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Judgment: approved by the Court for handing down | *Delivered:* 6/10/2005

(subject to editorial corrections)

IN THE CROWN COURT AT BELFAST

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THE QUEEN

-v-

WILLIAM JAMES FULTON, MURIEL GIBSON, RAIN LANDRY AND TALUTHA LANDRY

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BILL NO. 150/03

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HART J

[1] At the commencement of the trial I heard an application by the prosecution seeking orders that ten undercover officers (a) give evidence from behind screens so that they are screened from the public, but not from the defendants or their legal representatives, and (b) that they remain anonymous. So far as (a) is concerned, the original application was that the witnesses be screened from "the public gallery and from those defendants with whom they had no personal contact in the course of the investigation", but this was not pursued. So far as (b) is concerned, the application may be more correctly described as an application that the officers be permitted to retain the pseudonyms by which they were known to the defendants and that their true identities should not be revealed to the defendants or their legal representatives. Having heard the arguments and submissions of counsel on both sides I granted the applications and said that I would give reasons for my ruling later and I now do so.

[2] The prosecution rely upon tape recordings of conversations by the defendants obtained by surveillance and by undercover police officers who were in contact with the defendants. The defendants only knew the undercover officers by their first names and were unaware that these individuals were in fact undercover police officers. There were ten such police officers and they fall into three groups.

(a) Six are still serving police officers, namely Dave S, Sam, Gary, Robbie, Max and Liz. All six continue to work as undercover police officers.

(b) Three, namely Dave, David and Keith have retired from the police but still work undercover. One has been re-employed by a public authority and two are working in the commercial sector.

(c) One, Neil, has retired from the police. Detective Chief Inspector Jenner said in evidence that Neil was involved in a level of investigation but she was not sure whether that entails covert activities.

[3] The prosecution application was that these witnesses should all be granted anonymity and screened from the public for two reasons.

(a) As all of the individuals except Neil are still involved in undercover operations, were their identities and appearance to be revealed their effectiveness and the effectiveness of further operations could be jeopardised.

(b) Their personal safety, and that of their families, would also be compromised.

I shall refer to these as the "future effectiveness issue" and the "personal safety issue" respectively.

Anonymity

[4] This application was brought by the prosecution at common law because they contend that the granting of anonymity is outside the provisions of the Criminal Evidence (Northern Ireland) Order 1999. Mr Berry renewed the argument which was advanced in R v Marshall that the 1999 Order does encompass the granting of anonymity, and he referred me to my judgment in R v Millar and Others, unreported, 29 May 1992. He also referred to the decision of the European Court of Human Rights in Van Mechelen v Netherlands [1998] 25 EHRR 647. Ms Quinliven for Muriel Gibson also relied upon Van Mechelen. I considered the issue of anonymity at some length in Marshall and concluded that applications for anonymity are made under the common law and not under the provisions of the 1999 Order. However, in Marshall the witnesses for whom anonymity was sought were members of the public and not, as in the present case, undercover officers. The circumstances of the present case are therefore different to those in Marshall, and Van Mechelen was not considered in Marshall. It is therefore necessary

to consider whether, in the case of undercover officers, the Convention jurisprudence permits the granting of anonymity to a police officer who has been engaged in undercover activities. In Van Mechelen the European Court observed at [57]:

> "On the other hand, the Court has recognised in principle that, provided that the rights of the defence are respected, it may be legitimate for the police authorities to wish to preserve the anonymity of an agent deployed in undercover activities, for his own or his family's protection and so as to not impair his usefulness for future operations."

See also Ludi v Switzerland [1993] 15 EHRR 173. Therefore, provided that the trial procedures adequately counter-balance any disadvantages which the defendant might otherwise face, anonymity may be permitted. In Van Mechelen the anonymous police officers were in a separate room with the investigating judge from which the accused and the accused's counsel were excluded. All communication was via a sound link. The defence were not only unaware of the identity of the anonymous police witnesses, but were also prevented from observing their demeanour under direct questioning, and thus testing their reliability. See Van Mechelen at [59]. In the present case, if the witnesses are screened from the public, the defendants, their counsel and the judge will be able to observe the demeanour of the witnesses whilst they are being directly questioned. This is a very significant difference from the circumstances in Van Mechelen. Moreover, as in Ludi v Switzerland, here the defendants knew the undercover agents, although not their real identities, by their physical appearance because they had met them on a number of occasions. See Ludi at p. 201.

[5] Therefore, so far as the European Convention jurisprudence is concerned, I am satisfied that there is ample authority to justify a national court granting anonymity to an undercover police officer in order to preserve his effectiveness in the future and to protect himself or his family from harm as a result of his activities being revealed.

[6] I was reminded that in R v Millar at p. 36 (10) I concluded that:

> "It is not permitted to screen a witness whilst giving evidence merely because to conceal the identity of the witness would inhibit or prevent the detection of crime or apprehension of criminals in other cases."

