

The Times - Law Report
Dealing with public interest immunity issues
House of Lords, Published February 6, 2004

Regina v H
Regina v C

Before Lord Bingham of Cornhill, Lord Woolf, Lord Hope of Craighead, Lord
Walker of Gestingthrope and Lord Carsewell
Opinion February 5, 2004

The appointment of special counsel to represent a defendant in an ordinary criminal trial as an advocate in matters concerning public interest immunity was a course of last, never first resort which should not be ordered unless and until the trial judge was satisfied that no other course would adequately meet the overriding requirements of fairness to the defendant.

The House of Lords so stated when dismissing appeals by H and C from the Court of Appeal (Lord Justice Rose, Mr Justice Penry Davey and Mr Justice David Clarke) (The Times October 24, 2003; [2003] 1 WLR 3006) which allowed an appeal by the Crown from a trial judge's ruling at a preparatory hearing that, in order to comply with article 6 of the European Convention on Human Rights and the decision of the European Court of Human Rights at Strasbourg in *Edwards and Lewis v United Kingdom* (Application Nos 39647/98 and 40461/98) (The Times July 29, 2003), special independent counsel should be appointed to represent the interests of the defendants in forthcoming *ex parte* public interest immunity proceedings.

Mr Roy Amlot, QC and Mr Leonard Smith for H; Mr Ben Emmerson, QC, Mr Robin Howat and Ms Tamia Tagon for C; Lord Goldsmith, QC, Attorney-General, Mr David Perry, Mr Sean Morris and Mr Robin McCoubrey for the Crown.

LORD BINGHAM, giving the opinion of the appellate committee, said that as the House had declared and recently repeated: it was axiomatic that a person charged with having committed a criminal offence should receive a fair trial and, if he could not be tried fairly, he should not be tried at all.

Article 6 required the trial process, viewed as a whole, to be fair. Any answer given to the questions raised by the present appeals had to be governed by that cardinal and overriding requirements.

While the focus of article 6 was on the criminal defendant's right to a fair trial, that right had to be exercised in the framework of the administration of the criminal law.

There had to be fairness to all sides, involving account being taken of the position of the accused, the victim and his or her family and the public. The Strasbourg court repeatedly recognised that individual rights should not be treated as if enjoyed in a vacuum.

Institutions and procedures established to ensure the fairness of a criminal trial varied almost infinitely from one jurisdiction to another.

Judicial oversight of criminal investigations provided for in some countries, was entirely contrary to British Practice where the achievement of fairness in a trial on indictment rested above all on the correct and conscientious performance of their roles by judge, prosecuting and defending counsel and jury.

Save in defined circumstances, the judge was not a factual decision-maker. His task was to ensure that the trial was conducted in a fair and even-handed way; for that purpose he was entrusted with numerous discretions.

Disclosure

Fairness ordinarily required that any material held by the prosecution which weakened its case or strengthened that of the defendant, if not relied on as part of its formal case against him, should be disclosed to the defence. The golden rule was that full disclosure of such material should be made.

The Criminal Procedure and Investigations Act 1996 gave statutory force to the prosecution's duty; primary disclosure had to be made under section 3(1)(a) of any prosecution material not previously disclosed to the accused and which in the prosecutor's opinion might undermine the prosecution's case.

The section did not require disclosure of material which was either neutral in its effect or was adverse to the defendant.

Secondary disclosure under section 7(2)(a) was to be made, following delivery of a defence statement, or previously undisclosed material which might be reasonably expected to assist the defence.

Public interest immunity

Circumstances might arise in which such material held by the prosecution could not be disclosed to the defence, fully or even at all, without the risk of serious prejudice to an important public interest.

That most regularly engaged in the effective investigation and prosecution of serious crime, which might involve resort to informers and undercover agents, or the use of scientific or operational techniques, which could not be disclosed without exposing individuals to the risk of personal injury or jeopardising the success of future operations.

