

Question 1 - What guidance is being given to judges about witness anonymity following the latest legislation on the subject?

Answer:

This question is about the Criminal Evidence (Witness Anonymity) Act 2008 which became law in July. This was the Government's response to the decision in R v Davis in which the House of Lords decided that an order protecting the identity of key witnesses in a murder trial rendered the proceedings unfair as it violated Art.6 ECHR. The decision was of great concern to the Government as there were a large number of anonymous witness cases pending and the Bill avoided heavy Parliamentary opposition despite its very short timetable on the basis that it was considered to be a proportionate response to the threat posed by witness intimidation. In the last ten years there has been a doubling of the number of convictions for that offence.

Happily this is one of the shorter pieces of criminal legislation containing only 15 Sections and the Government has promised its repeal and thorough review in the next session of Parliament, reinforcing this with a sunset clause providing that the Act will cease to have effect on 21 December 2009. Put simply the Act establishes a statutory scheme under which Courts may grant "witness anonymity orders" which may include anything which the Court thinks appropriate to ensure the non-disclosure of a witness's identity. (Except screening and voice modulation from judge and jury) There are three criteria that must be fulfilled before an order can be made and the Act sets out various matters which must be considered which include a defendant's general right to know the identity of a witness and whether alternative means can be used to protect a witness's identity.

Therefore the Act itself provides a framework within which the judge should determine an application and Amendment 21 to the Consolidated Criminal Practice Direction which was issued in August sets out the procedure to be followed, providing that where possible the trial judge should determine the application and that any hearing should be attended by the parties' trial advocates. It is stressed that the Court must test thoroughly any confidential information in order to satisfy itself that the conditions are met and it follows that this Practice Direction is very important and very useful. On Merseyside the local practice will be that if an application is to be made then a senior CPS lawyer will inform Judge Globe who will issue directions as to the management of the issue. These will include the early allocation of a trial judge and compliance with the Director of Public Prosecution's Guidance and the Practice Direction.

It is apparent from the Practice Direction that a mere general assertion that a witness is in fear will not in itself be sufficient, for an application must be evidence based in the sense that the Court is given specific information supporting it. Ultimately the judge must apply the Act and determine if the three criteria are fulfilled. The key issue is likely to be whether the measures would be consistent with the defendant receiving a fair trial and the courts may have to look at counterbalancing measures to compensate for handicaps to the defence from anonymity. Therefore the answer to the question is that there is guidance in the Act itself and in the Practice Direction and of course judges are not unfamiliar with dealing with applications for special measures. However a lot of case-law is likely to come from both London and Strasbourg which will provide further guidance on how the Act should be applied.

Question 2 - What updates do judges receive about developments in the prison service, such as home detention curfew arrangements, drug treatment and educational programmes?

Answer:

In the main judges do not receive a great deal of information about home detention curfew arrangements, drug treatment and educational programmes in prison. Although such information is always interesting it is not essential in our role. Sometimes pre-sentence reports will set out the kind of offending behaviour work a defendant may do in the event of a custodial sentence being passed. However it is important that judges should appreciate what prison itself is like and we have all visited the Liverpool prisons and Thorn Cross young offender institution when we were shown around and had the opportunity to speak to the staff and prisoners.

On the other hand judges get a lot of information about to the work of the Probation service and at the QEII we regularly receive formal presentations as to what is happening in the area. At the last Judges' meeting we had a presentation on the Black Mentoring Scheme that is being run on Merseyside and is obviously very successful. At the same time judges do other things apart from sitting in court and in my case I am involved in a number of other areas including work on the Parole Board. Therefore I regularly attend at the prisons around the North West when I get a very good idea of what is going on and as I am dealing with risk assessment there is a great deal of information about programmes that prisoners have undertaken and educational courses they have been involved in.

There is a lot of offending behaviour work going on in the prisons and these programmes are run by dedicated professionals who are highly skilled at what they are doing. Some programmes are considered to have a better track record of success and much depends upon the level of risk and the motivational attitude of the prisoner. The Parole Board itself gives the members training about these courses. Therefore being on the Parole Board has given me a good insight into prison life and it is always interesting to see how a prisoner has progressed through his sentence. So in my case I do get a lot of information about the prison system but for other judges not on the Parole Board the position is more "patchy".

Question 3 - Do you have any views about the Titan prisons?

Answer:

This question is obviously about the massive prisons that the Government may introduce to cope with prison overcrowding. Plans for three Titan prisons, each holding 2,500 prisoners were proposed by Lord Carter's review and a consultation process on how they might work took place recently. The idea of building US style huge Titan prisons has come in for a lot of criticism and the Chief Inspector of Prisons has stated that smaller prisons work better than large ones. The Prison Officer's Association has warned that it would be difficult to maintain order in such large jails.

