

31 January 2023

Application by the Defence for Disclosure concerning the police investigation and the selection of cases

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Tuesday, 31 January 2023
(10.30 am)

(Delay in proceedings)

(10.59 am)

MR JUSTICE GOSS: Mr Myers.

Application re DISCLOSURE Submissions by MR MYERS

MR MYERS: May it please you, my Lord, first of all we are grateful to the court for the additional time given this morning just to discuss matters arises from this application. That's been helpful.

The defence are making an application or make an application under section 8 of the Criminal Procedure and Investigations Act 1996, and I can say straightaway the terms of it are limited, even limited by reference to the material given to your Lordship, so I will narrow that down very shortly.

MR JUSTICE GOSS: Thank you.

MR MYERS: But the documents your Lordship should have are the bundle provided by the defence, which includes the application, a response and bundle from the prosecution provided yesterday -- no complaint about that, that's just the way the timing has been -- and then an additional response this morning.

MR JUSTICE GOSS: An amended response?

MR MYERS: An amended response, yes.

MR JUSTICE GOSS: Which incorporates the original response with some amendments?

MR MYERS: Yes.

MR JUSTICE GOSS: I have discarded the original one.

MR MYERS: Very well, I'm working from the amended one as well. It has yellow highlighting and red lettering for the additions.

MR JUSTICE GOSS: Unfortunately, I don't have a copy (inaudible), so I'm looking at it on paper. Right.

MR MYERS: We are grateful to the prosecution, who have considered these responses properly, as one would expect, have provided disclosure in some cases and therefore, although disclosure request 4 dealt with various areas, most of that does not arise now. Some areas the prosecution have explained they can or will not make disclosure and we don't pursue those. There's really one area where we return or come before your Lordship with a specific request.

MR JUSTICE GOSS: Right, thank you.

MR MYERS: I'll focus upon that and therefore I won't go into the full extent of disclosure request 4 or the section 8 application because that no longer is a concern.

The area of focus for the defence is that which is in the section 8 application, not the formal notice but the submission, and it's in paragraph 6 in particular and an element of paragraph 7, but I'll assist your Lordship by going straight there.

It's in the defence bundle behind divider 2. That's where the application is. If your Lordship turns to page 3 of that application.

MR JUSTICE GOSS: It's paragraph 6, beginning paragraph 16 in square brackets?

MR MYERS: That's right. We'd set out in paragraph 5 areas we were pursuing but this is the principal area now. It's paragraph 6, which relates to a process the prosecution appear to have undertaken in deciding how to proceed with various children.

Before enlarging upon that, having shown your Lordship where it is that we are primarily concerned, I'd just like to explain, so it's quite clear, why the defence are requesting material relating to how the prosecution have made these decisions.

The defence are concerned by the extent to which Ms Letby is a focus of blame by virtue of being Ms Letby rather than by virtue of evidence outside that fact pointing to the commission of an offence or, more particularly, commission of an offence by her.

Your Lordship may recall the table at CH16 -- and just to assist, if Mr Murphy is able to assist, it's page J242 of the exhibits, what might be described as the presence table or however it's put. But your Lordship will be familiar with that and it identifies Ms Letby as being present, and the only person present, on all the occasions set out in that table and, one can see from the line at the bottom, present by some great degree compared to anybody else. I'm grateful for that.

Unless your Lordship wishes to return to that immediately, we can take that down. It was just to refresh the court as to that document. Thank you, Mr Murphy.

Of course there are two ways in which one can regard that. One may be that, having selected particular events and looked at them, it turns out that Ms Letby was present on each occasion. An alternative would be that Ms Letby was in effect the parameter for selection of cases and inevitably, therefore, those cases which have been found to be worthy of further consideration are automatically associated with her.

So what the defence have been concerned by, and what lies behind requests in disclosure request 4 and this item that's carried through into this section 8 application, is a way of assessing the extent to which the mere fact that Ms Letby was present has in effect become a search term and a parameter for bringing a prosecution or bringing the allegation, I should say.

We recognise that where deaths took place, she is present, as set out there. The real issue this goes to is where the question of collapses is considered because, we would observe, what is an inexplicable collapse or a suspicious collapse is plainly far more nuanced than the question of a fatality. There's no nuance to that. Our concern is that it's the presence of Ms Letby itself that has made the difference to that. And if that is right then aspects of the table which we've just gone to, and that aspect of the prosecution case, may reflect as much the way in which the matter was investigated and the search term as what would follow necessarily from the events that took place.

