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Judgment: approved by the Court for handing down | *Delivered:* **8/10/2009**
*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

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BELFAST CROWN COURT

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THE QUEEN

-v-

RICHARD STEWART
PAUL ERIC CECIL JOHNSTON
DEAN MILLIGAN
RODNEY THOMAS COLGAN

(NO. 2)

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HART J

[1] These are prosecution applications for various special measures directions to be granted in respect of a number of witnesses, and for anonymity orders in respect of witness C and witness D. The applications for special measures fall into a number of categories. First of all, a number of witnesses who were under 17 at the time they made video recorded statements of evidence, and who the prosecution say are therefore entitled to give their evidence in chief by way of their video recorded statements, and then be cross-examined by live link. The prosecution rely upon Articles 4, 9, 10 and 15 of the Criminal Evidence (Northern Ireland) Order 1999 (the 1999 Order) and my ruling in R v M [2009] NICC 15.

[2] The witnesses in this category are Leanne Dripps, Graham Lynch and Laura Gibson. There is no objection to the order sought in respect of either Dripps or Lynch by any of the defendants, but Mr John McCrudden QC on behalf of Milligan objected to the application in relation to Gibson. By way of a preliminary point he argued that the notice had not been served upon his instructing solicitor. I heard evidence in relation to service, and for the reasons I gave at the time I was not satisfied to the requisite standard that the prosecution had established that the notice had been served. However, I was satisfied that Milligan had suffered no prejudice whatever in relation to this.

It was apparent from the skeleton arguments that such an application was being made, and the defence had a long time to prepare for the application. I therefore extended the time for the application by virtue of Rule 44 of the Crown Court Rules.

[3] Paul Houston gave oral evidence at the committal, and Mrs McKay said that the prosecution now propose that at the trial (1) he should adopt his video statement as his evidence, (2) his deposition will be read, and (3) he should therefore be cross-examined by way of live link. There were no objections to this from any of the defendants, and I therefore order that the video recorded statement by Paul Houston be admitted as his evidence in chief, and that in addition his deposition be read, and he then give evidence by live link during which he may be cross-examined and re-examined as required.

[4] There are a number of special measures applications which relate to adult witnesses the prosecution say are suffering from fear, namely Adele Steffen, Hazel Nelson, Christina Jones and Trevor Jones. The application in relation to Danielle Clements was withdrawn.

[5] Finally, applications were made for witness anonymity orders for witness C and witness D under the Criminal Evidence (Witness Anonymity) Act 2008. This was opposed by Mr O'Donoghue QC for Stewart, but was supported by Mr McCrudden QC for Milligan.

[6] I will deal with the objections to the special measures application in respect of Gibson first as it raises the question whether I correctly interpreted Article 10 of the 1999 Order in my earlier judgment of R v M. Mrs McKay for the prosecution relied upon that judgment, pointing out that the offence with which Milligan is charged is a "violent offence", and as Gibson was under 17 when she made her video statement she is therefore a "qualifying witness" to whom the "primary rule" applies. She submitted that if Mr McCrudden's argument is correct the effect would be that a witness whose evidence in chief was given by video when the witness was under 17 would then be subjected to the more stressful experience of being cross-examined in person because the witness is over 17 by the date of the trial.

[7] Whilst that is clearly a factor in favour of the primary rule continuing to apply in such circumstances, in itself it cannot be decisive when interpreting Article 10 because such an outcome is provided for under Article 15(1) and (4) in the case of those who are not qualifying witnesses within the provisions of Article 10. Mr McCrudden's argument is that Article 10(2)(b) does not have the effect of disapplying Article 9(5), but notwithstanding Mr McCrudden's argument I adhere to my conclusion in R v M at [11], namely:

> [11] I am satisfied that the intention of Parliament was to extend the automatic protection of special measures directions otherwise available to children under the age of 17 only to those in certain categories who, having made their video statements when under 17, were over 17 by the time they come to give evidence in court. The alternative would be to lay them open to the prospect of having to appear in the courtroom to be cross-examined simply because they had now reached the age of 17. I have reached this conclusion for the following reasons.
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> (i) The use of "shall" on two occasions in Article 10(2)(a) is a significant indication that the requirement is mandatory.
>
> (ii) The framework of Article 10 suggests that particular provision is being made for a specific category of vulnerable witnesses, not merely someone who is over 17 when he or she comes to testify and is therefore classified as a "qualifying witness". To be eligible the witness has to satisfy a further requirement, namely being "in need of special protection" because the witness is to testify about sexual or violent offences. It is entirely logical that a witness who is to describe sexual or violent offences perpetrated against themselves or others but is now 17 should continue to be afforded the automatic protection afforded by the 1999 Order to children under 17 when they testify about such matters, provided that the witness made the video statement that is to stand as his or her evidence-in-chief when the witness was under 17."

