THE COURT OF APPEAL

[286/18]

The President
McCarthy J.
Donnelly J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

JONATHAN HAWTHORN

APPELLANT

JUDGMENT of the Court delivered on the 20th day of April 2020 by Birmingham P.

1. On 31st July 2018, the appellant, Jonathan Hawthorn, was convicted in the Special Criminal Court of the offence of membership of an unlawful organisation and sentenced to five years' imprisonment with credit to be given for time served. Mr. Hawthorn was tried alongside two co-accused, Messers James Geraghty and Donal O' Ceallaigh, who were both acquitted. He now appeals against both sentence and conviction. This judgment deals with the conviction aspect only.

2. As membership offences go, the factual background was somewhat unusual in that it arises from the activities of an FBI agent, referred to at trial as 'Agent Peter', this was and is the subject of controversy whose task it was to monitor the 'Dark Web'. While carrying out his duties, he was in contact with a person identifying themselves as 'Meat Cleaver' who was seeking to order explosive substances over the Dark Web. The FBI agent, acting in an undercover capacity, agreed with Meat Cleaver that he would supply him with Semtex. The package was to be addressed to James Geraghty, 76 Dolphin House, Dublin 8. Contact was made with An Garda Síochána who arranged what was described as a controlled delivery of inert explosives. At trial, there was evidence from Detective Garda McCarthy that the appellant accepted delivery of the inert explosives, addressed to James Geraghty, on the balcony outside of 76 Dolphin House. Garda McCarthy's evidence was that as he approached the door of the flat, one of two males who were there asked the Garda, who was posing as a DHL delivery man, "is that for No. 76?" to which the

Garda replied "what's the name?" and the male responded "James Geraghty". The evidence was that this male, now known to be Jonathan Hawthorn, then signed for the package in the name of James Geraghty. While this controlled delivery was taking place, the flat was under surveillance by members of the National Surveillance Unit of An Garda Síochána and a number of photographs were taken of the transaction. The appellant and another man made their way from Dolphin House to St. James's Hospital. There, the appellant was arrested. During the course of his subsequent detention, the provisions of s. 2 of the Offences Against the State (Amendment) Act 1998 were invoked. The appellant did not answer any questions put to him.

3. There were a number of elements of the prosecution case, including:

(i) The opinion/belief evidence of Chief Superintendent Maguire that the appellant was, on 14th September 2016, a member of an unlawful organisation styling itself the IRA;

(ii) The evidence of Agent Peter that he had entered into an agreement with a person known as Meat Cleaver to supply explosive materials to be addressed to a James Geraghty of 76 Dolphin House, Dublin 8. (It may be noted that it was never the prosecution's case at trial that the appellant was "Meat Cleaver");

(iii) The evidence of Detective Sergeant Roberts who, on behalf of An Garda Síochána, arranged the controlled delivery of inert explosives addressed to James Geraghty of 76 Dolphin House, Dublin 8;

(iv) The evidence of Detective Garda McCarthy that the appellant accepted delivery of the inert explosives from him and signed for them;

(v) The evidence of arrest and detention. At the time of arrest, there was a backpack in close proximity to the appellant which contained the inert explosive substances which had been the subject of the controlled delivery; and

(vi) The invocation of s. 2 of the Offences Against the State Act 1939 and the failure of the appellant to respond to respond to questions.

4. A large number of grounds of appeal have been formulated, but only three have been advanced by way of oral argument. These were:

(i) That witnesses were allowed give evidence without revealing their names to the defence. This was a reference to Agent Peter and the member of the National Surveillance Unit with particular reference to Detective Garda BK [Grounds 3&4];

(ii) That the photographing of the transaction which involved the handing over of the inert explosive substances was contrary to the provisions of the Criminal Justice (Surveillance) Act 2009 [Ground 5]; and

(iii) It was contended that the fact that the conversation that Garda McCarthy had with the appellant on the balcony of Dolphin House was not written down and read over to the appellant was a breach of the Judges' Rules [Ground 6].

Before dealing with the three issues which were the subject of oral argument, it is necessary to refer to the other grounds which featured in the written submissions and which have not been abandoned.

Grounds 1 and 2: The Challenge to Agent Peter's Evidence

5. The appellant objected to the fact that Agent Peter was permitted to give his evidence by way of video link or at all. There is express statutory authority for the giving of evidence by video link by witnesses who are outside the State. Section 29 of the Criminal Evidence Act 1992 provides:

> ". . . in any criminal proceedings a person other than the accused who is outside the State may, with the leave of the court, give evidence through a live television link."

