IN THE SOUTHWARK CROWN COURT

R

v

KENNETH KING

FURTHER RULING ON APPLICATION FOR A STAY

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1. This is a further application for a stay for abuse of process made on behalf of the defendant following the halting of the trial as a result of late and extensive failures in disclosure by the Crown.

2. It is submitted on behalf of the Defendant that the Court should now conclude that
   a. There cannot be a fair trial. The disclosure process has been shown to be systemically flawed to the extent that the Court cannot have confidence that it is operating fairly; and/or
   b. The history and nature of the disclosure failures in the case is such that it would be an affront to justice to permit the prosecution to proceed any further. Those failures include misleading the Court and elements of bad faith.

<u>The History and chronology</u>

3. The history of this case and the matters leading up to this application is partly set out in the Ruling on Stay for Abuse and on adding counts to the Indictment, dated 6 April 2018. The Background set out in that Ruling is of importance for this application as it is a record of what was known at the time, the assurances given to the Court, and the approach which was taken as a result. I

do not intend to set out what is already set out in paragraphs 1-20, and this Ruling should be read in the light of the previous Ruling.

4. As set out at paragraphs 16 and 19, at the time of that application the Defence were seeking disclosure of the Report by Merseyside Police on their review of Operation Arundel ("the Merseyside Report"). That was resisted by the Prosecution on the basis, as the Court was told, a review had taken place and that there was nothing in the Merseyside Report which required it to be disclosed applying the standard test for disclosure. Issues of disclosure in general were to be re-considered after service of the Defence Case Statement.

5. Consequently, in addition to the ruling on the Stay, the Ruling permitting the Prosecution to add to the Indictment counts which had been left on the file, the allegations by [redacted] [A] and [redacted] [B], was made expressly on the basis of the then disclosed material. As it has transpired, the information which was available in relation to [redacted] [A]was far from the full picture, for a number of material reasons.

6. On 10 April 2018 the Court was provided with the full papers – or at least all that had been found - by the Central Criminal Court. They had not been obtained by the Crown. Copies were provided to the Crown and then to the Defence.

7. There were further applications. Firstly, to exclude the hearsay statement of [redacted] [A] which, although falling within the ambit of s.116 as he was unable to be a witness through illness, had to be reviewed for reliability following Riat, as it was argued to be the sole and decisive evidence as to the Count. Despite the Crown resisting that application, no disclosure of the Merseyside report or comprehensive medical notes relating to [redacted] [A] was given at that stage.

8. Secondly on 4 May 2018 an application to stand out the trial was made on behalf of Mr King on the basis of late disclosure and the inability of the

Defendant to be ready in time. It was part of the application that a private investigator had to be instructed to carry out investigations into the allegations which were very old. No disclosure was given of the Merseyside report or medical notes at that stage, and it was submitted on behalf of the Crown that disclosure was complete and the Defendant was able to conduct his case, and challenge evidence on the basis of the disclosure given. The application was refused, although some additional time was given.

9. Thirdly, on 1 June 2018 there was a further application to exclude the hearsay elements of the statements of [redacted] [H] and [redacted] [C], on the basis that what [redacted] [A] had told them about abuse by the Defendant could not fall within s.120 of the CJA 2003, as "recent complaint" evidence, as it could not comply with s. 120(7), given the fact that [redacted] [A] was not giving oral evidence in the proceedings. The Prosecution accepted that argument, but argued that the hearsay statements made to [redacted] [H] and [redacted] [C] were admissible instead under s. 114, following the cases of MH and RD . Again, no disclosure of the Merseyside report was given, nor of medical evidence relating to [redacted] [A] .

10. The Trial was originally listed to commence on 11 June, but was put back to give further time for legal arguments and for enquiries by the Defence. Prior to the trial starting, the Crown indicated that [redacted] [B] had decided he was unable to give evidence, and that the counts which had been added were therefore not to be pursued. The trial started without those counts on the Indictment, and all other counts, including those involving [redacted] [A] were opened to the jury.

11. After the case was opened, and two complainants had given evidence - [redacted] [D], and [redacted] [E], it emerged that there was further disclosure of medical evidence relating to [redacted] [A]to be given. The Jury were sent away whilst this was resolved.

12. An application under s.8 for specific disclosure was made by the Defence, covering a wide range of documents. After considerable co-operation between Junior counsel in relation to documents remaining in dispute, a Schedule prepared by the Defence and annotated by both Counsel setting out the opposing positions. General, in principle, submissions were made by Miss Felix prior to consideration of the detail in relation to each document. Not having been provided with the document, I gave an indication that the Prosecution should consider the Merseyside Report again against the disclosure test having heard those arguments.

13. Following that re-consideration, a document marked Draft 2 of the Merseyside report was finally disclosed, substantially redacted. There was also a significant amount of further disclosure given both before and after the orders made by the Court. Throughout the application the assurance was given that the remaining documents had been reviewed and re- reviewed against the correct disclosure test.

