Guildhall CHAMBERS

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IN THIS ISSUE

EDITORIAL

The past year has seen two potentially significant inroads into common law – the first in relation to statutory self defence and, more recently, in the area of witness anonymity with the passage of the Criminal Evidence (Witness Anonymity) Act 2008.

Andrew Langdon QC and Christopher Quinlan have recently been involved in one of the first cases involving witness anonymity under the new Act on the Western Circuit – and Chris Quinlan's article provides a valuable insight into the present position of the law.

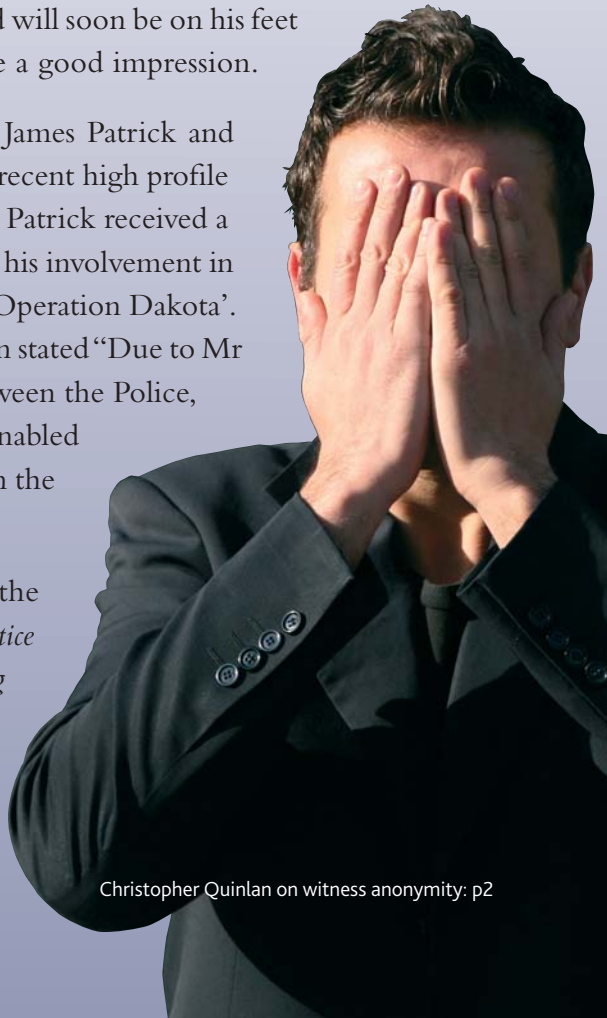
Of perhaps greater day to day relevance, the subtle changes to the common law position relating to self defence are set out by Martin Lanchester.

We are pleased to say that Sam Jones, Chris Quinlan's pupil, will soon be starting his second 6 months' pupillage and will soon be on his feet in court. We are confident that he will make a good impression.

We are also pleased to announce that both James Patrick and Ian Fenny have received commendations for recent high profile cases that they have been instructed in. James Patrick received a Certificate of Merit from Wiltshire Police for his involvement in the Ridgeway School hammer attack case -'Operation Dakota'. Paul Howlett, BCU Commander for Swindon stated "Due to Mr Patrick a strong professional relationship between the Police, CPS and Crown Prosecutor was built and enabled the team to work as one which was evident in the success of 13 defendants being convicted."

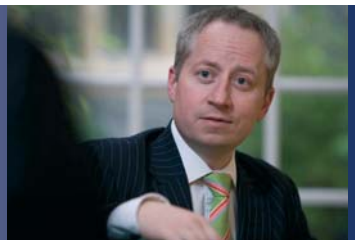
Ian Fenny and his Prosecution team in the case of Ho and Li have won the *'Dorset Justice Award for Outstanding Achievement in Caring for Victims'* – the difficult case involved the rape of a Chinese undergraduate at the University of Bournemouth.

Brendon Moorhouse, Editor



Christopher Quinlan on witness anonymity: p2

Jam and Cicero



The effect of the decision of the House of Lords in *R v Davis* [2008] UKHL 36 handed down on 18 June 2008, was significantly to restrict the courts' ability at common law to allow evidence to be adduced anonymously in criminal trials.

