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*(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-

STEVEN LESLIE BROWN

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RULING

HART J

[1] The defendant is presently on trial before Gillen J charged with the murder of Andrew Robb and David McIlwaine on 19 February 2000, and counsel have informed me that the trial has reached the stage where the defendant is giving his evidence in chief and the trial is scheduled to resume later today, Monday 2 February.

[2] On Friday afternoon I heard an application by Mr John McCrudden QC (who appears with Mr John Hunter for the defendant) that I should discharge or vary two orders concerning a person referred to as Witness F which I made on the 23rd November 2007 in advance of the trial. Mr Kerr QC (who appears for the prosecution with Miss McColgan) opposed Mr McCrudden's application.

[3] The orders of 23rd November 2007 which I had been asked to discharge or vary were: (1) that Witness F be permitted to give evidence anonymously; and (2) that by virtue of section 46(6) of the Youth Justice and Criminal Evidence Act 1999:

> "No matter relating to the person referred to in these proceedings as Witness F shall, during the lifetime of that person, be included in any publication if it is likely to lead members of the public to identify that person as being a witness in these proceedings".

For convenience I shall refer to these orders as "the anonymity order" and "no publication order".

[4] Before turning to the issues raised by the application, it is necessary to place it in context and I propose to refer briefly to my previous ruling of 23 November 2007 and to two rulings by Gillen J during the trial, both of which were delivered on 28th January 2009 and as they have not yet been given any other reference I shall refer to them as GIL7377 and GIL7382 respectively.

[5] Witness F made a statement to the police in which she alleges that the defendant admitted to her that he had cut the throat of, and stabbed, one of the two young men who were murdered at Druminury Road, Tandragee. See GIL7377 at [7] and [8]. Witness F was called as a prosecution witness during the trial, but after giving evidence for a short time was unable to give further evidence for reasons described in GIL7377 at [5]. Gillen J subsequently admitted her statement under the Criminal Justice (Evidence) (Northern Ireland) Order 2004.

[6] Mr McCrudden now seeks to persuade me to discharge or vary the anonymity order and the no publication order, and this raises the preliminary issue whether I have any jurisdiction to review orders I made before the trial now that the trial has commenced before another judge.

[7] As a matter of principle once a trial has commenced all matters relating to the conduct of the trial, including admissibility of evidence and the status of witnesses, are thereafter solely the responsibility of the trial judge unless there is a statutory provision that permits another judge or court to deal with any issue. This principle is so fundamental that it requires no authority. However, limited inroads have been made into it in recent years, for example, by the provisions of Part IV of the Criminal Justice (Northern Ireland) Order 2004, which permit the prosecution to appeal against certain rulings by the trial judge. Of particular significance in the context of a trial by judge alone, as in the present case, has been the development of the procedure whereby a judge other than the trial judge considers matters of disclosure. Whilst this was originally a non-statutory procedure, it now has a statutory basis in the form of Rule 7(4)(a) and (b) of the Crown Court (Criminal Procedure and Investigation Act 1996) (Disclosure) Rules (Northern Ireland) 1997 which provides that:

> "(4) On receipt of an application to which this rule applies, the chief clerk shall refer it -
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> (a) where the offence charged is a scheduled offence to such judge as maybe designated by the Lord Chief Justice for the purposes of determining the application;

(b) in any other case -

(i) if the trial has started to the trial judge; or

(ii) if the application is received before the start of the trial to the judge who has been designated to conduct the trial or if no judge has been designated for that purpose to such judge as maybe designated for the purposes of determining the application".

[8] However, there is no provision which expressly provides for any similar procedure in relation to the re-consideration of pre-trial rulings such as those that are the subject of the present application. Mr Kerr, whilst contending that these are matters primarily for the trial judge, was reluctant to exclude the possibility that a judge other than the trial judge might deal with such matters during the trial if the interests of justice required such a course.

