R v Davis, Johnson & Rowe [1993] 97 Cr App R 99

This appeal concerned with disclosure of unused material to the defence by the prosecution who had relied on public interest immunity to withhold certain documents.

On the 16th February 2000 the case of Rowe and Davis v UK was heard in the Grand Chamber at the European Court. This case had been well publicised and was better known as the 'M25 Three'. The Court was called upon to consider whether failure by the prosecution to disclose relevant evidence on the grounds of public interest immunity violates the right to a fair trial and Article 6 ECHR. The case involved the use of an informant and the prosecution withheld evidence on public interest grounds, without informing the trial judge.

The case against the three was supported largely by the evidence of a suspect turned witness, Norman Duncan. All three were convicted of serious robberies and murder and were sentenced to life imprisonment in 1989. On their appeal, the prosecution applied to the judge, ex parte, (without knowledge of the defence) on matters of non disclosure of certain documents. The Court decided in favour of the prosecutions request. Rowe & Davis's leave to appeal to the House of Lords was refused. In judgement the European Court in February noted that it was for the national courts to assess the evidence before them. Its task was to determine whether the proceedings complied with the requirements of adversarial proceedings and that there was equality of arms between prosecution and defence. The Court did state that entitlement to disclosure of relevant evidence is not an absolute right, as in the case of national security, protecting covert methods of investigation etc., but these had to be weighed against the rights of the defence. After losing their appeal the Criminal Case Review Commission referred the case back to the Court of Appeal after a new police investigation. This uncovered that the witness, Duncan, was actually a police informer who had originally told detectives that the robberies were the work of Rowe, Davis and a third man called Jason.

When he gave evidence, Duncan did not tell the jury he was the police informer nor that he had received a £10,000 reward. The Court of Appeal ruled that the prosecution should have disclosed certain things that Duncan had said pre trial and the judges referred to this as a 'material irregularity' that breached Human Rights.

'Because Duncan was concealing his status as an informant, he was also forced to lie about what had taken place. That could only have been in collusion with the police. It amounts to no less than a conspiracy to give perjured evidence.

We find the fact profoundly disturbing. It must dent the credibility of both Duncan and the police officers directly involved. (Lord Justice Mantell – Appeal Judge)

In this case the Court held unanimously that there was a violation of Article 6. Only the trial judge could have been in a position to assess the significance of the undisclosed evidence, the fact that Duncan had been the police informant.

However the trial judge had not seen that information.

The ruling of this case could well have implications regarding the future use of informants. However each case should be judged on the circumstances of the day and the judgement mentions three 'competing interests' that might lead to the prosecution withholding evidence from the defence,

- National security
- Protection of 'witnesses'
- Preserving the tactics of police investigation.

Disclosure is now governed by CPIA 1996 and the Code of Practice (in force 1/4/1997). The aspects of the case concerning public interest immunity will remain relevant.

It was the duty of the prosecution to comply voluntarily with the Attorney-General's guidelines. All material should be made available to the defence if it had some bearing on the offence charged and its' surrounding circumstances, unless it fell within the exceptions contained in paragraph 6 of the A-G's guidelines. There are three different scenarios, depending on the nature of the material involved –

Inter Parte

If the prosecution wished to rely on public interest immunity or sensitivity to justify non-disclosure, then normally the following should apply -

(a) they had to give notice to the defence that they were applying for a ruling by the court;

(b) they had to indicate to the defence the category of the material they held; and

(c) the defence had to have the opportunity to make representations to the court.

Ex parte (with notice)

However, where to disclose the category of the material would reveal the information that the prosecution felt it was in the public interest to conceal, then a different procedure should apply -

(a) the prosecution should still notify the defence that an application was to be made;

(b) the category of the material need not be disclosed;

(c) the hearing would be ex-parte;

(d) if the court, on hearing the application, felt that the procedure under (1) above should apply then that should happen;

(e) if not, then the court should rule on the ex-parte application.

Ex parte (without notice)

If, in exceptional circumstances, the mere fact that an ex-parte hearing was to take place would reveal the information that the prosecution wanted to conceal, then there was no need to serve a notice on the defence. The application should still be made ex-parte but the court could either -

(a) rule on the ex-parte application;

(b) order the procedure under (1) to take place; or

(c) order the procedure under (2) to take place.

A further point of interest was made in the later case of R v Doubtfire (Times 28.12.2000). In exceptional cases even the Court of Appeal could refrain from giving full reasons for its judgement, if it was in the public interest not to do so.

The overriding principle is that it is up to the court and not the prosecution as to whether an item can be withheld.