That position prevailed for thirty-two days. On the thirty-third - the 21 July - the Criminal Evidence (Witness Anonymity) Act 2008 ('the 2008 Act') received Royal Assent and came into force. The modest aim of this article is to introduce and summarise the provisions of that Act as discussed and analysed by the Court of Appeal (Criminal Division) in *R v Mayers*; *R v Glasgow*; *R v Costelloe and Bahmanzadeh*; *R v P., V. and R*. unreported, December 12, 2008 (*'Mayers'*).

'There's a row going on down near Slough'

Late in the evening of New Year's Day 2002, towards the end of a New Year's Eve party held in a flat in Hackney, two men were killed by a single gunshot. Iain Davis was arrested and charged with two counts of murder. The defendant pleaded not guilty; his case at trial was alibi. At the Central Criminal Court on 25 May 2004 he was convicted on both counts.

Three witnesses identified Davis as the gunman. Each was permitted to give evidence with a panoply of special measures. Each used a pseudonym and their true identities, personal together with any details which might lead to their identification withheld from the defence; their natural voices were distorted when heard by the defendant.

On 19 May 2006 the Court of Appeal (Criminal Division) dismissed his appeal against conviction (and the appeal of other defendants in an unrelated appeal heard consecutively – *R v Ellis & Ors*). The President of the Queen's Bench Division (Sir Igor Judge, who succeeded Lord Phillips as Lord Chief Justice in October of this year and presided over the five-judge Court in *Mayers*) expressed in vivid and compelling terms the real and prevalent problem of witness intimidation, particularly in gun crime. The Court found, *inter alia*, that where there was a genuine and justified fear of serious consequences if a witness's true identity became known to the defendant or the defendant's associates, the discretion to permit evidence to be given by witnesses whose identity may not be known to the defendant was 'beyond question'. Reception of such, notwithstanding that it may be the sole or decisive evidence against a defendant, was permitted provided that appropriate safeguards were applied and the judge was satisfied that the resulting trial would be fair.

The House of Lords allowed the appeal. Their Lordships concluded that *on the facts of that case*, the measures employed to protect the identity of the witnesses had hampered the conduct of the defence in a manner and to an extent which was unlawful and in consequence the trial unfair. The Judicial Committee acknowledged the growing problem of witness intimidation. Witness intimidation is not a new problem: Lord Rodger reminded us that when Cicero was intent on prosecuting Verres in Sicily, 'highly-placed henchmen of Verres threatened "the fearful and oppressed Sicilian witnesses" with dire consequences if they gave evidence against him'. Where once Cicero faced difficulties securing witnesses so did those seeking to bring to justice Mafia bosses, the Kray twins, and terrorists in Northern Ireland. However, the House was firmly of the view that the erosion of a defendant's right to be confronted by his accusers must stop. In the words of Lord Brown the 'creeping emasculation of the common law principle [the right of the accused to know the identity of his accusers] must not only be halted but reversed' (para. 66).

"…on the facts of that case, the measures employed to protect the identity of the witnesses had hampered the conduct of the defence in a manner and to an extent which was unlawful…"

The House did not decide that such evidence was *de facto* inadmissible at common law. Maybe the Government thought it did for the 2008 Act abolishes the 'common law rules relating to witness anonymity' (s.1(2)). Instead it provides a statutory framework 'for the making of orders for securing the anonymity of witnesses in criminal proceedings'.

'It's not important for you to know my name'

The 2008 Act provides for the making of 'witness anonymity orders' in relation to witnesses in criminal proceedings. Paragraph 50 of the Bill's explanatory notes states that the Bill 'aims to restore the law to, broadly, the position it was believed to be prior to *Davis*'. It creates what the Court in *Mayers* described as a 'new statutory special measure' (para 8).

A witness anonymity order requires such specified measures to be taken in relation to such a witness 'as the court considers appropriate to ensure the identity of the witness is not disclosed in or in connection with the proceedings' (s.2(1)). Witness is defined in the Act as 'any person called, or proposed to be called, to give evidence at the trial or hearing in question' (s.12(1)). The Court in *Mayers* described such an order as a 'special measure of last practical resort' (para 8).

