the ruling is, and the basis on which it was made. I interpret this ruling as follows:-

    i) The judge did not base himself on a finding that the undisclosed footage of other cars was "primary evidence". Footage recording the use of a prescribed device is admissible as a record of the measurement taken by the device of Mr. Davies' speed under s.20(1)(a) of the 1988 Act, see [5] above. It is hard to see

how records of other people driving could be primary evidence in the case of Mr. Davies, at least until some expert evidence is adduced to show that they may bear on the accuracy of the footage and speed reading relevant to Mr. Davies' case. The judge was therefore right not to make a ruling on this basis.

ii) The judge ruled that the unused footage was disclosable because he believed that an expert (he did not say who) had said that he needed it to form an opinion on "this piece of evidence". He did not say why that brief observation resulted in a decision that the disclosure test in s.3 and 7A of CPIA was met.

The Challenge

18. Mr. Heptonstall, appearing for the Director of Public Prosecutions in these judicial review proceedings, submits that this was a decision which was not properly open to the judge. He accepts that, as an interlocutory decision in proceedings which, though appellate, amount to a new trial it is reviewable only in the circumstances explained by the Divisional Court in *R (oao DPP) v. Manchester and Salford Magistrates' Court* [2017] EWHC 3719 (Admin) at [14], where Sir Brian Leveson P said:-

> "In the circumstances, it is appropriate to restate the approach in this way. First, it is difficult to visualise circumstances in which it would be appropriate to adjourn a trial simply for the purpose of challenging an interlocutory ruling made during the course of that trial. Such a challenge should be pursued at its conclusion. Second, a challenge to an interlocutory order or decision should not lightly be made but may, exceptionally, be justified where the challenge raises issues likely to have general or wider application and is not dependent on the ultimate result and there is no other means by which the order or decision can be challenged."

19. As to the substance of the challenge, he submits that this case is indistinguishable from the *Manchester and Salford Magistrates' Court* decision. He invites the court to reject the attempts to distinguish that decision contained in paragraph18 of Mr. Davies' Response to these proceedings.

20. As to the two stills of the siting check referred to at [4] above which are included in the report of Mr. Langdon, Mr. Heptonstall says that a focussed application for that 10 seconds of footage would not have been resisted. He submits that this, however, was not the basis on which the application was made or dealt with by the judge. He accepts that if this request is made now, it will be complied with.

21. At an earlier stage in these proceedings, and in writing, it appeared that some procedural complaints might be advanced, but Mr. Heptonstall has accepted that in view of CrimPR Part 15.5(4) the court has a broad discretion as to the procedure it adopts when ruling on an application under s.8 of CPIA and he does not pursue his procedural complaints.

22. As to the primary evidence issue, Mr. Heptonstall submits that this was not the basis on which the decision was reached by the judge on what was, in any event, an application under s8 of CPIA for disclosure of unused material.

The Response

23. Mr. Mark Ford, appearing for Mr. Davies, relies on Crim PR 19.3(d) which he says requires production of the footage from which earlier stills of the siting check were taken by Mr. Langdon. He submits that this should have been disclosed as material on which the prosecution expert had relied. He invites the court to infer that this was the basis on which the judge ordered disclosure, in the absence of any indication in the ruling that this was so.

24. In relation to the *Manchester and Salford Magistrates' Court* decision, he adopts his paragraph 18 of his Response to this claim which says:-

