Public Interest and Scott

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Politics aside, criticism of Sir Nicholas Lyell, the Attorney-General, for his advice to ministers as regards the signing of public interest immunity certificates in the Matrix-Churchill affair, is totally unjustified.

Following the publication of the Scott Report into the arms to Iraq affair, two central allegations have been made. First, should the ministers have signed the public interest immunity certificates and secondly, should the public interest immunity certificates have been used in criminal proceedings.

Public Interest Immunity certificates allow certain evidence to be excluded on the ground that it is not in the public interest that it should be disclosed to the court. This issue however has long been held to be left to the discretion of the trial judge. The documents are put before the judge, and it is left to the judge to decide whether the disclosure of the documents is necessary in order to demonstrate the innocence of the accused.

Public Interest Immunity certificates were introduced under the Crown Proceedings Act 1947. The Act allows the Crown not to disclose documents when to do so would harm the public interest and for the courts to determine if the documents should be disclosed. Although, the use of the public interest immunity certificates stems from civil proceedings, the determination of public interest immunity has long been dealt with in criminal proceedings.

As early as 1890, the Master of the Rolls, Lord Esher, stated in the Court of Appeal, that "... if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail."

At the time of the prosecution against Mr. Paul Henderson, the Managing Director of Matrix Churchill and two directors Mr. Trevor Abraham and Mr. Peter Allen, whose machine tool exporting firm, alledgedly made the shells for a supergun used by the Iraqis, capable of firing nuclear warheads with the acquiescence of the Department of Trade and Industry, the law stood as in the decision of R -v- Governor of Pentonville Prison ex parte Osman (No. 4) . In that decision Lord Justice Mann stated "The reasons for the development of the doctrine seem equally applicable to criminal as to civil proceedings. I acknowledge that the application of the public immunity doctrine in criminal proceedings will involve a different balancing exercise to that in civil proceedings... a judge is balancing on the one hand the desirability of preserving the public interest in the absence of disclosure against, on the other hand, the interests of justice. Where the interests of justice arise in a criminal case touching and concerning liberty or conceivably on occasion life, the weight to be attached to the interest of justice is plainly very great indeed."

In the case of Makanjuola -v- Commissioner of the Police for the Metropolis Lord Justice Bingham, now Master of the Rolls, stated inter alia, that a litigant observes a duty and is not claiming a right where he asserts that documents are immune from disclosure on public interest grounds. The litigant can, save in very exceptional circumstances, refuse to disclose documents which were prima facie immune until the court decides where the public interest lies, and orders disclosure or not.

Thus it can be quite plainly seen that at the time there was a duty upon ministers to sign a public interest immunity certificate if they considered that the disclosure of documents would be harmful to the public interest and that the certificates did apply to criminal proceedings.

The Attorney-General states that in fact the Government sought the advice of leading criminal experts in 1990, whose collective opinion was consistent the above decisions. Although, the state of the law at the time meant that the prosecution itself may have been avoided had there been full disclosure, once the matter went to trial, everything was in accordance with the law. The fact that the Public Interest Immunity certificates were able to be used in criminal proceedings is borne out by the fact that His Honour Judge Smedley, the trial judge of the Matrix-Churchill case, heard the matter: and that justice was seen to be done by the fact that the learned judge took a view, having heard Geoffrey Robertson QC for Mr. Henderson on what should and should not be disclosed and that further disclosure was ordered.

In his report , Sir Richard Scott criticises the Attorney-General by stating that the use of the certificates had no authoritative precedent in a criminal case and ought to have no place in a criminal trial. The report recommends that the certificates should never be used in a criminal prosecution because there can never be in the public interest to let an innocent person be imprisoned.

Surely, the contention that any decision on where the public interest lies should be in favorem innocentiae, is irreproachable. Equally, it should be left to the trial judge to decide what documents should be disclosed in the public interest once he has seen the documents and heard argument and can independently evaluate the situation. Recent developments in the field of public interest immunity do not bode well. The decision in Balfour , a civil case, seems to indicate that once a ministerial certificate demonstrated that the disclosure of documentary evidence posed an actual or potential risk to national security a court should not exercise its right to inspect that evidence and that the court in so doing was constrained by the terms of the certificates.