Neutral Citation no. [2006] NICC 8 | *Ref:* **HARC5519**

Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **24/3/2006**

IN THE CROWN COURT IN NORTHERN IRELAND

THE QUEEN

- v -

BRIAN McKEOWN, DARREN McKEOWN, BENEDICT MACKLE, PLUNKETT JUDE MACKLE, PATRICK MACKLE AND JAMES ANTHONY SLOAN

BILL NO: 280/05

HART J

[1] The prosecution have applied for orders that two officers of HM Customs and Revenue and four officers of the PSNI should be permitted to give evidence anonymously. In addition application is made that all six witnesses should give evidence screened from the public, and, in the case of the four police witnesses, that they should also be screened from the defendants. The prosecution has also applied for an order that the customs officers give evidence in private. The applications for screening and that the customs officers give evidence in private are made under the provisions of the Criminal Evidence (Northern Ireland) Order 1999 ("the 1999 Order"), and, as they were not made within 28 days of committal as required by the provisions of Rule 44 BA(3) of the Crown Court Rules, an application for an extension of time to make the application has been made under Rule 44 C(2).

[2] For the purposes of the present application it is sufficient to say that the allegations relate to the smuggling of some 6 million cigarettes into Northern Ireland and an attempt to evade payment of the duties payable thereon. The cigarettes were contained in a container transported from Malaysia which was delivered to an address near Coalisland, County Tyrone. On 27 January 2003 the police observed the container in the yard of the premises at Coalisland and the contents of the container being unloaded using a forklift. The defendant Patrick Mackle admitted that he was the owner of the premises but said that he had given his brother permission to use the premises. Brian McKeown, Darren McKeown, Benedict Mackle and

Plunkett Jude Mackle were arrested on the premises. The defendant Sloan is a customs officer who is alleged to be implicated in this offence by wrongfully disclosing information in his possession as a customs officer.

[3] The evidence of the customs officers who it is proposed should give evidence as witness A and witness B is against Sloan only. He is aware of their true identities because they are former colleagues. The evidence which is proposed to be given by the four police officers referred to as officers 0353, 0355, 0357 and 0361 consist of their observations of individuals allegedly connected with this offence. It appears from their depositions that they had no face to face contact with any of the defendants, that they purport to identify the accused Sloan in contact with a man called Robert Ferguson who features in this case, and who was originally intended to be a defendant but is not before the court. They also purport to identify a green Mitsubishi Jeep which it is alleged belonged to Patrick Mackle.

[4] I propose to deal with the application for anonymity first. In my ruling in R v Marshall and Others [2005] NICC 29 at [29] I set out the principles which apply to applications of this sort. In Marshall's case the witnesses whose evidence was to be given anonymously were all civilian eyewitnesses of the events which led up to the death which gave rise to the charges. In R v Fulton and Others [2005] NICC 32 I had to consider applications for anonymity on behalf of undercover police officers, and having referred to the relevant decisions under the European Convention, concluded at [5] and [6] that there was:

> "…ample authority to justify a national court granting anonymity to an under-cover police officer in order to preserve his effectiveness in the future and to protect himself or his family from harm as a result of his activities being revealed."

In R v Braniff and Others [2005] NICC 26 Weir J reached a similar conclusion in relation to PSNI covert surveillance officers. In Fulton and in Braniff it was accepted that there was a need to protect the safety of the undercover officers in the future. However, in Van Mechelen v Netherlands [1998] 25 EHRR 647 the European Court observed at paragraph 57 that:

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

[5] I am satisfied that the European Court recognised that if the court is not satisfied to the requisite standard that the undercover officer's safety may be at risk in future, it may nevertheless be legitimate to grant the witness anonymity so as not to impair his usefulness for further operations.

[6] I now turn to consider the application of these principles to the circumstances of the present case and I will deal with the customs officers first. I accept the evidence of Witness A (whose statement is signed Officer A) and of Mr Whiting that Witness A's proper name was inadvertently disclosed when the committal papers were being prepared. To that extent his position is somewhat different from that of Witness B. It could be argued that as his name has been disclosed there is no longer the same imperative to conceal his true identity. Nevertheless, it has not been suggested that his name has been disclosed outside the confines of the committal papers and for that reason I made an order at the commencement of the hearing that there was to be no publicity of his name in order to preserve his position pending the outcome of the applications. I am satisfied that if it is proper to grant him anonymity then, unless there is evidence to show that his name has already entered the public domain in a practical way, it is proper to consider making an order that he should only be referred to anonymously in the course of the evidence and prohibiting the publication or any public reference to his proper name.

