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Judgment: approved by the Court for handing down | *Delivered:* 15/09/05

(subject to editorial corrections)

IN THE CROWN COURT IN NORTHERN IRELAND

THE QUEEN

v

TRACY MARY MARSHALL, RALPH PHILLIPS, RODNEY CLARKE AND JOANNE ISOBEL McMULLAN

BILL No N84/04

DEENY J

[1] This ruling relates to the conduct of the trial of the above-named persons. It should not be published until the conclusion of their trial or earlier order of the court. The ruling deals with a number of related applications by defence counsel to me made at Newry on Tuesday 6 September 2005 and at Armagh on Friday 9 September. The applications by defence counsel related to the effect, implementation and extent of a ruling by Mr Justice Hart in relation to this trial granting anonymity to five Crown witnesses.

[2] The Judge's grant of anonymity was made on 1 July 2005 but the reasons were delivered on 23 August. I acknowledge my debt to the Judge for the careful review of the authorities set out therein. In particular I note that he took into account both domestic and European jurisprudence in arriving at his decision to grant anonymity to the five witnesses and direct that they be screened while giving evidence in court, pursuant to Article 11 of the Criminal Evidence (Northern Ireland) Order 1999. I will touch on some of the domestic jurisprudence in due course but note for the purposes of this ruling that the European Court of Human Rights has held in Doorson v The Netherlands 22 EHRR 330 [1996] that the use of anonymous witnesses was not under all circumstances incompatible with the European Convention on Human Rights. They did so in that case where counsel for the defence had the opportunity of questioning the witness before an investigating judge who was aware of their identity. Counsel had an opportunity to ask the witnesses whatever questions he considered to be in the interests of the defence except in so far as they lead to disclosure of their identity and these questions were

all answered (page 331). At paragraph 23 the learned Judge concluded that he was satisfied beyond reasonable doubt that each of the witnesses was suffering from real substantial and understandable fear in the light of the crime which they observed. Their fear was entirely credible fear and related to one of the four accused in this trial and his associates. Mr Dermot Fee QC in the course of one of the hearings before me sought a change of venue because of the notoriety of his client, while, of course, saying that such notoriety was on his instructions unjustified.

[3] No application has been made to me to alter or vary the ruling of Mr Justice Hart, which indeed has been given very recently and supported by careful reasons. However difficulty has arisen for the following reasons. Counsel for the prosecution, at the request of the defence, appear to have provided the defence with details of the addresses from which the anonymous witnesses had witnessed an altercation between Adrian Thomson and, according to some or all of the witnesses, the four accused. In the course of the altercation Mr Thompson was subjected to fatal injuries. The anonymous witnesses have made statements describing the incident so far as they saw it. Some of the legal representatives of the defence have inspected the locus. They have retained an engineer who has apparently had both internal and external access to some or all of the houses from which the witnesses were watching. The Crown has gone further than that. They have in their possession a CD Rom prepared by an English firm with experience in such matters which provides visual illustration of the viewpoints of the various witnesses in lighting conditions which the Crown contend were similar to those in existence at the time of the incident ie at night.

[4] One of the matters raised by defence counsel at the two hearings referred to was the need on their part to know which of the witnesses had been watching from which of the locations. This was necessary so that counsel could prepare and properly conduct his cross-examination as to the limitations, if any, on their view of the incident in question. The Crown accepted that contention and indicated that that information would be furnished this week.

[5] The defence say that a number of matters arise in the light, in particular, of the service of the CD Rom which expressly sets out the addresses of the witnesses. Firstly they say there is really nothing left of the ruling on anonymity at this stage. Secondly they suggest that the proper course for them now to adopt would be to seek to establish the identity of witnesses, by reference to electoral registers or other documents which would enable them to link names to the addresses in question. Thirdly they say that the ruling of Mr Justice Hart does not prohibit them from so acting but is confined merely to the screening of the witnesses pursuant to Article 11 of the Criminal Evidence Order and to them being described in court by a letter of the alphabet and not by name. Fourthly they suggest that in any event the

court would have no power to prevent the legal representatives of the accused from seeking to establish the identity, although quite properly Mr James Gallagher QC, in particular, sought leave of the court to do so before directing that such steps should be put into effect. Fifthly and in at least one case, they have been offered information about one person who is believed to be one of the anonymous witnesses but are uncertain as to how they can treat that at the present time. Sixthly and finally it appears that some of the solicitors involved saw some of the witnesses and they wish to be directed on whether they can pass any information garnered from that to their clients and to counsel.

