United Nations Association of Australia Conference: "A Conflict of Rights: Witness Protection and the Right to a Fair Trial"*

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A Conflict of Rights: Witness Protection and the Right to a Fair Trial

Ladies and gentlemen, I at once express my great pleasure at being here to speak with you this morning. I extend my thanks to the Vice President of the United Nations Association of Australia, Ms Virginia Balmain, for her invitation.

As many of you are aware, this year marks the 60th anniversary of the adoption of Universal Declaration of Human Rights. It was an instrument, proclaimed by the UN General Assembly at the time, as setting forth "a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education, to promote respect for these rights and freedoms."

Aspirational in nature, the Declaration emerged during a period of immense hope, in the aftermath of a period of horrific violence. As the first international agreement on the rights of human kind, it now exists as an influential statement on standards, and has almost certainly become part of international customary law.

Today I will speak on one of the fundamental principles proclaimed in the Declaration, a principle that underpins our common law system, ‘the right to a fair trial’. Specifically, I will highlight the dichotomy in our legal system between the right of an accused to confront his or her accuser in court, and the rights of witnesses not to be subject to threat and intimidation.

In June this year, the *Criminal Evidence (Witness Anonymity) Act* 2008 (UK) was hurriedly rushed through both houses of UK Parliament. The Act has established a legal framework in Britain in which anonymity orders can now be made by a Court on the application of the prosecution or defence. Most controversially, it provides that under certain circumstances, the identity of a witness may be withheld from the accused.

The purpose of the legislation is to facilitate the participation of key witnesses in trials. Witnesses are often reluctant to give evidence against an accused, fearful that if their identity is revealed, their safety, and the safety of their families, will be threatened. By concealing their identity, the Act operates to alleviate those fears.

While those in favour of the reforms argue that this is a necessary step to ensure that the effective administration of justice in Britain will not be derailed by the growing problem of witness intimidation, opponents fear the measures have gone too far.

Reflecting on the significance of this Act, Geoffrey Robertson has described it as, “the most serious single assault on liberty in memory.”[1]

Any assessment of the dichotomy between these conflicting rights first requires a broader consideration of what exactly is meant when reference is made to ‘the right to a fair trial’. The phrase is, in itself, not wholly descriptive. Article 10 of the Universal Declaration of Human Rights, defines this principle, providing that, “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.

[1] Geoffrey Robertson QC, ‘There can be no fair trials with this perjurer’s charter’. 2008

There are of course a variety of essential elements that go to make up a ‘fair trial’; the right to counsel, the right to silence, and the right to confront your accuser. I will focus on the last of these elements.

The right of an accused to confront his or her accusers extends to knowing the identity of the accuser, having the opportunity to be present during their testimony, and having the chance to cross-examine. Bentham described this as “the indefeasible right of each party”. It has been a feature of our common law system for centuries.

Nowadays, the right of an accused to confront an accuser is firmly entrenched in our legal system. This, however, does not mean it is an unlimited right. While a fundamental assumption of the criminal justice process, as traditionally crafted, was that an accused person must enjoy full capacity to test the evidence advanced against him, measures have now been introduced which allow vulnerable witnesses varying degrees of anonymity when giving evidence. These rules, designed particularly for young children, exist to ensure that witnesses are not placed under any undue pressure when giving their evidence.

The challenge lawmakers now face, is how to balance these competing rights so that fair trials are not sacrificed in favour of judicial expediency.

The recent legislative reform in the UK, was in response to an earlier decision by the House of Lords in *R v Davis* [2008] 3 WLR 125. In that case it was held that a defendant could not be convicted solely upon the testimony of one or more anonymous witnesses. The accused, Mr Davis, was convicted of murdering two men at a party in Hackney on New Years Day 2002. His conviction rested on the evidence of three witnesses who identified him as the gunman. In total, there were seven witnesses, who, before giving evidence, complained that the revelation of their identity would endanger their lives. To ensure their involvement as witnesses and alleviate their fears, the trial Judge allowed the personal details and any particulars that might reveal their identity to be withheld from the accused and his legal advisors.

