INFORMANTS: FINDING THE TRUTH BENEATH SELF-INTEREST

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by Marie Dyhrberg

Informants are a necessary evil who must be dealt with in an open way in the judicial system - and not with secrecy, says Auckland barrister, Marie Dyhrberg*.

Informants are as necessary to our judicial system as any other witness who can tell us what actually happened. However, in New Zealand and elsewhere, the current rules dealing with the treatment of informants are unsatisfactory and there is a need for a legislative framework to clarify the situation.

Criminals understandably try to avoid having independent bystanders witness their crimes. Criminals who later feel an overwhelming need to confess or to boast about their unlawful exploits are unlikely to choose an upstanding, law -abiding stranger to hear their tales of criminal behaviour. Most informants will be an accessory to the crime or will have committed some other crime. These are the very reasons why informants are seen by the accused to be "one of us" and therefore trustworthy enough to hear a confession about criminal exploits.

Therein lies the dilemma. Because such an informant can give relevant evidence, it should be treated with deep suspicion. They are criminals who tell the truth or remain silent as it suits them. They are capable of lying for their own self-interest.

Informants are not ordinary witnesses. Ordinary witnesses are not granted immunity for their criminal behaviour. They do not get letters confirming that they have been "co-operative and very helpful to the police" when they appear for sentence. They do not get reduced sentences. Ordinary witnesses do not get shifted to nicer/less secure prisons and they do not receive special support at their parole hearings. Ordinary witnesses generally do not get name changes, new identities, help to move to new locations and gifts of cash or other benefits. Informants do.

Simply to allow informants to come to Court, without being subjected to the utmost scrutiny, and to ask that their evidence is accepted at face value, is to ask the judicial system to participate blindly and wilfully in what could well lead to a grievous miscarriage of justice.

Currently in New Zealand there are no agreed rules of conduct or legislation in place governing how informants are to be dealt with and what information must be disclosed to an accused about the informant. This means the information an accused can obtain about an informant depends largely on what the police, the Crown and the trial Judge personally

see as relevant and discoverable.

The most perilous scenario for an accused under New Zealand's unregulated system would be a case with the following elements:

- The police adopt a defensive, protective stance to “their” star witness, and omit matters they decide are either not relevant or not helpful to their case.
- The Crown prosecutor senses victory (a conviction), and becomes unwilling to question, investigate further, seek corroboration, or even consider any information that might upset the odds of “winning”.
- The Judge does not accept that an informant is a special category of Crown witness. This is an important distinction in terms of ordering disclosure of what could otherwise be personal and private information, such as medical records, psychiatric or psychological records, or prison files.

In New Zealand there is a concern that under the present unregulated system, there may have been instances where one or more of these elements have played a role in a miscarriage of justice. In an adversarial system with no clear rules, there is a real risk that one or more of these elements may prevail. The problem is how to allow evidence which can be vital to a prosecution to be fairly assessed and controlled, when the witnesses to be relied on have their own reasons for giving evidence fuelled by self interest.

OVERSEAS

Lawyers in a number of countries share this concern. At the recent International Bar Association Conference in Amsterdam, a whole day was set aside to discuss the particular problems associated with the evidence of informants and agents provocateur.

Veteran Miami defence lawyer Albert Krieger, who lists John Gotti and the Bonanno family among his clientele, emphasised that informants are an indispensable part of law enforcement in many cases, and particularly in penetrating sophisticated multi-participant criminal organisations. “The prosecutor who does not appreciate the perils of using rewarded witnesses risks compromising the truth-seeking system of justice,” he said.

Mr Krieger described the aim of obliteration of organised crime in the United States as a “war”. He illustrated the danger of investigators and prosecutors engaging in this. He was troubled about prosecutors developing a “war mentality”, so that the end to be served is attaining a conviction. In order to do so, they will ignore the rules by which they are normally guided. Mr Krieger warned that this mentality, when combined with the fact that there can be no limit on what informant witnesses will do to find a way out of confinement, could have “explosive consequences”.

He said that even when precautions are taken, the most legitimate people in the judicial system are simply incapable of thinking with “the deviousness of the intelligent, desperate criminal”. He asked: “How do you pay an informant for information or testimony? The

reality is that the prosecution is ‘buying’ testimony.” But it is not like buying a diamond which can be scientifically tested. It is buying words which come out of the witness' mouth with no independent way of testing it. “It is close to impossible to challenge that evidence in the ordinary course of events. The witness wants to get out of trouble, get out of jail, and can lie convincingly regardless of the precautions which may be taken.”