The Act is silent on the position of anonymous hearsay. It never received a mention in the parliamentary debates and is not one of the problems foreseen by David Howarth MP in his article *The Criminal Evidence (Witness Anonymity) Act 2008*, Archbold News, Issue 8, 2008. In *R v P., V. and R*. the Court held that (notwithstanding the 'bold' and 'ingenious' arguments of leading counsel for the crown) neither the 2008 Act nor the *Criminal Justice Act 2003*, nor the common law permits anonymous hearsay evidence to be read (*Mayers*, para 113).

The measures which the court can require to be taken for securing anonymity include withholding the name and personal details (s.2(2)(a)),

The 2008 Act provides for the making of 'witness anonymity orders' in relation to witnesses in criminal proceedings.

use of a pseudonym (s.2(2)(b)), prohibition of questioning that might lead to identification of the witness (s.2(2)(c)), limited screening (s.2(2)(d)) and voice modulation to a specified extent (s.2(2)(e)). The list is not exhaustive (s.2(3)). The extent of screening and voice modulation is prescribed by s.2(4).

Section 3 addresses procedure; the detailed rules will follow in an amendment to the *Criminal Procedure Rules*. In the meantime section 3 is supplemented by Amendment 21 to the Consolidated Criminal Practice Direction (Criminal Proceedings: Witness Anonymity; Forms). With immediate effect Part I of the Practice Direction is amended by the addition of paragraphs I.15.1 to I.15.24 to prescribe the procedure to be followed on an application under the 2008 Act.

Applications for such an order may be made by prosecution or defence (s.3(1)). This is not innovative; in *Davis* the Court of Appeal heard evidence anonymously from a witness called by the defence. If made by the crown, the court must (unless it directs otherwise) be informed of the true identity of the witness (s.3(2)), but not any other party or his legal representative (s.3(2)(b)). A defendant making such an application must inform the court *and* prosecution of the witness's identity, though not a co-defendant or his legal representative (s.3(3)). On an application each party has a right to be heard, though provision is made for submissions to be made in the absence of a defendant and legal representatives (s.3(6)(7)).

The 2008 Act sets out the conditions which must be satisfied before a court can make a witness anonymity order. The conditions number three (A, B and C), are contained in section 4 and follow in large measure the position at common law. Each is mandatory, distinct and must be satisfied (Mayers, para 17). The considerations the court must have regard to when deciding whether to make an order are to be found in s.5. When deciding whether those conditions are met, in addition to such other matters it considers relevant (a broad discretion - s.5(1)(b)), the court must have regard to the six conditions, set out in s.5(2)(a)-(f), (s.5(1)(a)). None of those considerations outweighs any of the others and the order in which they appear does not represent an order of priority or importance. They are not exhaustive nor is any one conclusive (*Mayers*, para 19). Their focus is the protection of the interests of the defendant.

Those considerations include the general right ("recognised by the common law for centuries" *per* Lord Bingham in *Davis*, para 34) of a defendant in criminal proceedings to know the identity of a witness (s.5(2)(a)); protecting the witness's identity by means other than an anonymity order (s.5(2)(f)); whether there is any reason to believe the witness has a tendency to be dishonest or has any motive to be dishonest (s.5(2)(e)); the extent to which the credibility of the witness is in issue (s.5(2)(b)); whether the witness's account might be sole or decisive evidence against the accused (s.5(2)(c)); and whether the witness's evidence can properly be tested without his or her identity being disclosed (s.5(2)(d)). The last three matters were of crucial importance in the House's conclusion in *Davis*: he could not have been convicted without their evidence and his case was that they were giving false evidence at the behest of a former girlfriend; the restrictions in the trial (necessary to preserve anonymity) prevented proper exploration of this and so his trial was unfair.

The considerations s.5(2)(b), (d) and (e) are linked in the general sense that they relate to the weight to be attached to the evidence of the anonymous witness and the safeguarding of the process by which his credibility may be objectively verified and then tested in cross-examination. As the Court

observed in *Mayers* the 'process of investigation and disclosure is crucial… the defence statement provides the benchmark against which the disclosure process must be examined' (para 21). The defence statement provided after 3 November 2008 is 'a crucial document, which must inform and focus the disclosure process'. The prosecution must be proactive, focussing closely on the credibility of the anonymous witness and the interests of justice (*Mayers*, para 12). The disclosure obligations on the prosecution in this context go further than their ordinary duties and the services of special counsel may enable a judge to ensure any investigative steps have been undertaken. The court allowed the appeal of *Mayers* because it 'did not have sufficient confidence' that in respect of the anonymous witness (whose evidence 'assumed decisive importance in the case against the appellant') that 'everything relating to her credibility, motivation and integrity was revealed'. (para 52).

