Neutral Citation No. [2011] NIMag 1 | *Ref:*

Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **03/01/11**

Director of Public Prosecutions

Complainant

And

Brendan McConville
John Paul Wootton
Sharon Wootton

Defendants

Ruling

District Judge (MC) White

1. The defendants are charged with a total of eight offences, which can be grouped into four categories, as follows:-

(i) Brendan McConville and John Paul Wootton are charged with the murder of Constable Stephen Carroll on 9 March 2009, and with possession of a rifle and ammunition with intent on the same date (charges 1 and 2);

(ii) Brendan McConville is charged with four offences of possession of explosive substances between 11 October 2006 and 11 October 2007 (charges 3-6);

(iii) John Paul Wootton is charged with one offence of attempting to collect information likely to be useful to terrorists between 10 January 2009 and 10 March 2009 (charge 7);

(iv) Sharon Wootton is charged with one offence of doing acts with intent to pervert the course of public justice between 8 March 2009 and 20 October 2009 (charge 8).

2. The prosecution has requested the court to conduct a preliminary inquiry under Articles 31-34 of the Magistrates' Courts (NI) Order 1981, and has furnished papers to the court and served them on the accused in accordance with those provisions. In response, the accused have exercised their right under Article 34(2) of the Order to require fifteen prosecution witnesses to attend the committal proceedings and give evidence on oath.

3. The prosecution then lodged a number of applications with the court in regard to some of those witnesses. This ruling relates to those applications, a number of which were opposed by the accused, and which were heard on 13 December 2010.

4. The applications are as follows:-

(i) two applications under section 87 of the Coroners and Justice Act 2009 for witness anonymity orders. The first application requests that a total of three prosecution witnesses, referred to in the papers as Pin 8625, Witness K, and Witness J, be permitted to be referred to by those titles when giving evidence. It includes requests that, in order to preserve the anonymity of the witnesses, their names are withheld from the accused and their legal representatives, they are not asked questions which might lead to their identification and they are screened, when giving evidence, from everyone except the Judge, the prosecution and the legally qualified representatives of the accused;

(ii) the second application is a similar request that a total of five prosecution witnesses, referred to in the papers as Witnesses F, H, M, B and E be permitted to be referred to by those letters when giving evidence. The same additional requests are made, with the addition of a request that the witnesses' voices are subject to modulation consistent with protecting the witnesses' identities;

(iii) two applications under Article 18 of the Criminal Justice (Evidence) (NI) Order to admit, as hearsay, evidence in support of the applications for anonymity. The evidence consists of statements from the witnesses requesting anonymity, two Public Interest Immunity Certificates and some supporting evidence. These applications are made in accordance with Practice Direction 4/2010;

(iv) an application under Article 7 of the Criminal Evidence (NI) Order 2004 for a special measures direction in respect of witnesses B and E, in order that evidential video recordings are admitted as their evidence-in-chief, and they are cross-examined by way of video link;

(v) two further applications under Article 18 of the Criminal Justice (Evidence) (NI) Order to admit, as hearsay, a large number of items listed in the applications;

(vi) an application under Article 6 of the Criminal Evidence (NI) Order 2004 that evidence listed in the application be admitted as evidence of bad character.

5. As a background to the applications, I will briefly summarise the evidence on which the prosecution seek to rely to prove the charges against the accused. I should note that the evidence in the case is substantial and complex, and I propose only to summarise the evidence relevant to the applications.

Charges 1 and 2

6. On 9 March 2009, at about 20.41, police were called to an incident of vandalism at Lismore Manor, Craigavon. Constable Stephen Carroll was the driver of Skoda police car which attended the scene. At around 21.40 – 21.45 two shots were fired at the vehicle, fatally wounding Constable Carroll.

7. In follow-up searches, two empty casings were found in a grass area beside a cycle path adjacent to Lismore Manor. The firing position was established to have been close to the point where the casings were found, which was about fifty metres from the police vehicle. The rifle which discharged the shots was subsequently recovered in a search at 607 Pinebank.

8. Witness M walked past the area of the firing point on two occasions that night. At about 19.00, he observed five men standing in a group, two of whom walked away, leaving three behind. He recognised one of the three as Brendan McConville, whom he has known "since [he] was a nipper". McConville was looking at Witness M and said "Alright [M]". About an hour and a half later, when returning from where he had been, he passed the same spot. The same three men, including McConville, were there. Witness M was only twelve feet from McConville, and they had a clear view of each other, but this time nothing was said. A number of months after the murder, a man came to his door and warned him to keep his mouth shut. Notwithstanding that threat, he later went to police and made a statement about what he had seen.

9. In other police action following the murder, a gold Citroen Saxo car, registered to John Paul Wootton, and from which his driving licence was recovered, was seized by police. It transpires that an electronic surveillance device had been concealed in this vehicle some time prior to the murder by Witness Pin 8625, a soldier deployed on covert operations. After the vehicle was seized by police, he recovered the tracking device. Witness J, a Senior Director of an electronics company, describes how the device operates and confirms that it was functioning accurately. Witness K, an expert in navigation systems, deciphered the data from the device in order to track the movements of the car on the night of the murder.

10. He states that the data reveals that the car was static at or about 309-314 Drumbeg, Craigavon from 19.11 until 21.55 on 9 March. This is a location in an estate immediately adjacent to the estate where the shooting occurred, and only a short walk from the firing point. The vehicle then moved to other locations, arriving in the vicinity of 16 Collingdale, John Paul Wootton's home, at 22.06.

11. In the boot of the Citroen Saxo, police found a brown jacket. Forensic examination of this jacket resulted in DNA findings consistent with what the forensic scientist would expect if McConville was the regular wearer of the jacket.

12. Witness H says he has known McConville for a number of years. He says that, on four or five occasions, he has seen him wearing a brown coloured jacket, which he describes in terms similar to the jacket found in the boot. He further says that, on the morning of 10 March 2009, he saw a gold coloured Citroen Saxo parked in the drive of McConville's house.

13. Witness F says that he knows John Paul Wootton, and that Wootton normally drives a gold Citroen Saxo. He saw Wootton and his mother, Sharon Wootton, at or about their home, on the morning of 10 March.

