

Disclosure

IN THE SUPREME COURT
OF TURKS AND CAICOS ISLANDS

SHAWN PARKER V ATTORNEY GENERAL

Case number CL 18/08

TAVRON WATKINS V ATTORNEY GENERAL

Case number CL 36/08

CASEY STUBBS AND CLIFFORD GIBSON V R

Case number CL 21/08

C Barnett for Parker and Williams
O Smith for Watkins
N Hamilton for Stubbs and Gibson
D Ramdhani for AG and the Crown

Mr. Skerrington
N. Misick

Hearing: 17 April 2008
Judgment: 13 May 2008

Judgment

1. These actions are unrelated in their facts but all seek enforcement of a similar alleged breach of the Constitution. It was agreed by counsel that they should be heard together on the right of an accused person to disclosure by the prosecution. The hearing on 17 April 2008 was limited to submissions on that matter and it is not necessary at this stage to deal with the individual applications for information sought in the individual cases. Following this judgment, counsel for the applicants in each case will consider what further steps, if any, are necessary and any further hearings will be conducted separately.

2. The applicants seek enforcement of the provisions of section 6 of the Constitution which, so far as relevant, provide:

“ 6. – (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence – ...

(b) shall be informed promptly, in a language that he or she understands and in detail, of the nature

and cause of the accusation against him or her;

(c) shall be given adequate time and facilities for the preparation of his or her defence; ...”

3. Counsel for the applicants correctly submit that the requirement of a fair hearing includes adequate disclosure of evidence and have cited some of the numerous authorities dealing with such disclosure by the prosecution. It should be noted that, in each of the present cases, the application is for disclosure before the committal proceedings have taken place in the Magistrate’s Court. That gives rise to an additional consideration with which I shall deal later in this judgment. However it is appropriate to set out the general provisions as revealed on the authorities.

4. This judgment deals only with the duty of the prosecution to disclose in criminal trials. Whilst our law does impose a duty on the defence to disclose in specific and limited circumstances, for example the requirement to give notice of alibi, the general rule does not require disclosure by the defence. The situation has changed in England following the Criminal Procedure and Investigations Act, 1996, and many of the authorities since the passing of that Act introduce provisions which do not concern the courts here. A number of the authorities cited are principally concerned with the extent of public interest immunity. Such a claim by the prosecution has not arisen in these cases. Whilst some of the provisions on disclosure relate to such a claim, its relevance and the degree to which it applies in this jurisdiction will need to await a claim for non-disclosure by the Crown on that ground.

5. The position in Turks and Caicos Islands is governed by the common law. Although the applicants have all properly based their applications on section 6 of the Constitution, it must be borne in mind that those provisions do no more than to restate the common law, as was pointed out by the Privy Council in *Franklyn and Vincent v R* [1992] 42 WIR 262, 267 where Lord Woolf was dealing with similar provisions in section 20 of the Constitution of Jamaica:

“These provisions of section 20 do no more than codify in writing the requirements of the common law which ensure that an accused person receives a fair trial. They would, therefore, be part of the law of Jamaica even in the absence of the Constitution. They do not contain any specific requirement as to what is to be provided to a defendant before trial and a determination of whether the Constitution has been contravened by non-provision of statements of witnesses who are to be called by the prosecution before a trial depends upon an assessment of fairness prescribed by the Constitution. ...

Undoubtedly a defendant will be assisted in preparing his defence if he is provided with copies of statements on which the prosecution proposed to rely prior to the commencement of his trial. It is therefore desirable, where this is practicable, for statements to be provided.”

6. Mr Ramdhani for the Crown accepts that proposition but, on the strength of Lord Lowry’s statements in *Berry Linton v R* [1992] 42 WIR 244, 253 that, where the law is silent on the details of how the fairness is to be achieved, the ways of achieving it are “best left to and decided by the legislature, executive and judiciary which serve that community and are familiar with its problems”, he suggests this Court should not take the sole responsibility of formulating guidelines without some participation by the other arms of government.