Therefore to consider that and to consider therefore whether the investigation was conducted with appropriate breadth in that area -- and we make reference to paragraph 3.5 of the CPIA code, which we're grateful to the prosecution for including in their bundle of documents which were received yesterday. For your Lordship's reference it's at page 4 of that bundle.

MR JUSTICE GOSS: It would help if I had my laptop because I haven't printed it all off. I'm just wondering if the usher would be kind enough -- sorry to disturb you, but could you go

to my room, please, and ask my clerk to bring in my laptop, or you bring in my laptop.

Thank you very much.

Sorry, Mr Myers, please do carry on. Page 4?

MR MYERS: It's at page 4 of the prosecution bundle and I'll just read the relevant paragraph of the code of practice out for your Lordship and for the court. It deals with the section under the code for general responsibilities and paragraph 3.5 says:

"In conducting an investigation the investigator should pursue all reasonable lines of inquiry whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances. It is a matter for the investigator, with the assistance of the prosecutor if required, to decide what constitutes a reasonable line of inquiry in each case."

Therefore what the defence sought to determine is the extent to which Ms Letby was a focus of selection of cases. Having been concerned as to that, and having considered the material disclosed in the relevant schedules, we come to what we have in paragraph 6.

I can hand to your Lordship -- in fact, we considered it would be helpful to have the two documents we refer to there. I'll explain this and then put it into context with a paragraph.

MR JUSTICE GOSS: That's helpful, thank you very much.

(Handed)

MR MYERS: I'll return to the submission that we make in a moment, but just to acquaint your Lordship with these two items from the schedules. And we can send these electronically as well if it assists.

The first of the items, and it's in our paragraph 6, is schedule (inaudible: coughing) (9) (d) (3).

MR JUSTICE GOSS: Yes.

MR MYERS: I'm grateful -- your Lordship's computer is here.

I'll just wait for this to be delivered.

MR JUSTICE GOSS: Thank you. Please carry on.

MR MYERS: Your Lordship will see from the item of unused material there, D2915, that it makes reference to a case review flow chart and a name of a child whose initials are [redacted], not one of the children on the indictment. But the chart is used to assist in establishing whether the collapses [redacted] experienced whilst at the Countess of Chester met with, and it says, "the investigative threshold". It goes on to say:

"The flow chart indicates the investigation should take place as it achieved a matrix score of 30. [redacted] was in the COCH NNU [the Countess of Chester neonatal unit] during the period when the following neonates encountered a significant event on the highlighted times and dates."

And it sets out there the names of children who are on this indictment.

A matter of concern to the defence was the reference to the case review flow chart and the investigative threshold and the matrix score.

In a similar vein, under a different schedule, and it's the attached sheet, the second entry down is document 9.2. It says D2919. This document is a case review flow chart for a child with the initials [redacted]:

"Expert review indicates that there was a harm matrix score of 55..."

Sorry:

"Expert review indicates that there was harm. Matrix score of 55 indicates there will be a peer review and investigation."

That will come as no surprise to your Lordship: there is a substantial body of unused material in this case. On behalf of the defence, where we have raised enquiries, we have been as focused as we can be. This only relates to two matters after a lot of consideration and assistance from the prosecution.

Returning therefore to the written submission we have, perhaps it will make easier sense now in sub-paragraph 6 where we have talked about where the document refers to the investigative threshold and how the flow chart indicates the investigation should take place, and then a further reference to the case review flow chart and your Lordship sees where those come from now.

So it's with regard to that that the defence have made the enquiries that we do make in (i) to (vii) after that because we seek to know the extent to which Ms Letby is herself a factor in

this scoring and the weight given to that to better be able to determine the extent to which some of these allegations merely reflect her presence and that that has made all the difference rather than the strength of the medical evidence as such.

We're grateful for the prosecution for going through all these matters in the detail they have, but as to that one, in their response they make it plain or they say there is nothing to disclose. We question that because if it's the case that the difference in a matter becoming an allegation or not lies in the identity of Ms Letby rather than the sheer strength of the medical evidence, that is something, we submit, that is capable of assisting the defendant or potentially undermining the prosecution case on that count.