14. Forensic examination of the passenger compartment of the Saxo revealed 33 particles indicative of cartridge discharge residue (CDR) and 2 particles characteristic if CDR. Forensic examination of clothes attributed to John Paul Wootton revealed 1 particle characteristic of CDR and a number indicative of CDR.

15. Forensic examination of clothing attributed to McConville revealed a small number of particles indicative of CDR. Further particles were found on gloves, a suede jacket and a black coat found in his home.

16. In particular, the particles from the brown jacket found in the boot of the car were indicative of type 7 residue, consistent with particles on the casings recovered at the firing point, particles on the weapon, and particles from the Saxo.

17. There is some other evidence of association between McConville and John Paul Wootton on other occasions and there is evidence of interest in Republican activity from computers owned by Wootton.

Charges 3-6

18. It was agreed between the parties that any applications in respect of these charges will be better dealt with at the time of the contested committal, so it is unnecessary to outline the facts here.

Charge 7

19. Witness E, in a video recorded interview on 16 March 2009, says that he has been a friend of John Paul Wootton's for about a year. About two weeks previously, he was talking to Wootton on MSN when Wootton said he needed to speak to him. Wootton came down in his car and asked E if he was going with a policeman's daughter. He wanted to know the address. E told him to "f off" and Wootton told him to say no more about it. E later told Witness B about the conversation.

20. Witness B, in a video-recorded interview, says that he is a friend and next door neighbour of John Paul Wootton. In addition to describing Wootton's interest in Republican activities, he describes talking to Wootton about why he had asked Witness B for his girlfriend's address. Wootton said that people had threatened him and told him that if he didn't find it out, he would be next. Wootton had been starting to feel as if he was in too deep.

Charge 8

21. The evidence against Sharon Wootton is contained in her interviews with police and is not relevant to these applications.

22. In the course of argument, it became clear that the real issues between the parties concerned are, at this stage, the applications for anonymity and special measures and not hearsay or bad character. I will therefore set out only the relevant legislation in respect of anonymity and special measures.

23. The relevant provisions in respect of the applications for anonymity are contained in the Coroners and Justice Act 2009, as follows:-

> *"Witness anonymity orders*
> *86. Witness anonymity orders*
> *(1) In this Chapter a "witness anonymity order" is an order made by a court that requires such specified measures to be taken in relation to a witness in criminal proceedings as the court considers appropriate to ensure that the identity of the witness is not disclosed in or in connection with the proceedings.*
> *(2) The kinds of measures that may be required to be taken in relation to a witness include measures for securing one or more of the following –*
> > *(a) that the witness's name and other identifying details may be –*
> > > *(i) withheld;*
> > > *(ii) removed from materials disclosed to any party to the proceedings;*
> > *(b) that the witness may use a pseudonym;*
> > *(c) that the witness is not asked questions of any specified description that might lead to the identification of the witness;*
> > *(d) that the witness is screened to any specified extent;*

(e) that the witness's voice is subjected to modulation to any specified extent.

(3) Subsection (2) does not affect the generality of subsection (1).

(4) Nothing in this section authorises the court to require –

(a) the witness to be screened to such an extent that the witness cannot be seen by –

(i) the judge or other members of the court (if any), or

(ii) the jury (if there is one);

(b) the witness's voice to be modulated to such an extent that the witness's natural voice cannot be heard by any persons within paragraph (a)(i) or (ii).

(5) In this section "specified" means specified in the witness anonymity order concerned.

87. Applications

(1) An application for a witness anonymity order to be made in relation to a witness in criminal proceedings may be made to the court by the prosecutor or the defendant.

(2) Where an application is made by the prosecutor, the prosecutor –

(a) must (unless the court directs otherwise) inform the court of the identity of the witness, but

(b) is not required to disclose in connection with the application –

(i) the identity of the witness, or

(ii) any information that might enable the witness to be identified,

to any other party to the proceedings or his or her legal representatives.

(3) Where an application is made by the defendant, the defendant –

(a) must inform the court and the prosecutor of the identity of the witness, but

(b) (if there is more than one defendant) is not required to disclose in connection with the application –

(i) the identity of the witness, or

(ii) any information that might enable the witness to be identified,

to any other defendant or his or her legal representatives.

(4) Accordingly, where the prosecutor or the defendant proposes to make an application under this section in respect of a witness, any relevant material which is disclosed by or on behalf of that party before the determination of the application may be disclosed in such a way as to prevent –

(a) the identity of the witness, or

(b) any information that might enable the witness to be identified,

from being disclosed except as required by subsection (2)(a) or (3)(a).

(5) "Relevant material" means any document or other material which falls to be disclosed, or is sought to be relied on, by or on behalf of the party concerned in connection with the proceedings or proceedings preliminary to them.

(6) The court must give every party to the proceedings the opportunity to be heard on an application under this section.

(7) But subsection (6) does not prevent the court from hearing one or more parties in the absence of a defendant and his or her legal representatives, if it appears to the court to be appropriate to do so in the circumstances of the case.
(8) Nothing in this section is to be taken as restricting any power to make rules of court.

88. Conditions for making order
(1) This section applies where an application is made for a witness anonymity order to be made in relation to a witness in criminal proceedings.
(2) The court may make such an order only if it is satisfied that Conditions A to C below are met.
(3) Condition A is that the proposed order is necessary –
(a) in order to protect the safety of the witness or another person or to prevent any serious damage to property, or
(b) in order to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities, or otherwise).
(4) Condition B is that, having regard to all the circumstances, the effect of the proposed order would be consistent with the defendant receiving a fair trial.
(5) Condition C is that the importance of the witness's testimony is such that in the interests of justice the witness ought to testify and –
(a) the witness would not testify if the proposed order were not made, or
(b) there would be real harm to the public interest if the witness were to testify without the proposed order being made.
(6) In determining whether the proposed order is necessary for the purpose mentioned in subsection (3)(a), the court must have regard (in particular) to any reasonable fear on the part of the witness –
(a) that the witness or another person would suffer death or injury, or
(b) that there would be serious damage to property,
if the witness were to be identified.

