

THE QUEEN

v.

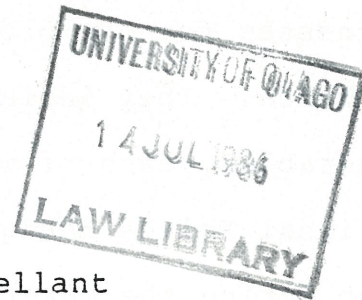
ROSS ANTHONY HUGHES

Coram: Cooke J. (presiding)  
Richardson J.  
McMullin J.  
Somers J.  
Casey J.

Hearing: 4 February 1986

Counsel: D.H. Quilliam for Appellant  
D.P. Neazor Q.C. and G.A. Rea for Crown

Judgment: 19 June 1986



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JUDGMENT OF COOKE J.

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Ross Anthony Hughes was indicted in the Napier District Court, having been committed for trial by Justices of the Peace, on four counts under the Misuse of Drugs Act 1975 and one under the Arms Act 1983. The first two counts related to 22 December 1984. They charged that at Napier on that day he was a party to a sale of cannabis plant 'to persons known as John Watts and Christopher Williams, both of whom were over 18 years of age' and that at Te Pohue on the same day he was in possession of a .22 calibre pistol without authority under the Arms Act. The next two counts related to 22 February 1985. They charged that on that day at Te Pohue he sold cannabis plant to the same two persons and had cannabis plant in possession for sale or unlawful

supply. The fifth count charged that between 1 January 1984 and 22 February 1985 at Waipunga near Tarawera he cultivated cannabis.

Before the Justices by consent written statements by the witnesses for the prosecution were admitted instead of oral evidence. They included statements by two police constables, each of whom said that he was stationed at National Police Headquarters, Wellington. Each also said that during the material period he had been employed on undercover duties in the Napier police district and each gave only the name that he had used during that period, being the name by which, as already indicated, the charge said that he was known. That is to say, neither gave his true name and, as the procedure followed by consent involved no cross-examination in the lower court, the question whether he was bound to disclose his true name was not raised there.

Before the commencement of the trial in the District Court Mr Quilliam, counsel for the accused, became aware of two High Court decisions holding that the true names of undercover police officers could be compelled to be disclosed. The first decision was that of Henry J. in Barnard v. Williams (Auckland A.1051/84; judgment 31 October 1984). That decision was given in judicial review proceedings concerning the powers of Justices of the Peace at a preliminary hearing of informations charging the

indisputable crimes of attempted murder and causing grievous bodily harm. Henry J. held that the Justices had no jurisdiction to make orders, as sought by the prosecution, to the effect that witnesses be permitted not to disclose their true names except by writing them on pieces of paper to be shown only to the Justices or only to the Justices and counsel for the defendants, but not to the defendants themselves.

In R. v. Fantham (Hamilton T.106/84; ruling 2 December 1985) Gallen J. followed that decision in a drug trial where the Crown had indicated an intention to call an undercover constable whose true name would not be disclosed. Counsel for the accused asked the undercover constable's immediate superior, who was giving evidence, for the true name of the constable. The Crown objected. Counsel for the accused submitted that the defence turned on credibility and that it was not possible to contest the credibility of the constable without knowing his true identity and thus being able to make inquiries into his antecedents and any other matters which might bear on whether his testimony should be believed. Counsel for the Crown referred to the possibility of physical danger to the constable and his family and said that it was the practice to give constables assurances before sending them to undercover duties that their identity would not be disclosed in court. Gallen J. ruled that the question could be put, recognising that the concern of the Crown was real but taking the view, as had Henry J., that

any protection should only be given by Act of Parliament. The Crown elected not to proceed and the accused was discharged. Since then there have been a number of other cases where similar rulings have been given and the Crown has similarly elected not to proceed.

In the present case, after the arraignment of the accused and before the Crown Prosecutor had opened the case, counsel made submissions to the District Court Judge as to whether counsel for the defence was entitled to cross-examine the undercover officer who had been known as Christopher Williams about his true identity, and whether he could ask any other witness about the true identity of that officer. The issue was confined to Christopher Williams as the Crown had indicated that John Watts was unavailable and would not be called at the trial, to which course the defence had no objection. Judge Tucker followed R. v. Fantham and ruled that counsel for the defence was entitled to cross-examine on the true identity. At the request of the Crown the Judge reserved two questions for the opinion of this Court under the Crimes Act 1961, s.380. As a result of that ruling the Crown elected to call no evidence. Pursuant to directions from the Judge the jury returned a verdict of not guilty on each of the five counts, and the Judge discharged the accused but advised him that he was subject to re-arrest if a new trial should be ordered by the Court of Appeal.

The questions reserved are expressed in the case stated as follows:

1. Was I correct in holding that Defence Counsel was entitled to put to the undercover Police Officer known as 'Christopher Williams' questions as to his true identity and
2. Was I correct in holding that if the Crown should elect to proceed without the evidence of the undercover Police Officer known as 'Christopher Williams' that Defence Counsel was entitled to put to other witnesses questions as to the true identity of the undercover Police Officer.

#### The Opposing Arguments

In the arguments in this Court Mr Quilliam adopted the reasoning in the two High Court judgments already mentioned. He pointed out that the rights of the accused are not the same as those of the public and urged that they should be seen as transcending other considerations, as, in general, disclosure of the identity of a witness enables the accused to make such inquiry as may be necessary to test the credibility of the witness against him. Counsel frankly conceded that in this particular case it was almost certain that nothing could have come from disclosure of the identity. He rightly accepted, too, that even without any evidence from the undercover officer there was sufficient evidence, including evidence of admissions by the accused, to go to the jury on all five counts. With regard to the

second question in the case stated he conceded, again rightly, that it was premature to seek or give a ruling on this before trial. If during the trial another witness, such as another police officer, was asked the true identity of the undercover officer and there was an objection, the relevance of the question would then have to be considered and, if the question turned out to be relevant, the objection would have to be considered in the light of the principles about police informers to which I will shortly have to refer more fully.

In his written submissions to us the Solicitor-General put the main propositions for the Crown as follows:

1. In prosecutions for criminal offences no question may be put to ascertain the true name of a Police Officer who has been employed undercover in the detection of offences.
2. This proposition is qualified, as is the rule of law as to the disclosure of informants' identity, to the extent that in any case where, on the trial of a defendant for an offence, disclosure of the true identity of the officer would help to show that the defendant was innocent of the offence, that disclosure would have to be made.
3. The onus to show that the name should be disclosed must be on the defendant. It is submitted that more must be placed before the Court in support of an application than counsel's assertion that the defence might be assisted if the name was known.

In discussion during the argument he modified or expanded upon these by saying that, if there is reason to believe

that disclosure of the name could show innocence, it would have to be made. That there is at least a threshold requirement on the defence to show some reason to investigate credibility. And that the whole argument for the Crown fails if it is enough to say that the defence wants to suggest that the witness is a liar and, in the hope of supporting that suggestion, to explore his background.

The Solicitor-General relied as an analogy on the principle about police informers, a principle well established in all common law jurisdictions. So far as relevant to the present type of case the principle is that, in the interests of preventing the drying up of sources of police information, police witnesses may not disclose the identity of persons who have given information to the police, except where upon the trial of a defendant for a criminal offence disclosure of the identity of the informer could help to show that the defendant was innocent. See D. v. National Society for the Prevention of Cruelty to Children [1978] A.C. 171, 218 per Lord Diplock. The obvious difficulty in the suggested analogy is that normally the credibility of the informer is not in issue at the hearing. The ordinary hearsay rule prevents a police officer from giving evidence of what the informer has said out of court. It is only the credibility of the evidence actually given against the defendant that matters. That evidence may result from inquiries or observations prompted by what the police have been told by an informer, but what they have

been so told is not normally admissible as any part of the case against the defendant.

### The Existing Law

In the exercise of a court's inherent jurisdiction to control its own procedure when sitting in public a witness may be permitted, for good reason established in the particular case, to write down his or her name and address, and a direction may be given that he or she be referred to in court by a letter only. The Leveller case and others establish that as an occasionally proper practice in England; I referred to it in Broadcasting Corporation v. Attorney-General [1982] 1 NZ.L.R. 120, 129-30, and consider that it is available in New Zealand also. But it is a course never to be followed without some particular and sufficient reason apart from the mere preference of the witness for confidentiality; and in no Commonwealth case of which I am aware has it been held to extend to withholding the name from the defendant and his counsel.

The device of disclosure to counsel only would manifestly not be an answer to the problem now under consideration. Given the information, the defendant himself might well be able to suggest lines of inquiry to which counsel might not be alive. To that extent the decision of this Court in Minister of Foreign Affairs v. Benipal [1984] 1 N.Z.L.R. 758 is in point. In the circumstances of that



case an order permitting counsel to inspect certain documents without disclosure to their clients was held unacceptable: see especially per Richardson J. at 767.

As to the power to clear the court and forbid reports of proceedings, the law is now codified, in substitution for the inherent jurisdiction, in the Criminal Justice Act 1985, s.138, while prohibition of the publication of names in various circumstances is dealt with in ss.139 and 140 of the same Act. But, with all respect to those who may think otherwise, I can see no reason to suppose that when enacting these sections or their forerunners Parliament had in mind, not merely questions about clearing the court and reporting the proceedings, but the question whether a witness could be permitted to insist on refraining, when giving evidence, from revealing his or her true name. That issue has only arisen in New Zealand quite recently, mainly because of the growth in drug-dealing crimes and in undercover police activities to combat the growth. In my opinion it would be unrealistic to suppose that any of the provisions just mentioned, or any others now in our statute books, have been directed to that quite new issue.

On the other hand it is equally true that, while in quite recent years a practice has apparently developed in the High Court and District Courts of allowing undercover police officers not to disclose their true names (at least before the two High Court decisions already cited), that quite new practice has not hitherto been considered either by this Court or by Parliament.

We were not referred to and I have not come upon any decision of a Commonwealth court on the matter, except the two New Zealand High Court decisions. The reason for this comparative dearth of authority may be that in other countries it has been the more usual practice to use undercover officers simply as informers, not as witnesses. Undoubtedly many convictions for drug-dealing crimes in New Zealand have been obtained by evidence given by undercover officers. If evidence of this kind becomes unavailable in fact, because the police are not prepared to expose undercover officers to the risk of disclosure, it seems likely that many drug-dealing criminals will escape conviction, either altogether or at least for longer than would otherwise have been the case.

In the Leveller case there is an observation by Lord Diplock at 447 that magistrates had been correctly advised that, in a prosecution under the Official Secrets Acts, it would not be possible to order that, for his own security and for reasons of national safety, a witness should be referred to only as 'Colonel A' and his name not disclosed to anyone. But it was an obiter dictum and made without any indication that the problems of undercover police officers were in mind. No reference to the latter subject by any Commonwealth court has been drawn to our attention or is known to any member of this Court. So I think that some words used by Lord Hailsham of St Marylebone, when dealing in D. v. National Society for the Prevention of Cruelty to

Children [1978] A.C. at 223 with whether the police informer principle should be extended to the facts of that case, are very much in point: 'I do not believe that the question involved has been decided in this precise form before, and therefore whichever way the appeal be decided it must to some extent break new ground'.