14. Following disclosure of the Merseyside Report and further medical notes for [redacted] [A] , an application was made to exclude his evidence. What then emerged in the course of argument was that the disclosed redacted Merseyside Report, marked Draft 2, was not the final version. Miss Cottage QC initially indicated her instructions that there was no final version, as the Merseyside enquiry had been transformed, or merged into Operation Ravine, However, she was informed even whilst she was addressing the Court, that this was not so. There was indeed a final version, which was at that stage located in Surrey, and had not been provided to Counsel. There are some relatively minor differences between the final version and Draft 2. The person who notified the existence of the final draft in Court was involved in the police disclosure team.

15. In addition, having seen the extensive redactions, I raised the question of whether they were for relevance or for matters which properly fell within the PII regime.

16. On 22 June, the Prosecution indicated that no evidence would be offered in relation to [redacted] [A] . In addition to the issues about disclosure, concerns had been raised by the Defence about the officer who took [redacted] [A] statement, Mark Williams Thomas. He left the police force in October 2000 and became an investigative journalist notably making a documentary about Jimmy Savile, which was one of the triggers which led to Operation Yew Tree. It appeared at that time that prior to his taking a statement from [redacted] [A] Williams Thomas had been told of allegations by others being made about Jonathan King. The Defence were therefore concerned that there was a possibility that he had conducted the taking of [redacted] [A] statement with that in mind, and in a manner which was influenced by what he already knew, and with a particular mindset.

17. Further enquiries were made, and ultimately it was apparent that the trial could not go on whilst all the disclosure matters which were raised were being investigated. The jury were discharged.

18. This application comes following a period in which it is submitted by the Crown that all the failings of the past have been rectified, and the trial can fairly proceed. Post trial disclosure includes material relating to a total of 29 witnesses. Three of those ([redacted] [E], [redacted] [D] and [redacted] [F]) had already given evidence.

Failures in disclosure

19. The Prosecution has prepared a Disclosure Chronology dated 10 July, which sets out over a period from 2000 to date, a detailed catalogue of the way in which disclosure has been approached. There are numerous, repeated and compounded failings which have led to
    a. Documents and information which clearly should have been disclosed not being disclosed;
    b. the Court being misled as to the robustness of the disclosure process on numerous occasions;
    c. decisions being taken by the Court on inaccurate material;

d. The halting of a trial after two complainants had already given evidence;

20. The Crown submit that the Disclosure Chronology, and the materials provided in the Annex to the Skeleton Argument , developed in course of argument explain the flaws in the early decision-making on disclosure, show the sequence of events which led to the gradual uncovering of those flaws; explain how the prosecution came to give unwittingly incorrect information to the court about the disclosure process; make absolutely clear that the errors made in the disclosure exercise have now been fully identified; demonstrate that the review of disclosure has been in-depth, comprehensive and effective. It is submitted that the court can be reassured that the disclosure process is now robust and fair.

21. There are a number of specific identified failings accepted by the Crown, which it is said have been rectified.

a. At the outset of the disclosure exercise relating to Mr King in November 2016, the then disclosure officer decided to conduct key word searches only on 4548 items. The CPS and Counsel were not told until 21 June 2018, well into the Trial, despite the applications and concerns expressed about disclosure. It is now said that all of these documents have been reviewed, and where there has been doubt, referred to Counsel;
b. the same original disclosure officer made errors in the assessment of relevance which affected his decisions as to which items should be listed on the MG6C and which on the non-relevant schedules. This issue was explored at a conference on 31st January 2018, but even then the full scale of the problem was not identified, and it was thought only a very small number of items had been missed. When Counsel came to review the non-relevant schedules in early June 2018, it was clear that a number of items which were clearly relevant and a small number which were disclosable were still on the non-relevant schedules. Further, during the trial it became clear to Counsel that inadequate descriptions on the non-relevant schedules had resulted in further material being missed. It is now said that

all of these documents have been reviewed, and where there has been doubt, referred to Counsel.

c. Similarly, it is said that in January 2018, a concern was raised about the adequacy of some of the descriptions given by the original disclosure officer to the items which appeared on the relevant and non-relevant schedules. A solution was proposed whereby the non-relevant unused schedules would be re-reviewed, and the description of items listed on the MG6Cs would be checked against the content of the documents to ensure that the descriptions given by the original disclosure officer were accurate. As an additional check, the Holmes system 'readers' would continue to read all the class of items to check that all relevant material had been considered by the disclosure officer. Nonetheless, despite this it became increasingly apparent during the trial that a number of the descriptions given to items by the original disclosure officer on both the MG6Cs and the non-relevant schedules could not be relied upon. It is now said that from approximately 18th to 22 June 2018, the disclosure officer and CPS lawyer conducted a full re-review of the underlying documents to ensure that no disclosable documents had been missed because of poor descriptions. All 'relevant' documents have been reviewed for disclosure by counsel.