89. Relevant considerations
(1) When deciding whether Conditions A to C in section 88 are met in the case of an application for a witness anonymity order, the court must have regard to –
(a) the considerations mentioned in subsection (2) below, and
(b) such other matters as the court considers relevant.
(2) The considerations are –
(a) the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings;
(b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his or her evidence comes to be assessed;
(c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant;
(d) whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without his or her identity being disclosed;
(e) whether there is any reason to believe that the witness –
(i) has a tendency to be dishonest, or

(ii) has any motive to be dishonest in the circumstances of the case, having regard (in particular) to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant;

(f) whether it would be reasonably practicable to protect the witness by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court."

24. The relevant provisions in respect of the application for special measures are contained in the Criminal Evidence (NI) Order 1999, as follows:-

"Witnesses eligible for assistance on grounds of fear or distress about testifying

5. - (1) For the purposes of this Part a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this paragraph if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.

(2) In determining whether a witness falls within paragraph (1) the court must take into account, in particular-

(a) the nature and alleged circumstances of the offence to which the proceedings relate;

(b) the age of the witness;

(c) such of the following matters as appear to the court to be relevant, namely-

(i) the social and cultural background and ethnic origins of the witness,

(ii) the domestic and employment circumstances of the witness, and

(iii) any religious beliefs or political opinions of the witness;

(d) any behaviour towards the witness on the part of-

(i) the accused,

(ii) members of the family or associates of the accused, or

(iii) any other person who is likely to be an accused or a witness in the proceedings.

(3) In determining that question the court must in addition consider any views expressed by the witness.

(4) Where the complainant in respect of a sexual offence is a witness in proceedings relating to that offence (or to that offence and any other offences), the witness is eligible for assistance in relation to those proceedings by virtue of this paragraph unless the witness has informed the court of the witness's wish not to be so eligible by virtue of this paragraph.

Special measures available to eligible witnesses

6. - (1) For the purposes of this Part-

(a) the provision which may be made by a special measures direction by virtue of each of Articles 11 to 18 is a special measure available in relation to a witness eligible for assistance by virtue of Article 4; and

(b) the provision which may be made by such a direction by virtue of each of Articles 11 to 16 is a special measure available in relation to a witness eligible for assistance by virtue of Article 5;

but this paragraph has effect subject to paragraph (2).

(2) Where (apart from this paragraph) a special measure would, in accordance with paragraph (1)(a) or (b), be available in relation to a witness in any proceedings, it shall not be taken by a court to be available in relation to the witness unless-

(a) the court has been notified by the Department of Justice that relevant arrangements may be made available in the district in which it appears to the court that the proceedings will take place, and

(b) the notice has not been withdrawn.

(3) In paragraph (2) "relevant arrangements" means arrangements for implementing the measure in question which cover the witness and the proceedings in question.

(4) The withdrawal of a notice under that paragraph relating to a special measure shall not affect the availability of that measure in relation to a witness if a special measures direction providing for that measure to apply to the witness's evidence has been made by the court before the notice is withdrawn.

(5) The Department of Justice may by order make such amendments of this Part as he considers appropriate for altering the special measures which, in accordance with paragraph (1)(a) or (b), are available in relation to a witness eligible for assistance by virtue of Article 4 or (as the case may be) Article 5, whether-

(a) by modifying the provisions relating to any measure for the time being available in relation to such a witness,

(b) by the addition-

(i) (with or without modifications) of any measure which is for the time being available in relation to a witness eligible for assistance by virtue of the other of those Articles, or

(ii) of any new measure, or

(c) by the removal of any measure.

Special measures `directions

7. - (1) This Article applies where in any criminal proceedings-

(a) a party to the proceedings makes an application for the court to give a direction under this Article in relation to a witness in the proceedings other than the accused, or

(b) the court of its own motion raises the issue whether such a direction should be given.

(2) Where the court determines that the witness is eligible for assistance by virtue of Article 4 or 5, the court must then-

(a) determine whether any of the special measures available in relation to the witness (or any combination of them) would, in its opinion, be likely to improve the quality of evidence given by the witness; and

(b) if so-

(i) determine which of those measures (or combination of them) would, in its opinion, be likely to maximise so far as practicable the quality of such evidence; and

(ii) give a direction under this Article providing for the measure or measures so determined to apply to evidence given by the witness.

(3) In determining for the purposes of this Part whether any special measure or measures would or would not be likely to improve, or to maximise so far as practicable, the quality of evidence given by the witness, the court must consider all the circumstances of the case, including in particular-

(a) any views expressed by the witness; and

(b) whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings.

(4) A special measures direction must specify particulars of the provision made by the direction in respect of each special measure which is to apply to the witness's evidence.

(5) In this Part "special measures direction" means a direction under this Article.

(6) Nothing in this Part is to be regarded as affecting any power of a court to make an order or give leave of any description (in the exercise of its inherent jurisdiction or otherwise)-

(a) in relation to a witness who is not an eligible witness, or

(b) in relation to an eligible witness where (as, for example, in a case where a foreign language interpreter is to be provided) the order is made or the leave is given otherwise than by reason of the fact that the witness is an eligible witness.

Screening witness from accused

11. - (1) A special measures direction may provide for the witness, while giving testimony or being sworn in court, to be prevented by means of a screen or other arrangement from seeing the accused.

(2) But the screen or other arrangement must not prevent the witness from being able to see, and to be seen by-

(a) the judge and the jury (if there is one);

(b) legal representatives acting in the proceedings; and

(c) any interpreter or other person appointed (in pursuance of the direction or otherwise) to assist the witness.

(3) Where two or more legal representatives are acting for a party to the proceedings, paragraph (2)(b) is to be regarded as satisfied in relation to those representatives if the witness is able at all material times to see and be seen by at least one of them.

Evidence by live link

12. - (1) A special measures direction may provide for the witness to give evidence by means of a live link.

(2) Where a direction provides for the witness to give evidence by means of a live link, the witness may not give evidence in any other way without the permission of the court.

(3) The court may give permission for the purposes of paragraph (2) if it appears to the court to be in the interests of justice to do so, and may do so either-

(a) on an application by a party to the proceedings, if there has been a material change of circumstances since the relevant time, or

(b) of its own motion.

(4) In paragraph (3) "the relevant time" means-

(a) the time when the direction was given, or

(b) if a previous application has been made under that paragraph, the time when the application (or last application) was made.

