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Judgment: approved by the Court for handing down | *Delivered:* **28/01/09**

*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

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THE QUEEN

-v-

STEVEN LESLIE BROWN

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GILLEN J

[1] In this matter the accused is charged with the murder of Andrew Robb and David McIlwaine on 19 February 2000.

[2] It is alleged that in the early hours of 19 February the accused, in the company of another man who is now deceased namely Noel Dillon, murdered the two victims at Druminure Road, Tandragee.

[3] At this stage the prosecution case has presented to the court all of its witnesses and evidence with the exception of one witness, namely witness F, who is the subject of this application. In essence it relies in the first place on the evidence of Mark Burcombe, who was allegedly at the scene of the murders in company of the accused and Noel Dillon when the murders took place. He has been cross-examined by Mr McCrudden QC who appeared on behalf of the accused with Mr Hunter. It was Mr Burcombe's evidence that the accused and Mr Dillon carried out the murders.

[4] Mr Kerr QC, who appeared on behalf of the prosecution with Ms McColgan, submits that there is supportive evidence for Mark Burcombe in the form of forensic evidence-tyre marks at the scene matching aspects of a car owned by the accused, pieces of plastic found at the scene matching pieces found at the home of the accused and DNA of the accused found on the bloodstained clothing of one of the deceased - which I do not need to further detail for the purposes of this application.

[5] Mr Kerr now seeks to adduce in evidence a statement made by a female witness described as witness F. She commenced to give oral evidence in this case for a short time but was unable to continue for health reasons. She has been examined by a general practitioner and by Dr Fred Brown,

Consultant Forensic Psychiatrist during a break in the trial. His conclusion is that she is suffering from mixed anxiety and oppressive disorder and is mentally unable to give further evidence in this case .

[6] Her statement, for the purposes of this application, can be dealt with in short compass by me. She alleges that she was the partner of the accused subsequent to April 2004 and that during her relationship with the accused he made a series of admissions to her about his involvement in the murder.

[7] Prior to the start of this trial, Hart J made a number of orders relevant to her evidence on 23 November 2007. At that time both the accused and Burcombe were charged with the present offences. In the course of an extract from the judgment of Hart J which has been given to me he said:

> "This brings me to the application for an order for anonymity for witness F. The application was not objected to, and I can deal with it briefly. I consider (sic) the law in this area in R v Marshall and Others (2005) NICC 29, and the jurisdiction to permit a witness to give evidence anonymously has been confirmed in R v Davis, R v Ellis and Others (2006) 4 All ER, 648. The present case is straightforward – as the defendant Brown is already aware of the identity of witness F – and so he is not prejudiced in any way by this application, and counsel for Burcombe takes no issue with the application, as it does not affect his client. There is no suggestion that this will, in any way, prejudice Brown. I therefore grant the application that witness F should be able to give evidence anonymously. It will of course be necessary for the trial judge to be informed of her identity, and the order does not affect the continuing obligation of the prosecution to disclose to the defence anything that would affect her credit worthiness.
>
> Although an order was made by Armagh Magistrates' Court on 29 September 2006 under Section 46(6) of the Youth Justice and Criminal Evidence Act 1999 forbidding publication of any matter during the lifetime of witness F that might identify her as a witness in these proceedings, in order to ensure that, if necessary, the order applies to the Crown Court, I shall make an order in the same terms. I do so because I am satisfied that it is necessary in order to ensure that any information which might lead to her identity becoming known by

> those who are not aware of it, is not published as a consequence of this trial. There will therefore be an order in the following terms; by virtue of Section 46(6) of the Youth Justice and Criminal Evidence Act 1999 it is ordered that no matter relating to the person referred to in these proceedings as witness F shall, during the lifetime of that person, be included in any publication if it is likely to lead members of the public to identify that person as being a witness in these proceedings.
>
> As this case is to be tried by a judge alone, whilst a transcript of this ruling will be made available to the parties, I direct that it and the papers relating specifically to these applications, should not be made available to the trial judge without further order."

[8] On the same date Hart J made orders pursuant to Article 13 of the Criminal Evidence (Northern Ireland) Order 1999 that during the evidence of witness F members of the public be excluded from the court (although incorrectly the Order refers to article 11) and under Article 12 of the Criminal Evidence (Northern Ireland) Order 1999 for a special measure that the evidence of witness F be given by live television link. The Order referring to the lifetime ban under the Youth Justice and Criminal Evidence Act was incorrectly headed "Article 19 of the Criminal Justice (N.I.) Order 1994".

[9] I am satisfied that the initial order granting anonymity by Hart J was made by him under the court's inherent jurisdiction at common law to control its own proceedings and to order the identity of a witness to remain anonymous (See R v Marshall and Others (2005) NICC 29 at paragraph 13 et seq and R v Davis, R v Ellis and Others (2006) 4 All ER 648 at paragraphs 13-15.).For reasons that I shall shortly set out I am satisfied that the anonymity order was one that could have been made had the Act been in force at the time Hart J made his order.

[10] Clearly his order did not intend to secure that the identity of the witness was withheld from the defendant Brown because, as the judge made clear, Brown was already aware of the identity of witness F as was the court. His order was addressing his common law power to permit the witness to refrain from identifying herself so that the press and public might hear. The rationale behind such power is a keen public interest affording protection to a witness even where her identity is known to the accused. In my view this is quite separate from the exercise of the common law power to afford anonymity from all, including the accused and his representatives, save from those calling the witness and the court. (See discussion of these different levels of witness protection in Archbold 2009 Edition at paras 8-69 and 8-70)

Hart J 's further orders reflected the fact that the common law principles have now found their way into statute for the various measures which he thereafter directed.