It may be that if there is a document or a matrix or some written criteria, it might even be something your Lordship should see before any final determination is made as to this. But that is the thrust if the submission that we make now, having had the benefit of the exchange of documents and further discussions.

I should add, on the final page of our application your Lordship will see sub-paragraph (vii). If your Lordship would kindly turn to page 4 of our application.

MR JUSTICE GOSS: Yes, I have it, thank you.

MR MYERS: We set out there, at the four numerals under sub-paragraph (vii), the request that was in the original disclosure request at paragraph 17 and there were a series of enquiries, which in a way to a large extent have been answered to us in one form or another now, for which we are grateful.

7(ii), which is:

"Confirmation of whether any of these cases do not involve Lucy Letby being present on the unit at the time of an event of interest (this means cases that have been reviewed)."

That is a matter to which we would still seek an answer if the court considers we're entitled to it, a straight answer to that, whether or not her presence as a person of interest is the factor.

It's right on the point of what lies behind our request under paragraph 6. But my Lord, that is the extent of this application.

MR JUSTICE GOSS: Sorry, maybe I'm misunderstanding it.

7(i):

"Confirmation of the total number of cases reviewed in the course of this investigation."

And you say that that information is available to you, you know the total number of cases?

MR MYERS: We do have a total number, yes.

MR JUSTICE GOSS: All right.

MR MYERS: We've had disclosed to us a variety of cases. We understand those are the cases that have been considered.

MR JUSTICE GOSS: Right.

MR MYERS: And therefore we work on that basis that we know what this involves. But we don't know beyond them what other cases have been considered, therefore thinking that through, I'm grateful to your Lordship for identifying it, that may be a matter which would be very helpful to have a figure as to that if it can be disclosed to us.

MR JUSTICE GOSS: Well, no, but (ii) says:

"Confirmation of whether any of these cases..."

In other words the cases that have been reviewed in the course of the investigation:

"... do not involve Lucy Letby."

That's not the point that you're making now, you're saying something else.

MR MYERS: In fact then I'm not being clear about that --

MR JUSTICE GOSS: Yes.

MR MYERS: -- and I'll return to that.

Your Lordship is quite right: we need to know how many cases were reviewed and, of those cases, how many did not involve Lucy Letby if we can be provided with that information.

MR JUSTICE GOSS: Exactly --

MR MYERS: Your Lordship is quite right.

MR JUSTICE GOSS: -- if any of them.

MR MYERS: If any of them.

MR JUSTICE GOSS: And if so, how many.

MR MYERS: Yes.

MR JUSTICE GOSS: But this is -- just jumping back a bit now, these are cases which, whatever the matrix is or whatever the criteria was for conducting further investigation, these are cases which, on the initial sifting process, it was considered should be the subject of further investigation?

MR MYERS: Yes.

MR JUSTICE GOSS: There is further investigation and that does not involve any -- they don't become a baby in this case. So what's the relevance of it? That's my question. Why is it therefore disclosable?

MR MYERS: If the only cases that were ever identified were cases where Ms Letby was present, that may be relevant in assessing the extent to which she is the defining parameter for any consideration of the cases. Again, we return to the question of the collapses rather than the fatalities --

MR JUSTICE GOSS: Yes, I understand that.

MR MYERS: -- because they're the ones that are far more nuanced and we consider that that would be relevant, potentially, because it would suggest that there has been a focus, whether right or otherwise, upon her rather than simply looking at the medical picture and taking it from there. So I'm grateful to your Lordship for --

MR JUSTICE GOSS: I'm trying to have it clear in my mind exactly what it is that you are seeking disclosure of.

MR MYERS: I made the mistake of going straight to 7(ii) without basing that upon 7(i), and your Lordship is right, the two need to be considered together, 7(i) and 7(ii), they are part of the same enquiry.

Paragraph 6, I have already dealt with.

MR JUSTICE GOSS: Yes, you have.

MR MYERS: That's a discrete enquiry in its own right, but that is the extent of the enquiry that we raise.

Thank you, my Lord.

MR JUSTICE GOSS: Thank you, Mr Myers.

Mr Johnson.

