

Informer Privilege and the Combat of Crime

The district court recently stayed a burglary trial after it emerged that a police informer and two undercover police officers had participated in the planning of the offence (DCCC 88 of 2004). All had been granted immunity from prosecution, and anonymity was insisted upon. The Director of Public Prosecutions explains the importance of informer privilege to the criminal justice system

Informers play a vital role in the combat of crime. If law and order are to be maintained, law enforcers require every assistance. The more serious the crime, the greater the need for justice to be done. Whatever the motives of informers, their position is often precarious. Trust must exist between those who inform and those who investigate and prosecute. To that, anonymity is the key.

The rule which protects the identity of informers in criminal cases is that of '*informer privilege*'. It is founded on considerations of public policy. The rule recognises that those who assist the authorities face retribution if exposed. It encourages actual and potential informers to disclose their knowledge of criminal activity. Informer privilege is a concept well known to the common law. In *R v Hunter* (1987) 34 CCC (3d) 14 at 18, Cory JA said :

The rule against the non-disclosure of information which might identify an informer is one of long standing. It developed from an acceptance of the importance of the role of informers in the solution of crimes and the apprehension of criminals. It was recognised that citizens have a duty to divulge to the police any information they may have pertaining to the commission of a crime. It was also obvious to the courts from very early times that the identity of an informer would have to be concealed, both for his or her own protection and to encourage others to divulge to the authorities any information pertaining to crimes. It was in order to achieve these goals that the rule was developed.

Those who prosecute have a duty to protect the identity of the informer. If informer privilege applies, the prosecutor must object to the disclosure of information which tends to reveal a person's identity or status as an informer.

The courts recognise informer privilege not just as a protection for the individual, but as something which ensures that '*the supply of information about criminal activities does not dry up*' (*R v Hennessy* (1979) 68 Cr App R 419 at 426).

Informer privilege vests in the prosecution. The prosecutor cannot, however, without the informer's consent, waive privilege either expressly or by implication by not raising it (*Bisaillon v Keable* (1984) 7 CCC (3d) 385 at 412). Even if the prosecutor does not assert the rule, the court '*is nonetheless obliged to apply it*' (*R v Rankine* [1986] 1 QB 861 at 867). This privilege is not a matter of discretion, but a rule of law. Save for the exception concerned with the liberty of the subject, the duty of the court is to enforce informer privilege. Once the privilege is established, '*neither the police nor the court possess discretion to abridge it*' (*R v Leipert* (1997) 112 CCC (3d) 385 at 392).

In a trial, informer privilege means that a witness cannot be asked questions which will disclose the identity of the informer, if he is a third person. The prohibition applies as well if the witness is asked if he himself is the informer (*Attorney General v Briant* (1846) 15 M&W 169 at 184). Cases can, however, arise where the strict enforcement of informer privilege will create injustice. In such circumstances, the rule may have to yield.

In *R v Turner* [1995] 1 WLR 264 at 268, the defendant asserted from the outset that he had been set up. In these circumstances, the balance which the judge had to achieve between the competing interests was struck in favour of disclosure. Lord Taylor CJ said that this situation '*gave rise to the need for the defence to be aware of the identity of the informant and his role in this matter*'. The dilemma which can arise where the interests of the parties compete in that way has been apparent from early times, and it is for the defendant to satisfy the court that disclosure is necessary. In *Marks v Beyfus* (1890) 25 QB 494 at 498, Lord Esher MR said :

If upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail.

The general rule in criminal proceedings is that material information should be disclosed to the defence. The prosecution, however, may wish to claim privilege over information that reveals the identity of the informer or that may indirectly expose him, even if such information is relevant to the trial. When that occurs the court will resolve the issue along established lines (*R v Davis, Johnson and Rowe* (1993) 97 Cr App R 110). That may, depending on the circumstances, be done *ex parte*, or after the prosecution has notified the defence of its intention to seek a ruling of the court. If the court decides that disclosure is required, the prosecutor will consider his options.

The prosecutor may comply with the court's ruling, and disclose the identity of the informer. Before doing so, however, he will wish to consult with the informer and the police to ascertain if the informer is likely to face criminal retaliation if the ruling is followed. If so, the prosecutor will have to determine whether the police can provide protection. If the prosecutor concludes that compliance with the ruling will place the informer and also perhaps his family at unacceptable risk, or if he is otherwise concerned about the overall impact of disclosure upon the integrity of law enforcement activity, he may have no option but to invite the court to terminate the proceedings.

The utility of a properly managed system of informers is recognised throughout the common law world. As long as crimes are committed, informers have a role to play in their investigation and prosecution. They may either be professional informers, acting for self-serving purposes, or they may be ordinary citizens, motivated by public-spiritedness. Whatever their reason, it is '*in the public interest that nothing should be done which is likely to discourage persons of either class from coming forward*' (*R v Rankine* [1986] 1 QB 861 at 865).