22. It also became apparent that during the investigation no or inadequate logs of contact with complainants and witnesses had been kept, and during the course of the trial that not all contact with witnesses had been scheduled or considered for disclosure. Since then, in the absence of contemporaneous contact logs, the police have created contact logs for all complainants and all supporting witnesses setting out the chronology of contact. All underlying documents were considered for disclosure by counsel, and both the disclosable underlying documents and the contact logs themselves disclosed to the Defence.

23. On behalf of the Crown Miss Cottage accepted that these significant errors had led to the Court being misled, but that was not intentional, and the errors had not been identified at the time. By way of example

a. When the Prosecution skeleton on 9 January 2018 referred to the process being robust and fair in response to the abuse of process application, the "prosecution team" were not aware of the initial key word searches as a means of filtering material, the faulty assessment of relevance by the original disclosure officer, the inadequate descriptions on the schedules or the gaps in contact with complainants and witnesses. The assertions made as to the disclosure process were made in good faith, but were disproved by later events;
b. By the time of the abuse of process application in April 2018, the "prosecution team" believed that such concerns with the disclosure process as had been raised had been resolved, and thus informed the court that the disclosure process was robust and fair;
c. When, in early June 2018, it came to light that the review of the non-relevant schedules had not been adequate, a further review was conducted and the court and Defence were informed of this further review. By the time of the s.8 application the full scale of the problems with disclosure had still not come to light, and the "prosecution team" believed that such difficulties as had been identified could be corrected in the normal way. It was only in the days after the s.8 application that the need for a more systematic review of disclosure became apparent. This review was commenced, and again, it was felt that the review could be completed in time for the trial to continue.

24. Miss Cottage submits that whilst the disclosure of the Merseyside Report and the resulting applications in which the Court made orders about disclosure revealed further material which needed to be re-reviewed for disclosure, the prosecution was already undertaking its own review of disclosure which revealed far more gaps than had been anticipated. That led to the trial being stopped and time being made for a full review and for the Defence to review any disclosure which was forthcoming. The prosecution applied to discharge the jury and adjourn the trial. She submits that the way in which the past errors in the disclosure process "revealed themselves was gradual and piecemeal". At no time did the prosecution deliberately mislead the court or the Defence, and as soon as the "prosecution team" understood the extent of the problems with

disclosure and the depth of the review which would have to take place to resolve these problems, this was conveyed to the court and the Defence.

25. She submits the in-depth review required has now taken place. The prosecution has been open and transparent about what has gone wrong and what has been done to resolve the situation. The disclosure of significant amounts of material indicates that the correct approach is now being taken, and that the court can be confident as to the fact that there will be no repetition of these errors and that an ongoing disclosure process is in place for a smooth running and professional approach to any forthcoming trial.

26. Mr Blaxland submits that the Disclosure Chronology and the admitted failures by the Prosecution, show systemic failings from the outset, and make plain that the Court has been consistently misled. Whilst Miss Cottage refers to the "prosecution team" – (which appears sometimes simply to cover Counsel, and at others also to encompass the CPS) all that can be said is that the CPS lawyers and counsel were themselves misled by the police disclosure officers. He submits that for the purposes of misleading the Court, the prosecution is indivisible. There can still be no confidence in the disclosure process for the future because the trust that the Court necessarily has to repose in the prosecution for the proper administration of the disclosure process is lacking. Alternatively, the protracted misleading of the Court culminating in the jury having to be discharged some weeks into the trial means that it would be an affront to justice to allow a fresh trial to proceed.

27. Mr Blaxland refers to the formal letter from the prosecution responding to the disclosure requests submitted by the Defence, in June, in which it was stated that the disclosure officer had checked all unused material generated by Op Arundel and Op Ravine and if found to be relevant in any way to the allegations to be tried in these proceedings it has been scheduled on the current non sensitive unused material schedules which have been served upon the Defence. He submits that this was simply untrue.

<u>Key Disclosure which was not been given as a result of the failures</u>

28. There is no doubt that substantial and significant documents and disclosure was withheld as a result of the failures in the approach taken I now refer to the main categories and items.

The Merseyside Report

29. I have previously indicated that now the report has been obtained, it is crystal clear that it ought to have been disclosed, not least because it made criticisms of the way in which statements were taken by officers in Arundel, which affected the cases which had been left on the file in 2001. The fact of the criticism should have been made clear at the time of the application to revive these counts and add them to the Indictment after a period of 17 years.