The question falls within the fields of evidence and the inherent jurisdiction of courts - both of them fields in which the law is basically judge-made. In these fields the English and the New Zealand courts have alike accepted their responsibility to develop the law to meet new problems. In England what is commonly called the inherent jurisdiction has never been more authoritatively explained than by Viscount Haldane L.C. in Scott v. Scott [1913] A.C. 417, 435-9. That case was concerned with the power to sit in camera, but the Lord Chancellor's speech plainly has a wider application. He said:

While the broad principle is that the Courts of this country must as between parties, administer justice in public, this principle is subject to apparent exceptions ... themselves the outcome of a yet more fundamental principle that the chief object of Courts of Justice must be to secure that justice is done ... unless it be strictly necessary for the attainment of justice, there can be no power in the Court to hear in camera either a matrimonial cause or any other where there is a contest between parties. He who maintains that by no other means than by such a hearing can justice be done

may apply for an unusual procedure. But he must make out his case strictly, and bring it up to the standard which the underlying principle requires. He may be able to shew that the evidence can effectively be brought before the Court in no other fashion ...

Viscount Haldane was speaking in a civil case. In principle, however, his observations apply also to criminal cases, where the parties are the Crown and the defendant. Indeed many of the leading cases on inherent jurisdiction concern criminal procedure. It does not follow, of course, that what is necessary to secure that justice is done is the same in both civil and criminal cases. Necessity may be affected by the nature of the case.

The House of Lords have extended the principle protecting the identity of informers to communications to the Gaming Board (Rogers v. Home Secretary [1973] A.C. 388) and communications to the National Society for the Prevention of Cruelty to Children (D's case, supra). More recently the Court of Appeal have extended the principle so as to preclude evidence identifying premises used for police surveillance (R. v. Rankine, The Times 4 March 1986). In this country we have recognised that inherent jurisdiction (whether of the High Court or courts generally) may require new applications in such cases as Taylor v. Attorney-General [1975] 2 N.Z.L.R. 675, Donselaar v. Mosen [1976] 2 N.Z.L.R. 191 and Quality Pizzas Ltd v. Canterbury Hotel Employees Union [1983] N.Z.L.R. 612. Likewise we have developed the

law of evidence in such cases as Jorgensen v. News Media (Auckland) Ltd [1969] N.Z.L.R. 961 and Busby v. Thorn EMI Video Programmes Ltd [1984] 1 N.Z.L.R. 461. I think, therefore, that if the submissions of the Solicitor-General clearly accord with justice it is the responsibility of this Court to accept them. There being no prior decision on the matter by this Court or the Privy Council in a New Zealand appeal, it would be an abnegation by us of judicial responsibility to say that the problem that has arisen is new and consequently can only be resolved by Parliament.

#### A Development in Denmark

Some developments in jurisdictions outside the Commonwealth are very much in point. An article by J.P. Andersen in [1985] Crim.L.R. 363 draws attention to the fact that Danish law now allows anonymous witnesses in a strictly limited class of case - a position established initially by a majority decision of the Supreme Court and said in the article to have given rise to vehement debate which, however, has not persuaded the Minister of Justice to introduce new legislation altering the effect of the decision. The following passage in the article at 365-6 merits quotation at length; manifestly it is a balanced account. The year referred to is 1984:

On December 2, in the same year the issue was decided again - this time by the Supreme Court. A person was charged with serious drug crime - sale of

1 kilogram of heroin - and various other crimes. Both the City court and the High Court accepted that the testimony of two witnesses was properly given anonymously. Their life and safety would be endangered if they openly were to give evidence against the defendant, a hardened criminal.

The Supreme Court analysed the facts of the case and a majority of five judges reached the conclusion that the grant of anonymity to these witnesses was consistent with the rules of Danish criminal procedure. The reasoning behind this result was as follows. A witness whose life and safety will be endangered by giving evidence is not obliged to give evidence. If, however, the witness chooses to do so or by special decision of the court is required to do so, the court has a duty to be considerate to the witness in order to alleviate the witness's delicate situation, e.g. by excluding the public from court. All this is elementary law set out in Chapter 18 on witnesses in the Act on Court Procedure. Without claiming this special protective duty of the court to be a direct juristic basis, the majority concluded that if the facts of the case indicate that a witness - giving evidence without initially being obliged to, will be exposed to clear danger then as a sole exception anonymity may be granted if the crime involved is grave and the enforcement of law is urgent. The same holds if the danger directs itself towards persons closely related to the witness.

A minority of two judges dissented. In analogy with the dissenting judge in the High Court case they found that the Act on Court Procedure did not warrant the use of anonymous witnesses in the criminal procedure. There were no provisions in the law to justify the anonymity, but several provisions to reflect the idea that the defendant is entitled to know about all evidence against him and also the identity of the witnesses produced against him.

In a recent murder case arising from a brutal vendetta between motorcycle gangs, the majority view was adopted by the judges who had hitherto been in the minority - now signifying that the legal issue is settled. The introduction of anonymous witnesses in the criminal procedure raises several difficult problems.

To ensure anonymity the defendant cannot be present during the examination of the exposed witnesses. Only his counsel is present to defend his interests. Entering the court again the defendant will not receive a full and detailed account of the evidence given in his absence. The account will be adjusted to avoid indirect identification of the witnesses. This restriction also covers counsel. He is debarred from discussing the evidence in full detail with his client.

This implication is open to even more criticism than the mere fact of anonymity of the witnesses. It amounts to a sort of secret or at least blurred evidence in the trial. It seems, however, inevitable. If the anonymity of the witnesses is to be effective, some 'dressing up' of the evidence is necessary to conceal its identifying elements. In this light it is not surprising that anonymity of witnesses has not been welcomed by defence counsel. They argue, rightly, that quite apart from the gloomy perspectives the acceptance of anonymity is incompatible with the principle of equality between the prosecution and the counsel for the defence - a principle normally upheld in Danish law. The procedural recognition of anonymity increases the risk of wrong convictions because the defendant's possibilities of contradicting untenable evidence are weakened to a considerable degree when he is deprived of exact knowledge of its contents and its source.

The prosecuting authorities have not been blind to these problems. They point out, however, that the alternative should not be disregarded, namely that some

cases of dangerous and outrageous crime might go unpunished because the accused is capable of terrorising the witnesses to remain silent - an alternative of low ethical acceptability. Moreover, the device of anonymity is not to be applied in every case of grave crime and whenever the witnesses are merely reluctant to give evidence. The narrow formulation adopted by the Supreme Court clearly shows that anonymity should be restricted to cases with a manifest aspect of necessity.

In the context of the New Zealand problem two comments should be made. First, the Crown has made no suggestion that the evidence of undercover officers should be given in the absence of the defendant. As the officer is likely to be known by sight to the defendant and the defendant's associates, there would normally be little point in that in any event. Secondly, in New Zealand the undercover officers are in theory obliged to give evidence on subpoena. There is no enacted rule that a witness whose life and safety would be endangered is excused, as there apparently is in Denmark. In reality though that is not a convincing distinction.

#### The United States

In the United States the subject has to be approached in the light of the constitutional rights of the accused. The Sixth Amendment provides inter alia that 'the accused shall enjoy the right ... to be confronted with the witnesses against him'. In theory the courts in a country such as New



Zealand where there are no formally guaranteed constitutional rights should have a freer hand; but again I doubt the real validity of the distinction, bearing in mind the very general language of the Sixth Amendment and the traditional and deep-rooted respect prevailing in our system for the idea that the accused should have a fair and public trial.

Two leading cases in the Supreme Court of the United States were cited to us in argument. In Alford v. United States 282 U.S. 687 (1931) a witness in a prosecution for using the mails to defraud had given his name but not his address. He was a former employee of the defendant and gave uncorroborated evidence of damaging statements by the defendant. The trial Judge disallowed questions in cross-examination as to where the witness lived and what was his present occupation. Defence counsel had wished to bring out that he was in the custody of Federal authorities. The Supreme Court ruled in an opinion delivered by Stone J. that it was wrong to 'cut off in limine all inquiry on a subject with respect to which the defence was entitled to a reasonable cross-examination'. It was said that cross-examination is a matter of right and that its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighbourhood; that the jury may interpret his testimony in the light reflected upon it by knowledge of his

environment; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. The opinion stressed that cross-examination may be exploratory: 'to say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial'.

The opinion did recognise that the trial court had a discretion as to the extent of cross-examination with respect to an appropriate subject of inquiry. The Judge could exercise a reasonable judgment in determining when the subject was exhausted; in a proper case the witness could invoke his constitutional protection from self incrimination (in effect the New Zealand position also); and there was 'a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him'.

The other Supreme Court case is more directly in point, Smith v. Illinois 390 U.S. 129 (1968). At a narcotics trial the principal prosecution witness, an informer who said that he had purchased heroin from the accused in a restaurant with marked money provided by police officers, gave a name which in cross-examination he admitted not to be his true one. His evidence was not corroborated as to the crucial

events inside the restaurant, and the accused gave evidence in conflict with it. The trial Judge sustained the prosecutor's objections to questions in cross-examination as to the correct name and address of the witness. The accused and his lawyers knew the witness but there was no evidence that they knew his correct name or current address.

The Supreme Court set aside the conviction, Harlan J. dissenting on the ground that the defendant may well have already have had the information, so that there was serious doubt about whether he had been prejudiced. There were two majority opinions. One delivered on behalf of eight members of the court by Stewart J. quoted extensively from Alford and was content with the simple approach that when the credibility of a witness is in issue the very starting point in exposing falsehood and bringing out the truth must to be ask him who he is and where he lives. 'The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself'.

In a separate opinion White J., with whom Marshall J. joined, added:

In Alford v. United States ... the Court recognized that questions which tend merely to harass, annoy, or humiliate a witness may go beyond the bounds of proper cross-examination. I would place in the same category those inquiries which tend to endanger the personal

safety of the witness. But in these situations, if the question asked is one that is normally permissible, the State or the witness should at the very least come forward with some showing of why the witness must be excused from answering the question. The trial judge can then ascertain the interest of the defendant in the answer and exercise an informal [semble, informed] discretion in making his ruling. Here the State gave no reasons justifying the refusal to answer a quite usual and proper question. For this reason I join the Court's judgment and its opinion which, as I understand it, is not inconsistent with these views. I should note in addition that although petitioner and his attorney may have known the witness in the past, it is not at all clear that either of them had ever known the witness' real name or knew where he lived at the time of the trial.