In acceding to the application that the evidence be given by video link, the Court indicated that statute provided for a broad discretion and that the application had been grounded on evidence from Detective Superintendent Gibbons. The said evidence established that the witness was located in America, that apart from the ordinary logistical issues such as travel, there was also the fact that the witness's work had an international dimension, that the dimension extended to the protection of the State, and that the witness was under pressure of work. In the Court's view, the Special Criminal Court was fully justified in permitting the witness to give evidence by video link.

6. Over and above the provision for anonymity, to which we will be returning, there was also an issue raised about the fact that the defence were anxious to have access to the computer used by Agent Peter. Given the nature of Agent Peter's line of work, we will content ourselves to saying that we are not at all surprised that the Special Criminal Court had little difficulty in rejecting this point.

Ground 7: The Evidence of Arrest

7. Another ground of appeal advanced in the written submissions was a contention that the judges of the Special Criminal Court erred in law and fact in failing to exclude the evidence of arrest. The factual situation is that having taken possession of the inert explosives, the appellant made his way to St. James's Hospital and, more particularly, to the H&H ward, a cancer ward, where his father was a patient. Gardaí who were armed entered the ward. The appellant was directed to go to the ground. Handcuffs were placed on him and the backpack, which had been in the possession of the appellant and was close by, was seized. The appellant was then brought to an exit. On the way, the Garda who had detained Mr. Hawthorn, Detective Garda Dean, formally identified himself, told the appellant that he had been detained and that he would be searched and questioned outside the hospital. Then, at 11.42am, approximately 12 minutes after Gardaí had entered the ward, the appellant was arrested. We agree with the Special Criminal Court that there was no evidential basis to support the submissions made that the arrest of the appellant was unlawful. We turn, then, to the issues that were the subject of oral argument.

Grounds of Appeal that were the Subject of Oral Argument

8. While the core of this appeal turns on the interpretation to be given to Rule 7(4) of the Special Criminal Court (No.2) Rules (SI 83 of 2006), we believe that we can deal with the other two issues which were advanced at the hearing quite quickly and we propose to dispose of those matters before embarking on our discussion in relation to the anonymity point.

Ground 5: The Surveillance Point

9. The controlled delivery was recorded by Garda BK, a member of the National Surveillance Unit, who took a series of photographs, four of which were admitted in evidence. It was submitted that admitting these was an error as the photographing of events on the balcony outside the dwelling was regulated by the Criminal Justice (Surveillance) Act 2009. The Court must say bluntly that it sees no merit in this ground of appeal. The Criminal Justice (Surveillance) Act 2009 defines surveillance as:

> "(a) Monitoring, observing, listening to or making a recording of a particular person or group of persons or their movements, activities and communications or
>
> (b) monitoring or making a recording of places or things by or with the assistance of a surveillance device."

A surveillance device is defined as follows:

"[a]n apparatus designed or adapted for use in surveillance, but does not include –

(a) An apparatus designed to enhance visual acuity or night vision to the extent to which it is not used to make a recording of any person who, or any place or thing that is being monitored or observed;

(b) CCTV within the meaning of section 38 of the Garda Síochána Act 2005 or

(c) A camera to the extent to which it is used to take photographs of any person who, or anything that is in a place to which the public has access."

In this case, the individuals photographed were photographed at a time they were in a place to which the public has access, the balcony of a flat complex. The appellants have formulated an argument based on a contention that the reference in subsection (c) to a place to which the public has access should be interpreted as if the words there were "to which the public has access as of right". We are quite unable to accept this submission. There are very few places to which the public has access in a totally unfettered fashion and in a manner not subject to conditions. In some cases, such as access to many public parks, the public is permitted access but only during opening hours. In other cases, large sports stadia and zoos are examples that come to mind, access is conditional on paying a prescribed fee. In yet other cases, access is conditional on conducting oneself in a manner acceptable to those in control of the premises, such as visiting a Church. We are quite satisfied that the section does not delimit or qualify the reference to a place to which the public has access. There is no room for doubt but that flat complexes are laid out in a way that permits public access to the various balconies within it. We have no hesitation in dismissing this ground of appeal on that basis.