30. The report contained a section dealing with [redacted] [A] allegations and how they were handled by the Arundel team. In addition, it is noted that the practice was adopted of using a pro forma questionnaire and tape recordings of the answers to the questions but that the tape recording would not incorporate the whole process of taking the witness statement. The tape recording was intended to assist the reviewing lawyers and officers in assessing the credibility of the complainants. The Report refers to the adopted practice of taking trigger notes, which were then used as the basis for the statement, signed 'days, if not weeks' after the notes were taken. At paragraph 5.3.41 the Report stated,

"*The review has been unable to ascertain if the procedure of taking statements in this way was standard practice. However this practice not only increases the possibility of error, but the integrity of any statement taken in this manner is open to question.'*

31. It is to be noted that at the time of the original abuse hearing, the Court was referred to the statement of DCI Hayes as to the reasons for Operation Ravine being started. There was a cursory mention of the Merseyside Report, stating that the overriding recommendation was for Arundel to be further investigated as there were further lines of enquiry. No mention was made of the criticisms of the way in which statements were taken, and the emphasis was placed on other factors which included other complainants coming forward, and Arundel

complainants contacting the police after the Jimmy Savile allegations came to light. The Court was assured that there was nothing of relevance in the Report.

30. Mr Blaxland submits that against the background of an application for leave to proceed with a count ordered to lie on the file based on the hearsay statement of the sole witness to the events, that position is both incomprehensible and wrong.

31. Miss Cottage accepts that the report should have been disclosed, but argues that there are some parts of the Report which would not pass the disclosure test, and disclosure has now been given of more than required. Further that the Defence now have the document.

[redacted] [A] <u>medical records</u>

32. The notes cover the period from 1978 to 2000. In addition there is medical correspondence post dating his statement to police. The notes refer to [redacted] [A] admissions for treatment for alcoholism and drug abuse. There is no mention of sexual abuse to medical practitioners prior to 3rd May 2000 at or about the time allegations were in the press about Chris Denning, The failure to inform any medical professional of his history of sexual abuse was clearly of relevance to his credibility, and relevant to the applications to add Counts to the Indictment, to exclude his statement as unreliable hearsay, and to the application to exclude parts of the statements of [redacted] [H]and [redacted] [C]. Whilst the notes were scheduled, Miss Cottage informed the Court that they were not made available to CPS or counsel. As soon as they were, they were disclosed. The fact that they were not disclosed earlier meant that the court was misled as to the information upon which important decisions on hearsay were made.

33. Of course the counts concerning [redacted] [A] are not now pursued, but it is a matter of importance that they were opened to the Jury, that this evidence emerged during the trial, and that overall, it was the Crown's view that due to the evidence which had emerged late it could no longer maintain the position that his statement was reliable evidence, or evidence which could

properly be admitted without his being available to be cross examined.. The position was never reached where a decision had to be taken about the future course of the trial without the Counts which had been opened, as the enormity of the failures in disclosure required discharge of the jury in any event.

Mark Williams Thomas

32. No disclosure was given as to the background of Mark Williams Thomas. During the trial the Defendant himself recognized his name as being the journalist who exposed Jimmy Savile in a TV programme. Williams Thomas was involved in taking statements from [redacted][A] . That was, I accept unknown by Counsel for the Crown.

33. Subsequent enquiries reveal that Mark Williams Thomas left Surrey Police in October 2000, but was prosecuted and acquitted of blackmail in 2003. During the investigation into that offence a document was found on his computer offering for sale names and introductions to victims of Mr King. There was also information that prior to Mr King's arrest, Williams Thomas said that he had been provided by a journalist with information about King. Williams Thomas left taking his contemporaneous notebooks of his involvement with enquiries into Mr King with him. No attempts had been made to obtain them, although it is the Crown's position that he should not have taken them with him, as they were the property of Surrey Police.

34. Evidence was given by Det. Supt. Hibbert during the course of the application. Although he was nominally in charge of the investigation , taking over from DCI Hayes and Det Insp Mizzi , he was unable to give significant first hand evidence and made it clear that it was in fact DCI Hayes who was in de facto charge of Operation Ravine. She reported sick on 29th June 2018 with symptoms of mental illness, connected with, although he could not say entirely the result of, concerns about the aborted trial.

35. A note from DCI Hayes has been disclosed dated 03/06/2016 referring to a declared personal link between Mark Williams Thomas, who had left the police force by then and 'CH' within the police. It is submitted by Mr Blaxland that it is not credible that she not would not have been made aware of Mark Williams Thomas previous involvement and character.

36. It is clear that at the outset of Operation Ravine, enquiries were made with Surrey Police Professional Standards Department about all officers involved in Operation Arundel. The policy book makes clear that the SIO (and deputy SIO) of Operation Ravine were aware that Williams-Thomas was now a journalist working within the historic child abuse arena. Det Sup Hibbert explained that the further information about Williams-Thomas' criminal case and offer to sell information came into the hands of Surrey Police's Anti-Corruption Unit in 2014, but that this is a restricted-access system not available to other departments. He said that there is no indication that this information was passed on to the Operation Ravine team, or that any enquiries were made by Ravine about Williams Thomas before the trial was aborted. Furthermore, the document recording the message relating to an interview with Williams-Thomas in 2013 in which he stated he had previously received information about King was held by Operation Yewtree and was not shared with Operation Ravine.