(5) Where in proceedings before a magistrates' court-

(a) evidence is to be given by means of a live link in accordance with a special measures direction, but

(b) suitable facilities for receiving such evidence are not available at any court-house in which that court can (apart from this paragraph) lawfully sit,

the court may sit for the purposes of the whole or any part of those proceedings at a place designated by the Department of Justice, after consultation with the Lord Chief Justice, as a place having facilities to receive evidence given through a live link.

(6) In this Part "live link" means a live television link or other arrangement whereby a witness, while absent from the courtroom or other place where the proceedings are being held, is able to see and hear a person there and to be seen and heard by the persons specified in Article 11(2)(a) to (c).

Evidence given in private

13. - (1) A special measures direction may provide for the exclusion from the court, during the giving of the witness's evidence, of persons of any description specified in the direction.

(2) The persons who may be so excluded do not include-

(a) the accused,

(b) legal representatives acting in the proceedings, or

(c) any interpreter or other person appointed (in pursuance of the direction or otherwise) to assist the witness.

(3) A special measures direction providing for representatives of news gathering or reporting organisations to be so excluded shall be expressed not to apply to one named person who-

(a) is a representative of such an organisation, and

(b) has been nominated for the purpose by one or more such organisations, unless it appears to the court that no such nomination has been made.

(4) A special measures direction may only provide for the exclusion of persons under this Article where-

(a) the proceedings relate to a sexual offence; or

(b) it appears to the court that there are reasonable grounds for believing that any person other than the accused has sought, or will seek, to intimidate the witness in connection with testifying in the proceedings.

(5) Any proceedings from which persons are excluded under this Article (whether or not those persons include representatives of news gathering or reporting organisations) shall nevertheless be taken to be held in public for the purposes of any privilege or exemption from liability available in respect of fair, accurate and contemporaneous reports of legal proceedings held in public.

Video recorded evidence in chief

15. - (1) A special measures direction may provide for a video recording of an interview of the witness to be admitted as evidence in chief of the witness.

(2) A special measures direction may, however, not provide for a video recording, or a part of such a recording, to be admitted under this Article if the court is of the opinion, having regard to all the circumstances of the case, that in the interests of justice the recording, or that part of it, should not be so admitted.

(3) In considering for the purposes of paragraph (2) whether any part of a recording should not be admitted under this Article, the court must consider whether any prejudice to the accused which might result from that part being so admitted is outweighed by the desirability of showing the whole, or substantially the whole, of the recorded interview.

(4) Where a special measures direction provides for a recording to be admitted under this Article, the court may nevertheless subsequently direct that it is not to be so admitted if-

(a) it appears to the court that-

(i) the witness will not be available for cross-examination (whether conducted in the ordinary way or in accordance with any such direction), and

(ii) the parties to the proceedings have not agreed that there is no need for the witness to be so available; or

(b) any rules of court requiring disclosure of the circumstances in which the recording was made have not been complied with to the satisfaction of the court.

(5) Where a recording is admitted under this Article-

(a) the witness must be called by the party tendering it in evidence, unless-

(i) a special measures direction provides for the witness's evidence on cross-examination to be given otherwise than by testimony in court, or

(ii) the parties to the proceedings have agreed as mentioned in paragraph (4)(a)(ii); and

(b) the witness may not give evidence in chief otherwise than by means of the recording-

(i) as to any matter which, in the opinion of the court, has been dealt with adequately in the witness's recorded testimony, or

(ii) without the permission of the court, as to any other matter which, in the opinion of the court, is dealt with in that testimony.

(6) Where in accordance with paragraph (2) a special measures direction provides for part only of a recording to be admitted under this Article, references in paragraphs (4) and (5) to the recording or to the witness's recorded testimony are references to the part of the recording or testimony which is to be so admitted.

(7) The court may give permission for the purposes of paragraph (5)(b)(ii) if it appears to the court to be in the interests of justice to do so, and may do so either-

(a) on an application by a party to the proceedings, if there has been a material change of circumstances since the relevant time, or

(b) of its own motion.

(8) In paragraph (7) "the relevant time" means-

(a) the time when the direction was given, or

(b) if a previous application has been made under that paragraph, the time when the application (or last application) was made.

(9) The court may, in giving permission for the purposes of paragraph (5)(b)(ii), direct that the evidence in question is to be given by the witness by means of a live link; and, if the court so directs, paragraph (5) of Article 12 shall apply in relation to that evidence as it applies in relation to evidence which is to be given in accordance with a special measures direction.

(10) A magistrates' court conducting a preliminary investigation or preliminary inquiry may consider any video recording in relation to which it is proposed to apply for a special measures direction providing for it to be admitted at the trial in accordance with this Article.

(11) Nothing in this Article affects the admissibility of any video recording which would be admissible apart from this Article."

Application for anonymity for Pin 8625, Witness K and Witness J

25. In support of the application in respect of these witnesses, the prosecution called Acting Detective Chief Inspector James Harkness. He spoke to Witness K on 8 November 2010 and recorded a witness statement from him. No objection was taken to the admissibility of that statement and it is, in any event, clearly admissible both as evidence of the witness's feelings and in the interests of justice under Article 18 (1)(d) of the Criminal Justice (Evidence)(NI) Order 2004. In the statement, Witness K states that he is eminent and well known within the field of navigation. If his identity is made known, he could be easily found. If he were identified and kidnapped, there would be the potential for harm to national security. He is unwilling to attend court in Northern Ireland unless his identity is protected and he is screened from view.

26. On 9 November, A/D/C/I Harkness spoke to Pin 8625 and recorded a witness statement from him. For the reasons set out in paragraph 26 above, I admit this statement in evidence. In his statement, he says that he is a serving soldier, one of a limited number trained to conduct surveillance operations. If he is identified, he believes his personal safety will be at risk, and he could not be deployed again in Northern Ireland. As a result, unless he is granted anonymity, he is unwilling to attend court and give evidence.

27. Also on 9 November 2010, A/D/C/I Harkness spoke to Witness J and recorded a statement from him. For the reasons set out in paragraph 26, above, I admit that statement in evidence. Witness J states that he is the Senior Director of an electronics company. One of their devices was used in the covert surveillance operation in this case. He believes that if his identity, and the name of the company become known, that will have a detrimental effect on national security. He believes that his own safety will also be at risk. As a result, if he is not afforded anonymity and screening, he is unwilling to attend court and give evidence.

