

INFORMANT EVIDENCE

Grasses, Supergrasses, Participating Informants and the new 'British FBI' - A Defence perspective - An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

WHAT IS AN INFORMER?

A pedestrian who calls 999 after witnessing a crime is an 'informant' in that he or she is informing the police about a crime. That person may become a witness and there might be factual disputes about what the informant saw, but there can be no attack on the motives of the witness in assisting the police. Then there is the paid informant – this is altogether a different animal. The paid informant will be registered and have a police handler and will periodically provide intelligence to the police for reward. This sort of person is unlikely to become a witness in a trial. The prosecution would never reveal the identity of their informant, even if it were somehow relevant to the defence case. However, if this type of informer were to come out of the shadows and testify in Court then their credibility as a witness of truth would certainly be an issue - assuming the evidence was disputed by the accused. This is when tactical defending counts. Material relating to the credibility of the informer can be demanded, e.g. de-briefing notes, first accounts, meetings with officers etc. If there were any suggestion that the informer would expect reward for testifying then that would have to be disclosed to the defence; R v Smith (unrep.) 29th July 2004, para. 17. This might not be enough to exclude the informant's evidence from the trial, but it would help establish the informant's unreliability in the eyes of the jury.

THE SUPERGRASS

There is no particular definition for determining when a 'grass' becomes a 'supergrass'. The only difference is that a supergrass will be responsible for putting a number of defendants in the dock by providing information from the inside – i.e. by admitting to involvement in crime and testifying against his former associates.

DISCLOSURE AND ABUSE OF PROCESS

The supergrass is the most unreliable of all the categories of informer. Wherever the truth lies the informer knows he has crossed a line. It becomes in his interests to ensure that those in the dock are convicted – he becomes a man with a motive, he knows he will not be sentenced until the defendants in the dock have had their trial. If they are acquitted then that could affect the way the Judge views him. If the evidence is disputed then credibility will be in issue and attacks on the motive and the character of the supergrass can be made – though now under the provi-

sions of the Criminal Justice Act 2003 the defence must be astute to the fact that notice of such tactics must be given at an early stage of the proceedings (s100). This means the defence can get disclosure of material relating to the supergrass in order that the attack on his credibility may be properly made. The defence should be entitled to, and be demanding, early disclosure of formal records of the authorities' dealings with the supergrass. If the supergrass is himself in prison then this may include his prison records as that material can assist the defence, e.g. in showing visits from police officers etc, see R v McCartney, Hamlett & Ors, (unrep.) CA 2003. In a drugs supergrass case that the authors of this article were defending in the extent of this type of disclosure was found by the trial Judge to include transcripts of the telephone calls made by the supergrass from prison. This in turn showed remarks made by the supergrass suggesting police involvement in special visiting arrangements and a proposed temporary prison leave. Evidence like this, of potential inducement or reward, can provide powerful cross-examination material, or even a platform for an argument to stay the proceedings or exclude the supergrass evidence. The prosecution however should be reminded by the defence at the earliest possible stage that they have a duty to retain this sort of material. This request means the defence are in a stronger position should the Crown be careless enough to lose or destroy that material.

SERIOUS ORGANISED CRIME AGENCY - SOCA

Supergrasses, and informants generally, are now likely to be much more widely used in prosecutions because of the recent implementation of the Serious Organised Crime and Police Act 2005 (the Act). The Act has introduced a wide range of measures, which we expect to cover in a separate article, but it is the Act's creation of a new agency that has caused the most interest; the Serious Organised Crime Agency (SOCA) dubbed the 'British FBI' by the press came into existence on 1st April 2006.

DRUG TRAFFICKING/ORGANISED IMMIGRATION/ INTERNATIONAL FINANCIAL CASES - THE AGENCY'S REMIT

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The National Crime Squad, the National Criminal Intelligence Service and the investigative branches of Revenue Customs and the Home Office Immigration Service have all been replaced by SOCA. The Act empowers the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of the Revenue and Customs Prosecutions Office to issue 'immunity notices' to a suspect who has turned Queen's Evidence; section 71. Basically the Government has formalised the Supergrass system and created a new agency to investigate serious cases. SOCA can prosecute cases but it is expected that existing agencies e.g. the CPS will prosecute the cases that SOCA has investigated. SOCA's first Annual Plan says that the Agency's "top Priorities" at the moment are combating Class A drug trafficking and organised immigration offences. SOCA's remit is wide however and other offences are certainly to be targeted; quite where the divide between SOCA and regular police forces will be is unclear. What is clear is that SOCA will be a force to be reckoned with, the agency will even have officers based overseas, which no doubt will assist in the Agency's other big priorities like – fraud and money laundering; SOCA will tackle the big international cases. As the Agency concentrates on 'intelligence led' investigations pro-active defenders will have to be prepared to tackle SOCA with human rights based arguments as the new force flexes its muscles.

The new Act does not however offer Supergrasses a central Witness Protection Agency. An immunity notice may be issued but it is up to the prosecuting agency to consider whether it should invest in protecting their informant perhaps for the rest of his or her life. SOCA can enter into a 'restricted use of undertaking' arrangement with an informer by which agreement may be made with the informer that anything said by him will not be used in a criminal prosecution or in asset confiscation proceedings. This, and a reduced sentence, is of course the great incentive for the informer.

Where 'serious and organised' crime is involved there can be no doubt that the defenders will increasingly be facing the challenge of informant evidence. The early cases will no doubt present challenges for both SOCA and for pro-active defenders. Just how far will SOCA and the prosecuting agencies go in 'cutting their deal?' and when will an agreed incentive offered to an informant who is clearly guilty of serious offences amount to an abuse of process?

PARTICIPATING INFORMANTS

Yet another category of informer is the participating informant. An undercover police officer, or a criminal used by the police to get close to suspects, can provide very valuable material to the police. But the Court's recognise that the temptation for those involved to cross the line and 'create an offence' is very real. The argument's on entrapment are different and may be less to do with the

witnesses motive and more to do with whether the police operation was lawful under the Regulation of Investigatory Procedures Act 2000 (RIPA).

RIPA

Since the enactment of the Human Rights Act 1998 the State has had to place on a statutory footing all methods of police surveillance – this is a requirement of Article 8 of the European Convention of Human Rights (right to privacy). Basically any surveillance must be authorised by a senior officer. To get authorisation the surveillance must be necessary and proportionate and kept under review. Participating or tasked informants are classified in RIPA as 'covert human intelligence sources'. These may be police officers acting under-cover or criminals acting in union with the police to extract information from suspects. RIPA is meant to protect suspects from some of the excesses of the past. In 2003 the European Court found a violation of the right to a fair trial where a suspect had exercised his right to make no comment in interview only to have a police informant deliberately placed in his cell who then badgered damaging comments out of the suspect. That 'evidence' was then used to convict him; *Allan v UK* (2003) 36 EHRR 12. The Court of Appeal subsequently quashed the conviction. This is another example of the fact that informer evidence, whilst appealing to the police at face value can, in reality, present the prosecution with just as many difficulties as the defence face.

Informants may be despised by many in prison and many working in criminal justice but they are regarded as a necessary evil. SOCA guarantees that many more prosecutions will involve informant witnesses with guarantees of immunity. It is up to pro-active defenders to test the prosecution's reliance on an informer – as usual early and thorough preparation is the key.

AUTHORS

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