

## ANONYMOUS WITNESSES

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Knowing Your Accuser - new case on use of anonymous witnesses - An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

### HOUSE OF LORDS RULING

On 18th June 2008, the House of Lords delivered a landmark judgment in the case of *R v Davis* [2008] UKHL 36. The House of Lords ruled that no conviction should be based solely or to a decisive extent on the evidence of anonymous witnesses as this violated the right to a fair trial guaranteed under Article 6 of the European Convention on Human Rights (ECHR). The BBC national news today (this article is drafted on 24th June) announced that a long running high profile murder case at the Old Bailey collapsed following applications made after the ruling. The case reportedly cost £6 million and there may be a re-trial next year. Rahman Ravelli solicitors were defending solicitors in that trial. As the BBC news announced the House of Lords ruling will have huge implications, one senior police officer has gone on record as describing ruling as 'disastrous' and the president of the Association of Chief Police Officers Ken Jones told Sky News that the situation was "critical".

Jack Straw the Minister for Justice has already announced that his department is drafting emergency legislation to tackle this issue.

### FACTS OF R V DAVIS

On 1st January 2002, at a New Year's Eve party in Hackney, London two men, were shot dead. Their deaths were caused when someone shot one of the men in the neck -the second death was "accidental", the bullet went through the first victim's neck, and into the neck of the second victim - thus a single bullet killed both men.

Soon after the killings Davis, who was at the party, travelled to the U.S.A. on a false passport. Following police investigations he was extradited back to England and was interviewed by the police - it was a 'no comment' interview. He was charged with two counts of murder.

### TRIAL AND APPEAL

Davis gave his defence of alibi at the Old Bailey in 2004 - he said he was at the party but left before the shooting took place and claimed he was the victim of false accusations from an ex partner. The Crown's evidence included witnesses who said that that they would be in fear of their lives if it became known that they had given evidence. These claims were investigated and accepted as genuine,

i.e. the witnesses genuinely held the fear whether it was well founded or not. To ensure the safety of these witnesses, and induce them to give evidence, the trial judge made an order to the effect that (1) each protected witness gave evidence under a false name; (2) no information would be supplied to the defence which could help identify a witness; (3) there would be no cross-examination which could lead to potential witnesses being identified; (4) the witnesses were to give evidence from behind screens and (5) the witnesses' natural voices were to be heard by the judge and the jury but were to be heard by Davis and his counsel subject to mechanical distortion so as to prevent recognition.

These measures were imposed despite the objection of the defence and Davis was duly convicted on 25th May 2004. He appealed to the Court of Appeal but lost.

### ENGLISH LAW

The law on the anonymity of witnesses in criminal trials has been largely developed by the common-law (i.e. Judge made law over the years). As Lord Rodger pointed out, though the common law is capable of developing to meet new challenges witness intimidation is not a new problem and the common law could have responded to the challenge at any time 'over the last few hundred years'. Lord Rodger did not feel that something so important as the right to confront ones accuser could be taken away by development of case law but only by Parliament, he said;

*"..in my view it is not open to this House in its judicial capacity to make such a far-reaching inroad into the common law rights of a defendant as would be involved in endorsing the procedure adopted in the present case. In effect, the ability of counsel for the appellant to cross-examine the decisive witnesses against him was gravely compromised."* (para. 44).

Statute law, i.e. law from Parliament as opposed to from the Courts, on the anonymity of witnesses is at the moment restricted. The Youth Justice and Criminal Evidence Act 1999 provides for 'special measures' (screens etc) in some cases involving witnesses who are minors, or witnesses suffering from a physical or mental disorder or impaired intelligence, there is also statutory recognition for witnesses alleging a sexual offence. But even these areas may now face challenge given the view of

anonymous witnesses from the European Court of Human Rights.

## **EUROPEAN CONVENTION**

Article 6 of the Convention is the right to a fair trial. Article 6(3)(d), is a part of Article 6 - it provides that defendants have the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." The Strasbourg Court has considered the issue of anonymous witnesses and found that it is not always incompatible with the Convention (see e.g. *Doorson v Netherlands* (1996) 22 EHRH 330, para 69.

The Strasbourg Court recognised that on occasion the interests of the defendant may have to be balanced against the interests of witnesses but noted however that: "even when 'counterbalancing' procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements..." (para. 80 of *Doorson*).

Thus Lord Mance in *Davis* felt able to say with confidence that he "did not believe that the Strasbourg Court would accept the use of anonymous evidence in the present case satisfied the requirements of Article 6." (para. 96). Lord Mance went onto detail the importance of cross-examination in criminal cases and how in the case of *Davis* effective cross-examination was hampered by the measures put in place to give the witnesses anonymity. This will often be the case when the case rests on the testimony of a witness who gives evidence from, for example, behind a screen.

## **UNDERCOVER POLICE OFFICERS & OTHER CASES**

Many readers will know the use of undercover officers used to speak to and befriend suspects has been an increasing trend in policing in recent years. When giving evidence these officers will usually only give evidence from behind screens. The justification for this is that undercover officers may be being used on other operations and/or future covert operations and exposure in evidence could jeopardise such operations or place the officer in danger.

Lord Mance recognised the particular problem of undercover policing. In considering whether English (as opposed to Strasbourg) law permits anonymous evidence he was prepared to accept that the Courts had some flexibility in "exceptional circumstances" - he said at para. 97 that an example of exceptional circumstances might be the use of undercover officers but:

the difficulty about accepting that would be that it would leave it to the judge, prosecution and police to investi-

gate and decide whether any concerns existed about the officer's record and reliability; the defence would be precluded from knowing or asking questions disclosing the officer's true identity and background; and it would become difficult to draw the line between this and more radical inroads into the basic common law rule.

So Lord Mance doesn't appear wholly convinced that even undercover officers should be anonymous. A great many prosecutions will rest "solely or decisively" on the evidence of undercover officers or other anonymous witnesses so what is the position now, and what about the huge amount of currently serving prisoners convicted on the evidence of an anonymous witness - police officer or not?

The answer is that there will be bound to be a large number of appeals and undoubtedly there will be successful appeals.

## **COMING OUT FROM BEHIND THE SCREEN**

In the current Old Bailey case we are advised that the CPS will be issuing guidance to prosecutors 'soon'. Jack Straw's announcement about emergency legislation is likely to be an attempt to extend the reach of existing special measures provisions.

The problem for the Government however will be that even when Parliament acts the legislation cannot deal with convictions already based on anonymous witness evidence. It cannot be retrospective. Furthermore, Parliament, as well as the Courts, are stuck with the Human Rights Act 1998 and thus no trial Judge can make a decision about a witness which is incompatible with a Defendant's Convention rights - even though Parliament may have given him the power to do so. Having the power is one thing - using it is another. So whatever Parliament and the CPS do in the immediate future it seems likely that once any new Act is used it will meet with challenges from pro-active defence lawyers demanding that the Courts do not allow witnesses to be anonymous and insist that they come out from behind the screen.

## **AUTHORS**

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