Albert Krieger concluded that accountability is essential and must be framed so as to guarantee the protection of the rights of all those charged with crime. In his view, it is the function of government to uphold rights, not to deliver a society free of crime.”We must recognise humans for what they are,” he said.

James O'Reilly, executive legal officer in the office of the Chief Justice of the Supreme Court of Canada, spoke of the trend towards greater judicial scrutiny of forms of police investigation that may result in unfairness against the accused. A particular area of concern in Canada is “jail-house” informants. A commission of inquiry was established to examine the causes of wrongful convictions, following the exoneration by DNA evidence, of a young man in Ontario who had been convicted for the murder of his 9-year-old neighbour. The conviction was partly based on evidence by two former inmates to whom he had made confessions in prison whilst awaiting trial.

The commissioner, a retired judge, recommended that trial judges should instruct juries to treat the testimony of such informants with great suspicion, because “jail-house informants are motivated by self-interest, have little or no respect for the truth. Accordingly they may lie or tell the truth depending only upon where their perceived self-interest lies. Jail-house confessions are easy to allege and difficult, if not impossible, to disprove.” The Commissioner's recommendations as to the factors to be taken into account in assessing credibility of such informants have now been incorporated into prosecutorial guidelines established by the Attorney-General of Ontario.

Nicholas Cowdery QC, director of public prosecutions (DPP) for New South Wales, and also co-chair of the IBA Human Rights Institute, highlighted the human rights implications of the use of informants. He said that if human rights are to be preserved, “any trial must be concluded on the basis of reliable, truthful and accurate evidence. Informant evidence is always suspect so, if it is to be relied upon, we need controls and the capability to evaluate that evidence”. Mr Cowdery emphasised that “independence of the prosecution from the investigation was vital in maintaining that capability”.

New South Wales deals with the problems of the inherent unreliability of jail-house informants by requiring special approval before their evidence is relied upon and, in almost every case, independent, corroborative evidence of the making of the admission such as a recording. Mr Cowdery said that as a result of the stringent requirement for corroboration, such evidence is rarely called.

CLEAR FRAMEWORK NEEDED

It must be to the benefit of all parties (police, the Crown, the Courts, the accused and society as a whole) that there is a clear legislative framework in place so everyone knows where they stand and what the rules are governing informant evidence. Accountability is the key. An ideal framework would incorporate many of the features adopted by the DPP in New South Wales and would include the following requirements and considerations:

> Informants to be registered and an index to be kept including all known public evaluations of any information or evidence given by the informant. The index is also to record any occasion when the informant offered to give evidence in a trial but did not do so, and the reason(s) why the informant did not give that evidence.
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> All contact between the police/Crown and an informant to be recorded with the date, time, place and what was discussed. All interviews, unless good cause is shown, are to be recorded on tape or video.
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> The information disclosed in regard to an informant would include:
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> - all previous convictions
> - their role in the current prosecution if they are an accessory
> - whether they were in custody when the information was offered
> - the inducement or reward sought
> - the inducement or reward offered to them, including any offer of assistance for any charge faced or sentence being served
> - whether immunity has been granted or is being considered
> - the nature of the evidence
> - any police and prison records or any other records known to the police or Crown which might assist in assessing the informant's credibility, such as records of any previous contact between the informant and the accused, records concerning the mental state of the informant, or any previous reports or evaluations which have been carried out on the informant
> - steps taken to corroborate the information given by them
> - advice as to any other proceedings when it is believed that the informant may also give evidence, and the nature of that proposed evidence.
> - When the informant is a prisoner and the proposed evidence is that the accused has confessed to the crime, that evidence will only be admissible if it has been recorded on tape or video, or if it can be corroborated by another party or witness who has recorded the confession on tape or video.
> - When the informant is a prisoner, the jury is to be given a special warning that includes the instruction that special caution is required when assessing their evidence, such evidence is often unreliable, and there are strong incentives for the witness to lie.

CONTROL NEEDED

Informants are a crucial tool in the prosecution of crime, but a tool that must be controlled and used correctly. The more information that is made available about an informant the more certain it is as to where the truth lies. What is required is being as sure as possible where self-interest ends and truth begins.

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