Ground 6: The Judges' Rules

10. In our view, the suggestion that the Judges' Rules have any application is quite misconceived. The Judges' Rules date back to 1912 and provide guidance to the police forces of common law jurisdictions. They are to be found in the judgment of *R v. Voisin* [1918] 1 KB 531 which also examines the context in which they should be invoked. As is widely known, they deal with issues such as the entitlement of police/Gardaí to question an individual, when a caution has to be administered and so on. While reference is made to the keeping of a record of any questioning that takes place, we do not see those rules as having any application to the events on the balcony of Dolphin House. As such, we have no hesitation in dismissing this ground of appeal in kind.

Grounds 3 and 4: Witness Anonymity

11. We now turn to the question of witness anonymity which we see as the principal issue in this appeal and to which we have alluded previously. During the course of the trial, the prosecution asked that six witnesses be allowed give their evidence without revealing their actual names to the defence and while the public were excluded from the courtroom. The witnesses were Agent Peter of the FBI, Detective Garda BK, and four other members of the Garda National Surveillance Unit.

12. In relation to Agent Peter, Detective Superintendent Gibbons of An Garda Síochána told the Court that Agent Peter is an FBI agent who works as an undercover operative. He said that if Agent Peter's name was made available in open court, "it would put his life at risk, the work he was in at the time, engaged in and the work he had done in the past or may do in the future". He further explained that "if [Agent Peter's] name was made known in public, people could Google him, perhaps, people would be able to identify him from criminal organisations around the world and from terrorist organisations around the world and be able to find out who he is, where he works and perhaps compromise investigations that he is involved in or future investigations, perhaps threaten him or his family".

13. In relation to Gardaí from the National Surveillance Unit, Detective Inspector Lawless of that unit told the Special Criminal Court that it was necessary that the Gardaí should give their evidence without revealing their names to the defence so as to protect their identities. He contended that if details were revealed, that it would place their lives and well-being in danger. He said to reveal their identities would pose a risk to the integrity of future operations.

14. On behalf of the appellant, it is contended that the Special Criminal Court had no jurisdiction to permit witnesses to give evidence without revealing their names. It is accepted that the Oireachtas might make provision for this to happen, and indeed, has done so in the Criminal Assets Bureau Act 1996, but the appellant submits that absent such specific statutory authorisation, what occurred was quite impermissible.

The Evidence Itself

15. Before addressing in greater detail the arguments arising from the decision to grant anonymity to witnesses, it is appropriate to review the evidence that was given by the witnesses in question. So far as Garda witnesses from the National Surveillance Unit other than Detective Garda BK are concerned, their evidence was entirely non-controversial and the three witnesses

were dealt with in eight pages of the transcript. No defence counsel had any questions for them. So far as Detective Garda BK is concerned, his evidence was somewhat more substantial, but only to a limited extent. Detective Garda BK gave evidence of what he observed on the balcony of the second floor of Dolphin House in the vicinity of No. 76. He took 82 photographs in all using a digital still camera, four of which were produced as exhibits at trial and the balance of which were disclosed to the defence. In cross-examination, he indicated that the piece of equipment that he used to take the photographs was the same piece of equipment that he was using to watch the balcony. While seeking to claim privilege on the equipment used by the National Surveillance Unit, he confirmed that it was a standard camera, a commercially available piece of equipment, and we have already dealt with any issues arising from same.

16. The evidence of Agent Peter was also relatively brief. He explained his background as an FBI employee, acting as an online covert employee for some five years. He explained that in his role, he utilised a variety of aliases and monikers. He received an unsolicited email from an individual using the moniker "Meat Cleaver" while on the Dark Web. He explained the concept of the Dark Web and how it is accessed using a software called TOR. He explained that Meat Cleaver had sent an unsolicited private message to him with the intention of enquiring about the purchase of Semtex explosives. He explained that the initial order was for Semtex explosives and there followed an order for an F1 Soviet Fragmentation Grenade and a later order for a 9mm handgun with 100 rounds of ammunition. He was cross-examined by counsel for James Geraghty, counsel for the other two accused did not have any questions for him. While under cross-examination, he confirmed that he would not be prepared to make the computer that he works on available to the defence to examine. Senior Counsel for Mr. Geraghty told him that the position on behalf of his client was that the defence did not accept the witness's credibility or reliability. Counsel continued that he wanted to emphasise that he could not put any details to him, he could not put any substance to that in circumstances where the witness had asked for anonymity. The witness responded by saying that he totally stood over what he had said.