In a footnote to his opinion White J. pointed out that the state evidentiary informer privilege is not involved when the informer is himself a witness at the trial. I have already noted this when referring to the difficulty in using the informer cases as an analogy.

The helpful American cases cited to us in argument ended at that point. It transpires, however, that there are more recent and pertinent lines of American authority, although not in the Supreme Court itself. The decisions diverge, so bringing out the dilemma that the subject inevitably creates. As the reports are not readily available in New Zealand it is desirable to give a summary of the cases that I have found. I do not suggest that the search has been

exhaustive. It is convenient to put the decisions into two broad categories, according to whether they tend to emphasise or to restrict the possibility of limiting cross-examination.

In the first category United States v. Varelli 407 F.2d 735 (1969) was in the United States Court of Appeals, Seventh Circuit. It concerned conspiracies to hijack trucks carrying silver and valuable goods. The Court held that the trial Judge had not erred in failing to require witnesses to testify on cross-examination to their present addresses, although the prior addresses should have been disclosed. The relevance of the decision is that it recognised that where the government has shown that the safety of a witness was in jeopardy the burden may shift to the defence to show the materiality of the request. It was said that there was no absolute right to the exact address of a witness where his safety was in doubt. The evidence of danger should be presented to the Judge in camera, not to the jury.

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United States v. Saletko 452 F.2d 193 (1971) arose out of a retrial in the same case, the Supreme Court having reversed the first conviction, apparently on grounds not now material. On this occasion it was held that a witness who was in danger could not be compelled to disclose his previous address or his present employment. His identity was known to the defence, however, and his 'sordid background was disclosed to the jury in substantial detail'. The Court thought that whatever prejudice to the defendant

resulted from the limitations imposed by the trial Judge was outweighed by the necessity of protecting the witness.

Those cases were concerned with addresses. In two other cases the protective jurisdiction has been taken further and the withholding of names permitted. United States v. Ellis 468 F.2d 638 (1972) was in the United States Court of Appeals, Ninth Circuit. The defendant had allegedly sold marijuana to an undercover agent in the presence of concealed police officers. The Court distinguished Smith v. Illinois on the ground that there the State had given no reasons which might have justified refusal to disclose the agent's name and address. In Ellis the position was otherwise:

... we conclude, in view of the marginal significance of the witness's testimony in this case, that no prejudice to the defendant can be shown. The government was fully prepared to go forward with the proper detailed showing of the personal danger to the witness. The incriminating transaction was observed by police officers, and the relevance of the personal history of the undercover agent was questionable.

United States v. Crovedi 467 F.2d 1032 (1972), in the Seventh Circuit, presents a variation in that accomplices who gave evidence in a trial concerning theft of interstate freight (connected with the conspiracies already mentioned) had moved their families and were living with their families under assumed names. Two other participants in the hijacking had met violent deaths. A refusal to require the

witnesses to give their present names, addresses and employment was upheld. The relevance of this appears to me to be that such information could be just as material in checking on matters going to credibility as the true names of the witnesses or the names by which they were formerly known. The Court said:

We find no abuse of discretion in a determination that these witnesses had reason to fear that disclosure of their present identities would endanger themselves and their families. Many facts, very probably the most significant in raising questions concerning their credibility, were fully explored in cross-examination.

Defendants seem to argue that the general rule of Alford and Smith v. Illinois entitling a defendant to ask a government witness where he lives is an unvarying absolute, not subject to any discretionary exception where the personal safety of the witness would be endangered.

This circuit has concluded that there is such an exception for the reasons explained in a decision involving the same Polaroid shipment, a superseding indictment after Varelli, and the witness Schang. Other decisions of this and other circuits to the same effect are there cited.

Defendants' argument that Shaw v. Illinois amounts to a holding by the Supreme Court that the exception does not exist is not persuasive. In Shaw the Supreme Court vacated the judgment and remanded a case in which a state appellate court had upheld withholding of a witness' address 'to protect her from a possible reprisal'. On remand, the state court decided the other way, but noted that in fact the record contained 'no evidence of danger to the witness'. Shaw is consistent

with the proposition that an exception may be made when there is proper support.

Four cases more in the other category may now be summarised. United States v. Palermo 410 F.2d 468 (1969), Seventh Circuit, an extortion case, contains statements that the Court agrees with White J. that where there is a threat to the life of the witness, the right of the defendant to have the witness' true name, address and place of employment is not absolute. An actual threat being shown, the government must also disclose to the Judge in camera the relevant information. 'Under almost all circumstances, the true name of the witness must be disclosed.' As to addresses and places of employment the Court evidently regarded the Judge as having a somewhat freer hand. The case was remanded to enable relevant information to be disclosed to him so that he could make an informed decision.

The conflict of principles is illustrated in a sharp form by The People v. Brandow App., 90 Cal.Rptr. 891 (1970). The defendant had been convicted of pandering, on the testimony of an ex-prostitute working for the police under an assumed name. A number of persons had been indicted as a result of her activities; she had been attacked at least twice and the trial court, after hearing evidence in the absence of the jury about threats to her safety, sustained an objection to questions as to her true name, the name of her home town, the name of a doctor who had performed recent surgery upon



her, the address of her grandmother. The appeal judgment states, after citing White J. in Smith v. Illinois:

This rationale was followed by the 7th Circuit ... in which the court observed that the decision to disclose a witness' address or place of employment cannot be made in a vacuum and where a showing is made of actual rather than conjectural threat to the witness' safety the trial court may, in its sound discretion, foreclose the inquiry. ...

There were only two principal witnesses to the events upon which the charges against the defendant in this case rested: Michelle DuPree and the defendant, himself. The defendant testified, in refutation of the statements made by the prosecuting witness, that he became acquainted with her in June 1968, and that it was his intention to marry her. He explains in this manner the substance of the tape recorded conversations in which the voices of the two parties were identifiable. Impeachment might be of limited value with respect to these conversations were the statements made by the defendant thereon clearly and independently incriminating. To the contrary, the contents of the tape recorded conversations are vague and subject to various interpretations. Under the circumstances, the credibility of the two opposing witnesses constitutes the fulcrum upon which the determination of the defendant's guilt or innocence must be balanced. We conclude that the identity of the witness was an essential element in the protection of the defendant's right to a fair trial.

The conviction was reversed.

Alford v. Superior Court for County of Alameda App., 105 Cal.Reptr 713 (1972) shows a similar approach to evidence at

a preliminary hearing. It was held that the accused should have been permitted to cross-examine the informant, who allegedly made the first purchase of narcotics from the accused and was the only person to testify concerning that transaction, as to the informant's true identity and address. The decision was a straightforward application of the earlier Alford case in the Supreme Court. It includes the dictum '... on balance the threat of a deprivation to a defendant of his right to a fair trial outweighs a threat to an informer'.

Finally I note Hassberger v. State Fla. App., 321 So.2d 577 (1975), a Florida case in which the trial court concluded after an in camera hearing that personal danger to the witness did exist and that other state investigations would suffer if his identity was revealed. This was overruled, the main appeal judgment containing a particularly vigorous assertion of the defendant's constitutional rights. The judgment reviews a considerable number of authorities, including some which I have already covered, and says forthrightly about United States v. Ellis, 'This reasoning is faulty. If a witness' testimony is only marginal ... the state has no reason at all to abridge a defendant's Sixth Amendment rights'.

#### Added Considerations

The American and the Danish cases are valuable because they illuminate and crystallise the issues. Some other considerations should be expressly added.

(i) Undercover police officers have been trained to deceive. Such an officer is not successful unless he is expert in deception. He has 'lived a lie'. Hence in general it would be unrealistic not to acknowledge a definite danger of false evidence, arguably greater than with complainants in cases involving sexual violation. For the latter the New Zealand Parliament has enacted, in s.23AA of the Evidence Act 1908 inserted by the Evidence Amendment Act (No.2) 1985, a protection that no question shall be put to a witness relating to the name, address, or occupation of the complainant except by leave of the Judge. The application is to be made and dealt with in chambers where practicable and the Judge is not to grant leave unless satisfied that the evidence to be given or the question to be put is of such direct relevance to facts in issue that to exclude it would be contrary to the interests of justice. These provisions are said to have given rise to some practical difficulties in relation to the complainant's own evidence, although no case calling for consideration of the matter has reached this Court. They do suggest, however, a contemporary community sense that a prying cross-examination should not necessarily be a matter of right.

(ii) As regards sexual violation cases, complementary to the new evidential legislation are provisions about the preliminary hearings. They are in Part VA of the Summary Proceedings Act 1957, inserted by the Summary Proceedings Amendment Act (No.4) 1985. They include a requirement that

every Court conducting a preliminary hearing in such a case shall be presided over by a District Court Judge. At present a preliminary hearing of a drug-dealing case can be presided over also by two or more Justices, under the general provisions of the Summary Proceedings Act, s.5. If difficult rulings relating to the disclosure or the withholding of an undercover officer's name are likely to be required, it will be preferable for a trained Judge to preside at the preliminary hearing. Legislation is not necessary to enable this as a matter of practice but would be necessary if the practice were to be made always obligatory.

(iii) There is a no less real danger that cross-examining counsel, in the interests of their defendant clients, will be ready to seek the true identity of undercover officers simply to discourage the prosecution from calling evidence and not with any expectation of securing damaging information. In my opinion it would be wrong for us in this Court to gloss over that danger or to throw up our hands and say that the task of doing anything about it is beyond us. If we do nothing, we may well compound the risk. In the absence of any judicial limitation of the right to elicit the name, some counsel might think it prudent, in order to avoid any suggestion of failure in their duty to their clients, to demand it as a matter of course.

(iv) The heavy penalties and very large sums at stake in major drug-dealing transactions can undoubtedly result in grave risks to undercover officers and their families if identity is disclosed. Presumably the risks are greater as regards class A drugs (heroin and others) but even in the present case, which concerns cannabis, there happens to be evidence in the written statements that the defendant told the undercover officers that there was a man in a forestry camp who told the bosses who was growing dope and who was selling it: that they did not want him killed 'but a good hiding and broken legs would be sweet'.

(v) New Zealand juries are alive to the drug menace and naturally tend to be antagonistic or unsympathetic to drug dealers. Convictions are obtained, on sufficient evidence, probably more readily than on charges of many other crimes. So it can be said that legitimate protection for the accused is of special importance.

(vi) Hard-drug dealing is regarded by Parliament and the Courts as such a grave danger that special statutory provisions for its detection, by listening devices, have been enacted in the Misuse of Drugs Amendment Act 1978. The legislation has been successful in enabling proof of many serious crimes and, as far as I am aware, no case of injustice has resulted. More recently special provisions have been made about the detention and internal examination of persons, by the Misuse of Drugs Amendment Act 1985. So

experience has shown that a special kind of crime may require a special kind of measure. While the Courts must never abandon concern for the protection of the accused against the State, it should not blind us to all other considerations and developments in society. A reasonable balance has to be kept. But the Solicitor-General did not limit his submissions to drug cases, and drug-dealing breeds other crime.