In most cases it would probably be helpful to address condition C first. Condition C: the order is necessary in the interests of justice by reason of the fact that it is important that the witness should testify (s.4(5)(a)) and 'would not testify if the order were not made' (s.4(5)(b)). The interests of justice are undefined. The order should not be made where the evidence of the anonymous witness is not potentially important or where the proposed evidence could be addressed by admissions or agree facts or edited and read. It relates to the evidence of a witness who will be called (or at the time the application is made) is intended to be called (*Mayers*, para 26; s.12). This consideration was of particular relevance in the appeal of *R v P., V and R*, where witnesses were too afraid to give live evidence.

Condition A is that such an order is necessary (s.4(3)); necessity may arise in one of two ways. The first is in order to protect the safety of the witness of another or prevent any serious damage to property (s.4(3)(a)). In this regard the court must have regard to any reasonable fear on the witness's behalf (s.4(6)). The second is the prevention of real harm to the public interest (s.4(3)(b)), for example the giving of evidence by an undercover police or security officer. The risk to the safety of the witness need not be attributable to the actions of the defendant personally (*Mayers*, para 28). The Court recognised that different considerations may inform the decision of the court when dealing with applications concerning civilians and those which involve police or covert investigators. There is an obvious public interest in maintaining the anonymity of such witnesses (*Mayers* para 30-35; and the decision in respect of the appeal *R v Costelloe and Bahmanzadeh*).

Condition B ensures an order is *Article 6* compliant (s.4(4)). It is fact specific. Taken on its own, the fact that the witness's account might be sole or decisive evidence against the accused is not of itself conclusive whether the conditions A-C are met. However, it directly 'impinges on the question whether condition B may be met'; it may be harder to fulfil where it is the sole or decisive evidence (*Mayers*, para 23).

The test is necessary. The court must be satisfied to 'the highest standard'. The court cannot make the order unless it is also satisfied the trial would be or will continue to be fair (*Mayers*, para 37).

Where a witness anonymity order has been made it may be varied or discharged on application by a party to the proceedings or by the court of its own motion (s.6). Where on a trial on indictment any evidence is given by a witness in respect of whom a witness anonymity order has been made, the judge must give the jury an appropriate warning to ensure the fact of the making of the order does not prejudice the defendant (s.7).

The remainder of the short Act deals with special provisions for the service courts (s.8), application of the provisions to extant and new proceedings (ss.9-11), interpretation (s.12), commencement (s.13) and other supplementary matters. The Act contains a 'sunset clause': the power to make such orders expires on 31 December 2009; the Secretary of State may extend that date by a further period not greater than 12 months (s.14). This no doubt went some way towards ensuring its speedy passage through the legislature. Chapter 2 of Part 3 of the Coroners and Justice Bill contains the provisions intended to replace the heart of the 2008 Act; it received its first reading on 14 January 2009.

'You've made your bed, you better lie in it'

The Attorney-General has issued guidelines on *The Prosecutors' Role in Applications for Witness Anonymity Orders* (dated 21 July 2008). The guidance is in four parts, including Part B (prosecutor's duties) and Part C (applications by defendants). Those guidelines should be read in conjunction with *Guidance on Witness Anonymity* from the Director of Public Prosecutions (dated August 2008 – which revise an earlier edition dated July). Together they set out how prosecutors must deal with applications for anonymity under the Act.

"On the 17 June 2008 anonymous witness testimony in criminal proceedings in England and Wales was not necessarily incompatible with Article 6, even where it was the sole or decisive evidence against the accused."