However the Government has denied it is the intention to build the kind of large prisons they have in the US and France. They have said they are aiming to have within a large complex what amounts to a number of smaller discreet accommodation units which might be called "cluster prisons". Nonetheless, it has been argued in the press that the proposals ignore evidence that

smaller, local prisons work better than large ones and raise serious concerns about the well being and safety of prisoners and staff. And it is said they would be difficult to run and would put at risk relationships between prisoners and their families.

So there is a lot of debate on the issue and judges have to be careful because we cannot be seen to be getting politically involved. For this reason the Council of HM Circuit Judges did not respond to the consultation process and it would not be appropriate for me to comment on behalf of the judiciary. However my personal view is that the Chief Inspector of Prisons, the National Association of Probation Officers and the Prison Officer's Association along with many other respected bodies are in a very good position to know whether or not Titan prisons should be introduced and they are all against the idea. In these circumstances I believe the Government would be wise to listen very carefully to what they are saying and think long and hard before going down this road.

Question 4 - Do Judges agree that with all the guidelines on sentencing and procedure, their powers and discretion is being eroded?

Answer:

In this country we operate on the basis the judiciary is quite separate from the executive and the legislature. Constitutional lawyers call it the "separation of powers". Whilst Parliament sets the maximum sentence for offences, judicial independence ensures that all cases are dealt with on their individual merits without political interference and it is an important safeguard in our democracy. At the same time guidelines on sentencing and procedure are not inconsistent with this principle for they seek to ensure a consistency of approach and thereby increase public confidence in the administration of justice. Guidelines on sentencing are not new and have been around for a long time, it is just that the situation has now become more formalised.

In his review of prisons last year Lord Carter recommended that there should be established a Sentencing Commission which should introduce a structured sentencing framework similar to schemes operating in some states of America. A structured sentencing framework involves a grid system and as a result of Lord Carter's review a working group under Lord Justice Gage was asked to examine its feasibility. There was a consultation process during which the judges and many others including leading academics unanimously rejected the idea on the basis that such a method simply could not work in this country and would result in considerable anomalies and unfairness.

It would also have represented a very serious challenge to judicial discretion and the upshot of the consultation process is that the scheme has been abandoned except that there is to be greater emphasis on the guidelines issued by the Sentencing Guidelines Council. That said those guidelines are widely framed and there is allowed an element of judicial discretion. They do not represent the same sort of straight jacket as a structured sentencing framework and judges are entitled to depart from them if it is considered appropriate provided that reasons are given for so doing. It is also important that the Sentencing Guidelines Council is chaired by the Lord Chief Justice and includes other judicial members.

Therefore provided there is the right balance between judicial discretion and this formalised approach the interests of justice will be well served. It is keeping that right balance which is so important and as was seen in relation to the structured sentencing framework the judges have an important part to play in maintaining the principle of judicial independence. The judges are always alert to the risk of their discretion being eroded and will strongly resist any attempts to do so. I believe the general public are very much on our side on this and agree that you cannot have political interference in the judicial process especially where the liberty of the individual is involved.

Question 5 - Do you agree that we should have anonymity for all defendants until and unless there is a conviction to avoid trial by media and large claims for damages?

Answer:

In this country we operate a system of "open justice" in the sense that trials take place in public and the press are entitled to report the names of defendants unless they are under the age of 18 or for some other good reason. After all any member of the public can come into court to see who is on trial and the names of alleged victims and witnesses are often reported as well. In high profile cases the public should be entitled to know who is on trial and where there is a great deal of media interest in a particular case then the trial process itself can deal with any prejudice that might arise. In the case of *Re Trinity Mirror plc* (2008) the CA re-stated the importance of the principle of open justice where the Crown Court had made an order which prevented the media from identifying the defendant in order to protect the rights of his children under Art.8 ECHR. The CA stated that such an order should not be contemplated unless the circumstances are exceptional.

Press freedom is an important element in our democratic society but it is always to be expected that the press will conduct themselves in a responsible and true way particularly as regards the reporting of trials. If they do not then there are avenues of complaint but in my experience the local press on Merseyside are very good at accurately reporting events in the court room. At the QEII Linda Roughly and Chloe Griffiths are excellent. Therefore I do not accept the proposition that there should be anonymity for all defendants unless there is a conviction, though I can see that the argument in favour may be stronger in rape cases where at present complainants get anonymity but defendants do not. However even in that situation I believe the principle of "open justice" should prevail and the public should be entitled to know the name of an individual charged with a serious offence.

Question 6 - Should we restrict or even abolish the jury system as being costly, time consuming and inconsistent?

Answer:

Trial by jury was introduced by the Normans in the eleventh century and it still remains at the heart of our system. It was Lord Devlin who said, "The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives".

I do not agree that we should abolish the jury system as I strongly believe it works and that juries take their responsibilities very seriously. It is very impressive to see how hard juries work and the care and attention they give to particular cases. People are giving of their time which can often have an impact upon their normal lives and generally do so with enthusiasm and good

humour. And in some cases they have to get to grips with difficult/complex issues or in other cases hear sensitive/distressing evidence.

