

Ex parte Lee

If there is one thing that the history of miscarriages of justice teaches us it is that the main cause of defeating justice lies in the failure of the Crown or one or more of its witnesses to make full disclosure of material that it holds or has held.

Historically, there used to be no disclosure of any material upon which the crown did not intend to rely. Until the early 1980's the prosecution would guard not only its unused material but, in the magistrates' court, it would jealously hold on to the evidence such that the first a person would know what a witness said was at the point the witness was giving his evidence in front of the magistrates. The whole ethos was to convict. You did not share the main advantage, namely knowledge of the case.

Society and the judges changed. Miscarriages were being brought back to the Court of Appeal. People were found to have been wrongly convicted due to the failure of the prosecution to share the material that proved the defendant did not commit the crime. The need for a heinous crime to be 'solved' seemed to be paramount in the eyes of the investigators/prosecutors. Rules to deal with unused material were introduced. The Attorney General made guidelines to assist the prosecution, the defence and the court.

However, the problem was never really understood by those seeking to deal with it. The prosecuting authorities investigated crime in such a way that they tended to amass material that they would prefer was not in the public domain. They did not change their methods to fit the new scheme.

The courts and the legislature realised that the burden (by which they meant cost) of dealing with a small number of high profile cases was a sufficient reason to accede to demands from the investigators to change the rules on disclosure. This gave birth to the Criminal Procedure and Investigations Act 1996 (CPIA). It appeared that the intention was to replace the English common law rules on disclosure with a precise and immovable set of rules to be found in the Act and the Code made under the Act. The common law rules that had previously been relied upon were changeable with circumstances. The new rules were to be definite/fixed.

This Act introduced a formal way of dealing with disclosure. It required the investigators to collect the unused material and to produce a schedule of non-sensitive material for the prosecuting lawyer to decide what needed to be disclosed to the defence.

Primary disclosure was material that might undermine the crown's case. This had to be disclosed to the defence unless a judge decided that the public interest in not disclosing outweighed the interest that the defence had in receiving disclosure. This further material to be withheld would be included in a schedule that the investigating officer would send to the prosecuting lawyer showing 'sensitive' material.

In crown court cases it was surprising that the rule the CPIA created meant that Primary Disclosure was to be made as soon as possible **after** committal. This meant that the material would not be made available to allow the defence the opportunity to mount an attack on the crown's case at the committal stage. This became even more



important when the right of the defence to cross-examine important prosecution witnesses or even to call evidence at the committal was removed. There were many other areas that the Act did not appear to cover. What about Newton trials, guilty pleas and bail applications. There are more situations not covered but these were the early ones to raise concerns. The Act purported to do away with the common law rules on disclosure. Could this really be the case?

In the case of Lee we had to take the CPS to the High Court on a judicial review of their decision to withhold disclosure pre-committal. The disclosure was needed to assist in an application for bail for Roger Lee who was charged with murder.

Very early on the defence had been told that the deceased came from a good family and he had never been in trouble. The reality was that the deceased was a multiple rapist and his modus operandi was such as to add significant weight to the defence claim of self-defence. The prosecution steadfastly refused to give any information to the defence. The case was sufficiently stark to warrant a test in the High Court to see if the common law rules were indeed abolished by the Act.

In the High Court the CPS was soon forced into conceding that if there was material in its possession that would affect the decision making process on bail then it should release it. The CPS would not concede that this meant the common rules did survive the Act. It claimed that there was some nebulous duty to be fair which was something less than the common law rules but it would not concede that the 'fairness' was in fact the common law rules! The High Court had no difficulty finding that the Common Law rules did continue to have relevance albeit in amended form. This was a significant blow to the prosecuting authorities that had behaved as if the bad old days of the pre-1980's were back again for the pre-committal stage.

However, the Court did not lose sight of the fact that the Act did clearly affect the common law rules by reducing the burden upon the prosecutor. The Court decided that for there to be pre-committal disclosure it was necessary for the defence to put a detailed request in writing to the prosecutor setting out the material required and the reasons it was required. This was not such an onerous task as it simply ensured that the careful defence lawyer considered the case at an early stage and set out reasons for disclosure of certain material. The case assisted with 5 propositions that may trigger early disclosure.

The advantage of such a request even where the prosecutor did not give any disclosure is that at a later stage it may be possible to argue that the Crown had abused the process of the Court by not releasing information earlier that may for example have allowed representations to be made at committal for abuse of process and thereby effectively end the case at that stage.

A prosecutor with such a request is bound by the Case and the common law rules to consider the matter. Clearly the terms of such a letter are crucial. If in due course you want to complain that the prosecutor did not make disclosure of some material early enough, you need to show that the request was in terms that warranted the time that needed to be spent on the unused material to comply. Most prosecutors will not welcome this request as it means that the lawyer and the investigating officer need to carry out enquiries well before the statutory time for doing so. This early



consideration may also be in addition to the later consideration. It is extra work and that is not (apparently) what the Act is about.

The lesson for the careful defence lawyer is that any letter needs to be drafted with the Judges' words in mind and structured to the case under consideration.

Roger Lee was acquitted. Full disclosure of the background of the deceased at the pre-interview stage may have allowed the interview to progress in a fairer way and then allowed for submissions at the committal stage. A point for another case another day.