28. In support of the application for anonymity for Witness K and Pin 8625, the prosecution lodged a Certificate from the Minister of State for the Armed Forces, commonly known as a Public Interest Immunity Certificate (PII Certificate). Such statements have commonly been received in evidence by courts. No objection was taken to the admissibility of the certificate, and it is, in any event, clearly admissible in the interests of justice under Article 18 (1)(d) of the Criminal Justice (Evidence)(NI) Order 2004. I admit it in evidence. In the Certificate, the Minister states that he is satisfied that the proposed orders are necessary to protect the safety of the two witnesses, and that real harm to the public interest would be caused if they are not afforded screening and anonymity. He also sets out his reasons for reaching those conclusions.

29. In support of the application for anonymity for Witness J, the prosecution lodged a PII Certificate from the Minister of State for Northern Ireland. For the reasons set out above, I admit it in evidence. In the Certificate, the Minister states that he is satisfied that the proposed orders are necessary to protect the safety of Witness J and to prevent real harm to the public interest. He also sets out his reasons for reaching those conclusions.

30. In opposing the making of the orders sought, Mr. Corrigan, for McConville, had lodged a helpful skeleton argument. He reminded me that the starting point is that witnesses should give evidence without anonymity. He noted that, in their original witness statements made as part of the police investigation, none of the witnesses had mentioned being in fear. He highlighted the fact that the defence did not know whether these witnesses had given evidence before, and whether their evidence may have been doubted, or even disbelieved or rejected in a previous case. This point was also taken up by Mr. Moriarty B.L., for the Woottons. In response, Mr. Russell B.L., for the prosecution, informed the court that neither Witness J nor Witness J had given evidence before, but that further checks would need to be made as regards Pin 8625. Mr. Moriarty sought a delay while such checks were made, which I refused for reasons I set out below.

31. Mr. Moriarty had set out his objections to the application in his Notice of Opposition. In oral argument, he contrasted the positions of the three witnesses with that of PSNI officers, who are at much greater risk from terrorists, but give evidence openly in court. He submitted that that there is a lack of precedent for dissident Republican attacks on the mainland and that Witnesses J and K are at no significant risk.

32. I now turn to the conditions in section 88 of the statute. In deciding whether each is met, I take into account the relevant considerations set out in section 89, although they are clearly, with the exception of consideration (2)(f), most relevant to Condition B, and I will only address them in detail when dealing with that condition. As suggested in the case of R v Mayers and others [2009] 1 W.L.R. 1915, from which I have derived assistance as regards all the conditions, I will address Condition C first.

33. I am satisfied that the importance of the evidence of all three witnesses is such that it is in the interests of justice that they ought to testify. The evidence as regards the location of the car at the time of the murder is central to the prosecution case. I am further satisfied, on the basis of the statements of the witnesses themselves, that they will not testify if the orders sought are not made. Given the nature of this case, and their various positions, their stated intention not to give evidence unless the orders are made cannot be regarded as irrational or unreasonable, and I have no reason to doubt it.

34. As regards Condition A, I am satisfied, on the basis of the statements of the witnesses and the two PII Certificates, that the orders sought are necessary in order to prevent real harm to the public interest. As regards Pin 8625, courts in Northern Ireland have previously heard evidence about the importance of maintaining the anonymity of undercover soldiers and policemen. (see R v McKenna, Toman and McConville, both in this court and the Crown Court) That importance was also recognised by the court in R v Mayers and others. There is a limited pool of trained officers, and the cost of training each one is substantial. It is clear to me that it is very much in the public interest that the security forces should have available to them, when necessary, highly trained undercover soldiers as part of their operations against terrorism and other serious crime. I am satisfied that disclosure of the identity of Pin 8625 would cause real harm to the public interest. Finally, directing myself to section 89(2)(f), I do not consider that it would be reasonably practicable to protect the witness by any means other than by making a witness anonymity order.

35. The circumstances of Witnesses J and K are somewhat different. However, I am satisfied that, in their operations against terrorism, the security forces need to have available to them the most advanced forms of technology, and to be able to bring evidence to court from that technology where necessary. I am further satisfied that, if experts feel unable to give evidence because of fear, or even to provide scientific and technical advice, real harm will be caused to the public interest. Again, directing myself to section 89(2)(f), I do not consider that it would be reasonably practicable to protect the witnesses by any means other than by making a witness anonymity order.

36. Finally, I turn to Condition B, namely whether, having regard to all the circumstances, the effect of the proposed orders would be consistent with the defendants receiving a fair trial.

37. In R v McKenna, Toman and McConville, I observed, at paragraph 44 of my ruling, that the proper approach is to regard fair trial as a process, of which committal proceedings are one part. One can then regard Condition B as requiring the court to be satisfied that any order would be consistent with this part of the process being fair to the defendant. That enables the court to take account of the distinct purpose of committal proceedings, namely to decide

whether the accused have a case to answer, not whether they are guilty or not guilty.

38. I consider that the judgment in R v Mayers and others lends support to that approach. At paragraph 12 of his judgment, Lord Judge LCJ sets out the importance of disclosure to a fair trial. However, the statutory provisions for disclosure in an indictable case, including the requirement for a defence statement to clarify the issues, and the powers of the court to order further disclosure over and above that made by the prosecution, only apply after committal. It is true that, in this case, Mr. Russell B.L. informed the court that the prosecution had been alive to their extra-statutory duty of disclosure prior to a contested committal, and it is clear that there has been disclosure of material such as the previous convictions of one of the witnesses required to attend and give oral evidence. Nevertheless, I remain of the view that the duty of the court conducting the committal can only be to ensure that the committal is fair, having regard to the distinct purpose of committal proceedings and the limited material that the court has before it. That may lead, in some cases, to a different decision at committal from that at trial, but that would not affect the fairness of the process as a whole.

39. I accept that it is the general right of a defendant to know the identity of witnesses in the proceedings. As regards Pin 8625, on the basis of the information presently available to me, I have some difficulty in seeing how disclosure of his identity might assist the defence to mount an effective attack on his credibility, either at committal or trial. His evidence is simple and involved no direct contact with the defendants. Further, on the basis of the material presently available to me, it seems likely that the issues as regards Witnesses J and K will involve the accuracy of their evidence and their professional competence, rather than their honesty. If there are issues to be explored as regards their professional competence, those can be first explored through the disclosure process after committal.