The Relevant Statutory Provisions

17. The respondent says there is statutory authority that supports the anonymisation of certain witnesses. She points, in the first instance, to s. 41(1) of the Offences Against the State Act 1939, which provides:

"(1) Every Special Criminal Court shall have power, in its absolute discretion, to appoint the times and places of its sittings, and shall have control of its own procedure in all respects and, shall for that purpose make, with the concurrence of the Minister for Justice, rules regulating its practice and procedure and may in particular provide by such rules for the issuing of summonses, the procedure for bringing (in custody or on bail) persons before it for trial, the admission or exclusion of the public to or from its sittings, the enforcing of the attendance of witnesses, and the production of documents."

Rule 7 of the Special Criminal Court (No. 2) Rules (SI 183 of 2016) provides as follows:

"(1) The Court shall be an open Court to the sittings of which the public generally shall have access so far as the same can conveniently be provided and subject to such conditions and limitations as the Court may at any time and from time to time impose.

(2) Without prejudice to the generality of the power to impose conditions provided in sub-rule (1) hereof the Court shall have power:

(a) to limit the number of members of the public, other than bona fide representatives of the Press, who may have access to a sitting of the Court either generally or for the hearing of any particular trial or trials;

(b) to authorise members of the Garda Síochána to prevent from attending any sitting of the Court any person who the Court has reason to believe is likely to interfere with the proceedings, and

(c) to direct the removal from the Court of any person interfering with its proceedings

(3) Where the Court is satisfied that because of the special nature of, or of the circumstances of, any trial or proceeding before it, it is desirable in the interests of justice, or for the protection of the accused or any other person to do so, the Court may exclude from the hearing or from any specified portion of the hearing the public or any members of the public other than bona fide representatives of the Press.

(4) The Court may permit a witness to give his or her name and address in writing to the members of the Court and may also permit a witness including the accused to give the name and address of any person mentioned in his or her evidence in writing to the Court.

(5) The Court may direct that the name, address, or the evidence or any part of the evidence of any witness shall not be published."

18. The parties are in disagreement about the significance of Rule 7(4). The appellant says that its effect is that a witness giving evidence in Court may write his name and give that to the

members of the Court. The effect of this is that members of the public who are present in Court observing the proceedings will not be aware of the name and address of the witness, but the defence will, and must be aware of the name of the witness in the usual way. The prosecution contended that the rule facilitated the giving of evidence by an anonymous witness whose identity would not be disclosed. The Special Criminal Court was quite satisfied to accept the submissions of the prosecution which was that the terms of Rule 7(4) were quite clear and permitted the giving of evidence with the protection of anonymity.

19. The starting point for consideration of the issues between the parties lies in Rule 7(4) itself. Viewed in isolation, the sub-rule would seem to permit the procedure that was followed. The witnesses were permitted to furnish their names to the Special Criminal Court. The question is, can the sub-rule be viewed in isolation? The appellant argues that the sub-rule cannot be divorced from statutory provisions such as the Criminal Procedure Act 1967, which the appellant says is representative of the established common law position that prohibits the granting of anonymity to witnesses. It must be said that it is slightly surprising that there is not a comprehensive statutory code dealing with this issue. The Constitution had contemplated the establishment of Special Criminal Courts, the Offences Against the State Act 1939 had addressed the subject, and a Special Criminal Court, or more recently, courts, has been a feature of the Irish legal system since 1972. Applications for anonymity and/or other special measures were always likely to arise and one might have expected that it was an issue that would have been dealt with in some detail with the Legislature specifying the circumstances in which anonymity and other protective measures could be put in place, and specifying in some detail the limitations to which the procedures would be subject. As is pointed out in by Harrison in *The Special Criminal Court: Practice and Procedure* (Bloomsbury Professional, 2019), such legislation is already in place in England and Wales, Northern Ireland, and Scotland. It is of some interest that legislation in England and Wales was enacted within one month of the delivery of the decision of the House of Lords in *R v. Davis* [2008] 2 All ER 461, a decision on which the appellant places reliance and to which reference will be made. In the context of the legislation that has been put in place in neighbouring jurisdictions, it is of significant that the European Court of Human Rights in *M v. The Netherlands* (15th July 2017) recently concluded that there were good reasons for special measures such as disguising witnesses and distorting their voices since they were still active intelligence officers or human sources and their safety had to be taken into account.