7. I accept that any solution may eventually require some involvement of all three arms of government but I suggest he is misreading Lord Lowry’s comment. It does no more than reflect the common sense view that, whilst the Privy Council in London can give guidance on legal principles, the actual implementation in terms of local law and regulations is better left to the institutions of the country in which they are to be implemented. It is clear that the executive, in the form of the Attorney General as prosecuting authority, should have input into any such consideration but it is the Court which must determine the fairness of any

trial in which such matters become relevant as is shown in the various cases by which the common law position has been developed.

8. I do not accept there is any need for legislation on this issue. The Constitution requires a fair hearing, including adequate facilities to prepare the defence, and the common law recognises that will only be achieved by disclosure of the case the accused person has to face. The result is that the principal duty lies on the prosecution in the form of the Attorney General's Department and the police or other investigating body and the common law clearly includes the duty to disclose any earlier written or oral statement of a prosecution witness which is inconsistent with evidence given by that witness at the trial and any statements in the possession of the prosecution authorities potentially favourable to the defence. The overriding duty of the court will only arise where there is a challenge to the manner in which the prosecution is performing its duty.

9. The development of the common law over the last fifty years has shown an increasing recognition of the necessity of disclosure in criminal cases if a just result is to be achieved. It has arisen, in part, from a growing acknowledgement of the fact that, in an adversarial trial system, the lack of equality of arms may contribute to unfairness and injustice.

10. When the State brings a prosecution, it has infinitely greater resources than the person against whom the charge is brought both in terms of finance and access to expert advice and research. Although the resources available to the prosecuting authorities in jurisdictions similar to our own do not match those in more developed countries, they still far exceed those which fall within the reach of the overwhelming majority of accused persons.

11. That was the background against which the law on disclosure was developed and extended in England through such cases as *R v Bryant and Dickson* [1946] 31 CrAppR 146; *Dallison v Caffery* [1964] 2 AllER 610; *R v Hennessey* [1978] 68 CrAppR 419 and *R v Lawson* [1989] 90 CrAppR 107.

12. The passing of the 1996 Act has set the law in England on a different course by including requirements for increased disclosure by the defence also in criminal trials. Clearly in developed countries, the ability of the defence to utilise similar resources as the prosecution and often, in many serious cases, to have greater resources available has changed the balance in terms of equality of arms. The Act does not apply in this country and, if that is the reason behind the shift in emphasis in England, it certainly has no place in this country. I am satisfied that the common law position here is as stated in the cases set out in paragraph 11 and summarised in *R v Ward* [1993] 2 AllER 577.

13. In the course of counsels' submissions, I was referred to the 1981 Guidelines issued by the English Attorney General in a Practice Note; [1982] 1 AllER 714. Those guidelines do not bind the courts here and whilst they may have some persuasive force in determining what should or should not be disclosed, the prosecuting authorities should base their decision on the principles contained in Ward's case. Those are better understood by noting, briefly, the way the courts have advanced from the limited requirements of disclosure in Bryant and Dickson – itself a notable development.

14. Following that case, the duty to disclose statements in the possession of the police was widened by Lord Denning in *Dallison v Caffery* at 618:

“The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which [tend to] show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a

witness can give. It the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish."

15. The duty of the prosecution was stated by Lawton L.J in *Hennessey's case* at 426, to be owed to the court and was to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence.

16. The principles as set out in *Ward's case*, so far as they apply to the courts in this country, may be summarised:

1. Where a prosecuting authority has taken a statement from a person whom it knows can give material evidence but decides not to call him as a witness, it is under a duty to make that person available as a witness for the defence. Material evidence means evidence which tends either to weaken the prosecution case or to strengthen the defence case.
2. Unless there are good reasons for not doing so, the duty should normally be performed by supplying copies of the witness statements or by allowing the defence to inspect them and to take copies. If the prosecution considers there are good reasons for not supplying copies of the statements, the duty to disclose will be satisfied by supplying the name and address of the witness to the defence.
3. The defence is entitled to be supplied with copies of all statements recording relevant interviews with the accused.
4. If an expert witness has carried out, or is aware of, experiments or tests which tend to disprove or cast doubt upon the opinion he is expressing, he is under an obligation to bring such experiments and tests to the attention of the prosecuting authority and that information must then be disclosed to the defence. Any expert consulted by the prosecution must be advised of this obligation.
5. If the prosecution has asserted non-disclosure in the public interest it is under a duty to give notice of that fact to the defence. Any challenge to the non-disclosure will be determined by the court and, if the prosecution is not prepared to have the reason for the public interest determined by the court, the result must inevitably be that the prosecution will have to be abandoned.

