

HOUSE OF LORDS

Select Committee on the Constitution

9th Report of Session 2007–08

**Criminal Evidence
(Witness Anonymity)
Bill**

Report

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in *R v Murphy* [1990] NI 306 came “close to the limits to which the courts should go in permitting any invasion of the core common law principle that the accused has a fundamental right to know the identity of his accusers”.¹⁴ In that case, television cameramen who had filmed the scene of the killing of two British army corporals were not referred to by name in court and they were screened so that the defendants and the public were unable to see their faces. Their credibility was not in issue, they were not providing personal identification evidence of the defendants and there was no necessity to inquire into their background and motives.

- (c) Lord Mance agreed, saying that “*R v Murphy* involves a limited qualification on the right to know the identity of prosecution witnesses which represents no threat to the fairness of the trial and which the common law can and should accommodate”.¹⁵
 - (d) Lord Rodger of Earlsferry held that, for the purposes of determining Davis’ appeal, it was unnecessary to decide whether *R v Murphy* is consistent with the common law as it was clear that Davis’ trial failed to meet the minimum standards of fairness required by Article 6 of the ECHR.¹⁶
 - (e) Lord Carswell, concurring that the particular anonymity measures in the Davis trial made the conviction unsafe, sought to distil a series of propositions from the case law that went further in permitting anonymity orders as a matter of common law than the other Law Lords were prepared to subscribe to. These included: that “it is possible in principle to allow departures from the basic rule of open justice to some extent, but a clear case of necessity should be made out”; that the more measures the court might consider adopting—such as withholding names and addresses, screening, voice modulation—“the stronger the case must be for invading the principle of open justice. Determination of the question depends upon balancing to ensure that the trial continues to be fair”; and “an important consideration is the relative importance of the witness’s testimony in the prosecution case”.¹⁷
11. The practical effect of the *Davis* judgment is to clarify and prevent any further broadening of the courts’ common law powers to order anonymity. The protective measures ordered in the Davis trial were a step too far in the particular context of that case.
 12. The Appellate Committee recognised that any changes to the rules governing anonymity would require legislation rather than developments through the common law. Lord Bingham said that the problem of witness intimidation was a serious one that “may very well call for urgent attention by Parliament”.¹⁸ Lord Rodger of Earlsferry suggested that witness protection schemes and the like were the best way of dealing with the problem of intimidation—changing the law on anonymity would only be “second best”

¹⁴ Ibid, paragraph 65.

¹⁵ Ibid, paragraph 73.

¹⁶ Ibid, paragraph 44.

¹⁷ Ibid, paragraph 59.

¹⁸ Ibid, paragraph 27.