37. It is suggested by Mr Blaxland that there was deliberate concealment of his previous prosecution and of the documents indicating attempts to gain financial advantage from selling details of Mr King's case. The [redacted] [A] allegations were important to the case as he was the first complainant. That was an incentive to withhold this information. The prosecution cannot cauterize this deliberate failure by dropping those counts.

38. Miss Cottage argues that whilst it may fairly be said that Operation Ravine might have undertaken further enquiries into Williams-Thomas and brought his involvement in [redacted] [A] statements to the attention of the CPS and prosecution counsel at a far earlier stage, that should not lead to the conclusion that there has been bad faith on the part of the police. Nor, now that disclosure

has been given, does it cause any difficulty, in particular as the counts concerning [redacted] [A] are no longer being pursued, and Williams-Thomas involvement was limited to his case.

Operation Future

39. It was not until the PII hearing that the fact that surveillance had been carried out on the Defendant in 2015 which had yielded no evidence of current offending was disclosed. The information contained in the disclosure was also relevant to the issue of the basis for errors made in relation to the search warrant obtained and executed on the address of Mollie Brown in 2015.

Bad Faith in the application for a search warrant

40. Mr Blaxland contends that recent disclosure shows that there was bad faith in the application for a search warrant at the address of Muriel (Mollie) Brown, an elderly lady who had been Mr King's secretary. In short, it is the Defence case that the Magistrates Court was misled. Having had a warrant refused, the court was told that there was evidence on a computer hard drive of pornographic photographs, which led to the grant of the application. Reliance is placed on short notes made by the magistrate which refer to the hard drive and the size of it in "terror bites". In addition, he submits that it clear from the Land Registry entry that the address did not belong to Mr King.

41. Evidence was given by DC Holley who made the application. Her evidence was that two errors were made: firstly, based on the Operation Future surveillance material, it was misunderstood that the house might be a safe house which was referred to in relation to another man – mistakenly believed to be King. Secondly, that she had taken her information about the occupant from the suspect profile she had been given, which involved a misread of the Land Registry entry, and had believed that the rubric which would have indicated that the property did not belong to Mr King related to this property, not the one above on the document.

42. She denied misleading the magistrate, and also that she was aware of the suggestion that there were images on the computer hard drive obtained in a previous search which gave rise to a belief that there may be further images in the premises occupied by Ms Brown. She told the Court that she was aware of polaroid images, which were shown to the magistrate, but did not believe that she knew of the contents of the hard drive, which had been seized from another address, but not analysed. She recalled DCI Hayes attending the hearing, but could not remember her saying anything. It appears that DCI Hayes made an enquiry as to the content of the hard drive the day before the application. DC Holley was unaware of that.

43. Having heard the evidence of Dc Holley, which I accept, I do not find that she was involved in a deliberate attempt to deceive the magistrate's court. I find, however that the fact that there were two such errors in the application, and that it appears that the magistrate was not specifically told that there had been a previously declined application show a cavalier attitude to an intrusive order such as a search warrant. It is in keeping with the overall approach to disclosure in this case. The involvement of DC Hayes could not be explored without her own evidence. I note that nothing material was gained from execution of the warrant or relied on in this case.

The Law

44. The court's inherent power and the twin test in considering whether a stay should be granted is well established: firstly, that it is impossible for the accused to have a fair trial or, secondly that it would offend the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. (See *Maxwell* [2011] 2 Cr. App. R. 31 (p.448), cited with approval in *Warren v A-G for Jersey* [2012] 1 A.C. 22). The concept of a fair trial involves fairness to the prosecution and to the public as well as to the defendant: *DPP v Meakin* [2006] EWHC 1067. There must be something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case (*Hui Chi-Ming v R* [1992] 1 A.C. 34, PC). 'Unfair and wrong' is for the court to determine on the individual facts of each case.

45. Both parties have referred to the case of *R v S(D) and S(T)* [2015] 2 Cr.App.R. 27 where the trial judge stayed an indictment where there had been serious disclosure failures during the course of a trial for serious sexual offences, which had caused the trial to be abandoned. The judge concluded that, although the prosecution had been able to correct the disclosure failures at trial and, therefore, a fair trial was possible and there was no evidence of bad faith, it was an exceptional case in which the prosecution had behaved with total incompetence and disobedience to the principles of disclosure, which required a robust response from the courts to protect their own integrity and independence. The CA allowed the prosecutor's appeal, attaching particular importance in the balancing exercise, to the seriousness of the charges and that a stay would result in a denial of justice to the complainants, who were not to blame for the prosecution's failures.

46. Mr Blaxland submits that this case is distinguishable and that the Court should stay on both limbs. Firstly the history and nature of the disclosure failures in the instant case is such that the Court cannot be confident that a fair trial is possible.