(vii) The special measures just mentioned are necessarily highly detailed and specific. They are of a kind which can only appropriately be made by legislation. Similarly, if some radically new procedure were to be contemplated for cases where undercover officers testify, legislation would be necessary. Without legislation this Court could go no further than stating a broad principle for the exercise of judicial control over the trial and the preliminary proceedings. It is very doubtful, however, whether the undercover officer problem lends itself to anything other than a broad principle approach. Even the new s.23AA of the Evidence Act, referred to above, is quite broad in its wording and leaves a good deal to the discretion of the Judge. In this situation and bearing in mind that the whole issue concerns the procedure of the courts, as to the necessities of which the Judges may reasonably be expected to have competence, it seems to me that we should try to evolve a broad principle.

Striking a Balance

Endeavouring to weigh the various considerations and authorities that I have discussed, I reach the following conclusions.

The ordinary form of oath used in the courts does not require the witness to state his name, but the statutory form of affirmation does (Oaths and Declarations Act 1957, s.4). It is customary for a witness beginning his evidence to state his name and his address, the latter quite often in general terms only. The court must be entitled to insist on the true name and particulars of the address whenever it thinks either desirable. But, provided that the undercover officer makes it clear that the name he is giving is merely the one by which he was known during his undercover activities, so that no perjury is involved, I do not think that the court need compel him to give his true name unless and until it is made to appear that the interests of justice so require. In other words I see nothing fundamentally wrong with the practice that has grown up in New Zealand in these cases, at least to the extent of allowing the use of the undercover name in evidence-in-chief.

Patently we could not lay down a rule that in no circumstances would an undercover officer be obliged to disclose his true name in cross-examination. To go so far would be out of the question, even if limited to cases concerning hard drugs. For there could be occasions when

disclosure would be vital to the defence. To take hypothetical examples, there might be a sharp conflict of evidence and the defence might be able to show that under his true name he had a conviction for perjury in another country or that he was associated with a rival drug ring. Whatever may be thought about sexual violation cases, in drug-dealing cases it could be most unjust to deny the right to cross-examine effectively as to credit. The Solicitor-General reminded us that the prosecution has an obligation to advise the defence of information which will assist it. That does not dispose of the difficulty, if only because counsel prosecuting for the Crown may not be aware of the material facts.

In my opinion some degree of protection can still be given to the undercover officers. The court has the responsibility of ensuring that cross-examination is not merely harassing or vexatious. In the event of an objection by the prosecution the matter should be explored in chambers and, if evidence is needed to decide the objection, at a hearing on the voir dire. This may occur during the preliminary hearing, but if it occurs during the trial the objection will be dealt with in the absence of the jury, as is customary. It must be remembered that the right of the accused to give evidence at the voir dire without affecting his right to remain silent at the substantive trial is absolute: R. v. Brophy [1982] A.C. 476, 483.



For present purposes it would not be useful to go into the question whether, in New Zealand, if the accused elects to give evidence at both the voir dire and the trial he may be cross-examined at the trial (subject to the Judge's discretion to prevent unfairness) as to whether he made different statements at the voir dire. The question was among those considered in Wong Kam-ming v. The Queen [1980] A.C. 247. If such cross-examination is permissible in New Zealand in some circumstances, as to which no opinion is now called for, that would not in my view create any injustice to accused persons outweighing the need to give reasonable protection to the undercover officers.

On an objection in the present class of case the defence should have to satisfy the Judge of no more than that the truth of the evidence of the undercover officer on a material matter of fact is genuinely in issue on substantial grounds; and that there accordingly arises a serious question as to the officer's credibility upon which it might be helpful to the defence to have his true name. To show this it should not be enough merely to say that the officer's account is not admitted or is denied. An alternative account would have to be before the court. While occasionally that might be sufficiently shown in some other way, often no doubt it would entail the giving of evidence by the accused or other witnesses for him on the voir dire. I do not think that the Judge would be bound to accept a mere claim by counsel that credibility is in issue

or that the accused has some different version. But it is important to emphasise that the Judge's function would not be to determine the truth. It would be limited to deciding whether there was some substantial ground for questioning the officer's credibility. Or, putting the test in another way: whether, if the accused's account were in evidence before the jury, it would be capable of raising a reasonable doubt as to the veracity of the officer. As always, if he gave evidence on the voir dire, the accused would of course be subject to cross-examination thereon before the Judge and a transparently fabricated story would not be enough. But I repeat that by giving evidence and thereby laying himself open to cross-examination before the Judge the accused would not in any way prejudice his right not to give evidence before the jury. If he gave no evidence before them, they would know nothing of what took place on the voir dire.

Further than that I do not think that we can go at this present stage. I am driven to think that, once the Judge is satisfied that there is a real dispute on the facts and that in that connection the credibility of the officer is seriously contested on substantial grounds, he must allow the defence reasonable latitude in exploring matters bearing on general credibility, including the true name, despite any danger to the officer or his family that might flow from revelation. It is with some reluctance that I reach this conclusion, but I cannot satisfactorily answer the point that threats to and discouragement of witnesses should not be

allowed to override the right of the accused to a fair trial. The choice between values made in such cases as the Californian one of People v. Brandow seems almost inevitable.

The approach that I have outlined does mean, however, that disclosure of the names of undercover officers would be far from automatic. It should operate as a check on attempts to elicit names merely for tactical purposes. It would not cast any unreasonable burden on the defence. While having sympathy for the position of the police administration and the undercover officers, I do not think that we could properly or practicably go further to help them by way of rules covering the generality of cases.

But two qualifications can be added. First, the inherent jurisdiction which exists to ensure justice is only resorted to for the strongest reasons. Nevertheless it is a flexible jurisdiction; and I would reserve the possibility that some wholly exceptional case might arise where, even though credibility was truly in issue, a trial Judge might be justified in allowing an officer to withhold his true name. I say that by way of precaution. It must be stressed that if there can ever be such a case, it must be altogether out of the ordinary.

Secondly, one advantage of tackling the whole problem by the judicial evolution of practice rather than by detailed legislation is that the practice can be more easily adapted

in the light of experience. The passage earlier cited from Viscount Haldane's speech in Scott v. Scott, emphasising the fundamental purpose and approach in the use of the inherent jurisdiction, is always to be kept in mind. It would not be surprising if the voir dire practice which I have proposed gave rise to some lessons, or even some difficulties. These the courts could meet or take advantage of as they arose.

#### Disposal of the Present Case

Applied to this case stated, the views that I favour would result in negative answers to both questions. As already explained, counsel for the accused conceded that the second question must be answered No. I would give the same answer to the first question, because counsel for the defence was apparently not asked whether he contended that the question was relevant or, if so, why. Consequently no inquiry took place into whether, having regard to the issues in the particular case, counsel would be justified in putting to the undercover officer questions about his true identity. So the ruling that he had a right to answers to such questions was in my view premature.

In saying that I am not in the slightest criticising the District Court Judge. He said that he found it hard to bring to mind situations in which the disclosure in court of the officer's correct name would have any effect at all upon the accused, or upon his defence, at that particular stage. But he went on to caution himself that there may be such

circumstances, however rare. In effect he ruled, following the High Court decision in Fantham, that the defence had an absolute right to elicit the name. He acted properly in giving that ruling, since it was his duty to follow the High Court decision. Nor could there be any criticism of the High Court Judges who decided Barnard v. Williams and Fantham. It was reasonable to be cautious in the absence of direct authority. On the view of the law which I have indicated it would now become the responsibility of this Court to set the matter right by directing a new trial.

On the new trial the position on my view of the law would be this. If the undercover officer gives or the Crown wishes that he should give evidence-in-chief under the name only of Christopher Williams and counsel for the accused applies for leave to cross-examine as to his true identity, the Judge will be able at an early stage to conduct a voir dire hearing at which the accused will have the opportunity of giving evidence. This is not a case which will necessarily reach that stage or in which if that stage is reached the cross-examination will necessarily be allowed. Counsel for the accused was perfectly frank and consistent throughout his argument. In reply to a question he indicated that he had taken the identity point in the District Court simply so as to obtain a ruling on principle from this Court. It may be, therefore, that in this particular case there are no sufficient grounds for exploring identity; but we are not at present in a position to decide that matter.

Summary

In brief my views are as follows:

1. Both at a preliminary hearing and at a trial the Judge has a responsibility to ensure that cross-examination is relevant and not merely harassing or vexatious.
2. Applied to undercover officers, this means that, if the prosecution objects, the Judge should not require the officer to state his true name under cross-examination unless the Judge is satisfied that the name is relevant. For this purpose he may conduct a hearing in chambers, hearing evidence on the voir dire as far as necessary.
3. If the defence claims that the name is relevant as enabling credibility to be checked, the defence should satisfy the Judge that there is a materially different version of the facts which, if it were before the jury, could raise a reasonable doubt in favour of the accused.
4. The Judge is not bound to accept a mere statement by counsel. Some evidence from or on behalf of the accused may be necessary; this is a matter for the Judge to rule on, as part of his control of the proceedings. Any such evidence may be given on the voir dire without affecting the accused's right to silence at the trial.
5. If satisfied that there is a substantial conflict as to material facts, so that the credibility of the officer is

relevant, the Judge should normally require the question to be answered. I reserve my opinion on whether there could ever arise a case so exceptional that the normal rule just mentioned need not apply. None has so far arisen in New Zealand.

6. If satisfied that there is no substantial conflict as to material facts, the Judge may allow the officer not to answer the question.

7. The whole matter can be summed up in a broad principle. The undercover officer should not be compelled to state his true name unless the presiding Judge is satisfied that it is of such direct or indirect relevance to facts in issue that to withhold it would be contrary to the interests of justice.

The broad principle could be expressed in other ways. The precise language is less important than the concept. I have chosen the language in 7 above simply because it is somewhat similar to and may be compared with that of the 1985 Evidence Amendment Act previously mentioned; that Act is more restrictive of defence rights. Points 1 to 6 above are really no more than a working out of the main consequences of the broad principle.

The formal answers to the questions in the case stated are not informative without reference to the reasons given by each member of the Court for his conclusions. In accordance with the opinion of the majority question 1 is answered Yes and unanimously question 2 is answered No. The Court is also unanimous in setting aside the acquittal and directing a new trial.