20. The appellant suggests that if reliance is to be placed on Rule 7(4) in the manner contended for by the prosecution, that a conflict would arise with the provisions of the Criminal Procedure Act 1967, and in particular, s. 6 thereof. Section 6 lists the documents that the prosecutor is to serve on the accused which includes *inter alia*:

> "[…] (c) a list of the witnesses whom it is proposed to call at the trial.
>
> (d) a statement of the evidence that is to be given by each of them. […]"

The reference to the Criminal Procedure Act 1967 seems misplaced. Section 6 is to be found in Part II of the Criminal Procedure Act 1967 which deals with the preliminary examination of indictable offences in the District Court. However, we do not understand this to be a case that originated in the District Court, rather, it is our understanding that Mr. Hawthorn was brought before the Special Criminal Court for charge. That being so, the relevant provision would be the Special Criminal Court Rules 2016, and in particular, Rule 16(1). Pursuant to that rule, the Chief Prosecution Solicitor is required to furnish the following:

(a) A list of the charges to be proffered against him.

(b) A list of the witnesses to be called.

(c) A statement of the evidence that is to be given by each of the witnesses.

(d) A list of the exhibits (if any).

21. The obvious way to comply with the s. 6 requirements, when that is what is in issue, and with the Rule 6 requirements, where applicable, is that proposed witnesses will be listed by name. However, even in entirely non-controversial circumstances, it is possible to imagine that the list would be compiled by reference to the role played by or occupation of a witness *e.g*. witness to prove Ordinance Survey maps, witness to prove receipt of samples, and so on. In that context, it is of interest that *The Special Criminal Court*: *Practice and Procedure* contemplates that witnesses from the National Surveillance Unit would be referred to by initials. At para. 3.113, the author states:

> "[t]he Court can also order that the identity of certain witnesses, such as surveillance officers, is restricted."

The text continues:

> " […] the anonymity of witnesses is discussed in more detail below."

At para. 3.116, it is stated:

> "Where statements of undercover surveillance Gardaí are included in the book of evidence, those witnesses are generally referred to by using letters or initials only. The Special

Criminal Court has seen fit, on occasions following an application by the prosecution, to permit the use of initials or pseudonyms where it is satisfied that it is necessary to protect the identities of surveillance witnesses for reason of safety and to protect the integrity of ongoing surveillance operations. However, a question arises as to whether r 7(4) can be interpreted to authorise the withholding of witness details from the accused person and his legal team."

We see nothing at all objectionable in referring to surveillance witnesses on the list of witnesses by initials or pseudonyms. However, by saying that, it does not necessarily follow that the defence would be denied information on the identity of the witnesses.

22. In suggesting that it is not possible to interpret the sub-rule in the manner contended for by the prosecution because to do so would be to interpret a sub-rule of court as setting aside a long-established principle of the common law, the appellant places particular reliance on the case of *R v. Davis* [2008] 3 All Eng. 461. The factual background to that case is of some importance if the opinion expressed by the Law Lords is given its proper context. On New Year's Day 2002, towards the end of an all-night New Year's Eve party held in a flat in Hackney, a shot was fired which killed two men. Both men were shot with the same bullet. At trial, the appellant admitted that he had been at the party, but claimed that he had left before the shooting occurred. Seven witnesses claimed to be in fear for their lives if it became known that they had given evidence against the appellant, among them, three witnesses who identified the appellant as the gunman. To ensure the safety of these three witnesses and to induce them to give evidence, the trial judge made orders to the following effect:

"(1) The witnesses were each to give evidence under a pseudonym.

(2) The addresses and personal details, and any particulars which might identify the witnesses, were to be withheld from the appellant and his legal advisers.

(3) The appellant's counsel was permitted to ask the witnesses no question which might enable any of them to be identified.

(4) The witnesses were to give evidence behind screens so that they could be seen by the judge and the jury but not by the appellant.

(5) The witnesses' natural voices were to be heard by the judge and the jury but were to be heard by the appellant and his counsel subject to mechanical distortion so as to prevent recognition by the appellant."

The appellant was convicted and appealed. The appeal was dismissed by the Court of Appeal of England and Wales. There, the judgment delivered by Igor Judge P. is notable for what it has to say about the issue of witness intimidation. The appellant further appealed to the House of Lords. As is clear from the Opinion of Lord Bingham of Cornhill, the appellant's challenge did not rest on the anonymity of the witnesses alone, but on the combination of restrictions applied which he referred to as "protective measures". In assessing the extent to which the defence was handicapped, it is of some significance that the argument advanced at trial was that witnesses had conspired to give false evidence against him, having been procured to do so by a former girlfriend with whom he had fallen out. Thus, as was specifically adverted to by Lord Carswell, the credibility of the prosecution witnesses was squarely in issue.