[9] It has been accepted that the system of non-jury trial may require a different mode of trial to that where the trial is by judge and jury, as may be seen from the following observations of the Lord Chief Justice in *R v Clifford George McKeown* [2004] NICA 41 at paragraph [44]:

> "The system of non-jury trial, involving as it does the judge as the tribunal of fact as well as the arbiter on legal issues, clearly falls for a different model than that which is suitable for trial by judge and jury. Judicial superintendence of the extent and nature of disclosure is essential but the form that this will take depends not only on the mode of trial (i.e. whether it is by judge alone or by judge and jury) but also on the issues that arise".

[10] Where the resolution of issues by the trial judge might require consideration of material adverse to the defendant and which would not be admissible in the trial itself to determine the accused's guilt, but which would be relevant to the determination of an ancillary issue, then it is understandable that steps be taken to place the material before another judge. However, I am firmly of the view that such a course should only be taken with the sanction of the trial judge, and that in the absence of express permission from the trial judge to allow another judge to deal with such an issue, no other judge has power to entertain any application during the trial

unless there is a statutory procedure such as that provided for disclosure matters. For another judge to entertain any application in the absence of either a statutory power or the express permission of the trial judge would be for that judge to interfere in matters that are exclusively within the province of the trial judge, and would be to encourage undesirable and unjustifiable satellite litigation.

[11] In the present case Mr McCrudden accepts that when he informed Gillen J of his intention to make these applications to me the learned judge said that he could not prevent him from doing so. That falls well short of express permission, and therefore unless there is some statutory power to entertain these applications I consider that I have no jurisdiction to do so.

[12] Mr McCrudden sought to establish that there was such a power for the anonymity order application by pointing to the power to discharge or vary witness anonymity orders contained in s. 6 of the Criminal Evidence (Witness Anonymity) Act 2008 (the 2008 Act). Whilst I accept that it is possible for a judge other than the trial judge to discharge or vary a witness anonymity order made under the 2008 Act, I consider this can only occur before the trial commences, where it could well happen that a judge other than the eventual trial judge could review an earlier witness anonymity order if there were reasons to do so. That is not the present case and s. 6(1) does not assist Mr McCrudden.

[13] However, a more fundamental obstacle to Mr McCrudden's application is that the 2008 Act does not apply at all to the anonymity order I made in favour of Witness F. That is because the identity of Witness F is known to the defendant because she lived with him, and I consider that the provisions of the 2008 Act do not apply to the anonymity order I made in November 2007, nor indeed to the no publication order.

[14] To explain why I have reached this conclusion it is necessary to look at the way in which the law in this area has developed in recent times. Prior to the decision of the House of Lords in *R v Davis [2008]* 3 AER 461, it was a long-established practice for the complainant in blackmail cases to be allowed to give his evidence without disclosing his name, as Lord Widgery CJ pointed out in *R.v. Socialist Worker* [1975] 1 All ER at page 144 d/f. In such a case, the defendant is fully aware of the identity of his victim and so there can be no question of that information being withheld from the defendant as Lord Bingham pointed out in *Davis* at [11].

[15] The decision of the House of Lords in *Davis* was directed to the situation where the protective measures approved by the trial judge were adopted to prevent the defendants discovering the true identity of several witnesses, and all of the judgments in that case were therefore directed to the propriety of that procedure, not to the quite different situation where

anonymity is granted to a witness to prevent others learning what the defendant knows, as the present defendant knows in this case, namely the identity of the witness. It is noteworthy that, for example, Lord Bingham in his reference to the *Socialist Worker* case made no criticism of the grant of anonymity to the witness whose identity was known to the defendant in that case.

[16] The 2008 Act is solely concerned with the making of orders that will have the effect of withholding the identity of the witness from the defendant. That maybe seen from the terms of s. 1(2) and s. 2 of the Act. S. 1(2) provides that;

> "The common law rules relating to the power of a court to make an order for securing that the identity of a witness in criminal proceedings is withheld from the defendant (or, on a defence application, from other defendants) are abolished".

[17] In my judgment it is the case that the common law rules permitting the withholding of a witness's identity from persons other than the defendant are unaffected where the defendant knows the real identity of the witness, and that the 2008 Act does not apply to that situation.