[7] Mr Canavan, who appeared on behalf of his client Sloan for the purposes of this application, accepted that as Sloan knows A and B Sloan would not be disadvantaged in any way by their giving evidence anonymously. The evidence of Mr Parr was that A and B are responsible for debriefing informants who deal with offences such as oil laundering, drug and cigarette smuggling. He expressed concern that were A and B to be identified as the handlers of informants, those who wish to identify informants could do so or attempt to do so by following the handlers. It was represented by Mr Parr that this was a unique case so far as witnesses in the position of A and B are concerned because normally they would not give evidence, but because of the position of Sloan as a customs officer it was necessary for them to do so in the present case.

[8] This is an unusual case because the defendant is already aware of the identity of the proposed anonymous witnesses, and therefore there is no prejudice to the defendant if they give evidence in this fashion. This is a factor of considerable importance. Having considered all of the evidence in relation to this issue and the submissions of the parties I am satisfied that in the exercise of my discretion I should permit Witness A and Witness B to give evidence anonymously. I may say that the circumstances of this case are such that any conviction would not be based either solely or to a decisive extent upon the evidence of A and B and therefore the prohibition under the European Convention enunciated in Doorson v The Netherlands and Van

Mechelen v The Netherlands does not apply. I am satisfied that the trial procedures can adequately deal with questions of anonymity and I will consider later in this judgment what mechanism is to be adopted.

[9] I now turn to consider whether the four police officers should be referred to anonymously. As I have already pointed out these officers carried out observation by way of covert surveillance on various people. They had no face to face contact with any of the defendants. However, their evidence, if admitted, may be said to implicate both Sloan and Patrick Mackle.

[10] The evidence in support of the application relating to the four police officers was that of Detective Inspector Brown. He advanced two reasons why the application should be brought. His evidence was that these officers work in small groups and that they are required to take part in investigations into a wide range of offences from murder and robbery to offences linked with what he described as organised crime. They operate in plain clothes, and are frequently required to work in hostile environments, and it is essential for their personal safety that they should not identified as police officers. Although Inspector Brown was properly cross-examined about a number of matters I am satisfied that is necessary for the personal safety of such officers that their true identity should be concealed. The nature of their work requires them to operate throughout the province and I have no difficulty in accepting that if it were appreciated by those with whom they were working closely that they were police officers their safety would be in real danger.

[11] The second limb of the prosecution application was that the operational effectiveness of the witnesses would be damaged in future were they to be identified by name. The evidence of Detective Inspector Brown was that there are a very limited number of such officers and that any compromise of their identity would have serious repercussions for their future use. In such circumstances if they were withdrawn from such duties it would take 12-18 months to train each replacement at a cost of approximately £70,000. In addition it may be necessary for them to move home and have additional security measures provided at their home, again at very considerable cost. These factors were also advanced before Weir J in R v Braniff and Others.

[12] In the case of the four police officers it cannot be said that the prosecution case against either Mackle or Sloan would be based solely, or to a decisive extent, upon their evidence, and that is also a factor I take into consideration.

[13] I accept that if the effectiveness of the officers were to compromised that there would be a considerable financial impact for the PSNI in providing replacements. That is a factor to be taken into account. Insofar as the police officers are concerned, it has not been suggested that it is a factor of particular significance to any of the defendants affected that they should know the identity of the officers concerned. I do not consider that there would be any material prejudice to the defendants if the officers give evidence anonymously, whereas the arguments in favour of the prosecution application are of considerable weight. I am satisfied that, provided the identity of the officers is disclosed to the trial judge, and the court is satisfied that the credit worthiness of each witness has been fully investigated and disclosed, that I should grant the application and I do so.