47. Secondly, even if the Court were to accept that the prosecution had now in fact rectified its disclosure failures, the Court should still conclude that it would be an affront to justice to permit the case to continue. The disclosure failures come against the background of an application by the Defence for the indictment to be stayed on grounds of the overall unfairness to the defendant arising from his previous prosecution and sentence, the age of the offences, the delay since he had been released from custody and the fact that it was not alleged that he had committed further offences since release nor, indeed, in the last 33 years. In those circumstances there needed to be compelling reasons for permitting the prosecution to proceed.

48. The purported justification for embarking on the current prosecution was the failure of the original investigation and prosecution process to provide justice for the victims of the Defendant's abuse. It was therefore imperative that the Operation Ravine investigation and prosecution was conducted with scrupulous

fairness and efficiency in order to be seen to remedy the claimed failures of the past. The disclosure fiasco shows that it has failed in its objective.

49. Further, that had the now disclosed information regarding the [redacted][A] counts been known at the time of the Court's consideration of the application to stay as well as the application to include those counts, it is likely to have had a significant impact on the Court's approach. Because the Defendant has previously been prosecuted for similar offences and because of the passage of time, it would be unfair to put him through a third trial in circumstances where he is not to blame for the jury having to be discharged. One of the consequences of any retrial is that the presentation of his case has been disadvantaged because two of the complainants have now been rehearsed and alerted to issues affecting their credibility and reliability.

50. The issue of justice for the complainants has to be viewed in the context of the history of the last trial in 2001 and decisions taken by the prosecution not to proceed with additional charges principally on the ground that they would not materially add to sentence. Disclosure in February this year revealed that at the time of the 2001 prosecution [redacted] [G] had expressly agreed not to pursue his allegation on the basis of the Defendant's prosecution for other offences. This is not, therefore, a case which has been driven by complainants' allegations, In fact, under the banner of justice for the victims, but by concerns about reputational damage to Surrey police in the wake of the Savile case and the consequent Merseyside investigation.

51. When considering the question of the weight to be attached to the interests of the victims and without consideration of the question of the veracity of their evidence, it is of great importance to have in mind that it is the process of the re-investigation and arrest of King, which has reawakened their memories (reliable or not) and raised expectations. The defendant should not have to suffer the consequences for others of the abject failure in the prosecutorial process, which has led to the trial having to be abandoned.

52. The overarching interests of justice are broader than the specific interests of the victims of crime and include justice for the defendant.

53. Miss Cottage submits that the Crown has now, for the reasons set out in her extensive skeleton argument, shown that a fair trial can be achieved. Whilst there have been failings, the effect of them is not to undermine the soundness of the prosecution as a whole. It would be wrong to conclude that the evidence of the complainants themselves has been undermined by the disclosure problems. The approach of Ravine, which has been challenged by the Defence has been shown by the recent disclosure to be fair and soundly based. The Court should not punish the Prosecution for past failings when the interests of justice require that these serious and grave offences are tried.

54. She submits that in considering the approach taken in *R v S(D) and S(T)* the relevant factors to consider in cases where there had been a failure of disclosure are a) the gravity of the charges, (b) the denial of justice to the complainants, (c) the importance of disclosure in sexual cases, (d) the necessity for proper attention to be paid to disclosure, (e) the nature and materiality of the failures (g) the waste of court resources and the effect on the jury, (h) the availability of other sanctions. The court was concerned to protect the integrity of the criminal justice system and had to weigh in the balance the public interest in ensuring that those charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court would adopt the approach that the ends justified the means.

55. She submitted that in this case the charges are grave, and relate to ten complainants; a stay would result in a denial of justice to the complainants in circumstances in which they are in no way to blame. Disclosure in sexual cases is plainly very important, and as at today's date, the failures in disclosure have now been rectified. It must be conceded that a trial has had to be aborted, with the inevitable consequent waste of the court's resources, but that decision has already been taken and no jury is currently awaiting the court's decision on this issue; plainly, other sanctions are available to the court.

Discussion

56. I have been reminded in considering the submissions in this case of the somewhat infamous statement of Donald Rumsfeld :

"There are known knowns. These are things we know that we know. There are known unknowns. That is to say, there are things that we know we don't know. But there are also unknown unknowns. There are things we don't know we don't know."

