

Annex D.14

R. v Agar (Vincent Raymond)

Court of Appeal | July 21, 1989 | (1990) 90 Cr. App. R. 318

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***318 R. v. Vincent Raymond Agar**

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Court of Appeal

21 July 1989

(1990) 90 Cr. App. R. 318

(Lord Justice Mustill , Mr. Justice Nolan and Mr. Justice Saville):

July 18, 21, 1989

Analysis

Trial—Public Interest—Public Policy to Protect Identity of Police Informants—Trial Judge Excluding Police Evidence as to Identity of Informant on Ground of Public Policy—Defendant's Right to Advance Tenable Case—Whether Defendant's Case Emasculated by Adherence to Rule Protecting Informers.

Trial—Practice—Discussion Between Judge and Counsel in Judge's Private Room as to Police Informer—Defence Counsel Complying with Judge's Request Not to Disclose Contents of Discussion to His Client—Desirability That Such Discussion Take Place in Open Court.

Four police officers executed a warrant to search for drugs at X's house. It was common ground that from information received the police officers knew that the appellant would be coming to the house to supply X with drugs. The appellant arrived at the house but, seeing the police officers, ran off. He was seen to throw something away which on examination proved to be a packet containing prohibited drugs. He was charged with possessing those drugs with intent to supply. At his trial his defence was that the evidence against him was fabricated, the drugs having been planted on him by the police and X having caused the appellant to arrive while the police were in his house. Defence counsel started to cross-examine the first police witness to that effect. Prosecution counsel was fearful that X's status as a police informer would become known; so both counsel went to see the judge in his private room. The judge ruled that defence counsel was not to put questions as to how the information was obtained or who the informer was and he also forbade counsel to reveal to anybody, including the appellant and his instructing solicitor, the matters discussed in the judge's room. Defence counsel complied with the judge's ruling, the appellant was convicted and appealed,

inter alia , that the judge's ruling prohibited counsel for the defence from putting questions which might elicit that X had told the police that the appellant would be coming to his house:

that although there was a clear and well established rule that the identity of police informants should be kept secret; there was even stronger public interest in allowing the appellant to put forward a tenable case in its best light. By adhering to the judge's ruling counsel was forced to emasculate his client's attack on the police. As it was impossible to say that if a different course had been taken, the jury might not have felt enough unease about the whole affair to reach a different verdict, the appeal must be allowed and the conviction quashed. Dictum of Lord Esher, M.R. and of Bowen, L.J. in *Marks v. Beyfus* [1890] 25 Q.B.D. 494, 498, 499 and *Hallett* [1986] Crim.L.R. 462 applied .

Per curiam : Discussions in the judge's room, with the defendant absent, are an expedient of last resort. The fact that both counsel had discussions in the judge's private room which were not disclosed to the appellant, would have required the Court's intervention, for thereby there had been a substantial irregularity in the course of the trial.

[For public policy and informers, see *Archbold*, 43rd ed., paras. 12-12, 14 .]

Appeal against conviction.

On February 10, 1989, in the Crown Court at Teesside (Judge Crawford, Q.C.) *319 the appellant was convicted of possessing a controlled drug (amphetamine) with intent to supply. He was sentenced to 18 months' imprisonment.

The facts appear in the judgment, as do the main grounds of appeal.

The appeal was argued on July 18, 1989.

Michael O'Neill (who did not appear below) (assigned by the Registrar of Criminal Appeals) for the appellant.

Timothy Roberts for the Crown.

Cur.adv.vult.

July 21. MUSTILL L.J.

read the judgment of the Court: In this appeal, brought with the leave of this Court, the appellant, Vincent Raymond Agar, appeals against a conviction on a count of possessing a controlled drug with intent to supply. At the conclusion of the argument we intimated that we would allow the appeal and quash the conviction, and we now give our reasons for taking that course.

The underlying facts are as follows: four police officers executed a warrant at about 11.45 in the morning on February 26, 1988, to search a private house in Middlesbrough, in which the occupier, whom we must call “X,” was present in the course of the search. It was common ground that, as a result of information received, the police officers knew that the appellant, whom they believed to be a drug dealer at a fairly low level of involvement, would be coming to the house to supply X with drugs. They thought it expedient to achieve two objects at the same time by searching X's house to see if they could find any evidence of drug participation there, and also to catch out the appellant if he appeared with drugs.

