

JULY 2008

ANONYMOUS WITNESSES: CONOR GEARTY

On the morning of New Year's Day 2002, towards the end of an all-night New Year's Eve party in Hackney, a shot was fired which killed two men. Iain Davis was at the party and shortly after the murders went to the USA on a false passport. When first questioned by police after his return to the UK he declined to give any answers and waited until his trial was under way before he produced an alibi, but even then did nothing to substantiate it. There was no forensic evidence linking him to the murders. Seven party-goers identified him but claimed to be in fear of their lives if it became known that they had given evidence against him. The three witnesses at his trial who identified him as the gunman did so only after restrictions were put in place to protect their anonymity: neither Davis nor his legal team were allowed to know who they were, where they lived, what they looked like or how they sounded. His conviction and consequent life sentence were therefore the result of proceedings in which his accusers had condemned him in mechanical distorted tones from behind a screen. It was the unanimous ruling by the law lords on 18 June that this process was unfair to Davis that has led to the Criminal Evidence (Witness Anonymity) Bill now being rushed through Parliament.

Many hundreds of trials in Britain are said to be dependent on anonymous witnesses. But, astonishingly, the practice is a very new one: as recently as 1972 Lord Diplock, making his famous report into the criminal process in a terrorism-wracked Northern Ireland, ruled it out as entirely contrary to the very foundations of the criminal process. There are dicta to that effect scattered across the law reports of the common law world, going back centuries. Giving the leading speech in the House of Lords, Lord Bingham referred with the utmost seriousness to the Star Chamber and the Inquisition as being two examples of the sort of things that society ends up with when this golden rule of open justice is not adhered to. And yet, starting with the need to protect journalists from terrorist retaliation in a particularly serious case in Belfast in 1990, and gathering pace in the cases that have followed, the unthinkable has now become almost routine. How can the presumption of innocence survive this severe distortion of the whole process? In one extreme case before an international tribunal in 1995, an anonymous witness who had said he had seen the accused killing thirty men including his own father had his credibility destroyed when the defence found out who he was and produced his father alive and well to undermine his claim. Supposing they had not been so lucky or so willing to break the rules?

In making their decision the law lords were not ruling out the need for anonymous witnesses in certain circumstances, but they were requiring that the matter be regulated by

Parliament. It is surely right to leave a door open for some flexibility here: the police cannot be relied upon to stop such threats completely and it is unrealistic to demand that people not be scared: how would you feel if you spotted a gang of organised criminals with a history of violence and witness intimidation beating someone up and you knew that when you came to give evidence your name *and address* would be automatically made available to them? There is also the need at times to preserve the integrity of undercover police and security service operations. The Bill before parliament restates the principle of open justice while leaving open the possibility of anonymity in these kinds of situations. One overriding requirement is as to whether 'having regard to all the circumstances' the taking of such measures is 'consistent with the defendant receiving a fair trial' – the guarantee of this right in the Human Rights Act ensures its prominence here. The case law from the European Court of Human Rights allows secret witnesses and may even permit them in certain extreme situations where the evidence involved is the sole or decisive basis for an accused's apparent culpability.

The main worry about the Bill is not its principle but rather its very rushed nature and in particular how easy it is going to be to make the claims of fear that turn a witness into an anonymous one. At present the Bill refers to the criterion of the 'safety of the person' which is a rather open-ended category potentially liable to be abused. The measure is vague as well on how the risk to a potential witness is to be established. The Bar wants the criteria to be toughened-up to reflect a real threat of death or serious injury or serious damage to property and then some kind of proper testing of the factual basis for such assertions. It must be possible but surely it should not be easy for us to evade our moral responsibility to give public testimony about wrong-doing if we should find ourselves thrown into such a situation. Of course there is risk here, but there is risk in everything we do – it is our relatively recent addiction to risk reduction at all costs that has driven this move into anonymity just as it has propelled us towards ever more draconian terrorism laws and ever stricter regimes of health and safety regulation. Our more resilient society in the past coped with a near-total ban on anonymous witnesses in a way that is not perceived to be possible today. While not going that far, the Bill needs to be careful not to lurch too far in the direction of assuming anonymity on the basis of the slightest anxiety.

The *Davis* case, and the Bill to which it has given rise, provide Parliament, and through Parliament the country, with an opportunity to consider afresh the role of the criminal trial in our culture and the right balance that is required between the state's duty to protect all its citizens (including victims and potential witnesses) on the one hand and the rights of those who stand accused of serious crimes on the other. The criminal process is not a static one; its procedures are not frozen in a past era of mythic perfection. But its commitment to a

proper balance between the various interests and rights of those caught up in the process remains the same: to do justice in a way that serves the public interest while protecting the rights of the victims of crime, the witnesses in criminal proceedings and those suspected of serious criminal wrongdoing.