57. Within the known knowns in this case are

a. That there has been a widespread failure to follow the proper procedures in the processes which are designed to safeguard a fair trial from the outset of Operation Ravine. That, to a great extent is not disputed.

b. The disclosure process started in error, and the errors have compounded. The control over and understanding of the approach taken by the disclosure officer (or more than one officer – that too is unclear) has been lamentable. Even when concerns were identified, they were not sufficiently pinned down and investigated. There has been at times a disconnect between the disclosure process and Counsel, even in the latest remedial process. No substantial explanation has been given for the failures, other than the disclosure officer took the wrong approach which was not spotted. The A-G's Guidelines on Disclosure at para. 28 make clear :

> 'The duty of disclosure is a continuing one and disclosure should be kept under review. In addition, prosecutors should ensure that advocates in court are properly instructed as to disclosure issues. Prosecutors must also be alert to the need to provide advice to, and where necessary probe actions taken by, disclosure officers to ensure that disclosure obligations are met. There should be no aspects of an investigation about which prosecutors are unable to ask probing questions.'

c. Further, that those failures have led to the court not only being misled, but on several critical occasions, misled in open Court in a way which affected the decisions made. I make clear that had full disclosure regarding Kirk McIntyre [A] , and the involvement of Williams- Thomas been made known, those counts would not have been added to the Indictment. The fact that they had to be abandoned mid-trial undermines the public

perception of justice being done even further. Had the woeful state of disclosure been known when the Defence applied to adjourn the trial, the application would have been treated in a different way. It is with unconscious irony that Miss Cottage submits that the Defence now have time to carry out such investigations as they need.

d. That had the Court not required reconsideration of the Merseyside report, and had not exercised its powers in the PII hearing significant parts of what has now been disclosed would not have been. I note that even as late as after the trial with all the history there were still aspects of disclosure which had not been considered with sufficient rigour. That gives rise to continuing questions about the integrity of the process.

e. When giving his evidence [redacted] [D] was cross examined about his previous statement, taken in 2001. He maintained throughout that it was not accurate and that he had never read it or signed it. His was not apparently one of the type of statements which was specifically criticized in the Merseyside report. This was relevant to his credibility, or the integrity of the statement taking, and was the subject of a question from the jury. His reading ability was seriously in question for reasons given in evidence about his limited education. The jury would have had to decide whether he was telling the truth, or whether the statement had been taken in a way which did not reflect his evidence, without his knowing it. Material disclosed after the trial includes an officer's note-book entry recording that [redacted] [D]had read his statement and agreed it as being accurate. Against the background of uncertainty as to the integrity of the statement taking in this case that is still a matter of concern.

f. That the Merseyside Report referred to there being 58 boxes of documents. 3 had gone to Operation Yewtree. I asked Miss Cottage if all of these boxes had been located and reviewed for any content relevant to Mr King. The answer was not clear. Due to the failings in the treatment of the continuity of document handling, no definitive answer could be given. The best that could be said was that all document which had gone to Merseyside had been returned.

58. Within the known unknowns are

a. The reasons for DCI Hayes inadequate statement about the Merseyside report, and her knowledge of Mark Williams Thomas' history. As she was in charge of the case overall, the inadequacy of her statement is troubling. She is highly unlikely to be available for any further evidence as to the conduct of the enquiry.
b. Further, that there are or were notebooks which Williams Thomas took with him and which may contain further information about his involvement in this case. Given the history it is surprising that assurances have been given that his only involvement was with McIntyre. [A]
c. that whilst a review has been carried out of the disclosure process, it appears that review has been done by others than Counsel and only those documents which are of concern referred to counsel. The unknown is the quality of the review having regard to the abject history.
d. A further known unknown is the accuracy of the reconstruction of the witness contact logs, being as they are, not contemporaneous documents. In a case of this age and complexity in the inter-relation between different enquiries, the contact with witnesses is of considerable importance.

59. The very nature of unknown unknowns speaks for itself. It is rare that it is within the realms of the courts consideration, to entertain even the suspicion that there may be any, due to their speculative nature. But this case and its history has given rise to unease that there is more to come, and that it is only the fact that not all of the complainants have given evidence that leads to the current Crown position that all has been rectified.

60. These offences date back up to 40 years. What was apparent from the evidence given by the two complainants who gave their evidence, is that there are inevitably aspects of their recollection which are faulty, in a neutral sense. Both accepted that there were parts of incidents which they simply did not remember. Their recollections are by necessity to be tested against contemporary material. Miss Cottage has pointed to the work which has been done in this investigation in to the surrounding facts, and where in some instances, complainants have been considered unreliable in their recollection,

their cases have not been pursued. But in this case, some material was produced to the complainants by the Defence which had not been considered by the Prosecution, and which was relevant to the accuracy of their recollections.

61. In cases of this kind, in particular where the gap in time is so great it is essential that there is confidence in the investigative process and disclosure to ensure a fair trial. Miss Cottage has repeatedly referred to the Prosecution team, in distinction it appears to the police. But no explanation has been given as to the CPS role in this. It is suggested that there was a failure by the disclosure officer to keep the CPS lawyers informed, but it is not clear what questions were asked, when, or why it was that this situation continued as it did. It is difficult to escape the conclusion that there was complacency at least, even in the light of the Henriques Report which set out the need for rigour in this type of case, involving historic abuse allegations in the glare of publicity. I accept that Counsel were not informed about some key aspects of disclosure, as this was manifest, for example in relation to the final Merseyside Report.