17. Where it becomes necessary, the issue of disclosure will be determined by the court in which the relevant case is to be heard. Application may be made by the defence or the prosecution. However, as was pointed out in *R v Keane* [1994] 99 CrimAppR 1, the duty lies on the prosecution to decide materiality of any particular evidence and the court should not normally be required to decide. Where the defence is seeking disclosure of otherwise undisclosed material, it is under a duty to provide clear and specific detail of the material of which disclosure is sought. However, even if there is no specific request for disclosure by the defence, the duty remains on the prosecution to determine and to disclose material evidence.

18. Mr Ramdhani makes it clear that he accepts the general principles set out above but suggests the small size of this jurisdiction and the interrelationships in the community suggest that disclosure of statements of all witnesses whether credible or not could lead to intimidation of witnesses. He bases his submission on the 1999 Jamaican case of *Halls v R* in which the Privy Council acknowledged such a possibility in Jamaica. I do not consider that is a relevant concern in this jurisdiction at this time. Should it appear there are such cases; the Court may have to reconsider the position.

19. One specific matter in the present applications calls for further clarification at this stage. The defence have called for disclosure of details of whether any witnesses, including police officers, have completed or pending cases or proceedings dealing with any adverse findings. The applications seek disclosure of

disciplinary actions, criminal cases and also the details of allegations or charges yet to be determined and the results of all such cases. Application is made by one applicant for the records of internal police inquiries into a death relevant in the case brought against him.

20. As the authorities clearly establish the right of the defence to any information which might lead to the weakening of the prosecution case or the strengthening of the defence case, I have no doubt that any evidence of a conviction or of an adverse finding of moral turpitude in disciplinary proceedings would fall into such category. However, I do not consider that any allegation that has not been proved against a witness can be relevant nor one which has yet to be tried; Guney v R [1998] 2 CrAppR 242. Neither do I consider, in the absence of special circumstances, that the record of an internal inquiry should be available but the prosecution's overall duty will oblige it to disclose any material findings by the inquiry which relate to a witness it proposes to call in the trial or which might otherwise weaken the prosecution case or strengthen a defence case.

21. That leaves the final question whether the duty to disclose applies to cases in the Magistrate's Court either where there is to be summary trial or a committal for trial by the Supreme Court.

22. I fail to see any reason why the same principles of fairness should not apply in all courts. Whilst separate procedural rules have been formulated for Magistrates' Court proceedings in England, the principle has been acknowledged to be the same and a failure by the prosecution to disclose relevant evidence has resulted in an order of certiorari on the grounds of a denial of natural justice; R v Leyland JJ ex p Hawthorn [1979] 1 AllER 209.

23. Mr Ramdhani suggests that, where there is a 'paper committal', the prosecution's duty is fulfilled by the supply of the bundle of statements as that includes all the original statements of the witnesses in the case. In the case of an 'old style committal' he points out that, as the purpose of the proceedings in the committing court is solely to ensure that there is a prima facie case against the defendant before he is committed for trial by the Supreme Court, it should not be regarded as "a rehearsal proceeding so that the defence may try out their cross examination ... with a view to using the results to advantage in the [Supreme Court] at a later stage"; R v Epping and Harlow JJ ex p Massaro [1973] 2 WLR 158.