*R. B. Cooke P.*

Solicitors:

Crown Law Office, Wellington, for Crown

D.H. Quilliam, Napier, for Accused



IN THE MATTER

of an appeal by way of  
case stated pursuant to  
Section 380 of the  
Crimes Act 1961

THE QUEEN

v

ROSS ANTHONY HUGHES

Coram: Cooke J  
Richardson J  
McMullin J  
Somers J  
Casey J

Hearing: 4 February 1986

Counsel: D P Neazor, Q.C. and G A Rea for Crown  
D H Quilliam for Respondent

Judgment: 19 June 1986

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JUDGMENT OF RICHARDSON J

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The name by which a person is customarily known is commonly and conveniently referred to as his reputed name or more loosely as his true name. Generally speaking our law allows any person to assume and use another name for a particular purpose in place of or in addition to that name. Actors use stage names. Commercial men may elect to enter into particular business

transactions under other names. Some persons adopt a name which identifies them culturally with others in the community in which they wish to move, while retaining their original name for official purposes. On marriage a woman may adopt her husband's surname for some purposes but continue to use her maiden name for other purposes. And undercover police absorbing themselves in their new milieu adopt a new name for that purpose in order to reduce the risk of exposure.

This appeal raises 2 distinct but linked questions of importance in the administration of criminal justice relating to the use of names. The first is whether counsel is entitled to put to a Crown witness questions as to his or her true identity. Following what has been a common practice, particularly in undercover drug operations, the Crown contemplated that the undercover constable would state at the beginning of his evidence that he was a police officer stationed at Police National Headquarters and that during his deployment on the particular undercover duties he used the cover name "Christopher Williams"; and that he would thereafter be referred to during the trial solely by that cover name. The second is whether defence counsel is entitled to ask any other witnesses about the true identity of the undercover officer.

Because of the nature and gravity of certain classes of offending and the associated difficulties of detection and proof it is often necessary to rely on informers and to engage police officers in undercover operations. A prime example in today's

society concerns the illegal trafficking in drugs and in many instances the use of informers and undercover personnel may be the only recourse available to secure the effective enforcement of the misuse of drugs legislation. Where the informer, whether a layman or a police officer, does not give evidence the well settled rule of law grounded in public policy is that no one else giving evidence will be required to reveal the identity of the informer unless the disclosure could help to show that the accused was innocent of the offence. For a contemporary statement of the rule and its rationale it is sufficient to refer to a passage in the speech of Lord Diplock in D v National Society for the Prevention of Cruelty to Children [1978] AC 171, 218:

" The rationale of the rule as it applies to police informers is plain. If their identity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So the public interest in preserving the anonymity of police informers had to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue upon which it is required to adjudicate should [not] be withheld from that tribunal. By the uniform practice of the judges which by the time of Marks v Beyfus (1890) 25 QBD 494 had already hardened into a rule of law, the balance has fallen upon the side of non-disclosure except where upon the trial of a defendant for a criminal offence disclosure of the identity of the informer could help to show that the defendant was innocent of the offence. In that case, and in that case only, the balance falls upon the side of disclosure. "

Both the rule itself and the qualification applying to criminal trials were recognised in this Court in Tipene v Apperley [1978]

1 NZLR 761 and recent decisions to the same effect in other comparable jurisdictions include Bisaillon v Keable (1983) 7 CCC (3d) 385; Signorotto v Nicholson [1982] VR 413; and Smith v Illinois (1968) 390 US 129.

The information conveyed to the authorities by the informer does not become evidence in the trial unless the informer gives evidence. His immediate credibility is not a factor unless he himself is a witness. Nevertheless there may be cases where the identification of the informer may have a bearing on the issues at the trial. Thus he may have been the only witness to part of the events other than the accused, or he may be the only person other than the accused in a position to contradict or add to the testimony of prosecution witnesses. Without his identification, which may lead to his being required to give evidence, the accused may be stymied in making a fair defence. Disclosure or refusal of disclosure of the informer's identity must turn on the circumstances of the particular case and the materiality of the informer's possible testimony must be determined by reference to the offence charged, the evidence which the prosecution proposes to adduce, the possible defences, and the possible significance of the informer's testimony. Where disclosure of the informer's identity is required it is because the interests of justice require that the accused be entitled to the information in order to test the case against him or make his defence. To do less is to deprive the accused of a fair trial and risk the conviction of the innocent. But the Crown may resolve the dilemma it faces by foregoing the prosecution.

The first question posed raises quite different issues. Here it is the true identity of the witness that is sought. It may be his word against the accused's. His credibility may be a critical issue. Prima facie the true identity of the proposed witness must be material whenever the evidence he is to give may be challenged. The defence must be entitled to check on the undercover officer's background in order to decide whether there is anything in that background bearing on the undercover officer's credibility in general or affecting particular portions of his proposed testimony where checking may suggest that under his usual name he was engaged in some other activity at a critical time. His cover name will have applied only to his association with a limited number of persons for a limited time. The rest of his life stays a closed book if his true identity remains unknown to the Court and to the accused. As Stewart J graphically put it in Smith v Illinois p 131:

" When the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself. "

Clearly the accused cannot be assured of a true and full defence to the charge unless he is supplied with sufficient information about his accuser in order to decide on investigation whether his credibility should be challenged.

In principle then information as to the identity ordinarily assumed by a prosecution witness is relevant to any issues of credibility and so is prima facie material to the defence of a criminal charge. However, it is only recently that New Zealand judges have been asked to rule on the point. It seems that the New Zealand Police practice of non-disclosure of the identity of police officers previously engaged in undercover work has hardened in relatively recent years, no doubt as the perceived risks of retaliation to officers and their families have heightened as the Police have sought to respond to the increase in drug trafficking and its associated intimidation and violence. We were advised at the Bar that by way of a policy decision the Police have assured undercover officers that their anonymity will be preserved and that the Police are understandably concerned that the enforcement of the drug legislation will be impeded if it becomes more difficult to recruit officers for undercover work.

Against that background the Solicitor-General submitted that this Court should lay down a public interest rule that an undercover officer need not disclose his true name when giving evidence in a criminal trial unless the defence has established as a threshold requirement that disclosure could show that the accused was innocent - and it was added that it would be necessary in that regard to point to specific reasons for investigating matters of credibility. The Solicitor-General accepted that the adoption of such a rule would involve some detriment to the defence but contended that it was required in

the public interest. It was emphasised that the community can expect police officers to be of the highest integrity and that the obligation on the prosecution to advise the defence of information which will assist the defence, which he accepted would include any information to the discredit of the officer known to the prosecution, was a protection provided in the public interest.

I cannot agree with the submission. The real risk of prejudice to the defence and of conviction of the innocent would remain. A private assessment by the prosecution of the credibility of a police officer is no substitute in the interests of justice for a proper check of his background by the accused whose liberty is at stake and who stands to be condemned on the undercover officer's evidence if his credibility is unchallenged. No doubt in the vast majority of cases undercover officers will give correct and fair testimony and there will be nothing in their backgrounds to impeach their credibility. However, we would be shutting our eyes to reality if we did not recognise that that might not always be the case and that there must be a risk of injustice if the truth of identity is withheld from the defence, perhaps particularly so in the case of witnesses such as undercover officers who have necessarily led a Jekyll and Hyde life and who in their undercover work have had to lie convincingly and dissimulate. Unless and until the defence ascertains the officer's usual name his background cannot be adequately checked in order to see whether there is justification for attacking his credibility.

If an inroad of the kind suggested is to be made into the protection which accused persons have in this country to test and challenge the prosecution evidence, that step should be taken by Parliament. As recently as last year Parliament, in dealing specifically with the publication of names and particulars of witnesses likely to lead to their identification, appears to have proceeded on the premise that the true name of a witness is given (Criminal Justice Act 1985 ss 138-141, particularly ss 138(2)(b), 139(1) and 140(1)). And the responsibility of the Court is clear: as Lord Atkin said in Liversidge v Anderson [1941] AC 206, 244: "It has always been one of the pillars of freedom, one of the principles of liberty ... that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law." In my judgment there is no support either in legislation or in the common law for this Court to curtail basic civil liberties in this way and Parliament is far better placed than we are to assess the public interest considerations and ramifications of any proposed change.

We would be on a slippery slope as a society if on a supposed balancing of the interests of the State against those of the individual accused the courts were by judicial rule to allow limitations on the defence in raising matters properly relevant to an issue in the trial. Today the claim is that the name of the witness need not be given: tomorrow, and by the same logic, it will be that the risk of physical identification of the



witness must be eliminated in the interests of justice in the detection and prosecution of crime, either by allowing the witness to testify with anonymity, for example from behind a screen, in which case his demeanour could not be observed, or by removing the accused from the Court, or both. The right to confront an adverse witness is basic to any civilized notion of a fair trial. That must include the right for the defence to ascertain the true identity of an accuser where questions of credibility may be in issue. To seek information which is relevant in that sense cannot be regarded as vexatious or harassment. While a request for particulars of identity may be made at the trial itself it is perhaps more likely to have been made initially at depositions before Justices of the Peace or a District Court Judge or on an application before trial so as to allow appropriate inquiries to be made before trial. Subject to any specific legislation it is surely not the function of the Judge (or of the Justices) to erode those protections or to second guess counsel and decide following some kind of judicial inquiry whether an accused actually has what the Judge regards as sufficiently substantial grounds for seeking the true identity of a witness or that in a "rare" case a supposedly "minor" intrusion on the right to confront a semi-anonymous accuser is justified in the interests of the State - and exceptions in "rare" cases have a habit of becoming commonplace and one person's "minor" intrusion is another's illustration of State tyranny and the denial of individual freedoms. I cannot presently perceive any circumstances at common law under which a witness whose

credibility may be in issue depending on the results of inquiries should be allowed to hide his real name and in the result foreclose any inquiries of that kind. Nor do I think we have any warrant for saying that defence counsel cannot be trusted to exercise a proper sense of professional responsibility when asking for particulars of identity; and, of course, any counsel who acted improperly would be subject to traditional professional sanctions.

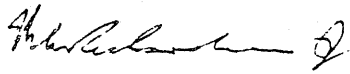
In appropriate cases some steps may properly be taken to reduce the risks to the safety of the undercover officer and his family. Where the Court is satisfied that it is proper to do so his true name may be written down and then handed to the Court, the accused, and his counsel, and in extreme cases where it is important to prevent his physical identification by outsiders the Court may be asked to sit in camera (Attorney-General v Leveller Magazine Limited [1979] AC 440; R v Socialist Worker Printers and Publishers Ltd, Ex parte Attorney-General [1975] QB 637; and Broadcasting Corporation of New Zealand v Attorney-General [1982] 1 NZLR 120). Certainly that is only a partial answer for disclosure of his true name is still made to the accused and that may give rise to the risk of the passing on of the information and of eventual retaliation by anyone so minded. While the presence of the witness at the trial allows for his subsequent physical identification - and the Solicitor-General has up to now disclaimed any suggestion that the witness could be masked to avoid that - the risk is obviously greater where the name is also available. It seems from what

the Solicitor-General said that in other Commonwealth jurisdictions undercover police are employed as informers, but ordinarily do not give evidence - perhaps for reasons of that kind. In any event if prosecuting authorities in this country regard it as imperative in the interests of justice to proceed with the particular trial and for that purpose to call the undercover officer as a witness the Crown may have to be prepared to provide the witness with a new identity and life after the trial is over, as at times has happened in some jurisdictions.