> "It is accepted that the principles evinced in DPP v. Manchester and Salford Magistrates' Court are relevant to the instant case. However, it is submitted that the authority may be distinguished in a number of important respects
>
> a) In *DPP v. MSMC* the court was concerned with requests for material in prosecutions for driving with excess alcohol. The disclosure requests related to comprehensive documentation concerning the Lion Intoxilyzer device used in the breath testing procedure. The court considered a prosecution expert report from Dr Williams *de bene esse*. It explained that the Itoxilyzer carries out a calibration check before and after the subject provides his or her breath specimens to ensure each are accurately analysed for the alcohol content. If faulty, the device will not work at all. Thus, the evidential proof that the device was working properly was served as part of the prosecution case. In the present matter, the distance checks referred to in Mr .Langdon's report have not been served; that is one aspect of the evidence the defence expert would be invited to consider;
>
> b) The certificates and engineering logs sought by the defence in *DPP v. MSMC* were not in the possession of the prosecution, but were obtained by request from the manufacturer of the device, Lion Laboratories Limited. Therefore, none of it came into the prosecutor's possession in connection with the case against the accused. By contrast, the footage in the present case was generated for the purpose of prosecuting the defendant; all that the Crown has done is to select a part of it;
>
> c) The defence experts in *DPP v. MSMC* [named] whose reports were also considered by the court *de bene esse* simply ignored the printouts. The disclosure request was made to enable the defendant to examine the evidence that purports to establish his speed accurately."

25. In summary of that argument he says that the decision really decides that a vague hope that material helpful to the defence may emerge cannot justify an order for disclosure of material not in the possession of the prosecution. In this case, he says, the point is different because the material has always been in the possession of the prosecution.

Discussion and Decision

26. As to jurisdiction, I am entirely satisfied that this is an appropriate case in which to permit a challenge by judicial review to an interlocutory decision. The tests identified by Sir Brian Leveson in *Manchester and Salford Magistrates' Court* cited above at [19] are clearly met. The disclosure issue potentially affects a large number of similar cases and it is important that it should be resolved, whether ultimately the appeal against conviction by Mr. Davies succeeds or not.

27. As to the substance of the challenge, it seems to me that the issue raised is fully covered by authority and the Criminal Procedure Rules. It is unfortunate that the judge was not referred to either, by either side. It is, however, fair to point out that the judge was referred, by prosecuting counsel who then appeared, to the defence statement and the test for disclosure in the CPIA, which he appears to have been referring to by the phrase "various procedural aspects" in his exchange with Mr. Rothwell set out at [15] above. The matters to which he was then alluding did not feature explicitly in his decision.

28. It does not seem that the judge ever asked to see a report from the expert he referred to in his decision. I have set out the references to that expert in the skeleton submissions of Mr. Ford, and in the hearing of 17th September at [8]-[12] above. That appears to be the sole basis on which the judge concluded that he should order disclosure so that an expert could examine the footage recorded by the device of vehicles other than that of Mr. Davies. It is understandable that he may have wished to deal with this speeding case with a degree of despatch in what may have been a busy list, but it is unfortunate that he did not reflect with rigour (at least in his reasons for his decision) on the factual basis on which the application was made and the test for ordering disclosure of unused material. He did not decide that the material sought was "primary evidence" only that it may have been. The decision, therefore, is to be understood as a decision about unused material, which is disclosable only if it might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused. Even without the benefit of authority, it is questionable whether an opinion from an expert which has not been disclosed, and which is rejected by that of an expert whose opinion has been disclosed could be a basis for reasonably considering that the unused material was capable of satisfying the test. Once authority is considered, the position is very clear.

29. This is an issue which goes beyond the facts of the present case. If the unused footage should be disclosed in this case, on this basis, it should be disclosed in many, many other cases. This will cause delay and expense and will stretch the resources of the criminal justice system. If that result must follow from a proper application of the rules, so be it. It should not, however, be brought into being by a decision which does not properly apply the law. The rules represent a carefully balanced mechanism whereby the disclosure necessary in the interests of a fair trial is given, without imposing substantial and unnecessary burdens. The interests of justice require a fair trial in all cases, but this will generally be achieved by a proper application of

    i) S.3, 7A and 8 of CPIA;

    ii) CrimPR Part 15;

iii) The Attorney General's Guidelines on Disclosure;

iv) In cases such as the present, CrimPR Part 19, which deals with experts;

v) The law explained by the Divisional Court in the *Manchester and Salford Justices* case by Sir Brian Leveson P at [54]-[56]:-