At about ten minutes past noon the appellant did arrive at the house and, finding police officers there, he made off. According to the evidence for the prosecution, he was seen to throw something away as he ran, and one of the officers gave evidence that after a search he had found the object which the appellant had thrown away, which proved to be a packet, subsequently discovered to contain drugs, amphetamine and glucose, in the form of a powder.

The appellant was searched, and it was found that he was in possession of ten video tapes and also a substantial sum in cash. He was arrested and taken to the police station. He did not then complain, as he might have done, to any officer that the drugs had been planted in the garden so as to facilitate a conviction for possession with intent to supply. Afterwards the appellant's home was searched in his presence, and there was a struggle between the appellant and some officers, and the case for the prosecution was that he had acted suspiciously on that occasion and that traces

of amphetamine were found in the kitchen of the house. The appellant was for saying that he had not, as the police had suggested, tried to dispose of what are now usually called paraphernalia of drug-taking activities when his house was searched. We do not go into that because it is of no real materiality to the present problem.

The essence of the defendant's case, as it subsequently developed, was that the evidence against him was a fabrication. He had never had any drugs about him when he went to the house of X. The drugs found in the garden had been planted there by the police as part of a plot to secure a conviction.

Now allegations that drugs have been planted are by no means unknown, but this particular version appears at first sight especially thin, for it would be asking the jury a good deal to accept as a possibility that the police having gone to search the house of X should find the innocent appellant arriving whilst they were there, and *320 having for some reason furnished themselves with quantities of drugs, should for some other reason decide to attribute them to this casual visitor.

In fact the defence which the appellant wished to run was more circumstantial. In essence it asserted a prior arrangement between the police and X. The latter was subject to a suspended sentence for dealing in drugs, and his recent arrest put him in peril of prison. He was therefore anxious to help the police by naming his suppliers, and indeed to go further by causing the appellant to arrive whilst the police were in the house. Hence an unusual telephone call, in the course of which, according to the appellant, X had asked him to bring some video tapes to X's house, notwithstanding that X had only the previous evening borrowed some tapes from the appellant, and had gone so far as to offer to pay the appellant's taxi fare if he came at once. Hence also, so the defence alleged, the fact that the police were already there when the appellant arrived within a few minutes of the call: a circumstance which suggests (so the defence maintained) that the call itself was made when the police were in the house. When the appellant duly arrived with the videos but without the drugs, the police were in a position to deploy false evidence to secure his conviction.

The difficulties which this line of defence would encounter were obvious, but it was not wholly impossible that the jury might, by effective cross-examination of the police officers, be induced to feel some doubts about the matter. There were of course many different ways in which such a cross-examination could have been conducted, but counsel for the Crown on the present appeal has not been able to suggest, nor have we been able to devise, any way in which it could have been mounted without, at the very least, a suggestion that X had told the police that the appellant would be coming to the house in response to a telephone call.

This fact is the source of the present problem, which first came to the surface when counsel for the prosecution told Mr. Hazell, who was then acting for the appellant, for his ears alone, that X was a “police informer.” We pause at this stage to note that there is a potential ambiguity in this expression. There are some people, no doubt comparatively few in number, who for reasons of personal gain furnish a regular supply of information to police officers, which is very important in the prevention and detection of crime. The identity of these informers is for obvious reasons jealously guarded. The supply of information would dry up at once, as soon as the person's practice of informing was known. But there are other instances, much more numerous, where in relation to a particular offence someone passes information to the police, usually to get himself out of difficulties with the police, or to seek favours from them in relation to that or some other offence. There, the interests of justice, and also of expediency, demand that the knowledge that the information came from the informant should be concealed from the public and from the defendant.

It is possible that in the present case there was at least for a time some misunderstanding between those concerned with the trial as to the type of informer which X was acknowledged to be, and that this had some part in the course of events as it was to develop. Be that as it may, we now know that the prosecution were not intending to do more than indicate that the information about the appellant's impending arrival had been given to the police by X—a piece of information which would not have surprised the appellant if he had been told about it.