The House of Lords overturned Mr Davis's conviction on the ground that the anonymity accorded the crown witnesses had denied him a

fair trial. On its face, the decision emphasised that the courts will be astute to respect the right of an accused to a fair trial, particularly in the absence of any legislative regime allowing Judges greater powers to accord anonymity to witnesses. As Lord Rodger of Earlsferry said in his judgment "…Parliament is the proper body both to decide whether such a change is now required, and, if so, to devise an appropriate system which still ensures a fair trial."[2]

Perhaps unsurprisingly in light of the comments, the UK Parliament's response was to pass the Criminal Evidence (Witness Anonymity) Act 2008. As previously explained, these laws now expressly allow a Judge, in certain circumstances, to grant anonymity to a witness, even if the resulting conviction will be entirely reliant upon the evidence given by the anonymous witness.

In *Prosecutor v Dusko Tadic* No IT-94-1 (10 August 1995), Sir Ninian Stephen, in his capacity as a Judge on the International Criminal Tribunal for the Former Yugoslavia, delivered a powerful expression of the inherent difficulties in attempting to balance these conflicting rights. Dusko Tadic, a Bosnian Serb, was facing charges

[2] *R v Davis* [2008] 3 WLR 125 at 145

of crimes against humanity for atrocities committed during the Bosnian conflict.

During the proceedings, an application was made for the introduction of protective measures to guarantee the anonymity of certain prosecution witnesses. The basis was that as a number of witnesses were still living in the territory of former Yugoslavia, or had family there, they feared that either they or their family may be harmed in retaliation for giving evidence.

Although the tribunal allowed this request, it is the dissenting opinion of Sir Ninian Stephen which continues to draw acclaim for its articulate expression of the difficulties associated with reconciling the desire to protect witnesses from intimidation, with the right of the accused to receive a fair trial. Through careful reference to a range of common law decisions, Sir Ninian argues strongly against allowing principal witnesses to give evidence anonymously. It is only on the rarest of occasions that such steps should be taken. He posited that, “…[T]o permit anonymity of witnesses whose identity is of significance to the defendant will not only adversely affect the

appearance of justice being done, but is likely actually to interfere with the doing of justice."[3]

In the U.S, attitudes towards witness anonymity are strongly influenced by the 6th Amendment and its provision for the confrontation of accusers. The most comprehensive US authority on witness anonymity is the Supreme Court of California's decision in *Alvarado v Superior Court* (2000) 99 Cal Rptr 2d 149. That case involved the jailhouse murder of an alleged 'snitch', a murder witnessed by three inmates. The trial court found that as the three inmate eyewitnesses would be in mortal danger were their identities revealed, their identities should be concealed from the defence during trial.

A seven member bench of the Supreme Court of California subsequently held that the witness anonymity order was incompatible with the right of the accused to a fair trial. As Chief Justice George ruled, when delivering the opinion of the Court, "The state's legitimate interest in protecting individuals who, by chance or

[3] *Prosecutor v Dusko Tadic* No IT-94-1 (10 August 1995),

otherwise, happen to become witness to a criminal offence cannot justify depriving the defendant of a fair trial."[4]

This decision affirms the view in the US that key prosecution witnesses will not be able to give evidence anonymously, because to do so would be seen to be interfering with the defendant's right to a fair trial. In cases where identifying information has been withheld from the defence, it has merely been their current addresses and places of employment, and on the occasions where complete anonymity has been granted, the evidence being given was only of marginal significance.[5]

In Australia, while State legislative regimes empower the courts to grant degrees of anonymity to witnesses, they do not go as far as the UK Criminal Evidence (Witness Anonymity) Act in extending the option of complete anonymity to any person who has witnessed a serious crime.

In Queensland, the general view is that the State cannot withhold the true identity of any witness from the accused, either at

[4] *Alvarado v Superior Court* (2000) 99 Cal Rptr 2d 149 at 169

committal or trial.[6] This right can only be denied in very rare circumstances. I now turn to those specific exceptions.

The *Witness Protection Act* 2000 (Qld) offers the possibility of witness anonymity to participants in Queensland's witness protection program. Second, the basic informant rule provides that police witnesses do not have to disclose the identity of persons who have given information to them, except where the evidence from the informer would help to show that the defendant was innocent.[7] This is a rule that exists within a number of common law countries.

