The Queen on the application of WV and The Crown Prosecution service [2011] EWHC 2480

'Informants protection'

WV brought an application for permission to apply for a judicial review to quash a decision by the CPS to disclose to the defence in a trial that he was the person who had provided the police with information. The CPS had decided not to protect his identity by way of a P.I.I. (Public Interest Immunity) hearing.

The brief facts are that WV was a defendant in criminal proceedings and he offered to supply the police information about more serious criminal matters. He was visited in prison by his solicitor and to protect his identity, a police officer posing as a legal representative.

The police officer explained to WV the procedure under the Serious Organised Crime & Police Act 2005 (SOCPA) regarding reductions in sentences for defendants who 'assist'. However, as WV was denying the offences he had been charged with, the route under SOCPA was not available.

WV agreed to give the information so long as safeguards were in place to protect his identity and that the information supplied 'was off the record'. The police officer did not disagree with the way he wanted to give information and he never suggested that his name would ever be disclosed. WV was given a pseudonym and he supplied the information which was recorded.

About 2 months prior to the trial for which WV had given the information, the police officer presented a written statement to be used in disclosure to the defence setting out the information provided by WV, but stating that it was provided by someone identified by pseudonym only. The statement also made clear that the information was provided in the presence of a legal representative.

A month before the trial, the CPS informed the solicitor for WV that the Crown had taken the view that the material provided by WV was in fact disclosable under the Criminal Procedure Investigations Act 1996 (CPIA), including WV real identity. An application was then made to the trial judge to prevent the disclosure of WV's identity and his view was that it would be wrong to intervene in the Crown's disclosure. The remedy agreed was by way of judicial review of the CPS's decision to disclose WV's identity.

Under the CPIA, the prosecutor is bound to disclose material which may undermine the prosecution case. However that duty is subject of Sec 3 (6) CPIA which states;

> '*Material must **not** be disclosed under this section to the extent that the court, on the application of the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly.'*

There is no doubt that the information provided by WV supported a real risk of his identity being disclosed and he may well have been killed as a result. There is, therefore, a positive obligation on the State to protect the life of WV under Article 2 of the European Convention on Human Rights. (See Osman v UK 1998 29 EHRR 245)

Public Interest Immunity

The principle of public interest immunity was summarised by Lord Bingham of Cornhill at paragraph 18 of R v H [2004] UKHL 3, [2004] 2 AC 134 where he said:

"Circumstances may arise in which material held by the prosecution and rending to undermine the prosecution or assist the defence cannot be disclosed to the defence, fully or even at all, without the risk of serious prejudice to an important public interest. The public interest most regularly engaged is that in the effective investigation and prosecution of serious crime, which may involve resort to informers and undercover agents, or the use of scientific or operational techniques (such as surveillance) which cannot 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 may be justified but such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial."

The Code of Practice under s.23 of the CPIA, includes:

- Material given in confidence.
- Material relating to the identity or activity of the informants or undercover police officers or witnesses or other persons supplying information to the police who may be in danger if their identities are revealed.

There is a long established rule of the common law that the identity of informants is not normally revealed in the course of a criminal trial: see *R* v *Hardy* (1794) 24 St Tr 199

It is clear from many cases that the rationale for the rule is not only to protect the safety of the individual informer but also to ensure that the supply of information about criminal activities continues to flow.

The rule is, however, not an absolute rule. In *Marks* v *Beyfus* (1890) 25 QBD 494, Bowen LJ expressed an exception in these terms:

> *'The only exception to such a rule would be upon a criminal trial, when the judge if he saw that the strict enforcement of the rule would be likely to cause a miscarriage of justice, might relax it in favor em innocentiae; if he did not do so, there would be a risk of innocent people being convicted.'*

In *D* v *NSPCC* [1978] AC 171, Lord Diplock after referring to *Marks* v *Beyfus* continued:

> *'The rationale of the rule as it applies to police informers is plain. If their identity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So the public interest in preserving the anonymity of police informers had to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue upon which it is required to adjudicate should be withheld from that tribunal.....'*

Although some cases might suggest that the exception to the rule is an automatic one, it is not. The court has to balance the competing interests.

The approach that should have been taken

The decision of the CPS was not based on the full understanding of the circumstances in which the information was given. The information was communicated *in confidence* and the identity of WV was one that required protection of the type accorded to any informant.

When a prosecutor decides whether or not to continue with a prosecution, the prosecutor has to balance the public interest of the state in continuing with the prosecution, the interests of the victim of a crime (if any), and the duty to ensure a fair trial. There may be a conflict between those duties, but the Crown Prosecutor on behalf of the state in deciding whether or not to prosecute is, save in exceptional circumstances, the best person to make the decision on whether to proceed with the prosecution. His decision will be accorded a wide margin of discretion.

In this case, however, there is a further interest, namely the interest of WV who has his right to the confidentiality of his identity; in addition on the facts of this case, he has his Article 2 rights. There is a potential conflict between the duty of the prosecutor who seeks to discharge the duty of disclosure under s.3 of the CPIA and the need to uphold the agreement that WV's identity would be kept confidential and the public interest in the flow of information from informers as well as WV's Article 2 rights.

The importance of informants to the prevention of crime has been a feature of our law for centuries. Where assurances are given to registered informants, to others or to the public in general (as is the case of a hotline) that their identity will be protected, those assurances should not be broken by the state without a judicial decision where the interests of the informant, the Crown, the defendant to a trial and the public interest can be carefully and impartially considered.

The judgment, therefore, is of the highest importance to public confidence in the administration of justice, that where the interests of justice require that an express or implied undertaking of confidence as to the identity of an informant or other provider of information has to be broken, unless there is informed consent from the informant/provider, ***the decision to break it is a decision of a judge***. Those who provide information in such circumstances have a right to that independent safeguard.

Thus it was the view of the judge the ordinary principle applicable to decisions by prosecutors ***is not applicable where the CPS seek to disclose the identity of a police informant who objects to that course.*** It is clear from the evidence from the police that the question of disclosure of an informant's identity is not a borderline case. It is truly exceptional. It seems giving the decision of the Crown Prosecutor anxious scrutiny, that the decision of the Crown Prosecutor was flawed, given the evidence that the court heard and the findings set out.