Resuming the narrative, the next material event was that the prosecution opened the case on the lines that whilst the police were searching X's house for drugs, the defendant had the misfortune to come calling. Since the appellant's instructions to counsel were that he had been set up by X and the police in concert, Mr. Hazell began to cross-examine the first of the police witnesses to this effect. Afterwards, at *321 the suggestion of counsel for the prosecution, both counsel went to see the judge in his private room. Prosecuting counsel at once explained that he had been told by the officer in charge of the case that the reason why they were present at X's house was that X was a police informer and had told them that the appellant would be coming round with an ounce of amphetamine to deliver; also that since they believed X to be involved in drugs, they wanted to search his premises as well. Prosecuting counsel then made it clear that if Mr. Hazell were to ask of a senior officer “were you aware that in fact Agar was set up for this offence,” and if the officer were to answer that question truthfully, he would be identifying an informer.

There followed a discussion of the problem, culminating in a ruling in these terms, which is to be found in the transcript at p. 6, E to F:

“(Judge Crawford:) I think the answer is this. Do not put questions—you must not put questions as to how the information was obtained. You are entitled to ask whether or not they knew that Agar was coming to that spot, but you must not ask how it was that they knew that. You must not ask questions which are designed to elicit who the informer was, and we will carry on like that. I do not think it is necessary here that the questions should be asked, since in your case, the nub of which is that the stuff was planted on him, can be put without the identity of the informer becoming crucial. And I think you should proceed on that basis.”

Mr. Hazell was by this time in a considerable difficulty. The information first conveyed in confidence as between counsel was now known to everyone involved in the case except the appellant and his solicitor. The appellant was keenly interested to find out what had happened in chambers, and would have been even more interested if he had heard the truth about X. Yet Mr. Hazell felt that he could not tell him. After considering the matter overnight, and discussing it with colleagues, Mr. Hazell sought another meeting with the judge to clarify his duties towards his client. In the course of this meeting there were the following exchanges. I read from p. 8, E to G:

“(Judge Crawford:) Put his case to the best of your ability. (Mr. Hazell:) Yes. But ... (Judge Crawford:) Within the rules. (Mr. Hazell:) Yes. But, judge, he obviously is—wants to know what happened yesterday when the court rose after the first witness, and I just wanted to seek your guidance about what I could say to him concerning that. Is it nothing at all? (Judge Crawford:) Nothing at all. I said to the jury that the law in relation to drugs cases was not straight-forward, or some phrase like that, simply to cover it, because I thought it might help your situation vis-à-vis your client as well. And I do not see the harm in using any similar formula. But there must be absolutely no question of anything that passed between us yesterday reaching your client, otherwise the whole point of it disappears.”

Then a little later, at p. 9D:

“(Mr. Hazell:) ... I did not understand—and I am very glad I have sought your Honour's guidance about this—that that is something which I should not communicate to my lay client, because I had understood my—very glad I have not spoken to him about it—that communications passing between ourselves in chambers could be communicated to him. It was the point about it being in open court which I had understood to be the basis of coming to see you in chambers, your Honour. (Judge Crawford:) No. That information must not reach him. There are in cases quite often matters which must not be communicated by counsel to their clients, which can be mentioned in chambers before the judge, and they must not go any further. They must not go on to reach the instructing solicitor. They must not reach anybody. This is such an occasion.”

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Then at page 11C:

“(Mr. Hazell:).... I can see that in presenting the case I am actually going to, not wittingly, but effectively perhaps trespass the line—I am not going to mention this to him, given your Honour's ruling, but I am effectively going to be putting the fact that X was in fact in contact with the police, that in fact it was he who lured him round there, and that in fact is where the plant of the drugs was made. That is his case. And I think, with respect, that when I say that, I am going to be saying in terms that X was a police informer. (Judge Crawford:) Well I do not think you can say that, given my ruling. It seems to me perfectly proper to put that X telephoned your client, and as a result your client went to his house, and I agree it does not take any very great deductive powers to draw an inference. But I do not think that you can put anything more than that. You cannot put anything about X being an informer.”

Subsequently there was at least one more discussion in the private room, but this added nothing material. In the event Mr. Hazell loyally adhered to the judge's ruling, and the trial was concluded without any mention of X's position as an informer (whatever precisely that expression may have meant) and without any communication to the appellant of what had been said in the meetings with the judge or, indeed, at least as regards the second meeting, that there had been any discussion at all with the learned judge.