> "54. First, those seeking and those making disclosure orders in excess alcohol cases must bear in mind the risks to which Lord Goff spoke, as set out above in *Cracknell v Willis*, above. These have been brought home recently by the decision of the Divisional Court in R *(Hassani) v West London Magistrates' Court* [2017] EWHC 1270 (Admin) and the appended extracts from the judgment of Senior District Judge Riddle in *CPS v Cipriani*. This means that there must be a proper evidential basis for concluding that the material sought is reasonably capable of undermining the prosecution or of assisting the defence, or that it represents a reasonable line of enquiry to pursue. We appreciate that DJ Hadfield did consider the extensive disclosure request because, plainly rightly, he declined to order disclosure of much of what was sought. We accept that he heard argument and asked some questions of Miss Dale. But we are satisfied that there is no evidential basis upon which the disclosure should have been ordered.
>
> 55. Second, it is not enough for one or more experts to say that the material is necessary to verify that the device was reliable in the language used in the reports of Dr Mundy and Miss Dale in support of the application for disclosure. Nor does the written application for s8 disclosure provide any evidential basis for it. It is not enough to say that the defence case is that the amount drunk would not put the defendant over the limit or anywhere near it, and therefore the machine must be unreliable. What the evidence needed to do, in order to provide a basis for such a disclosure order was to address two critical features.
>
> 56. The first requirement is the basis for contending how the device might produce a printout which, on its face, demonstrated that it was operating in proper fashion, but which could generate a very significantly false positive reading, where, on the defence case, the true reading would have been well below the prosecution limit. The second requirement is to identify how the material which was sought could assist to demonstrate how that might have happened. Those are the two issues which arise and which the expert evidence in support of disclosure should address. Unless that evidence is provided, the disclosure is irrelevant."

30. Crim PR part 19.3 provides

> "(3) A party who wants to introduce expert evidence otherwise than as admitted fact must—
>
> (a) serve a report by the expert which complies with rule 19.4 (Content of expert's report) on—
>
> (i) the court officer, and
>
> (ii) each other party;
>
> (b) serve the report as soon as practicable, and in any event with any application in support of which that party relies on that evidence;"

31. In the absence of a report served in support of the application for disclosure which established the matters identified in paragraph 56 of the *Manchester Justices* case it was not properly open to the judge to grant the order sought. Mr. Davies relied upon the opinion of an expert, apparently Mr. Watkinson, to show that he needs all of the footage in order to express an opinion on any of it. That opinion was essential to the disclosure application. In breach of CPR 19.3(3)(b) no report setting it out in proper terms so that it could be evaluated by the court was ever served. In these circumstances the disclosure application was entirely misconceived and the only proper course open to the judge was to reject it.

32. That is a sufficient basis on which to deal with this claim, but I deal briefly with some of the other issues which have been raised.

33. I do accept that there is a factual distinction between this case and the *Manchester and Salford Magistrates' Court* case in that here, the unused material was in the possession of the police and was therefore prosecution material, contrary to some suggestions made earlier in the proceedings. In the earlier case, the prosecution did not have it, but were able to call for it. This factual distinction does not affect the principles enunciated in that decision. In the absence of some evidential basis for concluding that the unused material might undermine the prosecution case or assist that of the defence, there is no proper basis for ordering disclosure in a case of this kind. That is the essence of the decision in the *Manchester and Salford Magistrates* case and that is indistinguishable in principle from this case.

34. I do not consider that Mr. Ford's first submission has merit. The judge did not make an order for the production of the material which had been examined by the prosecution expert under CrimPR Part 19.3(d). He ordered disclosure of it all, whether examined by Mr. Langdon or not, because of the assertion that an expert witness had said that he needed it in order to form an opinion. That conclusion was flawed by the fundamental error of relying on expert evidence without seeing it, as I have said.

35. For these reasons, this application for judicial review succeeds and the judge's order is quashed. We make no order in relation to the siting check footage because no specific application limited to that has ever been made, and it is accepted that, if the request is made, it will be complied with.

Lord Justice Coulson: I agree.