[8] I therefore hold that Article 10(2) of the 1999 Order automatically extends to witnesses who are under 17 when they made their video statement the protection of having that statement played at the trial as their evidence in chief when they are over 17, and they then must be cross-examined and re-examined as necessary by live link. That being the case, I grant the applications in respect of Leanne Dripps, Graham Lynch and Laura Gibson, and direct that in each case (1) that their video recorded interview be admitted as their evidence in chief; and (2) that each shall give their evidence by way of live link whilst being cross-examined and re-examined as appropriate.

[9] When considering the applications relating to Adele Steffen, Hazel Nelson, Christina Jones and Trevor Jones I bear in mind the circumstances relating to the charges outlined in part in my earlier judgment in this case at [2009] NICC 19 and I do not propose to repeat them. Adele Steffen (who was originally described as witness Q) is the subject of an application that both her evidence-in-chief and cross-examination should be by way of live link. The application, which is brought under Article 5 of the 1999 Order, is based upon the evidence of D/C McKinney and the statement of the witness dated 10 April 2008. The notice gives Adele Steffen's date of birth as 4 September 1976 and so she is now 33. She lives at Knockloughrim near Colgan's family. In her statement of 10 April 2008 she refers to worries she has as a result of her identity being known, but that was before her identity was revealed. She also refers to her dreading going to court, and feeling frightened because of the defendant's associates. When D/C McKinney spoke to her by phone on 5 August 2009 the witness told her that she was expecting a child and that her fears remain the same.

[10] That the witness's identity has now been revealed may imply that her previous concerns are perhaps of less importance, but I am satisfied that they are still relevant. Hers is something of a borderline case, but I consider that her present pregnancy, and that she will therefore either be pregnant or shortly after pregnancy when the trial is projected to take place, establishes that she meets the provisions of Article 5(1), and I therefore conclude that were she to give evidence by way of live link this would improve the quality of her evidence as required by Article 7(2)(a) and (b). In addition the application is not objected to by any of the defendants, and I therefore grant an order that Adele Steffen give her evidence by way of live link.

[11] Hazel Nelson (who was originally witness G) is now 48 and lives 4 or 5 doors from Stewart's home in Maghera. She became very distressed when her identity was revealed, although how this came about has not been explained. Most recently during a phone call by D/C McKinney in August 2009 she was still very distressed, told D/C McKinney that she felt that she would be unable to speak in court, that if she had to her legs would give way, and she would faint. It is obvious from her written statement and conversation with D/C McKinney that her concerns relate to having to face the defendants across the court in circumstances where she feels that she would be in an intimidatory atmosphere and extremely uncomfortable. She has explained to D/C McKinney that initially she did not tell her doctor why she felt stressed, and says that her skin has broken out in a serious rash and that skin condition has been observed by D/C McKinney. A further burden is that her husband has been very seriously ill for some time.

[12] Although there is no medical evidence from her doctor this is not essential although it may be desirable. See R v Petraitis [2008] NICC 15. There is no objection by any defendant to this application and I am satisfied

that it meets the requirements of Article 5(1) and 7(2)(a) and (b). I therefore grant the application that Hazel Nelson give her evidence by way of live link.

[13] So far as Christina and Trevor Jones are concerned, Mrs Jones was a relative of the deceased and she and her husband were with him the night he died, and were present when he was attacked and then run over. The applications in their cases are that both should be screened from the defendants under Article 5 and from the public gallery under common law. Each made clear in his or her statement that they would feel intimidated at having to see the defendants, whom they know, both because of the events of that night, and because of the defendant's alleged associations with so called paramilitaries, a euphemism for terrorist or terrorist supporters. Given the events of that night as described by many of the witnesses I do not find such concerns surprising or insubstantial.

[14] Mr Jones told D/C McKinney he would feel intimidated and nervous if the defendants could see him whilst he was giving evidence, and he was frightened that in those circumstances he would forget something or get mixed up. When Christina Jones made her statement of 2 October 2008 she said:

> "If I could answer my questions without them seeing me or making eye contact with them then I think I could answer my questions to the best of my ability."

[15] There has been no objection to the applications that they be screened from the defendants, although Mr Farrell on behalf of Johnston somewhat faintly suggested that the case had not been made out for screening them from the public gallery. However, I am satisfied that the prosecution have established that the requirements of Article 5(1) have been met by virtue of Article 5(2)(a), and that Article 7(2)(b)(i) has been met in that the order sought would maximise the quality of the evidence of both witnesses. I therefore grant the applications and make the following orders.

(i) That they be screened from the defendants whilst giving evidence under Article 11 of the 1999 Order, and

(ii) That under common law they be screened from the public gallery whilst giving evidence.

[16] This brings me to the final application, namely that witnesses C and D be granted anonymity. For the purposes of the present application I accept that the following have been established.

(i) That C and D chanced upon the final stages of the violent attack which they witnessed.

(ii) They are both young women.

(iii) Both are Roman Catholics and that there was a strongly Loyalist ambience about many of the events and the participants in those events that night.