In due course the jury returned a verdict of guilty against which Agar now appeals. He is now represented by Mr. O'Neill, since Mr. Hazell very properly felt that in the circumstances he could not continue to act. The appeal is founded on the proceedings in the private room. It is not disputed, and indeed is apparent from the transcript, that the learned judge in a courteous and helpful manner did his best to provide directions and guidance in accordance with law, in what was not an easy practical dilemma. Nevertheless, it is submitted that the solutions at which he arrived were wrong in two respects. We are constrained to agree as regards the first ground, and believe that the second objection may also be well-founded.

The first ground of appeal concerns the ruling which prohibited counsel for the defence from putting questions which might elicit that X had told the police that the appellant would be coming to his house. The law arising from the special rule of public policy which inhibits the disclosure of the identity of informants is well established, and we need mention only two of the authorities which were cited in argument.

First, there is *Marks v. Beyfus* [1890] 25 Q.B.D. 494, which was a civil action for malicious prosecution arising from an earlier acquittal of the plaintiff in criminal proceedings. At the trial of the civil proceedings, the plaintiff called the Director of Public Prosecutions and sought to ask him the names of the informants who had been responsible for the initiation of the prosecution. The trial judge refused to allow the questions to be put, and his decision was upheld on appeal. Lord Esher M.R. said this at p. 498:

“What, then, is the rule as to the disclosure of the names of informants, and the information given by them in the case of a public prosecution? In the case of *Attorney-General v. Briant*, (1846) 15 M. & W. 169 Pollock, C.B., discussing the case of *Rex v. Hardy* (1794) 24 St. Tr. 199, says that on all hands it was agreed in that case that the informer, in the case of a public prosecution, should not be disclosed; and later on in his judgment, Pollock C.B. says [at p. 185]: ‘The rule

clearly established and acted on is this, that in a public prosecution a witness cannot be asked such questions as will disclose the informer, if he be a third person ... and we think the principle of the rule applies to the case where a witness is asked if he himself is the informer.' Now, this rule as to *323 public prosecutions was founded on grounds of public policy, and if this prosecution was a public prosecution the rule attaches; I think it was a public prosecution, and that the rule applies. I do not say it is a rule which can never be departed from; 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 shew 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. But except in that case, this rule of public policy is not a matter of discretion; it is a rule of law, and as such should be applied by the judge at the trial, who should not treat it as a matter of discretion whether he should tell the witness to answer or not."

The judgment of Bowen L.J. was to the same effect, at p. 499:

"The only question which remains for our decision is, whether the Director of Public Prosecutions was right in objecting to answer the questions put to him, and whether the judge was right in saying that on grounds of public policy he ought not to be asked to disclose the name of his informant. That depends upon whether this was a public prosecution; if so, then neither upon the criminal trial nor upon any subsequent civil proceedings arising out of it, ought the Director of Public Prosecutions, upon grounds of general policy, to be asked to disclose the name of his informant. The only exception to such a rule would be upon a criminal trial, when the judge if he saw that the strict enforcement of the rule would be likely to cause a miscarriage of justice, might relax it in *favorem innocentiae* ; if he did not do so, there would be a risk of innocent people being convicted."

Aside perhaps from the reference, no doubt inadvertent, to the innocent man's innocence being proved, these statements have always been accepted as the foundation of the law on this topic. Much more recently, in Hallett [1986] Crim.L.R. 462, another division of this Court in a judgment delivered by the Lord Chief Justice reviewed the authorities and concluded as follows (as taken from the transcript of that case at p. 7D):