40. In my view, the evidence of all three witnesses can be properly tested at committal to determine whether there is a case to answer without their identities being revealed. I do not consider that there is any realistic prospect that disclosure of their identities would lead to cross-examination at committal resulting in their evidence being disregarded or devalued to such an extent that it could not be given any significant weight in determining whether there is a case to answer.

41. There is no material before me to suggest that any of the three witnesses has a tendency to be dishonest, or has any motive to be dishonest in the circumstances of the case. So far as I am aware, none has any previous convictions, and none has any relationship with the defendants or any associates of the defendants.

42. Taking every relevant consideration into account, I am satisfied that, having regard to all the circumstances, the making of the orders sought is consistent with the committal proceedings being fair. I bear in mind that, in the event that circumstances change so that any of the conditions for making the order no longer apply, I have the power to vary or discharge any order I make.

43. I therefore order that the witnesses are permitted to use pseudonyms at committal, namely Pin 8625, Witness J and Witness K. Their names will be withheld from the defence and are to be removed from materials disclosed to any party to the proceedings. They may not be asked any question at the committal proceedings which might lead to their identification. They will be screened from all persons in the court except the judge, the prosecution and the defendants' legally qualified representatives.

Applications for anonymity for Witnesses M, B and E

44. I will deal with these witnesses together, as the same issues arose when considering their applications.

45. At the outset of Mr. Russell's opening of these applications, I made it clear to him that I had a fundamental difficulty with them. The 2009 Act is concerned with securing that the identity of a witness is withheld from the defendant. Thus, section 5(2) abolishes the common law rules for securing that object. However, when one considers the evidence of witnesses M, B and E, one is driven inexorably to the conclusion that, if their evidence is true, their identities must be known to one of the defendants, namely McConville in the case of M and John Paul Wootton in the cases of B and E.

46. Looking first at M's evidence, he saw and recognised McConville at close range on two occasions close to the firing point on the night of the murder. It is clear that McConville saw and recognised him in return as he spoke to M and called him by his name. Lest there be any remaining doubt that he was recognised, he was later visited by a man at his home and told to keep his mouth shut, which he says he knew was a reference to the night the policeman was shot, and which he took as a warning. Mr. Russell sought to argue that M might be one of a small class of persons who saw McConville on the night in question, and the prosecution should not be required to confirm his identity to the defence. In my view, this submission flies in the face of reality.

47. Mr. Russell also sought to argue that, if the identity of the witness was only known to one of the defendants, there should be an order to prevent it being disclosed to the other defendants. In my view, this submission also flies in the face of reality. There is no way in which the court can prevent the defendants speaking to each other and informing each other of the identity of the witness, and it would be a wholly artificial exercise to attempt to do so.

48. Turning to Witness B, he says that he was John Paul Wootton's next door neighbour and a really good friend of his. They talked to each other near enough every night. At the outset of his video recorded interview, the following exchange occurs:-

> *"And you've told me yourself that you're quite happy to tell us on tape that John Paul is your neighbour.*
>
> *Ah ha.*
>
> *You, you're not bothered about him knowing that you've spoken to us…*
>
> *No"*

While it seems to be the case, as will become clear, that Witness B is now extremely concerned about his identity being known, there can be no doubt that, if his evidence is true, John Paul Wootton knows who he is. Quite apart from his relationship with Wootton, it should also be borne in mind that his evidence involves a detailed description of conversations he had with Wootton, which, if they took place, Wootton would undoubtedly remember.

49. The position of Witness E is almost identical to that of Witness B. He says he met John Paul Wootton about a year previously, and they hung about with the same friends. He says that Wootton told him on MSN that he needed to talk to him. When they spoke, Wootton asked him if he was going with a policeman's daughter, and asked for her address, which is the basis of charge 7. It is inconceivable that, if this account is true, Wootton does not know who he is.

50. Mr. Russell accepted that, if I had reached the above conclusions, then I could not make an order under the 2009 Act, and he, in my view wisely, did not argue the matter further, but moved on to consider what alternative measures might be available to secure the greatest possible protection for these three witnesses in the absence of an order under the 2009 Act.

51. Before I turn to consider those measures, I should, for the sake of completeness, deal with the issue of fair trial. I have set out my view above that, if the evidence of Witnesses M, B and E is true, their identities must be known to one of the defendants. The corollary of that proposition is also true. Only if the evidence of the witnesses is untrue or mistaken, or (and I should make it clear that there is no suggestion that this is the position in this case) one or other of the defendants has severe problems with memory, or other psychiatric difficulties, will the defendants not know their identities. The evidence of Witness M is clearly of great importance to the case against McConville on charges 1 and 2. The evidence of Witnesses B and E, taken together, is the sole and decisive evidence against John Paul Wootton on charge 7. In those circumstances, I could not have been satisfied that a fair trial, including a fair committal, was possible without the identities of the witnesses being known to the defence.

52. Mr. Russell then submitted that the court should use a combination of powers at common law and statute to permit Witnesses M, B and E's identities to be concealed from the public at large but not the defendants, and should also use such special measures as are available in the 1999 Order to facilitate their evidence.

53. In support of these submissions, he relied on statements made by Witnesses M and E, and B's mother. No objection was taken to the admissibility of these statements and I would, in any event have admitted the statements of M and E as evidence of the witnesses' feelings and all three statements in the interests of justice.

54. In a statement made on 24 June 2010, Witness M said that he is very scared about what could happen to him and his family, if his identity is made known to Brendan McConville. He further said that if he is not provided with total witness anonymity, he is not prepared to give evidence in court.

55. In a statement made on 8 July 2010, Witness E said that, he fears that, if his identity is made known to the defendants, they would take action against him. He has been diagnosed as having psychiatric symptoms as a result of his involvement in the case, and, although those symptoms have been successfully treated, he fears they may recur if his identity is not concealed. He says that if he is not provided with witness anonymity, he will not give evidence.

56. In a statement made on 23 July 2010, the mother of Witness B says that he has been suffering from acute depression. She says that she knows that it is his intention not to give evidence unless his identity is fully protected.