That said the system can always be improved and the changes that occurred a couple of years ago on jury eligibility have had a positive impact so that the make up of juries now better reflects society as a whole. In other words juries now include almost everyone even judges. But in my view there is no better system and it is no coincidence that it has been adopted in many countries around the world. As to the criticism that it is costly, time consuming and inconsistent, I am not sure the evidence supports this but in any event the advantages far outweigh the disadvantages.

However there may be a case for removing the right to jury trial for some relatively trivial offences provided safeguards were put in place. I also believe it is important the minimum age for jury service should remain at 18 as jurors need to have some experience of life/maturity and it should not be reduced to 16, which has been suggested by some commentators. There has also been debate on whether juries should be reduced to 8 rather than at present 12 people, which is the situation in other jurisdictions such as civil jury trials and inquests and whether the law on majority verdicts should be changed. Nonetheless, in my opinion Lord Devlin was right and that for serious cases the present should be retained.

Question 7 - Should we not create special courts, procedures and secure hospitals/prison units for the defendants suffering mental health problems?

Answer:

Prison is obviously not the right place for the mentally ill as it is not an environment which will improve their condition and the situation can have an adverse impact on other prisoners and the management of the prison as a whole. The Mental Health Act 1983 provides a framework to deal with defendants suffering from a mental illness. Upon the recommendation of two approved doctors the Crown Court has power to make a hospital order or in serious cases where they represent a danger to the public, to make a hospital order with a restriction which means they will go to a secure hospital such as Ashworth.

And generally these orders will not be made until there has been a period of in-patient assessment so the process is thorough. Accordingly there is already in place a procedure for dealing with these individuals and as they may have committed serious criminal offences I don't think there should be special courts for dealing with them. I also believe judges are well able to determine the issues especially as they are provided with the opinions of very experienced and well qualified clinicians, one of whom must give oral evidence if there is to be a restriction order.

The Mental Health Act 2007 which has not yet come into force widens the definition of mental disorder to include psychopathic disorder and mental impairment which is to be welcomed for there are some people in prison who have personality disorders and hitherto have not qualified for medical treatment. In their cases if medical treatment is likely to alleviate or prevent a deterioration of the condition then a hospital order or guardianship can be made. There are also two prisons in the country that provide specialist services for individuals having a personality disorder which are known as therapeutic communities where they get intensive one to one therapy.

In the South West of England there is a pilot scheme under way whereby a community psychiatric nurse is allocated to each court centre so that any defendant with a mental health problem can be identified at an early stage. In these cases the psychiatric nurse will provide a short report to the judge who will then direct a more detailed assessment. On Merseyside a similar scheme has operated for some time on a more informal basis with a community psychiatric nurse being available at the courts and the judges are always very grateful for their input, which can identify vulnerable defendants who may have slipped through the system.

Therefore progress is being made in this area and what is needed is proper resources and adequate funding.

Question 8 - Prison population rising by the week! Does prison work or are there realistic alternatives which should be used more often?

Answer:

Where risk to the public is not involved the whole purpose of imprisonment is punishment, deterrence and rehabilitation. It is likely that in a serious case the judge will have no choice but to send the defendant to prison and the Criminal Justice Act 2003 provides that the sentence should be no longer than is necessary commensurate with the gravity of the charge. Punishment is a key factor together with retribution in the sense that the victim feels that he/she has obtained justice. In relation to deterrence and rehabilitation the re-conviction rate may suggest that prison isn't as effective as it might be. However in my work for the Parole Board I have seen evidence of many positive things taking place in prison particularly as regards education/training but overcrowding makes the situation more difficult.

At the present time there are over 80,000 prisoners and the shortage of prison places has forced the Government to introduce an early release scheme for many offenders and to change the law in relation to dangerous offenders. The sentence of IPP which was introduced under the 2003 Act has had a significant impact on increasing the prison population in that there are now far more people serving indeterminate sentences with little prospect of being released in the foreseeable future. It is also suggested that if you take out of the prison population those suffering from a mental illness and illegal immigrants then it would be reduced by about 20%. Those who are against Titan prisons say the Government should focus on the causes of the growing prison population and ensure that alternatives to custody such as community orders are properly resourced.

As I have already stated, judges have to be very careful about commenting upon political issues and must avoid being drawn into a political debate. This is really a question for the politicians but my personal view is that for the less serious cases there needs to be a culture change as regards people's attitudes to community orders. Any effective system of criminal justice requires public confidence and it is perhaps not fully understood just how punitive community orders can be. It is not a let off or a soft option which is the way these orders are sometimes portrayed in the media and the Probation Service is very pro-active in ensuring that orders are complied with. However this change of attitude is a matter for society as a whole and until it occurs there will always be the risk that the prison population will continue to rise.