“Thus it seems to us that the rule is a rule of exclusion, that is to say it is a rule which excludes evidence as to the identity of informants, unless the Judge comes to the conclusion that it is necessary to override the rule and to admit the evidence in order to prevent a miscarriage of justice, and in order to prevent the possibility that a man may, by reason of the exclusion, be deprived of the opportunity of casting doubt upon the case against him. The point made, and made well, if we may say so, by Mr. Suckling is that it is wrong in those circumstances to speak of the judge's power as a discretion, and he invites us to read, as we do, a passage from Professor Cross's book on Evidence, 6th ed. , at p. 168 , under the heading ‘Nature of the Discretion.’ It is a valuable passage, and I read it: ‘Not for the first, or last, time in the exposition of the law of evidence, it is necessary to beware of the danger inherent in the loose use of terminology, in this case the use of the word “discretion” in a number of different senses. It is particularly important to distinguish between the idea that the judge has the responsibility of deciding upon the application to the facts before him of an inherently vague term, and the idea that he is free to act in any way he chooses upon the facts which he finds to exist. The difference is that in the former case the judge must act in a particular way once he has found the facts, and in the latter he is still free to choose which action to take after finding it.’ The point that Mr. Suckling makes is that this type of case falls under the former heading, where the judge must act in a particular way, he submits, once he ***324** has found the facts. The result is, on his submission, that if the judge does come to the conclusion that the lack of information as to the identity of the informer is going to cause a miscarriage of justice, then he is under a duty to admit the evidence. We would respectfully agree with that view.”

We should mention that when the Court held that the trial judge had been right in concluding that there was no duty on him to allow the names of the informants to be given in court, it added that to have done so would have made no difference to the outcome.

Since the law is clear, the present case raises no issue of principle. The question as we see it is whether in the particular circumstances of this trial it would have been possible, with a reasonable degree of ingenuity, to have put the defendant's case to the officers without, as an integral part of the exercise, inquiring of the officers whether it was true that they had got their information from X. As already indicated, we do not see how this could have been done. By adhering to the ruling counsel was in effect forced to emasculate his client's attack upon the police. Now it is certainly not the case that a defendant can circumvent the rule of public policy so as to find out the name of the person who had informed on him, for his own future reference and possible reprisal, simply by pretending that something is part of his case, when in truth it adds nothing to it. And it may be—and we emphasise “may”—that if the defence is manifestly frivolous and doomed to failure the trial judge may conclude that it must be sacrificed to the general public interest in the protection of informers. We do not see the present case in this light. There was a strong, and absent any contrary indication, overwhelming public interest in keeping secret the source of information; but as the authorities show, there was an even stronger public interest in allowing a defendant to put forward a tenable case in its best light. We venture to think that the learned judge lost sight of this countervailing factor. For our part, we believe that the outright prohibition should not have been made. This is not to say that, as the trial developed, there might not have come a time when a different approach was called for, but to cut off the inquiry at the very beginning was more than the public interest demanded. It is impossible to say that if a different course had been taken, the jury might not have felt enough unease about the whole affair to reach a different verdict. We must therefore allow the appeal.

This makes it unnecessary to express a conclusion on the second ground of appeal which rests on the fact that there were proceedings in the private room which counsel was forbidden to disclose to his client. We are very much inclined to think, however, that this would in itself have been a ground upon which we would have been compelled to intervene. We recognise very well the problems which face a judge who is called upon without notice to rule upon a problem brought before him by counsel who have thought it appropriate to act in private; the risk of hindsight for an appellate court, looking at the case at leisure on paper, is obvious; the fact that counsel for the defence may already have been fatally compromised in his professional relationship with the appellant by the well-intentioned volunteering of confidential information by prosecuting counsel needs no emphasis.

All this being said, we believe that the course adopted was mistaken. As this Court has repeatedly emphasised, discussions in the judge's room, with the defendant absent, are an expedient of last resort. This appeal demonstrates once again how things can go wrong, and how a real sensation of injustice may be engendered in the absent client. This is not to say that a solution was easy to find, but we are sure that with some resource it would have been possible to deal with the matter in open court, if necessary at the price of successive objections and applications in the *325 absence of the jury, whilst honouring the spirit of the two conflicting grounds of public policy emphasised in the cases which we have cited.

Whether, if this objection had stood alone, we should have felt impelled to quash the conviction in the interest of underlining the principle of open justice is a difficult question. As we have already said, we are inclined to think that we would have been so impelled, but in the circumstances it is not a question which we need answer, given our conclusion on the first point.

Accordingly, whilst recognising the efforts made on all sides to arrive at an appropriate solution, we are of the opinion that there was a substantial irregularity in the course of the trial, which leaves us with no alternative but to quash the conviction. The appeal will therefore be allowed.

Representation

- Solicitors: Crown Prosecution Service, Teesside .

Appeal allowed. Conviction quashed.

(1990) 90 Cr. App. R. 318