Submissions by MR JOHNSON

MR JOHNSON: So far as the case review flow chart or the matrix is concerned, that's a tool that was introduced as part of the review after Lucy Letby had been identified by the inquiry as the perpetrator for the offences on which she is presently standing trial. In other words, it wasn't used in the course of this case. Therefore we say it is irrelevant.

Whilst the information or the basis for further police inquiries into Lucy Letby may be of great interest to Lucy Letby, they are irrelevant to the issues in this case. So that is the reason why we have taken the decision we have.

MR JUSTICE GOSS: Irrelevant according to the law in relation to obligations to disclose?

MR JOHNSON: Quite.

MR JUSTICE GOSS: Because they cannot be considered, reasonably be considered, to be capable of undermining the case for the prosecution against the accused or of assisting the case for the accused?

MR JOHNSON: Precisely. So section 7A(2)(a) of the Criminal Procedure Investigations Act.

MR JUSTICE GOSS: Which I've just quoted.

MR JOHNSON: You have.

MR JUSTICE GOSS: Right. So that's what you say in relation to that?

MR JOHNSON: Yes.

MR JUSTICE GOSS: Then?

MR JOHNSON: Well, so far as how many other cases the police are investigating and whether or not Lucy Letby was there, same point. It would be odd, wouldn't it, if the Crown were doing anything other than proceeding on the basis that this was anything other than a true bill, this case, this trial. So making that common sense deduction, as no doubt my learned friend and Lucy Letby have, it would be fairly odd if in investigating what else she may or may not have been up to, they

weren't looking at cases where she was there. But this has got nothing to do with disclosure, those common sense deductions which I'm sure have been made on the other side. But us answering the question and confirming or denying whether that is the state of play is no part of our disclosure obligations under the Criminal Procedure Investigations Act.

MR JUSTICE GOSS: Right.

MR JOHNSON: Thank you.

MR JUSTICE GOSS: Mr Myers.

Reply submissions by MR MYERS

MR MYERS: My Lord, the problem with proceeding on the approach it's a true bill -- I understand what my learned friend means and the sense of that. But the problem is the duties of the investigators certainly, and the prosecution as well, is whilst doing that at the same time to have a mind to alternative lines of inquiry or alternative possibilities, which is why the code is drafted as it is.

We cannot see how, for example, the explanation just given gets away from the fact that if Ms Letby's identity was the factor that determines what passes the investigative threshold, as set out in the items disclosed, how there isn't a powerful element of circularity to that if what has been weighted is the mere fact of her presence.

MR JUSTICE GOSS: Well, does that proceed then on the assumption that one of the qualifying criteria for further investigation is only a case in which there is evidence that she was present at the time of the alleged incidents or could have been responsible for the collapse?

MR MYERS: Or the weight to be given to that, my Lord. Well, what I mean is this: we don't know what this flow chart or this matrix involves, but not knowing it, if we imagine, for example, there's various factors. If the medical evidence is given a weight of 5 and the presence of the defendant is given a weight entirely disproportionate to that, it may be that the mere fact of her presence, rather than the strength of the evidence when looked across all the various children considered, is what it is it has converted, what is an event that's been considered, into something that appears on the indictment.

It seems to us, looking at the material that's been disclosed, that there is some system for weighting what should be proceeded with. That's certainly how it appears from the material we have here. It doesn't seem to us that this matrix is applied as a

means of selecting the event in the first place. Events have been selected and then the matrix applied to them in deciding whether or not to proceed with them.

MR JUSTICE GOSS: Can I just interrupt you there? Can I just check whether that is the case?

MR JOHNSON: Can I make it entirely clear: this matrix has not been applied to this case.

MR MYERS: Well, I follow that. I suppose if it is of no part in this case, there's little that we can point to where the matrix can have played a part in determining what's on this indictment. The residual issue remains, we say --

MR JUSTICE GOSS: In which case, arguably, it shouldn't be on the disclosure schedule at all.

MR JOHNSON: I agree.

MR MYERS: Well, for that bit we don't take responsibility.

MR JUSTICE GOSS: Absolutely, no.

MR MYERS: We merely identify it.

MR JUSTICE GOSS: Yes, I understand. I think we all know where we are and I understand why this, having been disclosed as material considered by someone, the disclosure officer or whoever's responsible for disclosure, that it was potentially disclosable, but then you, rightly, are pursuing it.