In the present case we must, I think, proceed on the basis that the defence wishes to have the information as to the undercover officer's true identity in order to consider challenging his credibility and that the decision by the prosecution not to call him as a witness following that ruling was made by the prosecution in terms of the assurance of anonymity, and not because of any specific threat to his safety. There was an incautious remark by Mr Quilliam which suggested that nothing might be expected to be gained from that information. But in any case where credibility may be in issue an absolute answer cannot be given unless and until that information is available and checked out. I prefer to approach the matter on the basis that the original claim must have been made with a proper sense of professional responsibility and I would not penalise this accused for an unconsidered remark made by counsel in the rush of argument. But Mr Quilliam frankly acknowledged that if the undercover officer did not give evidence counsel could not contend that the officer's name would have to

be disclosed by other prosecution witnesses - he accepted that it would not be relevant to any of the issues at the trial.

Question 2 should accordingly be answered in the negative. It is common ground too that without the evidence of the undercover officer there is a sufficient case to go to a jury and accordingly that there must be a new trial.



Solicitors:

Crown Law Office, Wellington  
D H Quilliam, Napier, for respondent

IN THE MATTER of an appeal by way  
of Case Stated pursuant  
to s.380 of the Crimes  
Act 1961

THE QUEEN

V

ROSS ANTHONY HUGHES

<u>Coram</u>	Cooke J Richardson J McMullin J Somers J Casey J
<u>Hearing</u>	4 February 1986
<u>Counsel</u>	D.P. Neazor QC and G.A. Rea for Crown D.H. Quilliam for respondent
<u>Judgment</u>	19 June 1986

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JUDGMENT OF McMULLIN J

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Some questions arising in the law of evidence are concerned with technical, but necessary, rules which are of little concern to anyone but the lawyers engaged in the case. Others raise matters of public importance and call for a balancing of the interests of the public against the interests of the individual. The questions raised on this appeal fall within the second class. The primary issue is

whether an undercover police officer should be obliged to reveal his true identity when called to give evidence on the trial of a person accused of a criminal offence. On the one hand, regard must be had to the interests of the State in the maintenance of law and order and the preservation of the health and wellbeing of its citizens; on the other, any person who is accused of a crime should be entitled to a disclosure of material matters in the case against him, including not only the content of the evidence but also the calibre of the witnesses who tender that evidence for it is upon the credibility of their testimony that the strength of the case may depend.

Undercover officers are now frequently used in the detection of drug offences. Such officers have long been used, albeit with much less frequency, to detect other offences, such as breaches of the Licensing Act and the Gaming Act 1908. And in other jurisdictions, such as the United States of America, they are used in the detection of a range of offences - arms, immigration, drugs and prostitution. Although some civil libertarians may think that their use is unfair, Courts in the United Kingdom and in New Zealand have come to recognise that the only way in which some types of crime, particularly organised crime, can be exposed is by having undercover agents infiltrate the suspected illegal activity itself. And they have refused to exclude the evidence of such agents on a claim that it is unfair or that it comes within, what is known in America as,

the doctrine of entrapment. R v. Capner [1975] 1 NZLR 411, Police v. Lavalley [1979] 1 NZLR 45, R v. Loughin [1982] 1 NZLR 236; R v. Katipa (CA.225/85, judgment 24 March 1986). But, as the judgment of the Court in R v. Katipa records:

New Zealand Courts accept that there is a distinction between the use of police agents who merely provide the opportunity to those so disposed to commit offences of a particular kind on the one hand, and the sort of active encouragement that may result in a crime being committed by the offender that otherwise would not have been committed, on the other.

In the past 25 years there has been an enormous growth in the number of offences of drug-dealing which now represent about one fifth of all criminal charges before the High Court. This growth has resulted in a number of legislative measures. In 1965 the Narcotics Act was passed. It consolidated the Dangerous Drugs Act 1927 and its amendments, and greatly widened the scope of the legislation against drugs. Then in 1975 the Narcotics Act was repealed by the Misuse of Drugs Act 1975. The latter enactment was itself amended by the Misuse of Drugs Act 1978 in several ways, the most significant of which permitted the use of listening devices under strict conditions. This Court dealt with this legislation in R v. Menzies [1982] 1 NZLR 40. Since the passing of the Misuse of Drugs Act 1975 the use of undercover officers has been common and, so far as I am aware, with the exception of the cases of Barnard v. Williams (A.1051/54, Auckland Registry, judgment 31 October 1984) and Reg v. Fantham (T.106/84, Hamilton Registry, ruling 2 December 1985),

undercover officers have given evidence in drug cases under their operational names without being called upon to reveal their true identities. However, since these two cases were decided it has become the practice for defence counsel to seek an order that any undercover officer giving evidence reveal his true identity. It appears that in the present case counsel for the respondent was moved to seek discovery of the identity of the undercover constable involved solely because of what had been decided in Barnard and Fantham. Indeed Mr Quilliam, as one would expect of him, was frank enough to say that he expected nothing to come out of that enquiry.

The Solicitor General is concerned that, if undercover officers are compelled to reveal their true identities, the detection of some classes of crime will become impossible. He submitted that in the detection of all criminal activity, drug or otherwise, which might be described as professional, undercover officers whose identities become known will face the risk of retribution to themselves and to their families after the operation has ended, and they have given evidence; that there is a distinct possibility that police officers will not make themselves available for undercover work if they have to face that risk; and that to require them to reveal their identities will be contrary to undertakings given to them on recruitment that their anonymity will be preserved.



While there is no direct evidence in the present case of actual threats of violence being made to the undercover officers involved, no Judge who has presided in the High Court over trials of persons for drug offences can be under any illusion that the nature of the work they undertake places undercover officers under very real risks to their safety. In assuming this role they are obliged to adopt the lifestyle of those, even known criminals, whose offences they hope to detect; they must move in the world of crime and associate with the confederates of their suspects; and they take the risk that, if their identity becomes known while the surveillance operation is under way, their own safety may be then and there imperilled. The Solicitor General has urged that if, even after the surveillance has ceased, the undercover officers have to disclose their true identity in evidence the risk to them will be increased and that few, if any, officers will be willing to engage in undercover work; that the sources of information presently available to the police will no longer be available; and that fewer offences will be detected. So he argued for a ruling that undercover officers should not have to reveal their true identities in giving evidence. I think that the appearance of an undercover officer in the witness box, without the revelation of his true name, may in itself supply a sufficient measure of identification to expose the officer to the risk of harm. But I have no difficulty in accepting that the risk may be greatly increased if the witness is identified by name and, for the reasons given by-

the Solicitor General, I accept that there is a strong measure of public interest in protecting the anonymity of undercover officers in that offences under the Misuse of Drugs Act and other statutes are more likely to be detected and offenders brought to justice if the anonymity of these officers is preserved.

In contending for anonymity the Solicitor General sought to draw an analogy between police informers and undercover constables. The Courts have long since protected the anonymity of persons who give information to the police. A witness is entitled to refuse to disclose the names of persons from whom he has received information and the nature of the information received unless the Judge is of the opinion that the disclosure of the name of the informant, or of the nature of the information, is necessary or desirable to show the innocence of the accused person. The reason is plain. If their identity were to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. Marks v. Beyfus 25 QBD 494; D v. The National Society for the Prevention of Cruelty to Children [1978] AC 171, 218. But I am unable to accept the suggested analogy because, while the Courts have long accepted that public policy requires that the police should not be required to disclose their sources of information, there is an important difference between informers and undercover officers. The former are never called as witnesses and the

case is established without their evidence. The latter are called as witnesses upon whose evidence proof of the case rests. So they become liable to cross examination as does any other witness in the case.

So far, I have covered the argument for the preservation of anonymity. I refer now to the argument against it. An accused should be entitled to be confronted by his accusers, to know who they are, and what they say about him. He should be entitled to know, not merely what a witness says about him but how reliable that witness is. Knowledge of the true name of a witness may enable an accused to throw doubts on or undermine the value of his testimony. There are those cases where knowledge by the Court of a witness's antecedents may be the making or breaking of the prosecution's case. R v. Knightsbridge Crown Court and Another ex parte Goonatilleke (1981) 81 Cr App R 31 makes this point.

But while there will be those cases where the identification of a witness by his true name may be important to the defence, there will be others where it may be of no importance at all. The present case appears to be one of this last kind. If the Courts now say that every undercover officer must reveal his true name as a factor qualifying the admission of his testimony, it is likely that many counsel, instructed by their clients, will use it to keep that testimony out of court even though they have no real reason to challenge the veracity of the undercover officer's testimony or impugn his

credibility. And in this way prosecutions which are rightly brought may be brought to an end by the unmeritorious ploy of insisting that the officer shed his anonymity.

For these reasons I think that there is no justification for a rule that would make it incumbent for an undercover officer to reveal his true identity in all cases. In many cases there will be other evidence against the accused, perhaps a statement from him, written or oral, amounting to a confession of the crime or going some distance towards establishing the case for the prosecution. The case against the accused may even be so strong as to leave him no real ground of defence. In such an instance an insistence on the disclosure of the officer's identity can hardly be justified as a genuine enquiry into the credibility of the officer. Rather it may become a cynical device, unrelated to the ascertainment of the truth, to take the case away from the tribunal of fact and bring a speedy end to a meritorious prosecution. Acquittals obtained in such circumstances are likely to bring the administration of justice, and those associated with it, into disrepute.

For these reasons I would reject a rule of evidence expressed in categorical absolutes which would result either in undercover officers being required in every case to reveal their identities or not disclose them at all. Whether an officer should be required to reveal his true name must depend on what is in the public interest and that

can only be determined by a balancing of the interests of the State against the interests of the accused. A proper balancing of those interests requires a judicial process in which the trial Judge is called upon to decide from case to case whether the undercover officer should reveal his true identity. I think that his decision should be made upon the basis of the following principles:

1. There is no obligation on a witness to reveal his true name in his evidence in chief. He may long since have forsaken the name under which his birth is registered and acquired another. It will be a sufficient compliance with his oath or affirmation if, in the case of an undercover agent, he gives the name under which he has operated, provided he makes that clear.
2. Counsel for the accused is nonetheless entitled to ask the undercover officer to disclose his true identity in cross examination and as part of his obligation to tell the truth, the whole truth, and nothing but the truth the witness must do so unless excused by the Court. If then an undercover officer indicates that he does not wish to disclose his true name, and satisfies the Court that he has proper reasons for not doing so, (e.g. a justifiable fear for his safety), the trial Judge should ask counsel in the first place to state the grounds upon which he wishes the witness to disclose his true identity. If, as is the case here, counsel indicates that there are

really no grounds, then the witness should not be ordered to disclose his true name, because disclosure of the true identity of the witness will have no possible relevance to the guilt or innocence of the accused. But if counsel satisfies the Judge that the true name of the witness is relevant, e.g. to the credibility of his evidence, then the Judge should order the witness to disclose his true identity. But in advancing any grounds upon which the application for disclosure of the true name is based, counsel acts as an officer of the Court. Therefore it is not for him to raise unfounded claims that credibility is or may be in issue. The object of cross examination is to put in issue the veracity of the witness's testimony on some basis to which counsel can conscientiously subscribe.