In such circumstances, some derogation from the golden rule of full disclosure might be justified, but it always had to be the minimum necessary to protect the public interest in question and could never imperil the overall fairness of the trial.

The procedural regime, derived from *R v Ward (Judith)* ([1994] 1 WLR 619) and refined *R v David* ([1993] 1 WLR 613), was sanctioned by the 1996 Act, the Crown Court (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules (SI 1997 No 703).

Three classes of cases were identified:

1. Most cases in which a public immunity issue arose, the prosecution had to notify the defence that they were applying for a court ruling and had to indicate to the defence at least the category of material they held; namely the broad ground on which immunity was claimed, and the defence had to have the opportunity to make representations to the court. Thus there was an interpartes hearing in open court with reference at least to the category of material in question.
2. Cases where the prosecution contended that the public interest would be injured if disclosure were made even of the category of the material. The prosecution still had to notify the defence of the application, but the category of material need not be specified.

The defence would still have an opportunity to address the court on the procedure to be adopted, but the application would be made to the court in the absence of the defendant or his representatives.

If the court considered that the application fell into the first class it would order that procedure to be followed, otherwise it would rule it was a highly exceptional case.

3. Highly exceptional were cases where the public interest would be injured even by disclosure that an ex parte application was to be made.

In such cases the application would be without notice to the defence. But if the court considered that the case should be within class 1 or 2 it would so order.

His lordship, giving a number of statutory examples, referred to the novel procedure introduced in some areas of the law of appointing special advocates to protect the interests of a party against whom an adverse order might be made and who could not either personally or through his legal representatives, for security reasons, be fully informed of all the material relied on against him.

There was as yet little express sanction in domestic legislation or legal authority for such an appointment to represent, as an advocate in public interest immunity matters, a defendant in an ordinary criminal trial as distinct from the examples just given.

But novelty was not of itself an objection, and cases would arise where appointment of an approved advocate as special counsel was necessary in the interests of justice to secure protection of a criminal defendant's right to a fair trial.

Such an appointment raised ethical problems since a lawyer could not take full instructions from his client, nor report to his client, who was not responsible to him and whose relationship with him lacked the quality of confidence inherent in any ordinary lawyer-client relationship was acting in a way hitherto unknown to the legal profession.

While not insuperable, those problems should not be ignored. They should not deter the court from appointing special counsel where the interests of justice were shown to require it; but the need had to be shown. Such an appointment would always be exceptional, never automatic; a course of last, and never first resort.

It should not be ordered unless and until the trial judge was satisfied that no other course would adequately meet the overriding requirement of fairness to the defendant.

Strasbourg jurisprudence

His Lordship referred extensively to Strasbourg case law and to *Edwards and Lewis v UK* on which the appellants had particularly relied.

They contended that, taken at its narrowest, the principle established by that case was that it was incompatible with article 6 for a judge to rule on a claim to public interest immunity in the absence of adversarial argument on the accused's behalf where the material sought to be withheld was, or might be relevant to a disputed issue of fact which the judge had to decide in order to rule on an application which would effectively determine the outcome of the proceedings.

They submitted that the principle applied wherever the defence relied on entrapment to stay the proceedings or exclude evidence, but did not apply to entrapment only and was not confined to determinative rulings.

It was, however, acknowledged that there was not absolute rule requiring the appointment of special counsel in any particular kind of case.

His Lordship said that those submissions sought to place the trial judge in a straitjacket. The consistent practice of the Strasbourg court had been to declare principles and apply them on a case-by-case basis according to the particular facts but to avoid laying down rigid or inflexible rules.

There was not doubt as to the principles to be applied and there was no dissonance between those of domestic law and those recognised the Convention jurisprudence.

It was contrary to the trend of Strasbourg decision-making to hold that in a certain class of case or when a certain kind of decision had to be made a prescribed procedure had always to be followed.

The overriding requirement was that the guiding principles should be respected and observed, in the infinitely diverse situations with which trial judges had to deal, in all of which the touchstone was to ascertain what justice required in the particular case.