62. In my judgment there are several significant differences between the case of *R v S (D) and S (T)* and this case. Firstly, whilst these are clearly serious and grave offences involving allegations of buggery and sexual assault by 10 complainants, there has been a trial in 2001 for similar offences. At that time a decision was taken not to pursue some of the complaints at the time of the first trial, and some complainants were informed. Other complaints made immediately after the trial were not investigated, but no follow up has been shown by the complainants then. No charges have been brought in relation to offences committed at a later stage than the original trial [redacted] [B], whose complaint was to be heard in a trial which was halted in 2001 has not proceeded with his complaint. [redacted] [A] wish to proceed was communicated through his wife, but is now not to be proceeded with. [redacted] [G] agreed at the time with the decision not to proceed, but when his friend contacted the police later, said he wished to proceed. Those who have given evidence in the current aborted trial would have to do so again. I

bear all of this in mind when considering the position of the complainants and their access to justice.

63. Secondly, and importantly, in this case the integrity of the criminal justice system and processes have been undermined publicly in a fundamental way by the disclosure failures and persistent misleading of the court. There was ample opportunity for a proper and comprehensive review of disclosure to have taken place when alarm signals were given in January 2018. Nonetheless, counts were added to the Indictment which would not have been. Evidence has been ruled admissible, which would not have been. A trial has been aborted due to the failures. The time of the court and public money has been wasted, in a time of scarce resources. Undoubtedly the Jury who were subjected to delays as the various disclosure issues unfolded would have had their confidence in the system undermined on being discharged having heard the evidence they did. No explanation was possible given the application to come.

64. I have concluded on the issue of the warrants that there was no bad faith on the part of the police, but a deplorable lack of seriousness and rigour in applying on the basis of information which was inaccurate, and misled the magistrate's court. Without an explanation by DCI Hayes as to her knowledge of Williams Thomas, I conclude that at least, given the note in 2016, enquiries should have been made which would have revealed the disciplinary matters. Again there appears to have been a lamentable lack of joined up approach to the provision of information, given his prominent status in the Yew Tree history.

Conclusions

65. I have reviewed the Indictment and evidence in this case in considering the two limbs of the test. On the first limb, for the reasons which I have set out above, I have come to the conclusion that in contrast to the position when the first application was made to stay for abuse, I cannot be sure that a fair trial is still possible.

66. The disclosure process set off on a bearing several degrees away from where it should have been, and the effect is it ended up miles from its proper destination. Despite the steps which have been taken, I do not have confidence that the effect has been to get it back on track, nor that all that should be disclosed has been, or that what has not been disclosed would have no bearing on the fairness of the trial if it is permitted to restart. In coming to this conclusion, I acknowledge the strength of some of the evidence, and that it is right that no application to dismiss has been made on grounds of evidential insufficiency. Also that there has been a conviction for sexual offences. But this is a case which depends on the witnesses and their recollections of events a long time ago. Significant reliance is placed on cross admissibility and a shared modus operandi. Thus failings in one part of the case have a bearing on the whole case. Aspects of the evidence in the aborted trial, for example the situation which arose in respect of [redacted] [D] statement, show the difficulties which the statement taking process in Arundel , some aspects of which were identified by Merseyside Police , have caused for the trial process, and for complainants if they are genuine. Further, that material which was relevant to contact between King, [redacted] [E] and his mother had not been identified by the prosecution.

67. In any event, on the second limb, taking into account the factors set out in *R v S(D) and S(T),* I have concluded that this is a case where even if it were possible to have a fair trial, it is in the rare category where the balance, taking account of the history, the failures and misleading of the Court, is in favour of a stay on the basis that following what has occurred, continuation would undermine public confidence in the administration of justice. In this respect I accept Mr Blaxland's submission that having had one trial, and agreed to leave matters on file, in deciding to pursue grave and serious allegations made and known about at the time of the first trial, or indeed shortly after, but not pursued for over 15 years, combined with new allegations about matters at or about the same time as those dealt with in the original trial, it was incumbent on the Prosecution to ensure that the process was rigorous and in accordance with high standards of attention to disclosure and fairness in the process. That has not been done.

68. That fairness is not only to the benefit of the Defendant, but to the complainants, who deserve to have their complaints investigated and prosecuted in a way which does not lead to their embarrassment or the debacle which occurred in this case. There can be no confidence that if the trial carried on, there would be no further manifestations of the problems which have been exposed thus far. The recent late disclosure of the note about [redacted] [D] is one such example.

69. I stress further that the fact that I was misled and made a judgment which I would not otherwise have done is not considered in the balance as a personal matter, but in relation to the effect of the failures and the overall effect on public confidence. To allow the misleading of the Court on important procedural decisions, deliberate or otherwise, to pass would give rise to a belief that in this type of case, where there are sexual allegations against figures in the public eye, and public interest is engaged, the Courts are prepared to sanction the end justifying the means.

HHJ Deborah Taylor
Southwark Crown Court
2 August 2018.