[14] Mr Rodgers on behalf of the accused Benedict Mackle submitted that any prejudice to the defendants of the witnesses being referred to by letter could be reduced significantly were they to be referred to by a pseudonym. Mr Kerr QC on behalf of the Crown was disposed to accept that that might ameliorate the situation and provided it is practicable I see no reason why this should not be adopted. To refer to a witness as for example John Smith rather than A may however make it unduly complicated for witnesses to remember who the individual concerned is, particularly where there are a large number of undercover officers who are all used to referring to each other as A or B etc throughout an operation or when preparing their statements. However in the present case, there are 6 such witnesses, taking the customs officers and the police officers together, and provided that an acceptable series of pseudonyms can be agreed I consider that this is the preferable method to adopt. If necessary I will determine this matter closer to the trial, but should it not be practicable to have such names agreed then the witnesses will have to be referred to either by letter or by number.

[15] I now turn to those applications which are made under the 1999 Order. The accused were committed for trial on 8 July 2005 and the applications were brought on 26 January 2006. They were therefore brought outside the 28 day period from committal prescribed by Rule 44BA(3) of the Crown Court Rules. An explanatory statement as to why these applications were brought out of time was lodged under Rule 44C(3) which stated:

> "The accused were returned for trial on 8 July 2005. Senior police subsequently indicated that screening would be required for certain Police and Custom witnesses in this case.
>
> Supporting documentation in respect of the applications was forwarded but not completed until 16 January 2006. Twenty eight days had elapsed since

> committal thus necessitating an extension of time application."

[16] Mr Kerr QC stated that his instructions were that it was necessary for the statements and documents to support the applications to be considered by a senior assistant director before approval would be given to applying for an order. However, I must point out that this is not the first time that the PPS have failed to bring applications for such orders within 28 days from committal as provided for by the Rules. See for example R v Braniff, R v Marshall and Others and R v Fulton. I was informed by counsel that the issue of anonymity was debated at the committal proceedings, and that it makes it all the more surprising that this application was not brought in time. In R v Cooper I considered the provisions of Rule 44CA(2)(b) and concluded:

> "That the Crown was 'unable' to do so would seem to imply that it was prevented from applying in accordance with the Rules by circumstances which could not easily have been anticipated or avoided. A failure to do what was apparently recognised should be done, or at least realised should be considered, does not satisfy that test."

[17] I therefore conclude that the application for an extension of time should be refused. The prosecution has not advanced a satisfactory explanation as to why this application could not have been brought within 28 days. However, as I pointed in Cooper, the provisions of Rule 44CA(1)(b), together with Article 7(1)(b) and Article 8(1)(b) of the 1999 Order appear to confer a residual but unfettered discretion on the court to initiate, vary or discharge a Special Measures Direction if the interests of justice require it. In this case the trial date is some distance away and so it has been possible to deal with this matter without in any way affecting the date of trial. I have heard full argument on the merits of the application and it has not been suggested that the defence would be prejudiced in any way by the tardiness of the prosecution in bringing this application and I therefore propose to extend the time of my own motion to deal with these applications.

[18] An application was made that the two customs officers should give evidence in private under the provisions of Article 13 of the 1999 Order. However, this was not pursued in the evidence of Mr Parr and the main thrust of the application was that the witnesses should be screened whilst giving their evidence. Article 13(4) provides:

> "A special measures direction may only provide for the exclusion of persons under this Article where –
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> (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."

Plainly Article 13(4)(a) does not apply, and although the arguments which I consider later in relation to the safety of the witnesses might be argued to give rise to grounds under Article 13(4)(b), I do not consider that this has been made out in the present case. What is relied upon in relation to the custom officers is a general fear that if they give evidence they may be exposed to risk in the future, rather than that they would be intimidated in order to prevent them from giving evidence in this case, which is what Article 13 appears to be directed towards. I therefore refuse the application for evidence to be given in private under Article 13.

[19] The applications for screening in relation to the four police officers and the two customs officers are somewhat different. The application in respect of the customs officers is that they only be screened from the public, whereas the application in relation to the police officers is that they should be screened from both the public and the accused. As in the case of Fulton the applications may be said to rest on two limbs; (a) that the personal safety of the witnesses would be at risk in future were they to be exposed to public view, and (b) that their future effectiveness would be impaired for the same reason. Article 11 of the 1999 Order only permits a witness to be screened from the accused. The 1999 Order makes no provision for screening a witness from the public, but not from the accused, and therefore if that is to be done it must be done under the common law, and the skeleton argument of the Crown relied upon the common law as an alternative.

[20] In R v Millar, McFadden & McMonagle (unreported, 29 May 1992) I reviewed the relevant authorities relating to screening of witnesses at common law, and although in some respects the law has evolved since then, as in R v Fulton & ors, the following principles are relevant to the present case.