24. As I have stated, I consider the same overall principles must apply in all criminal courts but it must also be tempered by questions of practicality and degree. In summary trial of a minor offence (in this context, one which is not punishable with imprisonment), it would be an unnecessary burden for the prosecution to make full disclosure in the terms set out above. Neither do I consider the defendants in such a case would welcome the delay such a procedure will almost inevitably cause in the trial. I am satisfied the requirements of section 6 of the Constitution will be satisfied in such trials by a clear written statement summarising the case to be brought against the accused. However, if having received such a summary, the defence requires further disclosure, the prosecution is under a duty to ensure it complies fully with the requirements set out above.

25. In all other trials in the magistrates court where a plea of not guilty has been entered, the minimum requirement must be to supply, before the hearing commences, copies of the statements of all witnesses the prosecution intends to call. Where it is known there is a defence attorney, it would be prudent to ensure such statements are served at least a day before the date set for trial to avoid the possibility of adjournment.

26. Where the evidence is adduced for the purpose of committal for trial, I accept that the submission of Mr. Ramdhani has force. Where it has been agreed to hold a 'paper committal', the bundle of statements will be sufficient disclosure of the prosecution case for that proceeding. In an 'old style committal, the

court is considering no more than whether there is a prima facie case disclosed against the accused. If the magistrate finds such a case is disclosed, the accused will be tried in the Supreme Court. Until then there is no determination of guilt or innocence and I do not consider that the duty to disclose at the committal proceedings extends beyond the statements of the witnesses to be called then.

27. Once the case is committed, the prosecution must obey the rules of disclosure fully. I see no disadvantage to the defence at the stage of determination of a prima facie case only to be given the actual statements of the prosecution witnesses.

28. I am advised from the bar table that the practice in summary trials in the Magistrate's Courts falls short of the requirements I have set out above and the prosecution generally declines to disclose the evidence on which it intends to base its case. Apart from the limited exception in respect of minor cases, anything that falls short of those requirements will effectively allow 'trial by ambush' and will not satisfy the requirement of procedural fairness.

29. The prosecution must always remember that its duty is to ensure fairness in the trial and so, in any summary case where the prosecution knows of evidence which is material, it must disclose it to the defence before any evidence is called.

30. These rules of disclosure are an important safeguard that accused persons will have a fair trial. However, the practice of making wide ranging applications for disclosure of much of the peripheral evidence raises the possibility that the defence is simply embarking on a fishing exercise.

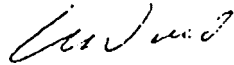
31. Such applications may properly be sought where defence counsel's instructions make such an application an essential step in the presentation of the instructed defence. They are not to be regarded as open house for the defence to trawl through the evidence to find a defence other than one on which instructions have already been given.

32. In Guney's case, the position was aptly summarised by Judge LJ;

"Without attempting a fresh examination of the authorities, the principles are clear. The defence is entitled to be given information in the possession of the prosecution which has any relevance, or possible relevance, or realistically may lead to evidence which may undermine the prosecutions' case against the defendant or to provide support for the defendant's case. This obligation arises whether the defence seeks specific disclosure or not. In practice, as Lord Taylor CJ underlined in Turner (Paul) [1995] 2 CrAppR 94, a justified claim that material in the possession of the prosecution is relevant in the sense explained in the authorities must be distinguished from a forensically manufactured opportunity for a general trawl through the prosecution papers, with the risk that the burden imposed on the prosecution will defeat the interest of justice by causing a discontinuance of the case where it otherwise should proceed. ... In the present case the prosecution had to decide whether to make disclosure of the basis of the provision of piecemeal information about the defence case which involved veiled or implied allegations against police officers in which were to be 'explored'."

33. In any case where the court is asked to rule on the need for disclosure of material that has been, or is suspected on reasonable grounds to have been withheld, the Court will expect to be given a clear indication by the prosecution of the need for disclosure of that evidence in light of the defence to be pursued.

34. This ruling may allow the disputes in the individual cases to be resolved. If any specific instances remain where counsel cannot agree whether a particular aspect of the evidence falls within the terms of this judgment, application should be made for a hearing.



13 May 2008

Gordon Ward
Chief Justice