[6] I must express some surprise at the approach of the Crown to this case. On the one hand in June and July they sought anonymity for the witnesses, knowing full well that that is something not granted as a matter of course but in limited circumstances. By late August or early September they are furnishing information to the defence about the addresses of the witnesses for whom they have sought anonymity. There is an apparent inconsistency in these two approaches. It is most unfortunate that any issues regarding the working out in practice of anonymity were not canvassed before Mr Justice Hart at the earlier hearing. I was told by counsel that this had not happened. The explanation, at least in part, of this surprising approach may stem, I was told, from the fact that both senior and junior counsel for the prosecution have changed over the summer. Senior and junior counsel presently instructed felt the service of the CD Rom was necessary for the proper presentation of the case. I have provisionally indicated that the CD Rom is relevant and admissible in these proceedings. Counsel are to discuss the way in which it is to be brought to the attention of witnesses although I do not regard that as likely to give rise to any significant difficulties.

[7] I propose to deal with the matters raised by counsel for the defence sequentially. I consider that it is clearly implicit in the ruling of Mr Justice Hart that the defence would not seek to identify the five witnesses in this case. At paragraph 22 he lists the disadvantages to the defence in the grant of anonymity as outlined by their counsel. At 22(1) he says:

> "If the defendants are unaware of the identity of a witness, it limits the ability of the defendant to establish whether the witness held a grudge against that defendant."

He clearly envisaged therefore that the identity would not be disclosed. Incidentally and importantly the submissions of Mr Gallagher QC, with whom other counsel agreed, were indeed to the effect that if they did identify the witness they may be able to identify that he was a person with a motive for hostility towards one or other of the accused. At paragraph 23 of his ruling the learned Judge goes on:

> "Whilst I accept that each defendant may suffer some prejudice through not being able to identify the witnesses I think that the prejudice will be minor, and the trial judge can give appropriate directions to the jury as to how they are to approach the evidence given by the anonymous witnesses and any other matters relating to the difficulties faced by the defendant should he consider it necessary."

[8] Contrary to the submissions of Mr Fee QC I consider that the court has indeed the power to direct the defence, if the court thought it proper, to desist from efforts to identify witnesses to whom anonymity had been granted. The High Court, and indeed the Crown Court exercises the powers of the High Court in this regard, has an inherent jurisdiction to prevent abuse of its own processes. Having given such a ruling it would indeed have the power to prevent a breach of a ruling granting anonymity to a witness. The inherent jurisdiction of the court is preserved by Section 16(2)(a) of the Judicature Act 1978. The Court of Appeal in England in R v G and B [2004] CAR 37 630 at 634 concluded that the court, had the powers in relation to contempt of court the enforcement of its orders and all other matters incidental to its jurisdiction. The equivalent provision here is Section 47(4) of the Judicature Act 1978. See Hutton LCJ, as he then was, in Doherty v Ministry of Defence [1999] 1 NIJB 68 at pages 89-91. See also Archibold 2005 paragraph 8.71.

[9] The real issue is whether, in the exercise of my discretion, I should either permit or prohibit further investigations by the legal advisers to the defendants in the light of the unusual circumstances which have arisen here. In approaching that task I am conscious that I am obliged to perform a balancing exercise in order to achieve a trial which is fair to the defence but also to the prosecution and the witnesses. I pay particular regard to the matters set out by Evans LJ in R v Taylor (Gary) [1994] TLR 484 which are cited with approval by Lord Hutton in Re Al-Fawwaz [2002] 1 All ER 545 at 568. I am also mindful of the view of the Court of Appeal in England in R v G and B op cit. In that case the trial judge had ruled that certain sensitive material should not be disclosed to the defence. After the trial had begun the prosecution inadvertently disclosed highly secretive and sensitive material to the defence which was read by three but not all of the counsel for the defence. The trial judge ruled that counsel should not disclose this information to their clients. The Court of Appeal allowed an appeal against that ruling "not least because it was too late to restore the status quo having regard to all the matters set out above, and therefore it was not just or equitable to order restraint". (Paragraph 17). In this case, the addresses and even the bedrooms from which the witnesses saw the events are now known to the defence. Some of the defendants or their legal representatives may be able to say that a