23. In the course of the various Opinions of the Law Lords, there were reviews of the occasions when courts in the United Kingdom were called on to confront the issue, a comprehensive review of the Strasbourg jurisprudence, a task undertaken by Lord Mance, as well as references to decisions from the United States, South Africa, New Zealand, and Australia. The review of the developing practice in the United Kingdom included committal proceedings, extradition proceedings, and cases from England and Wales and Northern Ireland. One of the Northern Ireland decisions, the case of *R v. Murphy* [1990] NI 306, is of particular interest. It had its origin in a murder trial arising from the murder of two British Army Corporals near Milltown Cemetery. At trial, the prosecution adduced the evidence of a number of television journalists who, in the course of their work, had filmed the scene of the killing. At trial, these witnesses were not identified by name, and when giving evidence, were screened so that their faces were seen only by the judge and lawyers, but not by the defendants or public. Lord Bingham felt that if the case represented a departure from established principle, it was nonetheless a small one. It was pointed out that the evidence of the witnesses, although a necessary formal link in the prosecution case, did not implicate the defendants in the commission of the crime, the identification of individuals from the footage was the task of police officers, and the credibility as opposed to the reliability of the witnesses was not in issue. Another Northern Ireland case considered to fall within the same territory was *Doherty v. The Minister for Defence* [1991] 1 NIJB 68. This was a civil action in which the defendant minister sought that military witnesses would be screened while giving evidence. They were also to be identified by letters, not names, but the claimant raised no objection to that aspect. Giving judgment, Hutton LCJ, who had been the trial judge in *R v. Murphy*, distinguished his earlier judgment on the grounds that the evidence given by the media witnesses in that case

had been of a very limited nature, as proof of real evidence, whereas the evidence to be given by these military witnesses would be directly detrimental to the plaintiff's case.

24. Lord Carswell, in the course of his Opinion, pointed out that the media witnesses' testimony in *Murphy*, though of some importance, was not like direct identifying evidence. The credibility of the witnesses was not in issue, nor was there any necessity to enquire about their background or motives. Lord Brown of Eaton-Under-Heywood commented that he too had no difficulty with the decision of the Northern Ireland Court of Appeal *in R v. Murphy*, nor, he noted, did the European Commission on Human Rights which found Murphy's application under Article 6 of the European Convention to be manifestly ill-founded. He commented that he felt that that case seemed to him close to the limits to which the courts should go in permitting any invasion of the core common law principles that the accused has a fundamental right to know the identity of his accusers. Adding "by 'accusers' I mean in this context, those giving the sole or decisive evidence pointing to the accused's guilt as the three identifying witnesses in the present case".

25. At para. 72, Lord Mance referred to cases from the USA, South Africa, and New Zealand. He did so in these terms:

> "[i]n many cases, particularly cases where credibility is in issue, identification will be essential to effective cross-examination. In both *Smith v Illinois* 390 US 129 (1968) and *State v Leepile and Others* (5) 1986 (4) SA 187 the credibility of the witness was central to the case against the defendant, and it was said in the former case (at p 132) that ignorance of the witness's identity was 'effectively to emasculate the right of cross-examination'. In *R v Hughes* [1986] 2 NZLR 129, 149, Richardson J was referring to the potential significance of credibility when he said that 'I cannot presently perceive any circumstances at common law under which a witness whose credibility may be in issue depending on the results of inquiries should be allowed to hide his real name and in the result foreclose any inquiries of that kind'."

In the following paragraph, Lord Mance dealt with the *R v. Murphy* case in the following terms:

> "[i]n *R v Murphy and Anor* [1990] NI 306, the situation was quite different, and the cases of *Smith v Illinois* and *State v Leepile* (5) were distinguished accordingly. The photographers' evidence was relied on to do no more than prove the video film and photographs that they had taken of the funeral, from which police officers identified the defendants. The photographers' evidence 'did not implicate either appellant' (per Kelly LJ, p 334), except in the sense that they produced objectively unchallengeable material from

which others were able to do so. In the later Northern Irish case of *Doherty v Minister of Defence* (5 February 1991), Sir Brian Hutton LCJ highlighted this distinction. Lord Bingham observes that, if *Murphy* was a departure from established principle, it was a small one (para 12). Courts have an inherent power to control their own proceedings, and I consider that *R v Murphy* involves a limited qualification on the right to know the identity of prosecution witnesses which represents no threat to the fairness of the trial and which the common law can and should accommodate."