The Queensland *Evidence Act* 1977 also contains provisions that place special limitations upon the cross-examination of special witnesses. Section 21A of the Act defines a special witness as a child under 16 years, or a person who in the Courts opinion would likely suffer special emotional trauma, or be so intimidated so as to be disadvantaged as a witness. The Act allows the Court to make a range of special orders. These include:

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[5] Lusty p 381-382
[6] R v Stipendary Magistrate at Southport, ex parte Gibson [1993] 2 Qd R 687
[7] Sankey v Whitlam (1978) 142 CLR 1

i) that the person charged be excluded from the view of the witness when the witness is giving evidence;

ii) that the witness be allowed to give evidence in a room separate from the courtroom in which the court is sitting; and

iii) that a video taped recording of the witnesses testimony be taken as the evidence, rather than direct testimony.

Significantly, aside from those provisions that allow for the identity protection of law enforcement operatives, there is nothing else within the Evidence Act that expressly allows for the identity of a witness to be completely withheld from an accused.

At the heart of the provisions that apply to ‘special witnesses’, is the general recognition that there is a need to control cross-examination of complainants. This curtailment arose from a view that, in effect, complainants were through cross-examination sometimes being bullied out of their allegations. There was a feeling the road for complainants had become so discomforting that

legitimate complaints, of rape in particular, were not being advanced or pursued.

In the result, the Parliament decreed that “the court shall not receive evidence of and shall disallow any question as to the general reputation of the complainant with respect to chastity”. The court’s leave was required for any cross-examination of a complainant as to her sexual activities with anyone, and as to the reception of evidence about sexual activities of the complainant with anyone. A grant of leave was dependent upon the court’s satisfaction that the evidence would have “substantial relevance to the facts in issue or be proper matter for cross-examination as to credit”. These rules have curtailed the length of rape trials, as well as fulfilling their primary function of upholding the privacy of a complainant’s personal life so far as the interests of justice allow.

The rules that currently exist in Queensland reflect the view that on occasions, the right of the accused to confront their accuser should be limited by the need to protect the witness from undue intimidation. When special witnesses are involved, Queensland courts have the discretion to control the way in which evidence is

presented. These customary protection measures provided for within the Evidence Act are what is usually contemplated when attempting to protect witnesses from unnecessary levels of intimidation. Despite the occasional limitations that are placed upon the rights of the accused, careful effort has been taken to ensure that these limitations do not fatally intrude upon their right to a fair trial.

There can be no doubting that contemporary conditions have produced serious restrictions on cross-examination in certain situations, particularly in relation to the cross-examination of vulnerable child witnesses. Witness intimidation however is not a modern phenomenon.

During the religious Inquisitions set up by Pope Gregory in 1231 to investigate and punish heretics, there were accounts of many witnesses disappearing, often at the hands of relatives or friends of the accused.[8] To counter this problem, a range of special evidentiary rules were introduced. These measures, it has been said, operated to protect witnesses from reprisals. It was argued

[8] Lusty p 368

that in order to ensure the safety of those who had given evidence against the accused, their identities had to be completely withheld. While the justification of these evidentiary restrictions was that they were necessary to counter the threat of witness intimidation, it seems that it also allowed these vague charges to be expediently processed in favour of the prosecution. Indeed, the Inquisitions, where torture and capital punishment were also frequently used, have been described as “among the darkest blots on the record of mankind.”[9]

In we are to remain true to those values expressed 60 years ago in the Universal Declaration of Human Rights, and more specifically, to the principle outlined within Article 10, then we must continue to remember that extreme care must be exercised when attempting to strike a balance between the rights of the accused, and the rights of vulnerable witnesses.

To highlight this need for care, I again refer to case of Tadic. One of the witnesses, who had been granted anonymity, made the assertion that he had seen Mr Tadic execute 30 males, including

[9] Lusty p.366

the witness's own father. Significantly, after managing to identify the witness, the defence were able to produce his father, still alive. It was only then that the witness admitted that he had been trained by Bosnian Government authorities to give evidence against Mr Tadic.

Indeed, in light of the unhappy history of emergency legislation throughout the world, it will be interesting to see over the next few years, the effect that this new witness anonymity legislation has upon the right to a fair trial in the UK.