particular person lived at a particular house at that time and that was their house or their bedroom, indeed. Are they to be prohibited for the duration of a lengthy trial from communicating that information either to their own client or their fellow accused or their counsel? Is it fair that one defendant has that information and another does not? I am informed from the Bar that information is being proffered to one defendant. Is it right for them to refuse that? Would that be a ruling that could be enforced in practice by the court given the right to legal privilege between the defendant and his legal advisers? The Court of Appeal in R v G and B in a way that I need not repeat sets out some of the difficulties of asking legal advisers to hold back from clients relevant information. This is not, of course, an absolute rule. As I pointed out in Conway v Kelly and Northern Ireland Ambulance Service [2005] NIQB 29 the disciplinary code of the Bar of Northern Ireland currently prevents counsel from disclosing to his client any conversations he has had in Chambers with a judge eg with regard to sentence. (That is something that will have to be looked at in due course in the light of the recent decision of the Court of Appeal in England in Regina v Goodyear The Times, 21 April 2005.) Furthermore, I am informed from the Bar, that some of the solicitors have or may have some knowledge of the witnesses themselves. It is certainly far from ideal that they should be prohibited from sharing with their clients as it is not conducive to a proper professional relationship. See Lord Taylor LCJ in R v Davis Johnson and Rowe (1993) 97 CAR 110. I note, further, that only one of the four accused excites fears on the part of the witnesses.

[10] I therefore have concluded that it would not be fair and equitable, or indeed realistic, in the present circumstances to restrain the legal advisors to the four defendants from taking some further action in this regard. Counsel had indicated a desire to consult the electoral registers for the relevant period to seek to identify the adults in the house at the time of the offence. Whilst initially against that, correctly, in the light of Mr Justice Hart's ruling, I do now permit that in the light of the submissions of counsel, the circumstances of the case and my consultation of the authorities. I will hear from the defence on any further steps they desire to take and rule on them.

[11] I observe that counsel were to make any authorities or written submissions available by Monday of this week. The prosecution did indeed provide a skeleton argument on Tuesday, helpfully, and Mr Fee QC referred me to an authority on the same day. It can be seen that my ruling is inevitably to some degree ex tempore, nevertheless.

[12] I still have a duty to seek to protect the witnesses here. I do not propose and have not been asked to vacate the ruling of Mr Justice Hart. It may be that there is not a great deal left of anonymity here but I propose to retain as much as possible of that. The witnesses will not be identified by name in examination in chief or in cross-examination by counsel. If they have

points to put to the witnesses they will do so without identifying them. The witnesses will continue to be screened.

[13] I note that the prosecution have already been directed by me to comply with all the requests in a letter of Mr Kenneth McKee, solicitor for two of the defendants with regard to any reasons for hostility on the part of the witnesses. I append that to this Ruling, as I do the statement of Detective Sergeant Colin Brown of 1 September 2005 detailing his enquiries into the backgrounds of the witnesses. The witnesses themselves should not therefore be approached even if identified. That is, of course, consistent with the current practice in this jurisdiction. I direct that no written information of any kind about the witnesses be furnished to any third party by the solicitors and counsel concerned, including their clients. I accept the view that they should be able to ask their clients whether they are aware of any reason why such a person would be hostile to them and give false evidence against them but I do not wish to have any lists of the witnesses names in circulation in any way. To permit that to happen would be a contempt of court. If any cause for personal hostility to the defendants exists on the part of any of the witnesses it seems likely that it would be known to the defendants or their witnesses. Mr Gallagher accepts that. Indeed he very properly said that no one acting for the defence would do anything that could conceivably assist any intimidation. Neither he nor other counsel sought any further step. I add further that no doubt the police will consider their duty to take such steps as are appropriate to protect and reassure the witnesses, particularly until they have given evidence in the trial. I reach no adverse conclusion about any of the defendants but on foot of the ruling of Mr Justice Hart it is sensible to envisage the possibility that some person, with or without the assent of any of the accused, might be so misguided to try and deter witnesses from giving evidence. Indeed he very properly said that no one acting for the defence would do anything that could conceivably assist any intimidation. Neither he nor other counsel sought any further step.

[14] One benefit of this ruling is removing the important potential difficulty identified by Mr Justice Hart at paragraph [19] of his judgment ie. that a conviction, in the view of the European Court of Human Rights in Doorson v The Netherlands (paragraph 76) op cit "should not be based either solely or to a decisive extent on anonymous statements." This view, I note, was presaged to some extent by the remarks of Sir Brian Hutton, LCJ in Doherty's case at page 90, and by Kelly LJ in R v Murphy & Maguire (unreported).