(iv) Witness C has family who live in the area and who are quite well known, and she fears for their safety.

(v) D is from that area, and also has family who live and work in the area, she feels vulnerable to attack if her identity becomes known.

(vi) D has expressly stated that she will not give evidence unless she is granted anonymity.

(vii) C does not expressly say that she will not give evidence unless she is granted anonymity.

[17] Mr O'Donoghue for Stewart accepted that the evidence of witness C could not be said to be the sole or decisive evidence against his client, but focused his argument on the absence of any statement by witness C that she would not give evidence if the application for anonymity is refused, and he went on to emphasise that her desire for anonymity has to be balanced against the general right of a defendant to know the identity of a witness. He suggested that an appropriate alternative would be to make a suitable order for special measures. In witness D's case he accepted that whilst D was clearly in fear, nevertheless there was nothing to derogate from the general principle that a defendant is entitled to know the identity of a witness.

[18] R v Mayers [2009] 2 AER 145 is the principal authority on anonymity under the 2008 Act and I do not propose to refer to it in detail, and I also refer to the principles which I sought to highlight in R v McKenna, Toman and McConville [2009] NICC 44. Mayers suggests that it is appropriate to consider Condition C first and I propose to do so. This establishes that in order that an anonymity order is made (a) it is important that the witness should testify, and (b) the witness would not testify if the anonymity order was not made. That the witness is reluctant or unhappy to testify is not enough, it must be clear that the witness will not testify.

[19] I am satisfied that each of these requirements under Condition C has been satisfied in respect of witness D. Witness C is more problematic. She has not explicitly stated that she will not testify unless she is granted anonymity, although when the tenor of her statement of 17 October is considered as a whole it strongly suggests that that is the case. In Mayers at [27] Lord Judge CJ observed that:

> "We should perhaps add that it is open to the court to reach the conclusion that the witness would not testify if the circumstances of the offence itself justified the inference, …"

Whilst I consider that the court should be very slow to infer that a witness will not testify where the witness has not said so in her statement, nevertheless the circumstances of the present case, and a fair reading of the witness statement by witness C, suggest that she is extremely unlikely to give evidence unless she is afforded anonymity. In reaching this conclusion I take into account the statement from D/C McKinney which states that when she spoke to witness C on 17 October 2008:

> "She stated that one of the main issues for wanting to remain anonymous was that she was a Roman Catholic …"

[28] A further consideration, and an unusual feature of the present case, is that Mr McCrudden on behalf of Milligan supported the prosecution application because Milligan regards it as important for his defence that both witness C and witness D testify. I agree with Mr McCrudden that this cannot determine the outcome of the application in relation to witness C, but I consider that it is a relevant consideration when the court has to decide whether or not "it is necessary" that C should be granted anonymity, because in principle it must be correct to have regard to any adverse effect upon a co-defendant if a witness is refused anonymity at the urging of another defendant, and that witness then refuses to give evidence which might assist the other defendant.

[29] In light of that, considering the tenor of the statement of witness C as a whole, and having regard to all of the circumstances surrounding the alleged offence, circumstances which lend credence to the reasons witness C has given to explain her concern about giving evidence, I have concluded that it is clear that she will not give evidence unless she is granted anonymity, and therefore that it is "necessary" to make an anonymity order in her case as well.

[30] Turning to Condition A, I am satisfied that an anonymity order is "necessary" to protect the safety of witness C and witness D in the light of the fears they have expressed for themselves and their families as they are Roman Catholics who have links with family who live in this area, and that they have genuine concerns that they would be intimidated or threatened.

[31] The final condition which I have to consider is Condition B, namely whether the defendants would have a fair trial if these applications were

granted. As these witnesses came upon the scene by chance and have no apparent prior knowledge of any of the other participants in these events it is difficult to see how Stewart would be prejudiced in any way in testing the credibility or the accuracy of their evidence if they are granted anonymity. The prosecution are bound to disclose any material relevant to their credibility, and Mr O'Donoghue was unable to point to any specific disadvantage which his client would suffer if witness C and witness D were granted anonymity. It is also relevant, as already noted, that their evidence is neither the sole nor the decisive evidence against his client. I am satisfied that to grant anonymity orders in respect of witness C and witness D is consistent with Stewart receiving a fair trial, and I therefore make the following orders in respect of witness C and witness D.

(a) The witnesses named in committal papers as Witness C and Witness D are to be referred to as Witness C and Witness D respectively.

(b) The witnesses' names and other identifying details are to be withheld and removed from materials disclosed to any party to the proceedings.

(c) The witnesses are not to be asked questions that might lead to their identification.

(d) Witness C and Witness D are to be screened from all persons in court whilst giving evidence except the judge, the prosecution and the defendants' legally qualified representatives. In view of the anonymity orders there is no need to make any order under the 1999 Order in respect of special measures.

The identities of Witnesses C and D are to be provided to the court as soon as is convenient, and in any event before the start of the trial.