'And the public gets what the public wants'

On the 17 June 2008 anonymous witness testimony in criminal proceedings in England and Wales was not necessarily incompatible with *Article 6*, even where it was the sole or decisive evidence against the accused. On the 18 June 2008 save in very limited circumstances, it most certainly was. During the course of his opinion, when recognising the 'serious' problem of witness intimidation, Lord Bingham said it "may very well call for urgent attention by Parliament" (para. 27). Lord Mance recognised the 'undoubted threat to the administration of justice posed by witness intimidation' but opined that further relaxation of the basic common law rule is 'one for Parliament to endorse and delimit and not for the courts to create' (para. 98).

When moving the second reading of the Bill in the House of Commons on 8 July, the Justice Secretary interpreted those sentiments as an 'invitation urgently to consider filling the void that was left by their judgment of 18 June'. Parliament has done so. Time will judge the sagacity of Lord Rodger's observation (para. 45 of *Davis*) that tackling the conditions which allow the intimidation of witness to flourish 'would be the every best way of tackling the problem which lies behind this appeal'.

On 19 September one of the first rulings under the 2008 Act (certainly locally) was handed down by Royce J at Bristol Crown Court in *R v P., V. and R*. That case, a murder in which the crown sought to call anonymously eleven witnesses, went on interlocutory appeal to Court of Appeal. It was one of the four cases heard by the five-judge court on 29 & 30 October 2008.

Commentators will continue to debate whether this Act is a proportionate response to the challenge to the rule of law posed by witness intimidation. For the gangster, drug dealer, murderer, should it be a case of *what you give is what you get?*

Christopher Quinlan

Business as usual?

Section 76 of the Criminal Justice and Immigration Act 2008 has been drafted in an effort to clarify the parameters and operation of the law of self-defence which already existed within the common law and found in section 3(1) of the Criminal Law Act 1967 (c. 58) (use of force in prevention of crime or making arrest). It was not parliament's intention to seek to alter or widen the scope of the existing law and was introduced in part to try to allay the fears of householders who do not know how far they can go to defend themselves in their own homes.

Notwithstanding the intention of the legislation – has the law changed? Certainly it would seem clear that the on reading section 76(1-6) the main and accepted principles of self defence have been drafted into the legislation. However on reading 76(7) some new concepts may have been introduced which some may feel do not 'clarify' the law at all.

*"…does the person acting in self defence have to act honestly **and** instinctively to enable the section to assist him?"*

Section 76(7) reads:

(7) In deciding the question mentioned in subsection (3) [whether the degree of force used by D was reasonable in the circumstances] the following considerations are to be taken into account (so far as relevant in the circumstances of the case)—

a *that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and*

b *that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.*

A 'legitimate purpose' is later defined by 76(10) as meaning:

i *the purpose of self-defence under the common law, or*

ii *the prevention of crime or effecting or assisting in the lawful arrest of persons*

Certainly 76(7)(a) does nothing more than reiterate the well established common law principle and uses the same terms as the standard direction given in cases where self defence arises. However 76(7)(b) creates some new terms. Firstly the concept of the defender using what he "***honestly and instinctively thought was necessary for a legitimate purpose***" and secondly, if those concepts are established they "***constitute strong evidence that only reasonable action was taken by that person for that purpose***".

One point arises from the first section – does the person acting in self defence have to act honestly **and** instinctively to enable the section to assist him? Many people when recounting why and how they defended themselves may not accept acting on instinct, indeed they may say they remained calm and took a considered decision to act as they did or acted in accordance with their training. Would that reduce their prospects of being successful in their defence?

The second section also uses new terms with potentially unclear meaning. This section could be interpreted as trying to give a steer to the police, CPS and juries that they should perhaps 'go easy' on people acting to defend themselves or prevent crime. However it does not establish what the nature of 'strong evidence' is or how it compares to other evidence. For instance, does it allow people acting to prevent crime to be a little less reasonable in their actions than normal and if so just how unreasonable can they be?

In real terms it may be that this attempt to clarify the law will not amount to a material change. However it highlights the potential difficulties in attempting to 'clarify' long established common law principles. Self defence is wide in its ambit and this allows it to be used in the most diverse set of factual circumstances, and this can be seen as its great strength. However by the same token the general nature of self defence does not lend itself to being easily codified for the purpose of, for example, allowing people to know exactly what they can and can not do in a myriad of possible circumstances.

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