(1) It is a fundamental principle of the common law that justice must be administered in open court.

(2) The interests of justice may require a departure from this principle.

(3) A departure will only be permitted where it is proved to be necessary in the interests of justice, mere desirability or convenience is not enough.

(4) It will be permitted in the following circumstances.

(a) Where the witness would otherwise be prevented from giving evidence because of fear during those proceedings or any possible proceedings in future.
(b) Where the witness's safety may be at risk in the future because he gives evidence during those proceedings.
(c) Where the prosecutor would otherwise be deterred from bringing proceedings.
(d) Where the witness's future effectiveness would be impaired.

[21] I will deal with the question of screening the customs witnesses from the public first. So far as they were concerned, there was little evidence in relation to the difficulties which the customs may face if these officers are exposed to public view and their identities and hence their functions, become known. The evidence is therefore lacking to make out the case that their future effectiveness may be impaired if they are not screened and I do not grant the application on this basis. So far as their personal safety is concerned, I have no hesitation in accepting that anyone who is identified as working with informants would be at risk. Both they and their informants would be open to considerable personal risk in those circumstances. Both witness A and witness B have referred to perceived risk to their personal safety in their witness statements, and Mr Parr suggested that consideration would have to be given to whether the prosecution could continue if the witnesses were not screened, although he accepted under cross-examination that he had not asked witness A or witness B if they would refuse to give evidence if the application were refused. That the prosecution may be prevented from proceedings by unwillingness on the part of the prosecutor to continue if the application is refused is a valid factor for the court to take into account.

[22] If the customs officers are screened from the public that will ensure that the legitimate concerns of the customs officers are met, whilst ensuring that the defendants can see them. I am satisfied that there are no alternative methods of protecting the customs officers other than screening them from the public and I therefore grant the application that Witness A and Witness B be screened from the public.

[23] The application so far as the police are concerned is somewhat different because the prosecution seek to have the officers screened from the accused as well as the public. Article 11(2) of the 1999 Order permits witnesses to be screened from the defendant as in R v Marshall. The evidence of Detective Inspector Brown was that these witnesses have to operate throughout the province and would be at risk if their identity became known. I accept that fear is genuine. Undercover officers would receive short shift in many areas in the province if they were identified as such and the fear for

themselves, their colleagues and their families which Detective Inspector Brown said they conveyed to him is quite understandable. However, I note from his deposition that officer 0361 has twice given unscreened evidence as a surveillance officer in the past and I take this into account. To that extent the application in his case is weaker because it has not been suggested that his safety or effectiveness have been affected or impaired by this. It also weakens the general submission made by the prosecution as it suggests that the fears for the future safety and effectiveness of the other surveillance witnesses may not be as strong as might otherwise appear.

[24] Mr Mulholland on behalf of Patrick Mackle pointed out the concern of the customs officers at being identified was not as great as that of the police officers because no application was made on behalf of the customs officers that they should be screened from the defendants. In the present case none of the officers appear to have had any personal contact with the defendants at any time, and there is nothing to suggest that the defendants would be handicapped in any way by not being able to see the witnesses. This is an important factor when the court has to consider the application of Article 7(3)(b) of the 1999 Order.

[25] In this case I attach considerable importance to the fact the one of the surveillance officers has twice given evidence unscreened in the past without any apparent impairment of his safety or future effectiveness as a result. That suggests that the concerns expressed in support of the application for the surveillance officers are less compelling than otherwise might appear. I consider that the prosecution has failed to establish that it is necessary for the PSNI surveillance officers to be screened from the accused and I refuse that application.

[26] There remains the application that the police surveillance officers be screened from the public whilst giving evidence. Whilst the arguments in favour of the application are weaker than those of the customs in that one of the officers has given unscreened evidence before, nevertheless I am satisfied that it is necessary to screen the officers from the public to protect their safety and future effectiveness, and that there are no alternative methods of protecting them. I therefore order that the witnesses 0353, 0355, 0357 and 0361 be screened from the public whilst giving evidence.

[27] There are six defendants in this case and it will not be easy to screen the witnesses from the public whilst permitting them to be seen by the defendants, and this may require further consideration of the matter closer to the trial in order to see how this can be achieved in practice.