3. In some cases the Judge may be satisfied by what counsel tells him that the witness should disclose his true name. But in many cases, perhaps most, it will be necessary for the Judge to hear evidence, necessarily in the absence of the jury, as though he were conducting a voir dire. If at the end of that evidence he is left in doubt as to whether the disclosure of the witness's identity is relevant the interests of the accused must prevail and the witness should be ordered to disclose his true identity.

4. In deciding whether or not to order the witness to

reveal his true name one of the matters to which the Judge should have regard is the weight of evidence against the accused other than the officer's evidence. There may be evidence which would render the revelation of the witness's true identity a matter of no real help to the accused (e.g. where there is strong evidence, possibly an incriminatory statement, sufficiently involving the accused).

5. When the Judge orders the undercover officer to reveal his identity, the witness should be asked to write his name on a piece of paper which can be shown to the Judge and counsel. Necessarily, the accused will be entitled to see it as he is a party to the case. But he will not be entitled to retain the piece of paper.

Thus I would leave the Judge with a discretion to be exercised in each case in the interests of justice, a phrase which, I emphasise, takes account of both the interests of the State and those of the accused.

The question now arises as to whether this Court should lay down the law in this area itself or whether it should leave it to Parliament to legislate. While fully recognising that there are some matters on which Parliament is far better placed to legislate in areas of public interest rather than leave the Courts to change, modify or declare the law, this is, I believe, not one of them. It does not involve questions

of social, economic or financial policy on which Parliament may be better suited to determine the law. The law of evidence is largely the development of case law. The Courts have had to evolve that law in many areas to balance competing interests. Many well-known rules of evidence are the result of judicial legislation. The law as to the admission of voluntary statements; the rule (now repealed) as to the need for direction on corroboration in sexual cases are instances.

Reference may usefully be made to three important areas where the law of evidence has been settled by the Courts after a consideration of the conflicting interests involved. The first area concerns the disclosure by the police of their sources of information in criminal cases, a matter to which reference has already been made. The law on this point is stated in the following passage from the judgment of Lord Diplock in D v. N.S.P.C.C.:

If their identity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So the public interest in preserving the anonymity of police informers had to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue upon which it is required to adjudicate should be withheld from that tribunal. By the uniform practice of the judges which by the time of Marks v. Beyfus 25 QBD 494 had already hardened into a rule of law, the balance has fallen upon the side of non-disclosure except where upon the trial of a defendant for a criminal offence disclosure of the identity of the informer could help to show that the defendant was innocent of the offence. In that case, and in that case only, the balance falls upon the side of disclosure. (218)



The second area concerns the disclosure by editors or journalists of their sources of information. The rule relevant to this branch of the law may now be taken to be settled by Attorney General v. Clough [1963] 1 QB 773; Attorney General v. Mulholland [1963] 2 QB 477 as rejecting any claim for privilege protecting the sources of information, subject only to the qualification added by Lord Denning in the last case at 489:

A judge is the person entrusted, on behalf of the community, to weigh these conflicting interests - to weigh on the one hand the respect due to confidence in the profession and on the other hand the ultimate interest of the community in justice being done .... If the judge determines that the journalist must answer, then no privilege will avail him to refuse.

The third area concerns public interest immunity, or Crown privilege as it was once called, relating to the discovery by the Crown of documents in civil cases. In this area the Courts have evolved the principle that Crown documents may be withheld from discovery only if, and to the extent that, the public interest renders this necessary. A judge conducting that particular balancing exercise needs to know -

... whether the documents in question are of much or little weight in the litigation, whether their absence will result in a complete or partial denial of justice to one or other of the parties or perhaps to both, and what is the importance of the particular litigation to the parties and the public. All these are matters which should be considered if the Court is to decide where the public interest lies.

- per Lord Pearce in Conway v. Rimmer [1968] AC 910, 987.

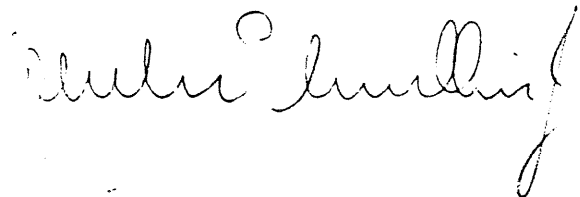
Sir James Fitzjames Stephen, noted for his Digest on the Law

of Evidence, said that the judge-made law of evidence was "full of sagacity and practical experience". That is not to say that Parliament has no place in legislation on the law of evidence. Indeed in some cases judge-made rules of evidence have become so developed and entrenched that only Parliament can change them. See Evidence Amendment Act (No. 2) abrogating the corroboration rule; the "newspaper rule" now too well settled to be undone by judicial pronouncement - Hennessey v. Wright (No. 2) (1888) 24 QBD 445; Broadcasting Corporation v. AHI [1980] 1 NZLR 163; and DPP v. Ping Lin [1976] AC 574 where Lord Hailsham said that while the English law of confessions was not wholly rational, it was so well established that only Parliament could modify it.

But the issues which fall for determination in this case are not in that category. This is not an area where the law of evidence is too well settled to admit of the exercise of a discretion (Cf R v. Uljee [1982] 1 NZLR 561, 596). The American cases cited in the judgment of Cooke P show that the matter is still open in the United States where it has been the subject of many judgments. It is completely open here where this Court has not so far pronounced upon it. I hope that I shall not be thought to be arrogant when I express the view that this Court is in as good a position as Parliament to weigh the relevant considerations and that it ought now, at this stage, to take the responsibility of declaring what the law should be.

On the application of this reasoning I think that the first question must, in the circumstances of the case, be answered in the negative. The second question poses no real difficulty: the answer to it is determined by the settled principles of the law as to informers. I would also answer it in the negative. I would order a new trial.

I have read the judgments prepared by the other members of the Court. Because of the differing views expressed it may be necessary for Parliament itself to legislate upon the matter. While I have approached the consideration of this appeal in my own way, in the interests of certainty in the law it is desirable that I indicate that I am in broad agreement with the seven points made at the end of the judgment of Cooke P.



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IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 10/86

THE QUEEN

v.

ROSS ANTHONY HUGHES

Coram: Cooke J.  
Richardson J.  
McMullin J.  
Somers J.  
Casey J.

Hearing: 4 February 1986

Counsel: D.H. Quilliam for Appellant  
D.P. Neazor, Q.C., and G.A. Rea for Crown

Judgment: 19 June 1986

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JUDGMENT OF SOMERS J.

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The first question reserved for the opinion of this Court is whether the District Court Judge was correct in holding that counsel for the accused was entitled to put questions to the undercover police officer as to his true identity. This question implies that the witness might, immediately after being sworn, profess his name to be the pseudonym used in his undercover operation or some name other than his real name. So long as he is not false to his oath I think he may do this. Thus he may be able honestly to say 'I am known, or commonly known as X'. The real question is whether when asked his true name he must answer.

It can hardly be doubted that the general rule is that a witness must, when asked, give his true name and as well his address and occupation. There is more than one reason for this. First it is an important element in the open administration of justice. The public interest requires, and the law normally demands, that the whole of a trial is open to public scrutiny. Next, it is an aspect of the well understood right of an accused to be able to confront the witnesses against him. This right not only embraces the presence of the witness before the accused but also the right to know who he is, where he comes from, and what he does. This right is regarded as so important in the United States that it is guaranteed by the Sixth and Fourteenth Amendments to the constitution. Third, and this is both an aspect of, and a reason for, the right to confront witnesses, the true name and address of a witness is the starting point of any inquiry into his credibility, whether by the accused or the tribunal. This is illustrated by the rules about cross-examination of a witness. It is not confined to facts strictly relevant to the issue between the Crown and an accused person but may include matters that are relevant only to the credibility of the witness, such as his conduct on other occasions, his character, and his previous convictions. It cannot of course be predicated of a witness in advance of such enquiry that no material damaging to his credibility exists. If the true name and address of the witness cannot be obtained enquiry into the antecedents of the witness would be prevented and the right of cross examination as to credit would be

substantially emasculated. The same considerations apply to questions put to a witness as to other names by which he is or has been known at relevant times. This would normally except enquiry into a new name assumed or a new address obtained after the events in issue for the purpose of the witness' own protection.

As presently understood and accepted, the limits on the range of cross-examination as to the credibility of a witness include the point at which it attempts to trespass on his privilege against self-incrimination and the discretion of the trial Judge to excuse the witness from answering when the answer would not in his opinion affect the credibility of the witness as to the subject matter of his testimony, that is to say, when the question is not a genuine inquiry as to credibility but mere harassment of the witness. Sections 12, 13 and 14 of the Evidence Act 1908 touch on this.

The proposals put forward by the Solicitor-General are in aid of the protection of witnesses against reprisals or against other earlier criminal activities aimed at preventing their giving evidence at all. They are at present confined to the case of policemen who are, or have been, engaged in undercover drug investigations. By its very reason however the anonymity suggested must extend to any witness in respect of whom there is a well-grounded threat or apprehension of danger - circumstances which may arise in cases involving gangs and in cases where the witness turns Queen's evidence. Nor can cases be excluded where the danger to a witness arises not merely from

disclosure of his name or other particulars but also from recognition when he gives evidence. Protection in such a case might require that evidence be given from behind a screen or, it might be suggested, in the absence of the accused.

While therefore, in the case of an undercover policeman in respect of whose safety there is a evidence of a real or palpable threat, the suggestion of the Solicitor-General seems on its face reasonable for the protection of such a policeman giving evidence and perhaps as well for the safe continuity of undercover detection of serious criminal offences, it has also to be recognised that it involves a serious limitation on the presently accepted rights of an accused person and one whose scope is not readily apparent. It may be doubted too whether these last considerations can be adequately met by allowing the general proposition to apply only to 'rare' cases or cases in which the judge is 'satisfied of the immediate likelihood of danger'. Experience suggests that that which begins as an unusual exception tends to become more frequent in practice. Nor can it be postulated that any such case is not the very one in which information obtained about a witness will be important.

Something must next be said about legislation in this field. Section 138(2)(b) of the Criminal Justice Act 1985 provides that where a court is of opinion that the interests of justice, or of public morality, or of the reputation of any victim of any alleged sexual offence or offence of extortion, or

of the security or defence of New Zealand, so require, it may make an order forbidding the publication of the name of any witness or witnesses or any name or particulars likely to lead to the identification of the witness or witnesses. Section 138(2)(c) in effect empowers the Court in any such cases to direct the hearing to be held in camera although, except in cases where the interests of security or defence so require, an accredited news media reporter cannot be excluded. Section 140 gives power to prohibit publication in any report or account of proceedings of material which must include particulars about a witness. And s.139 prohibits the publication of the name of the victim of specified sexual offences. These provisions all imply that the witness has given his name and address in evidence.