Conclusions

If material did not weaken the prosecution case or strengthen that of the defendant there was no requirement to disclose it.

For that purpose, the parties' respective cases should be carefully, but not restrictedly analysed to ascertain the specific facts the prosecution sought to establish and the specific grounds on which the charges were resisted.

The trial process was not well served if the defence were permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material might turn up to make them good.

Neutral material or that damaging to the defendant did not need to be disclosed and should not be brought to the court's attention. Only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands.

When any issue of derogation from the golden rule of full disclosure came before it the court had to address a series of questions:

1. What was the material which the prosecution sought to withhold? That had to be considered by the court in detail.
2. Was the material such as might weaken the prosecution case or strengthen that of the defence? If "No", disclosure should not be ordered. If "Yes", full disclosure should, subject to 3, 4 and 5, be ordered.
3. Was there a real risk of serious prejudice to an important public interest (and if so, what) if full disclosure was ordered? If "NO", full disclosure should be ordered.
4. If the answer to 2 and 3 was "Yes", could the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which would give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?

That question required the court to consider, with specific reference to the material which the prosecution sought to withhold, the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence sought to establish or whether disclosure short of full disclosure might be ordered.

That might be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied were in each instance approved by the judge.

In appropriate cases, the appointment of special counsel might be a necessary step to ensure that the contentions of the prosecution were tested and the interest of the defendant protected.

In cases of exceptional difficulty the court might require the appointment of special counsel to ensure a correct answer to questions 2 and 3 as well as 4.

5. Did the measures proposed in answer to 4 represent the minimum derogation necessary to protect the public interest in question?

If “No”, the court should order such greater disclosure as would represent the minimum derogation from the golden rule of full disclosure.

6. If limited disclosure was ordered under 4 or 5, might the effect be to render the trial process, viewed as a whole, unfair to the defendant?

If “Yes”, then fuller disclosure should be ordered even if that led or might lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.

7. If the answer to 6 when first given was “No”, did that remain the correct answer as the trial unfolded, evidence was adduced and the defence advanced?

It was important that the answer to 6 should not be treated as a final, once-for-all answer but as a provisional answer which the court had to keep under review.

His Lordship said that throughout consideration of any disclosure issue, the trial judge had to bear constantly in mind the overriding principles referred in the present opinion.

In applying them the judge should involve the defence to the maximum extent possible without disclosing that which the general interest required to be protected but taking full account of the specific defence which was relied on.

There would be very few cases indeed in which some measure of disclosure to the defence would not be possible, even if that was confined to the fact that an ex parte application was to be made.

If even that information was withheld and if the material to be withheld was of significant help to the defendant, there had to be a very serious question whether the prosecution should proceed, since specialist counsel, even if appointed, could not then receive any instruction from the defence at all.

In the present case, the judge did not address the first question listed above. The Court of Appeal was accordingly right to hold that his decision to seek the appointment of special counsel was premature.

Whether he would ever reach that stage had to depend on the answers to the succeeding questions to be answered with particular reference to the material which the prosecution sought to withhold and the specific facts the defence sought to establish.

The appeals would be dismissed. Provided the existing procedure for dealing with claims for public interest immunity made the prosecution in criminal proceedings were operated with scrupulous attention to the governing principles referred to and continuing regard to the defendant's proper interest there should be no violation of article 6.

Proceedings in magistrates courts

The relevant principles had been correctly applied in R (DPP) v Actor Youth Court (The Times June 26 2001; [2001] 1 WLR 1828). If public interest immunity applications were confined, as they should be, to material undermining the prosecution case or strengthening that of the defence, the bench would not be alerted to material damaging to the defendant.

If it was, the principles governing the court's decision whether to recuse itself were the same as in the case of any other tribunal of fact but the court had discretion to send the case to the crown court for trial, the magistrates court should carefully consider whether those issues were best resolved in the crown court.

The occasions when it would be appropriate to appoint special counsel in the magistrates court would be even rarer than in the crown court.

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