26. Apart from reviewing the Strasbourg jurisprudence, Lord Mance also considered the position that prevailed in international criminal courts. He pointed out that a detailed consideration of the issue had been given by the International Criminal Tribunal for the former Yugoslavia in the case of *Prosecutor v. Tadic*, Case No. IT-94-1 (10th August 1995) which, by a majority of two to one, allowed a number of witnesses to give anonymous testimony. Lord Mance pointed out that Sir Ninian Stephen dissented after a review of the case law of the European Court of Human Rights as well as decisions from the United States, Victoria, and the United Kingdom. Interestingly, Lord Mance pointed out that Judge Stephen did not as a matter of principle exclude anonymity in all circumstances, citing the case of *Jarvie v. Magistrates Court of Victoria* [1995] 1 VR 84. He accepted that where an accused had known a witness in the past, but only under an assumed name, as in the case of an undercover police witness, that in such a case justice might require, when protection of witnesses is important, that only the false name should be revealed.

27. Even if one proceeds by reference to *R v. Davis*, which would appear to represent the high-water mark of the case on behalf of the appellant, it cannot be said that granting anonymity is precluded in all circumstances. It seems to us, therefore, necessary to focus on the decision of the Special Criminal Court to grant anonymity in the present case. They did so in a situation where there was ostensible authority provided by Rule 7(4). So far as the surveillance witnesses were concerned, their credibility was not put in issue. So far as Detective Garda BK is concerned, his role was to take photographs which he then produced in court. His role in the present trial was not very different to the media witnesses in *R v. Murphy* in that it concerns proving real evidence.

28. In the case of Agent Peter, a powerful case in favour of anonymity had been presented by Detective Superintendent Gibbons. In truth, Agent Peter's credibility was not on trial. We say that notwithstanding the reference by counsel for the accused, James Geraghty, to formally putting the witness's credibility in issue. It was not suggested that Mr. Hawthorn, or indeed, either of the other accused on trial, was the person who identified as 'Meat Cleaver', nor was it suggested that

there had been any prior interaction between Agent Peter and any of those on trial. At another level, his credibility was established and put beyond doubt by the events that occurred on the balcony when the package containing the inert explosives was accepted by Mr. Hawthorn. In a situation where there was no contact whatsoever between Agent Peter and the appellant, nor, it seems, between Agent Peter and the co-accused, Agent Peter was, in truth, a witness of limited significance. Certainly, he could not be said to have been the sole or decisive witness. He was not, to use the language of Lord Brown of Eaton-Under-Heywood, Mr. Hawthorn's accuser.

29. If the question is asked, was the defence disadvantaged in any way by the fact that anonymity was afforded to the surveillance witnesses or to Agent Peter, then the answer must be no. If the question is asked whether the fairness of the trial was called into question by the ruling of the Special Criminal Court, then the answer must also be no.

30. We remind ourselves that in *Doorson v. Netherlands* [1996] 22 EHRR, the Court ruled:

> "[i]t is true that Article 6 (art. 6) does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 (art. 8) of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify."

31. A further matter which reinforces us in our view is that there were a number of layers to this prosecution. There was the opinion/belief evidence of the Chief Superintendent, the failure to answer material questions put to him, and then the events in Dolphin House. So, the Dolphin House incident constituted just one of the layers, and in any event, as we have seen, in our judgment, the defence was not handicapped in any significant extent in dealing with that aspect of this case. The case mounted by the prosecution was a multi-layered one, and in our view, a very strong one indeed. If, contrary to our view, what was permitted to happen meant that Rule 16 of the Special Criminal Court Rules was not complied with, that has not, in the circumstances of this case, given rise to any unfairness. Rule 53 of the Special Criminal Court Rules provides that non-compliance with the rules shall not render any proceedings void. We would be prepared to excuse

the non-compliance and would, if necessary, rely on s. 3 of the Criminal Procedure Act 1993 in that regard.

32. We have not been persuaded that the trial was unfair or the decision unsafe. In the circumstances, we are not prepared to uphold any ground of appeal and so we will dismiss the appeal.