Whether the provisions of s.138 of Criminal Justice Act 1985 comprehend or subsume the whole of the inherent jurisdiction to sit in camera on those occasions on which such a course might be justified in the interests of the administration of justice in criminal cases is perhaps debatable. But cases on the inherent jurisdiction are of assistance in considering the meaning of the expression 'the interests of justice' used in that section. Such interests may be taken to include the likelihood that an open hearing may deter the Crown from prosecuting in cases where it ought to do so. This was explicitly so stated in Scott v. Scott [1913] A.C. 417, 446 by Lord Loreburn and is mentioned in Attorney-General v. Leveller Magazine Ltd. [1979] A.C. 440 at pp.457 and 471.



Then there are particular provisions about cases involving sexual violation as defined in s.23A of the Evidence Act 1908. By s.23AA no oral evidence may be given and no question put to a witness relating to the name, address and occupation of the complainant except by leave of the Judge. This section reaches the area with which the present case is concerned. Both provisions were enacted in 1985.

Consideration of all these matters leads me to the opinion that if any change is to be made to such an important aspect of the conduct of the trial of an accused person, an aspect which is the product of experience and legislation balancing the interests of the state and the accused, it ought to be made by Parliament. It is better able to estimate the weight of the public interests involved, the extent and seriousness of the difficulties outlined by the Solicitor-General, and, if any change is required, the scope of the alteration and the degree of protection to be retained by an accused person. It is a field in which Parliament has itself recently legislated.

This does not mean that there is not now a large degree of protection available to a witness in appropriate cases. Where the Judge is satisfied that a failure to preserve some anonymity - I will refer presently to its degree - will be contrary to the interests of justice or fall within one of the other heads mentioned in s.138 of the Criminal Justice Act 1985 the Court may sit in private and as well, or alternatively, make an order forbidding the publication of the name of any witness or of

particulars likely to lead to his identification. The latter course is obviously a much less severe invasion of the general expectation of a public trial than is a hearing in private which defeats it entirely and is to be preferred when it can achieve this object. But if, as I consider is the case, the statutory power enabling such orders to be made contemplates that the name of the witness is to be given it must necessarily and rightly follow that it is to be communicated to the accused and his counsel.

One recognised way of aiding an order forbidding publication of a name and address of a witness is to let him write the same, swear to the truth of the writing, show the writing to the accused and his counsel, if there be one, and require the writing thereafter to remain sealed until further order of the Court. The witness may then be referred to by a pseudonym. It is clear from Attorney-General v. Leveller Magazine Ltd. [1979] A.C. 440 that this is a common and accepted way of securing a substantial and real degree of anonymity for the witness and there are indications in the case that that is as far as the Court can go. But even a hearing in private would not protect the disclosure of the true name of the witness to the accused. See the remarks of Lord Diplock at [1979] A.C. 447E and F, Lord Edmunds-Davies at 464B & D and Lord Scarman at 471F. This course has been recognised in New Zealand in Broadcasting Corporation of New Zealand v. Attorney-General [1982] 1 N.Z.L.R. 120, at p.129-130.

The second question upon which the opinion of this Court is asked is whether the District Court Judge was correct in deciding that if the Crown elected to proceed without calling the undercover police officer counsel for the accused was entitled to put to other witnesses questions as to the true identity of that officer. This is an hypothetical question. The circumstances never arose. In my judgment the District Court Judge should not have given any ruling on the matter unless and until it was necessary to do so at which time he could assess the matter in the light of the principles which govern it.

The rules about the disclosure of the names of police informers are well enough understood. Essentially such names are protected from disclosure upon the grounds that the privilege is in the public interest in encouraging effective law enforcement. But where the disclosure might be helpful to the defence then the balance of the public interest falls in favour of disclosure. See D. v. N.S.P.C.C. [1977] 1 All E.R. 589. There are cases in the United States which indicate that where the informer was also particeps criminis with the accused disclosure ought to be made. See Roviaro v. U.S. 353 U.S. 53; Nutter v. State of Maryland [1970] 262 A. 2d. 80. Whether in such circumstances in this country the public interest requires disclosure will no doubt depend upon all the circumstances. At least it may be said the ground will need to be made good by the defence. It will seldom if ever be possible to decide where the balance lies until the issue arises.

It follows that I consider the first question should be answered in the affirmative and that the Judge was in error in answering the second question as he did, at the time he did. There should be an order for a new trial.

*W. H. Jones*

THE QUEEN

v.

ROSS ANTHONY HUGHES

Coram: Cooke P  
Richardson J  
McMullin J  
Somers J  
Casey J

Hearing: 4 February 1986

Counsel: D H Quilliam for Appellant  
D P Neazor QC and G A Rea for Crown

Judgment: 19 June 1986

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JUDGMENT OF CASEY J

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Cooke P has detailed the circumstances giving rise to this appeal and summarised the available authorities bearing on the question of whether an undercover police witness in a drug prosecution can be required to disclose his or her true name and other details leading to identification. Lacking any precedent in other common law jurisdictions, I would find those cases decided in the United States on the same issue more relevant than the Danish example cited by Cooke P. Notwithstanding the specific constitutional requirement in the former country, the predominantly common law background in areas of criminal evidence and procedure would appear to provide a better guide than that offered by Denmark, which may not adhere to the same traditions.

The variety of the views expressed by some American judges reflects the difficulty of reconciling the conflict between the public interest in ensuring a fair trial, and the same interest in protecting the common good. The prosecution and the accused are each anxious to ensure that all evidence relevant to their case can be put before the Court, even at the possible detriment of the other. The availability of such evidence to both sides and the ability to challenge it must be the corner-stone of any trial conducted under the adversarial system. It follows that the Court's concern must be with the development of rules of evidence and procedure designed to achieve these results.

In special cases exceptions have been made for the more effective promotion of justice. The rule against disclosure of the identity of informers exists to secure the flow of evidence in criminal proceedings and other cases involving wider community concern, but is subject to the overriding principle that in a criminal trial, if disclosure of the informer's identity could help to show the accused was innocent, then it must be made.

The position of an informer is very different from that of a witness at the trial; with the latter, credibility becomes of immediate and potentially critical importance. It is essential for an accused to have the opportunity to investigate and challenge the honesty and reliability of prosecution witnesses. This must include the ability to

find out who they are, so that their background can be explored and any lines of enquiry followed up. I do not see how this can be achieved under a procedure which allows the judge at depositions or trial a discretion not to order disclosure of name or identity.

There may be cases in which such an enquiry is seen to be irrelevant, in which event the judge would be entitled to rule out the question, if necessary resolving any dispute under the normal *voir dire* procedure. This may happen if, for example, the accused made an unchallenged admission of the essential facts to be proved by the witness; or if the only reason for seeking his or her identity has nothing to do with credibility or the issues in the trial. Indeed, Mr Quilliam frankly came very close to conceding irrelevancy during the course of his submissions on appeal. Nor will a question be allowed if its purpose is simply to harass or intimidate the witness.

It is easy to resort to emotive language in this situation and make comparisons with the Star Chamber and the adoption of inquisitorial criminal procedures alien to our common law tradition. However, the sobering fact is that a person accused of a Class 'A' drug offence could face up to life imprisonment on the evidence of an anonymous undercover officer; equally sobering is the disclosure of concern among the police authorities over the escalating violence in this area of criminal activity, to such an extent that they can

no longer rely on officers to do undercover work without the assurance of confidentiality.

In the past Courts have adopted a pragmatic approach to the development of evidential and procedural rules on a case by case basis. But there is a major shift in principle involved in the proposition that undercover police witnesses should remain anonymous. It produces a head-on conflict between a fundamental and long-standing practice for an accused's protection, and what is said to be a pressing but novel requirement for the protection of police officers. Its resolution would require a balancing of aspects of public policy and concern of such basic importance that I do not think the Court is abdicating its responsibility by declining to give the answer sought by the Crown.

That will depend on such matters as the extent to which the community is prepared to relax existing safeguards for people accused of serious crime in favour of the ability to secure more convictions; an assessment of the reality of the risks confronting the undercover agents who give evidence; the feasibility of other methods of producing relevant evidence in Court; an appraisal of the perceived worth of such evidence from witnesses whose credibility cannot be tested by full cross-examination; possible jury prejudice against drug offenders; and whether such protection should be confined to police officers, or limited to drug



prosecutions, or to disclosure of names only. Some of these problems require information and social judgment which may be outside the appropriate competence and experience of judges. I think the position is summed up in the following comments by Lord Hailsham in D. v National Society for Prevention of Cruelty to Children [1978] A.C.171, 225, when dealing with the appellant's proposition that there be a general extension to the rules of disclosure :

"Thirdly, and perhaps more important, the invitation of the appellants seems to me to run counter to the general tradition of the development of doctrine preferred by the English courts. This proceeds through evolution by extension or analogy of recognised principles and reported precedents. Bold statements of general principle based on a review of the total field are more appropriate to legislation by Parliament which has at its command techniques of inquiry, sources of information and a width of worldly-wise experience far less restricted than those available to the courts in the course of contested litigation between adversaries."

In the absence of any indication or suggestion at the trial that they were irrelevant or intended only to harrass, I would hold that the judge was correct in ruling that

defence counsel was entitled to put questions to the undercover police officer as to his true identity, and would answer the first question in the case "Yes". However, this would not preclude consideration of its character if the same question is proposed on a re-trial, although I am far from saying that the mere fact of asking it will automatically justify a challenge. As with any other question, its relevance or character will depend on the circumstances of the trial and the evidential context within which it is put, accepting that it will normally be presumed relevant to credibility.

Criminal trials do not take place in a social vacuum. It may appear to the judge that a witness has a well-grounded fear of disclosure and he may suspect that the only purpose of the defence in seeking it is to prevent him giving evidence. There may be a rational basis for that suspicion where it has become known that the Crown will not put forward undercover police officers if their identity cannot be protected. In the overall context of securing justice for both sides - and indeed on grounds of ordinary common sense - trial judges should not be expected to close their eyes to such a circumstance nor, when it exists, to forbear from enquiring into the reasons for disclosure.

I think the judge was wrong in holding that Counsel was entitled to put to other witnesses questions as to identity of the undercover police officer if he did not give evidence. In that situation the rules as to disclosure of informers' identities would apply and (as Counsel have agreed) the answer to the second question should be "No". There appears to be evidence on which the accused could be convicted without the testimony of the undercover officer, and as his identity could then be protected at the discretion of the presiding judge, it is appropriate to order a new trial and I would do so.

*H. B. Lacey*