[18] The entire framework of the 2008 Act, with its elaborate provisions for withholding details that might lead to the identification of a witness from the parties, is directed at a situation where the defendant (or a co-defendant if a defendant makes an application under s. 3(3)) does not know the true identity of the witness. As Lord Judge CJ has recently pointed out in *R.v. Mayers & Others* [2008] EWCA Crim 1418 at [5]:

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

[19] Therefore, where the defendant does know the identity of such a witness the Act has no application. If it has, then Parliament has put the blackmail victim whom the defendant does know in the same category as the undercover policeman, or the frightened witness, whom the defendant does not know. I am satisfied that was not Parliament's intention nor what the Act achieved, and I am satisfied that the 2008 Act does not apply to Witness F. I therefore respectfully agree with the conclusions of Gillen J to the same effect at [15] to [17] in GIL 7382.

[20] I should say that having refreshed my memory from my notes of the arguments before me, and from my ruling of 23rd November 2007, the question of public interest immunity was not raised before me, nor considered by me, at that time, contrary to what appears to have been suggested to Gillen J, see GIL 7382 at[15].

[21] This brings me to Mr McCrudden's argument that the no publication order made under s. 46(6) of the Youth Justice and Criminal Evidence Act 1999, is "a witness anonymity order" within the meaning of s. 2(1) of the 2008 Act. That provides:

> "In this act 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 proceedings".

[22] Section 46(6), whilst it has some of the attributes of a witness anonymity order because it prevents the dissemination of information about the witness, does not have the effect of concealing the identity of the witness from the defendant, which is the purpose of the 2008 Act, because a s. 46(6) order only applies to the publication of information, as can be seen from its terminology. Section 46(6) provides:

> "For the purposes of this section a reporting restriction in relation to a witness is a direction that no matter relating to the witness shall during the witness's lifetime be included in any publication if it is likely to lead members of the public to identify him as being a witness in the proceedings".

[23] A s. 46(6) order therefore only relates to preventing reporting as is evident from the reference to inclusion in a publication, and this is emphasised by the description of the order as a reporting restriction. A witness may be the subject of such a restriction but have been named in court and identified to the defendant. See for example *R.v. Andre Shoukri & Others* [2007] NICC 8 at [16]. I am satisfied that a s. 46(6) order is not a witness anonymity order and does not fall within the provisions of s. 2(1) of the 2008 Act.

[24] Mr McCrudden also submitted that the court could review the s. 46(6) order under s. 6(6) of the 2008 Act, but (1) as the 2008 Act has no application to Witness F; and (2) a s. 46(6) order is not within the 2008 Act either, s. 6(6) does not apply.

[25] For these reasons I am satisfied that I do not have jurisdiction to entertain the application to discharge or vary the anonymity order, or the no publication order, that I made on 23 November 2007. For those reasons alone this application must fail, but as the merits of discharging or varying those orders were briefly touched upon by Mr McCrudden it is appropriate that I say something about them.

[26] Mr McCrudden argued that because Gillen J has decided to admit the statement of Witness F that will mean that there will now be no public verification, scrutiny or examination of the witness. Whilst that is so in the sense that her identity will not be disclosed to the general public, her statement will be subject to careful scrutiny and analysis as Gillen J has emphasised in GIL 7377.

[27] Despite Witness F being anonymous the defendant knows who she is and lived with her for a lengthy period. He above all may be expected to know about her credibility and veracity, and the prosecution of course remain under a continuing duty throughout the trial to make disclosure of any material that might undermine the prosecution case, or assist the defence case, and that duty includes any material that would undermine the credibility or veracity of her statement. There has been no suggestion of any material change of circumstances in relation to her credibility or veracity by Mr McCrudden, and when asked by the Court what was the purpose of the application if the identity of Witness F were revealed, he suggested that someone might come forward with new information about her. Whatever might be the weight to be attached to such a suggestion if it were the case that the defendant did not know the identity of Witness F, as he does know who she is and, presumably knows a good deal about her, I consider that this suggestion has no merit.

[28] I have revisited my rulings of 23 November and I do not propose to rehearse the evidence and conclusions contained therein. No material has been put before me, nor has Mr McCrudden suggested that any exists, that would provide any basis for discharging or varying either of these orders and on that basis also I refuse this application. For these reasons the application is dismissed.