I am satisfied that this no longer represents the law in view of the acceptance of the principle which I have outlined above by the European Court in Van Mechelen and Ludi. The European cases do not draw a distinction between

terrorist and other crimes, and I can see no valid reason for drawing such a distinction in domestic law, given the widespread nature of non-terrorist serious crime and the increasingly sophisticated methods which law enforcement agencies have to adopt for the prevention or detection of crime. See for example the circumstances of R v Braniff [2005] NICC 26. I therefore conclude that, provided the position of the defendants can be adequately safeguarded, there is no reason in principle why anonymity should not be granted for the undercover officers in the present case.

[7] Should anonymity be granted in the particular circumstances of this case? So far as the effectiveness issue is concerned, I do not consider that there is a material difference between the position of the six officers who are still in the police force and the three who have retired but who continue to work under cover. Provided that the latter are engaged in the prevention or detection of crime and will continue to be so I am satisfied that they should not be distinguished from the others just because they are not employed as police officers. There are many organisations that seek to prevent or detect crime and, provided that their activities are within and comply with the law, I see no reason why those activities should be inhibited. The effectiveness of undercover personnel is entirely dependent on their not being associated with others who are seeking to prevent or detect crime, and the public interest therefore requires that their identity be concealed in order to ensure their continued effectiveness wherever they may operate. It is a truism that criminal activity takes place not merely on a local or national, but often on an international stage. I am satisfied beyond reasonable doubt that if the witnesses (other than Neil to whom I will refer in a moment) are not permitted to conceal their identity by continuing to adopt the pseudonyms they used during their activities in this case their effectiveness would be completely destroyed for the reasons set out by Detective Chief Inspector Jenner in her witness statement and her evidence.

[8] However, the evidence relating to Neil does not establish that he is presently, or will be, engaged in undercover operations. Were the effectiveness issue the only basis upon which anonymity should be granted to him I would have refused the application.

[9] However, in respect of all of the witnesses the main thrust of the application relates to their safety and that of their family. Again leaving Neil aside for the moment, I accept that the safety of the other nine witnesses and their families may be imperilled in the future if their true identities were to be revealed. I am satisfied that they would thereby be placed at risk of retribution from those they are currently deceiving as to their true identities, as well as from others in future operations, and I therefore granted the application to extend anonymity to each of these nine witnesses.

[10] So far as Neil is concerned, given the lack of certainty as to his future plans, I consider that any risk to himself or his family is likely to come from those he had dealt with in other cases in the past, although one cannot entirely exclude the risk of violence being inflicted upon him by others he has had no connexion with simply because he has been known to perform this task in the past. I accept the evidence of Detective Chief Inspector Jenner about the risks created for those who have been involved in operations in the past as undercover officers, and the results that flow from that, including putting such persons on the witness protection scheme. I was therefore satisfied that Neil should be granted anonymity to ensure his safety and that of his family.

[11] The defence laid considerable stress in their submissions upon the disadvantage it was said they would be under by being unable to establish the true identities of the witnesses, because it was said that the defendants were thereby deprived of the opportunity of checking their credit worthiness. I was told by Ms Quinliven that the prosecution had said in a letter of 24 February 2005 that none of the witnesses have criminal records, but she argued that the prosecution have not said whether the witnesses may have been discredited in other cases. That may be so, and I take that into account, but this is something for the prosecution to consider within their normal duty of disclosure. Mr Kerr QC on behalf of the prosecution said that checks have been made and that checks will be made again before the witnesses give evidence and if there is any such information it will be disclosed to the defence. I consider that undertaking answers Ms Quinliven's concerns in that respect.

Screening

[12] Mr Kerr put forward the application on the basis that the court had a common law power to order screening of witnesses, both in respect of the "effectiveness issue" and the "personal safety issue". However, Mr Berry (supported by Ms Quinliven) argued that insofar as personal safety was relied upon as part of the screening application, this fell within the provisions of Article 5 of the 1999 Order because the witnesses were saying through Detective Chief Inspector Jenner that they were in fear for themselves or their families. Mr Kerr pointed to the decision of Weir J in Braniff where the judge held that he had a common law discretion to order witnesses to be screened. However, it does not appear from the judgment that the present point was argued in that case. Mr Kerr further argued that pre-existing common law powers were preserved as there is no provision in the 1999 Order extinguishing pre-existing common law powers. This may be so, but it must be open to argument whether a common law power can continue to exist, or if it exists, whether it should be resorted to where, as in the 1999 Order, Parliament has provided a statutory framework containing a power to screen a witness on the grounds of fear. If the provisions of the statutory scheme do

not extend to the particular circumstances of an application, as I have held to be the case in relation to applications for anonymity, that is a different matter. In those circumstances it is open to the courts to develop the common law by adapting existing principles provided that this does not infringe a defendant's Convention rights. It may be the case that this would be the position were it necessary to consider a screening application based only upon the need to protect the effectiveness of the witness in future.