MR MYERS: We are. We appreciate what's been explained about it, which would make it of no immediate relevance to what we're dealing with here.

MR JUSTICE GOSS: No.

MR MYERS: The only matter that remains, insofar as the court sees merit in it, is the point we raised under paragraph 7, which is the extent to which, given the total number of cases, Ms Letby is not present in any of those. If there is material that can be provided setting that out, we would wish to see it because then at least we can gauge the extent to which this investigation has looked beyond just her identity. That's the only matter we are left with in the light of how things have developed here.

MR JUSTICE GOSS: All right. Mr Johnson has said, if I've understood him correctly, that there is no relevant material to disclose in relation to that aspect.

MR JOHNSON: Correct.

MR JUSTICE GOSS: All right. So there we are. I will provide a short written judgment in relation to this, but I am not proposing to make any order in response to your application, Mr Myers. But I will of course keep the matter under review --

MR MYERS: Thank you.

MR JUSTICE GOSS: -- as I am obliged to do, as the prosecution are, for the duration of the trial.

MR MYERS: We're grateful for that.

MR JUSTICE GOSS: It will be there and should something arise that may touch upon this application, then of course you are entitled, indeed duty bound, to raise the matter again.

MR MYERS: We would, thank you, my Lord.

Housekeeping

MR JUSTICE GOSS: Right. Thank you very much indeed.

Just whilst we are all assembled and the defendant is present as well, first of all I take it you will -- will you want to see her --

MR MYERS: Yes, I will, my Lord.

MR JUSTICE GOSS: -- before she is taken from the building?

MR MYERS: Please.

MR JUSTICE GOSS: That will be obviously some time this morning, someone will come down. Thank you very much to the officers who are present.

Just as far as timetable is concerned, Mr Driver, thank you very much for the latest update. As I understand things, it is anticipated that essentially we will get -- I haven't brought it in with me, I could look it up on my laptop but that would waste time -- we would get close to the end, if not to the end, of the evidence relating to [Baby I] this week?

MR DRIVER: Indeed. Your Lordship will recall that Professor Owen Arthurs is joining us on Friday to deal with several cases.

MR JUSTICE GOSS: Yes.

MR DRIVER: It is difficult to gauge with precision the length of that exercise. Therefore there is a risk of the [Baby I] chapter of evidence spilling over into Monday.

MR JUSTICE GOSS: Well, that's why I phrased my comment in the terms that I did. Of course, we never know what other events may occur as sometimes unexpected and unforeseen events do occur.

MR DRIVER: Quite. Thereafter we will move to [Baby J] and then [Baby K]. We've measured, estimated, the length of those cases, and they are comparatively short in terms of the duration of time that we require to present that evidence. We think by about this time the week after we may have completed both of those, the evidence in relation to both of those babies.

MR JUSTICE GOSS: Thank you. All right. That's very helpful, thank you very much indeed.

So in terms of the general anticipated completion of the evidence relating to the individual babies, before we get on to the more generic evidence that then follows, we are looking at roughly where?

MR DRIVER: We had this discussion yesterday. Of course there's an enormous element of guesswork involved, but somewhere towards the end of March. Certainly we would be confident of completing the evidence that related directly to any of the babies, any and all of the babies, before the Easter break.

MR JUSTICE GOSS: But not further than that?

MR DRIVER: Completed before the Easter break.

MR JUSTICE GOSS: Exactly, but not further in relation to the prosecution case? I was originally -- well, earlier this month it was anticipated that the jury would be in a position to retire to consider their verdicts probably in May.

MR DRIVER: Yes. We may very well reach further into the prosecution case before Easter, but I wouldn't want to put my name to that estimate because there's so many variables. But we can foresee an acceleration in the rate of progress as we go through the counts.

MR JUSTICE GOSS: Right. Thank you very much. Well, the jury is on notice now as to when they are likely to be required in terms of the period before they retire to consider their verdicts in the case. Essentially, what you're saying is there's no real update so far as that is concerned? We certainly haven't slipped further back?

MR DRIVER: Certainly not. At the point after we have presented all the evidence in relation to the [Babies L & M] twins, then we'll be very well placed to give a more reliable estimate of time.

MR JUSTICE GOSS: That's very helpful. Thank you very much.