57. Given the circumstances of this case, I am satisfied that Witnesses M, B and E are in genuine fear. While, for reasons set out above, I am unable to make an order under the 2009 Act, I am satisfied that I should order whatever other measures the law permits, consistent with a fair trial, to provide the greatest degree of protection possible. I accept that, as Mr. Russell told me, in the absence of an order under the 2009 Act, one or more of the witnesses may decline to give evidence, and, at the very least, they may have to be persuaded to give evidence. I also take into account Mr. Moriarty's submission that it is not the court's role to persuade people to give evidence. However, it is most certainly the court's role, and its duty, to take whatever measures it can, consistent with fair trial, to protect witnesses brave enough to give evidence in terrorist cases.

58. Mr. Russell referred me to the case of R v Brown [2009] NICC 14, and to the orders made by Hart J. In that case, quoted by Gillen J at paragraph 7 of his ruling. Hart J, in a case where the identity of the witness was known to the defendant, made an order, under the inherent jurisdiction of the court to control its own proceedings, permitting the witness to give evidence anonymously. He

made a further order under section 46(6) of the Youth Justice and Criminal Evidence Act 1999 forbidding publication of any matter during the lifetime of the witness that might identify her as a witness in the proceedings. Finally, he made a special measures order, pursuant to Article 13 of the Criminal Evidence (NI) Order 1999, that, during the evidence of the witness, members of the public should be excluded from the court.

59. While those orders were made prior to the passing of the Criminal Evidence (Witness Anonymity) Act 2008, the predecessor to the 2009 Act under consideration in this case, and, for these purposes, identically worded, Gillen J held that the abolition of the common law rules under the Act is confined to cases where the identity of the witness is withheld from the defendant, thereby leaving all other common law rules untouched, including the common law power to preserve identity from press and public.

60. Both Mr. Corrigan and Mr. Moriarty helpfully made clear that their clients had no objection to the identities of the witnesses being withheld from the press and public. I therefore order that Witnesses M, B and E be permitted to give evidence using pseudonyms. I further order as follows:-

> "By virtue of Section 46(6) of the Youth Justice and Criminal Evidence Act 1999 it is ordered that no matter relating to the persons referred to in these proceedings as Witness M, Witness B or Witness E 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."

61. I will deal with the question of excluding the public while the witnesses give evidence under the general issue of special measures, to which I now turn.

Application for special measures for Witnesses M, B and E

62. The evidence of witnesses B and E is currently in the form of video recorded question and answer interviews, and the prosecution apply, under Articles 15 and 12 of the 1999 Order, for the tapes to be admitted as the evidence of the witnesses' evidence-in-chief, and for the witnesses to be permitted to be cross-examined by live link. While there is no written application under the 1999 Order for special measures for Witness M, a request for him to be screened while giving evidence was one aspect of the application for anonymity under the 2009 Act, and Mr. Russell requested the live link orally once I indicated my intention to refuse the application under the 2009 Act. In any event, the court has power to raise the issue of its own motion.

63. The defendants opposed the above applications. They did not argue that the witnesses are not in fear. However, they submitted that the prosecution had failed to establish that the quality of the witnesses' evidence, as defined by

Article 4(5), would be diminished as a result of that fear, and, more particularly, that there is no evidence that the special measures requested would be likely to improve the quality of that evidence. Mr. Moriarty argued that there is a fundamental inconsistency between the witnesses' averments that they will not give evidence at all without an order under the 2009 Act and an application for special measures to improve the quality of their evidence in the absence of such an order. The defendants referred me to a number of authorities, which I have read and considered. I also derived assistance from the ruling of Hart J in R v Shoukri and others [2007] NICC 8.

64. I am satisfied that M, B and E each fall within the provisions of Article 5(1) of the 1999 Order in that their evidence is likely to be diminished by reason of fear or distress on their part in connection with testifying in these proceedings.

65. Having determined that M, B and E are eligible for assistance by virtue of Article 5. Article 7(2)(a) requires me to consider whether any of the special measures available would be likely "to improve the quality of evidence" given by each of them. If that is the case, I then have to determine whether, by virtue of Article 7(2)(b)(i) any of these measures would "be likely to maximise so far as practicable the quality of such evidence". I have to consider all of the circumstances of the case, including in particular any views expressed by the witnesses.

66. I accept that the statements of the witnesses were made with a view to obtaining complete anonymity from everyone including the defendants. However, as I stated at paragraph 57 above, I am satisfied that Witnesses M, B and E are in genuine fear. Given the circumstances of this case, I am satisfied that the quality of their evidence would be improved by a combination of special measures. Giving evidence in this case is likely to be extremely stressful for each of them. In addition, the committal procedure, whereby, in evidence-in-chief, they answer questions, and the question and answer then have to be transformed and typed into the form of a deposition, and in cross-examination, the question has to be accurately typed before it is answered, can only heighten that stress.

67. As regards the definition of the quality of the evidence, contained in Article 4(5), I am satisfied that special measures will improve the completeness, coherence and accuracy of the witnesses. As regards B and E, the tapes record their evidence at a time when it was much fresher in their memories than now. Both are clearly still quite young, and it appears that both have suffered mental problems as a result of their involvement in the case. As regards M, he has already been the subject of a threat, which is bound to bear heavily on his mind.

68. As regards the live link, the argument is sometimes put forward that for a witness to give evidence by way of live link affects the ability of the judge and counsel to assess the demeanour of the witness, and interrupts the flow of question and answer. However, at committal, that flow is already interrupted by

the need to type the questions and answers. Further, whilst I accept that the live link procedure may reduce the ability of the judge and counsel to assess the demeanour of the witness to some limited extent, I do not consider that this inhibition is of such significance that, when all of the circumstances are taken into consideration, it would be right to refuse to make a special measures direction which was otherwise justified. In any event, demeanour is less significant at committal than at trial.

69. I grant the application for Witnesses M, B and E be permitted to give evidence by way of live link. I also grant the application for the recorded interviews of Witnesses B and E to be admitted as the evidence in chief of those witnesses.

