# SUPERGRASS EVIDENCE

## The law, practice and development of supergrass evidence in England - An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

### THE FIRST SUPERGRASS

In 1973 Bertie Smalls made legal history. He was a leading member of a gang of London bank robbers. Following his arrest he offered to help the police by naming his accomplices in return for his liberty. The Director of Public Prosecutions subsequently gave him a written assurance of immunity from prosecution and Smalls gave evidence for the prosecution in no less than three trials resulting in 16 convictions. The press provided the label 'supergrass' and it has stuck. There is no particular definition for determining when a 'grass' becomes a 'supergrass'. The only difference in reality is that a supergrass will be responsible for putting a number of defendants in the dock by providing information from the inside by admitting to involvement in crime and testifying against his former associates.

One of the Defendants in the Smalls trials appealed. It was contended that the Courts should not admit evidence of accomplices who could still be influenced by continuing inducements. The Court rejected this but said that the police themselves should never give immunity and the DPP should only do so sparingly; R v Turner (1975) Cr. App. R 67. In reality the Court was expressing its preference for those turning Queen's Evidence to first of all plead guilty thus reducing the obvious risks in relying on such evidence. Over the years this has become the accepted way of turning Q.E.; i.e. by Defendants approaching the police pre-trial and seeking a deal - they should then be told by the police that there can be no discussions at that stage, the potential supergrass pleads guilty and the start of a very lengthy debriefing process begins.

### THE DANGERS OF 'GRASSES'

Arguably the supergrass is the most unreliable of all the categories of informer. Tackling supergrass evidence is never easy as fact and fiction are often interwoven in a series of so-called de-briefing interviews taken by the police over several months, where the informant is expected to reveal the totality of his criminal history right back to boyhood. This purging process is an insurance by the Crown so they can say to the jury 'this man is a criminal, but he is honest now about all of his wrongdoing'. The more he reveals the more material there is of course to attack or use in cross-examination against him. In this de-brief material defendants can discover the shocking truth that the man they regarded as a long-time friend had a past which they never had any inkling of, for example a series of sex offences or a history of past informing. 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. On the other hand a successful prosecution is bound to lead to a very significant discount in the sentence. In any supergrass trial the credibility of the supergrass will be the main, if not the only issue, and attacks on the motive and the character of the supergrass will be made.

### DEFENCE STRATEGY

The defence need ammunition for this attack and to that end the defence should be demanding, at an early stage, disclosure of formal records of the authorities' dealings with the supergrass. If the supergrass is himself in prison then this will 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 recent 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 even 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 exclude the supergrass evidence. In that case the Crown, having failed to ensure certain recorded prison telephone calls were not kept, found that they had little choice to offer no evidence against our client as the Judge had ruled large parts of the supergrasses's evidence inadmissible. As ever there is no silver bullet, no one size fits all knock-out legal argument; each case depends on its own facts - and always a lot of hard work.

It is important to remind the prosecution at the earliest possible stage that they have a duty to retain this sort of material; i.e. details about the life of the supergrass from the moment of his arrest to date; e.g. all his contacts and calls etc and possibly even medical records and disclosure of discussions with his solicitor if waiver of legal privilege can be secured - which does happen in some

supergrass cases. As a supergrass trial will almost certainly be all about the credibility of the supegrass himself the defence must be pro-active in seeking as much information about the man as possible. For instance has he informed before, how was he rated then; i.e. reliable or unrelaible? What is his prison disciplinary record, what do his prison Security Information Reports show, what prison visits has he had, what telephone calls etc etc? Debriefing notes, first accounts, meetings with officers etc are all disclosable but often need to be asked for.

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.

## WARNINGS TO THE JURY

It is well understood by the Courts that supergrass witnesses are not generally giving evidence because they feel a burning desire to turn over a new leaf - even if that is what they say. All concerned are alive to the fact that the man in the witness box has pleaded guilty but has not, in most cases, yet been sentenced. Given this in-built unreliability the police will often go to great lengths to corroborate what the witness says; often by use of cell-site material from telephone service providers (if still available) which helps to show that a certain defendant was in a certain location when the supergrass says he was. Concrete corroboration will often be difficult for the police to come by and the supergrass trial - though long and arduous, may in effect be a one witness case. In R v Thorne (1978) 16 Cr. App. R 6 the Court of Appeal found that even though evidence given by an accomplice is not supported or corroborated by other evidence a jury may convict provided that the trial Judge gives them an adequate warning as to the dangers of doing so. In practice most Judges in supergrass cases are likely to give some kind of warning to the jury, especially if it can be plainly shown that the witness will receive a benefit by giving evidence; Chan- Wai-Keung v R [1995] 2 Cr. App. R 194, PC. It is this use of strong jury warnings that kept the supergrass trials systems alive. Today the system has new life breathed into it by virtue of the Serious Organised Crime and Police Act 2005.

## SOCA

The use of supergrasses in trials declined from the late 1970s onwards as the focus of organised crime moved from armed robbery to drugs. However, we are seeing in more recent years a return of the supergrass. The Serious Organised Crime and Police Act 2005 created SOCA - The Serious Organised Crime Agency, Britain's so-called FBI. They have taken over from the National Crime Squad and the National Criminal Intelligence Agency as well as parts of H.M. Customs and the Immigration Service. SOCA was created in April 2006 and it re-writes the rule book on supergrasses; essentially we have now gone back to pre-Turner days as now certain senior officers will be able to give written guarantees of immunity and, under s73, can draft a notice giving a guaranteed reduction in sentence. SOCA has had this power for a little over a year and we are just starting to see the effects of it. All sorts of issues arise over these new powers which will need to be tested - for example should it be disclosed to the defence when a SOCA agent approaches a prisoner seeking their assistance in getting a conviction in the Defendant's matter- the fact that SOCA came up with nothing might assist the Defendant's case? What about when SOCA make it clear they are interested in adding a further defendant to an indictment but need your help? That could be very interesting when your pleaded defence is 'you've got the wrong man'. These difficult questions, as well as the hard toil of extensively analysing and cross-referencing the de-brief material, is at the forefront of a good defenders approach in tackling supergrass evidence.

## AUTHORS

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