The current application

[11] Mr McCrudden QC, who appears on behalf of the accused with Mr Hunter, submitted that the Criminal Evidence (Witness Anonymity) Act 2008(passed in the wake of R v Davis [2008]3]All ER 461("Davis")) and as interpreted by R v Mayers and Others (2008) EWCA Crim. 1418("Mayers") provides no procedure authorised by any express statutory provision to permit the use of anonymous hearsay evidence or evidence made in the form of a statement by an unidentified and unidentifiable witness which is simply read to the jury as part of the evidence.

[12] Hence it was his submission that although Hart J had made an anonymity order in respect of F it was predicated on the basis that she would give evidence. That evidence is now inadmissible as a statement once it has become clear that she is not prepared to give evidence.

The statutory framework

[13] Where relevant the Criminal Evidence (Witness Anonymity) Act 2008("the Act") provides as follows:

> "**Introduction**
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> **1. New rules relating to anonymity of witness**
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> (i) This Act provides for the making of witness anonymity ordered in relation to witnesses in criminal proceedings.
>
> (ii) The common law rules relating to the power of a court to make an order for security that the identity of a witness in criminal proceedings is withheld from the defendant (or, on a defence application, from other defendants) are abolished.
>
> (iii) Nothing in this Act affects the common law rules as to the withholding of information on the grounds of public interest immunity."

Conclusions

[14] I observe that this is not a case falling within 1(ii) of the Act where the identity of a witness, namely witness F, has been withheld from the

defendant. The accused is well aware of her identity. Indeed no objection was made to the prosecution application by the defendant before Hart J. How could there have been when the accused knew who she was and no other witness was said to have been present when the alleged conversations took place? No prejudice whatsoever was occasioned to the accused . Indeed Mr Kerr went so far as to suggest in the course of submissions that prior to the trial counsel had agreed that there was no need to apply under the 2008 Act. There was no express acceptance of that by Mr McCrudden.

[15] The ruling of Hart J that F be permitted to give her evidence anonymously refers only to the public as his subsequent orders made clear and is therefore outwith the common law rule abolitions in 1(ii).At one stage in the submissions Mr Kerr QC, who appeared on behalf of the Crown with Ms Colgan, submitted that 1(iii) is the operative provision in this instance in that Hart J had clearly exercised his anonymity ruling under the common law rules on the grounds of public interest immunity although the judge did not say this in his ruling .

[16] I am satisfied that the abolition of the common law rules under the Act is confined to instances where the identity of the witness has been withheld from the defendant, thereby leaving all other common law rules untouched including the common law power to preserve identity from the press or public. Whether it was on this basis or, as Mr Kerr had argued, the ruling of Hart J was clearly within the bounds of 1(iii) of the 2008 Act, this ruling is not within the ambit of the 2008 Order .

[17] I pause to observe two matters which lend weight to that view. First the 2008 legislation was passed in reaction to the House of Lords decision in Davis .The mischief addressed in that case was a trial order that 3 witnesses were each to give evidence under a pseudonym, all addresses and personal details and any particulars which might identify the witnesses were to be withheld form the accused and his legal advisers and the witnesses were to give evidence behind screens so they could be seen by the judge and the jury but not by the defendant .One could scarcely imagine a greater contrast with this case. It was to that situation that the 2008 Act was addressed and hence the confined reference to the abolition of the common law power to withhold the identity of a witness from the accused .

[18] Secondly whether one adopts the literal rule or the modern trend towards purposive construction of statutory provisions, the wording of the 2008 Act seems clear and unambiguous. The draftsman must have been aware of the various levels of the common law power on the granting of anonymity. This Act has chosen to abolish only one level namely that where the court formerly had a common law power to withhold identity of a witness from the accused.

[19] In Mayers , the Lord Chief Justice of England and Wales at paragraph 5 of the judgment underlined this emphasis on the identity being withheld from the defendant in the legislation when he said:

> "Notwithstanding the abolition of the common law rules, it is abundantly clear from the provisions of the Act as a whole that, save in the exceptional circumstances permitted by the act, the ancient principle that the defendant is entitled to know the identity of witnesses who incriminate him is maintained."

[20] I am satisfied therefore that the emphasis in this legislation is on the defendant being aware of the identity of a witness who incriminates him. At Section 4 of the 2004 Act three conditions (a), (b) and (c), must be met before the jurisdiction to make a witness anonymity order arises. Each is mandatory. When all three conditions are met, the jurisdiction to make a witness anonymity order arises. Condition (c) is expressly directed to oral testimony. The evidence envisaged in these provisions is the evidence to be given by a witness who will be called – or at the stage when the application is made – is intended to give oral testimony. Section 12 of the Act identifies those to whom its arrangements may extend. A witness is defined as "any person called, or proposed to be called, to give evidence at the trial". Hence if, as in the instances of V, P and R in the case of Mayers it is proposed to call anonymous hearsay where the defendant is precluded from knowing the identity of his accuser, the 2008 Act does not permit it. Crucially however Mr McCrudden failed to recognise that he is unable to avail of that provision in this instance because witness F has not been afforded anonymity under the common law rule relating to the power of a court to make an order for securing that the identity of a witness in criminal proceedings is withheld from the defendant and which have now been abolished under the 2008 Act. Hence the 2008 Act does not govern the case of witness F and the factual matrix and legal principles set out in the cases of Mayers and Others do not obtain in this instance.

[21] I therefore dismiss this application.