70. The final question to be addressed is whether the witnesses should give evidence in private by virtue of Article 13 of the Order. On the basis of both the statement of Witness M and the nature of the case generally, it appears to me, for the purposes of Article 13(4)(b) of the Order, that there are reasonable grounds for believing that persons other than the accused have sought, and will seek, to intimidate the witnesses in connection with testifying in the proceedings. An order under Article 13 does not exclude the accused, their legal representatives or representatives of news gathering or reporting organisations, unless the court restricts the presence of such persons to one named person to represent all such interested organisations. I have considered the alternative option of screening the witnesses from the public. However, it will be recalled that the applications for anonymity requested that the voices of the witnesses be modulated, in order that they not be recognised. Voice modulation is not one of the special measures provided for by the 1999 Order. I therefore direct that members of the public are excluded from court while Witnesses M, B and E are giving evidence. The result will be that the defendants will have the opportunity of hearing the witnesses and viewing the demeanour of the witnesses whilst they give evidence by way of live link, while still protecting the identity of the witnesses so far as possible by preventing members of the public from recognising them or their voices.

Application for anonymity in respect of Witness F

71. This application can be shortly dealt with. Mr. Russell conceded that F's evidence is one small part of a complex circumstantial case. It may become of greater relevance at trial, depending on the precise nature of the defence. However, it does not bear on the decision whether or not there is sufficient evidence to return for trial. In those circumstances, I hold that it does not meet Condition C in section 88(5) of the 2009 Act for the purposes of the committal proceedings, and I refuse the application. While it is a matter for the prosecution, the appropriate course would appear to be to remove the statement from the papers, and, in the event of a return for trial, serve it as additional evidence with a fresh application for anonymity.

Application for anonymity in respect of Witness H

72. It will be recalled that Witness H provides two significant pieces of evidence, namely that, on four or five occasions, he has seen McConville wearing a brown coloured jacket, which he describes. Further, on the morning after the murder, he saw a gold coloured Citroen Saxo parked in his drive.

73. In support of the application, the prosecution relied on a statement from H dated 20 July 2010. The defence did not object to the admission of this statement in evidence, and I would have admitted it anyway as evidence of his feelings and in the interests of justice. In his statement, H says that he is in fear of his life, and he will not give evidence unless his identity remains anonymous and his voice cannot be recognised.

74. The defence objected to the application on the basis that fair trial requires that the defendants know H's identity, so that his credibility can be properly explored. They noted that the prosecution have disclosed to them H's criminal record, which includes convictions for offences of dishonesty.

75. This application can be distinguished from all the other applications for anonymity, because, unlike in the cases of M, B and E, there is nothing to indicate that the defendants presently know who H is, and unlike in the cases of Pin 8625, J and K, it is clear that H knows one of the defendants well.

76. I return to my observations at paragraphs 37 and 38 above. I am considering this issue at committal. At present, I have no detailed information about the defendants' response to the evidence of Witness H. It may or may not be that such information will emerge when H gives evidence at committal, or when, in the event of a return for trial, defence statements are lodged. Inevitably, it seems to me that the trial judge will be in a much better position than me to determine whether fair trial is possible.

77. Turning to the conditions in the 2009 Act, as regards Condition C, I am satisfied that the importance of the evidence of Witness H is such that it is in the interests of justice that he ought to testify. I am further satisfied, on the basis of the statement of the witness made on 20 July, that he will not testify if the order sought is not made. Given the nature of this case, his stated intention not to give evidence unless the order is made cannot be regarded as irrational or unreasonable, and I have no reason to doubt it.

78. As regards Condition A, I am satisfied that the proposed order is necessary in order to protect the safety of the witness.

79. Finally, as regards Condition B, I take account of the relevant considerations in section 89. I accept that the credibility of Witness H will be an issue, and that his criminal record demonstrates a tendency to be dishonest, although I am presently not aware of any motive for him to be dishonest in the circumstances of

this case, and I would observe that one could readily conclude that it would have to be a very powerful motive before he would take on the risks associated with giving evidence in a case of this nature.

80. His evidence, while important, is not the sole or decisive evidence against either defendant. It is difficult to fully assess the importance of his evidence about the jacket until the forensic evidence to the effect that there are DNA traces on the jacket consistent with what the forensic scientist would expect if McConville was the regular wearer of the jacket, is properly tested in evidence.

81. Having regard to the limited purpose of committal, I am satisfied that the evidence of Witness H can be properly tested at committal in order to determine whether there is a case to answer without his identity being disclosed.

82. For those reasons, I conclude that the effect of the proposed order of anonymity is consistent with the committal being fair. I do not consider that it is reasonably practicable to protect Witness H by any means other than by making a witness anonymity order. I bear in mind that, in the event that circumstances change so that any of the conditions for making the order no longer apply, I have the power to vary or discharge any order I make.

83. I therefore order that the witness is permitted to use a pseudonym at committal, namely Witness H. His name will be withheld from the defence and is to be removed from materials disclosed to any party to the proceedings. He may not be asked any question at the committal proceedings which might lead to his identification. He will be screened from all persons in the court except the judge, the prosecution and the defendants' legally qualified representatives. His voice will be subject to modulation so that only the judge, court staff recording the deposition, the prosecution and the defendants' legally qualified representatives can hear his true voice.

84. Having regard to the special measures order that I made under Article 13 of the 1999 Order, namely that Witnesses M, B and E can give evidence in private at the committal, I consider it appropriate to extend that order to cover Witness H. The condition in Article 13(4)(b) is met in his case also. Making the order does not affect the fairness of the committal, but serves to reinforce the protection that is being afforded to the witness.

Hearsay applications

85. It was agreed between the parties that the majority of the hearsay applications will have to await the committal. For the moment, I admit into evidence, by consent, the following items:-

(i) Exhibit 4, an autobank withdrawal slip marked GMcI 14;
(ii) Exhibit 154, an ATM transaction document marked AG3;

(iii) The statement of Catherine Watson at page 253;
(iv) Exhibit 155, bank account documents marked AG I and 2;
(v) The statement of Louise Pitcairn at pages 254-256;
(vi) Exhibit 6, Bank of Ireland documents SMcC 1 and JMcM 2;
(vii) Exhibit 153, DVA UK Registration Certificate;
(viii) The statement of Helen Rankin at page 252;
(ix) Exhibit 5, a driver's licence marked RJM 40.

Bad character applications

86. It was agreed between the parties that these applications should await the committal.