Mr Myers, any matters you want to raise?

MR MYERS: To assist with that, so far as the evidence not relating directly to the children, but the overarching evidence is concerned, it's a matter that we and the prosecution are considering as we go along, both its shape and its limits, because there are three aspects to that. One is the police investigation, as one routinely encounters in any case, albeit it's a large one, but that's what one might call the police evidence and we are familiar with the type of material that will have: exhibits, interviews, things like that.

Then there is evidence in the papers from senior staff at the hospital, who describe the history of this matter, which comes under the overarching evidence, and there is evidence from the experts, which is of a more general overarching nature.

With regard to those two aspects of the case, this is a matter still in discussion between prosecution and defence, I don't go behind that, but there may well be quite some limiting in evidence in court to what is in the doctors' overarching statements. So when your Lordship is looking at the amount of material, it may well be in reality that is very much less than what is in the papers.

Certainly at this point the position of the defence is that there's a good deal of background that should not feature, but I won't go beyond that because there may be some disagreement as to that.

MR JUSTICE GOSS: I understand that.

MR MYERS: I know the prosecution are anxious not to go beyond what is necessary.

With the experts and their overarching opinions, it may be once we are clear as to what that will encompass that we may wish to seek the assistance of the court as to how far they can go in knitting together material over the case as a whole and, depending upon that, again, that may limit to some extent the material to be dealt with in that part of the case.

So we agree with the prosecution as to the general length of the prosecution evidence. It may well be that it is realistic to

anticipate we could get to the end of that evidence by the Easter break in total, although we understand Mr Driver's caution and we support that.

MR JUSTICE GOSS: There are all sorts of things between now and then.

MR MYERS: Yes. But by far, as the court sees, the bulk of the evidence is that of the children and we are looking at ways of dealing with the rest of the evidence as efficiently as possible.

MR JUSTICE GOSS: Thank you very much indeed.

MR JOHNSON: Can I just say one thing? Just on the question of what I'll call broadly the treating consultants' overarching statements, I think as between counsel we're pretty much agreed as to the limits of that, but I just want to make it clear that that limitation is agreed on the basis that the defence doesn't head off in a certain direction.

MR JUSTICE GOSS: Mr Myers will understand.

MR JOHNSON: He does, he does, but I just wanted it on the record because the way that develops might open a Pandora's box.

MR JUSTICE GOSS: Yes. I have confidence in Mr Myers --

MR JOHNSON: So do I.

MR JUSTICE GOSS: -- in him knowing exactly what the consequences of certain lines may lead to.

MR JOHNSON: Yes.

MR JUSTICE GOSS: Right. Good. Well, thank you very much indeed. I will be here until the usual time this afternoon, but I don't anticipate I'm going to be needed. I don't see that the defendant needs to be kept here, apart from to see you.

MR MYERS: Yes, apart from to see us, my Lord, there's no requirement.

MR JUSTICE GOSS: It's not anticipated there will be a further hearing in this court today in relation to this case. We will resume with the jury at 10.30 tomorrow morning, we hope. Thank you very much.

Thank you, officers, Mr Myers and others will be down to see Ms Letby shortly.

MR MYERS: My Lord, may I just confirm one thing?

MR JUSTICE GOSS: Yes, please do.

(Pause)

MR MYERS: There is one matter, but I really need to discuss it with my learned friend, so I won't detain your Lordship immediately. I'll speak to him when your Lordship rises and, if we require your Lordship's assistance this morning within a short compass of time, we shall let you know.

MR JUSTICE GOSS: Any time this morning, I think, if you can deal with -- if you do need me this morning. As I say, I will actually be available. I'm just thinking of the defendant's position and her being kept here.

MR MYERS: We'll seek to deal with this issue. It's a discrete issue, it's a fairly short one, but it's something the defendant is anxious we deal with. I'll deal with that this morning if I may but it's something I do need to discuss with my learned friend before discussing it with your Lordship.

MR JUSTICE GOSS: So be it. Thank you very much. So I'll simply rise now at this stage. Let the clerk of the court know as and when.

MR MYERS: I am grateful, my Lord. We shall.

MR JUSTICE GOSS: Thank you.

(11.37 am)

(The hearing adjourned until 10.30 am on Wednesday, 1 February 2023)