[13] Without the benefit of fuller argument I do not propose to venture a concluded opinion in relation to this, but I am satisfied that it is undesirable to resort to a common law power where there exists a statutory procedure which exactly covers the circumstances in respect of which the application is brought. In the present case I therefore propose to treat the application for screening as one which should have been brought under the 1999 Order in so far as it relies upon the fear on the part of the witnesses.

[14] As Mr Berry pointed out, that means that the prosecution have not complied with the requirements seeking leave to apply out of time. See R v Cooper [2004] NICC 2. Nevertheless, I propose to invoke the powers contained within Article 7(1)(b) of the 1999 Order because the substantial merits of the application to screen the witnesses have been fully argued, and it has been evident from the service of the committal papers that the officers were undercover officers. I am satisfied that the defence have not been placed at any disadvantage by the tardiness of the prosecution in making the application, and that the interests of justice require a special measures direction to be made. I have received the views of the witnesses which have been adequately conveyed through Detective Chief Inspector Jenner although she has not spoken to them personally. I am satisfied that they are unanimous in requesting screening. Therefore, so far as the personal safety basis for screening the officers is concerned, I am satisfied that, subject to the matter which I shall refer to below, I should make the screening order.

[15] I have left to this point the issue which is common to both the anonymity and screening applications, namely the principle laid down by the European Court of Human Rights in Doorson v Netherlands and in Van Mechelen that a conviction should not be based either solely or decisively on anonymous statements. As I have already indicated, there is a substantial difference between the course which is proposed by the prosecution in the present case and the facts of Doorson and of Van Mechelen because the manner in which the witnesses would give evidence if permitted to do so would place the defendants in a significantly less disadvantaged position than was the case in either of those cases. In the present case it is proposed that the defendants would be able to see the witnesses as they give evidence and to question them directly and therefore observe their demeanour throughout. That is a very significant difference between the circumstances of this case and those considered in Doorson and in Van Mechelen.

[16] In addition, as the evidence presently stands I do not consider that it can be said that the evidence of the undercover officers could be said to be either the sole or the decisive evidence relied upon by the prosecution. It is correct that the evidence of the undercover officers is necessary to establish in each case that it was the defendant who was speaking at the material time and therefore that evidence is a vital link in the evidential chain which the prosecution must establish in order to prove the guilt of each defendant in relation to each charge. However, other than establishing the identity of each defendant, the evidence of the undercover officers does not establish the elements of each charge which the prosecution has to prove. On the contrary, proof of those elements depends upon the alleged admissions made by each defendant that had been recorded. If the recordings containing the alleged admissions are admitted in evidence, then any consequent conviction could not be said to be based solely or decisively upon the statement of the anonymous witnesses, rather they would be almost entirely based upon the alleged admissions.

[17] It may be that there could be circumstances in which it is clear that the proposed evidence of an anonymous witness or witnesses is the only evidence to be relied upon by the prosecution and be the only evidence upon which the prosecution can rely. In such circumstances that a conviction might result from the admission of such evidence may be a relevant consideration for the court to take into account at the pre-trial stage in deciding whether or not to admit the anonymous statement(s) relied upon. However, in the normal way it is not until all of the prosecution evidence has been heard that it would be possible for the court to determine whether any conviction would be solely or decisively based upon the statement of an anonymous witness. It is at that stage at the earliest that the application of the principle in Doorson and Van Mechelen should be considered, rather than at the stage when the admission of the evidence is being considered.

Conclusions

[18] So far as the applications for anonymity are concerned, I do not consider that there is any less intrusive or alternative method of protecting the witnesses, nor has one been suggested. In considering the applications I applied the principles I identified in Marshall at [20] and was satisfied beyond reasonable doubt that all the witnesses should be granted anonymity (with the exception of Neill) in order to preserve their effectiveness in the future, and in all cases that anonymity should be granted in order to preserve their safety and that of their families. So far as the personal safety issue is concerned, I was satisfied that I should grant the screening order sought because I was satisfied beyond reasonable doubt that not to do so would impair the effectiveness of the witnesses evidence because they would not otherwise give evidence. For these reasons I granted the applications.

[19] I directed that each witness should remain anonymous, and that each would be referred to by the pseudonym they had already adopted. I ordered that each witness will be required to provide his or her name on a piece of paper and confirm to the court that he or she is the person so named. The paper will then be handed to the judge and placed in a sealed envelope and kept secure until further order of the Crown Court or the Court of Appeal. I also granted the application that each witness be screened from the public, but not from the defendants and their legal representatives, whilst giving evidence.