R v Fungavaka & Tapu

Supreme Court, Nuku'alofa
Hampton CJ
Cr 227 & 229/97

28 July & 1 August 1997

Criminal law - disclosure - prosecution - pre trial
Practice and procedure - prosecution - disclosure pre trial
Evidence - prosecution - pre trial disclosure

Prior to a murder trial the defence sought disclosure of statements made to the police by both persons not to be called as witnesses and persons to be called for the prosecution. During argument orders were sought only as to the latter category of persons.

Held:

1. "Prosecution" included the police, crown solicitors and crown counsel, and forensic experts engaged by police and crown.
2. s.143 Evidence Act does not enable a court to make the orders sought, that section relating to control of cross-examination on a prior inconsistent statement.
3. The common law used to be that if the prosecution did not intend to call as a witness a person whom they had interviewed and who could give evidence upon a material subject then, whether the prosecution considered him credit worthy or not, his name and address should be made available to the defence; but only in exceptional uses would the persons statement have to be produced to the defence.
4. And in the case of the police statements of persons to be called as witnesses for the prosecution the duty of the prosecution was to produce such statements to the defence if there was a material inconsistency between the statement and the oral testimony of the witness .
5. But the more recent approach in England was less rigid and had been extended. An inflexible approach could lead to an injustice and the interest sof justice are paramount. An inflexible or restrictive approach could render nugatory the defence rights to cross-examine under s.143 Evidence Act.
6. The court has an over-riding and supervisory role in such matters; and a court has a discretion to order disclosure by the prosecution.
7. A failure to disclose may result in a material irregularity in trial, justifying a conviction being set aside on appeal.
8. Open justice requires maximum disclosure and whenever possible the

opportunity for the defence to make representations on the basis of fullest information. That is an aspect of the defendants elementary common law right to a fair trial; and in that it is of help to an accused to have the opportunity of considering all the material evidence which the prosecution have gathered and from wich the prosecution have made their own selection of evidence to be led.

9. Here the accused were charged with a capital offence. Full statements by prosecution witnesses had not been made available to the defence at the preliminary inquiry. There was a material discrepancy between witnesses statements and their oral evidence.
10. In fairness the statements to the police by prosecution witnesses should be disclosed to the defence. The potential to work an injustice must be avoided.
11. An order for disclosure was made in these particular circumstances.

Cases considered :
R v Ward (1993) 96 Cr App R1
R v Bryart & Dickson (1946) 31 Cr App R146
Dallison v Caffery [1965] 1QB 348
R v Howes (CCA – unreported: 27/3/50)
R v Hall (1958) 43 Cr App R 28
R v Xinaris (1955) 43 Cr App R 30 (note)
Muhadeo v R [1936] 2 All ER 813
Baksh v R [1958] AC 167
R v Clarke (1930) 22 Cr App R 58
R v Charlton [1972] VR 758
R v Mason [1975] 2 NZLR 289
R v Lawson (1989) 90 Cr App R 107
R v Mason [1976] 2 NZLR 122 & [1975] 2NZLR 209
re Van Beelen (1974) 9 SASR 163
R v Turnbull [1976] 3 All ER 549
R v Church [1974] 2 NZLR 117
Practice Note [1982] 1 All ER 734
R v Maguire (1992) 94 Cr App R 133
R v Davis [1993] 1 WLR 613
R v Livingstone [1993] Crim LR 597
R v Keane [1994] 2 All ER 478
Leyland Justices exp. Hawthorn [1979] QB 283
R v Hennessey (1979) 68 Cr App R 419

Statutes considered :
Evidence Act ss 143, 134, 132
Magistrates Court Act ss.34, 42
Criminal Procedure & Investigations Act 1996 (UK)

Counsel for Crown : Mr Cauchi, Ms Tapueluelu
Counsel for Fungavaka : Mr L. Foliaki
Counsel for Tapu : Mr Appleby

Judgment

This is a ruling pre-trial on a defence application for the court to order pre-trial disclosure (or discovery) by the prosecution, of documents viz statements of all persons interviewed by the police during the course of a homicide investigation and whether those persons are to be called as prosecution witnesses or not. (The joint trial of the accused on murder and grievous bodily harm counts is set to commence on 18 August 1997). As the application was argued however it became centred around matters relating to disclosure of police statements made by persons to be called as witnesses for the prosecution. A general order was sought from the Court in relation to the statements of all (some 26 or so) prosecution witnesses; and in the alternative an order for the disclosure of the police statement(s) of one prosecution witness, viz. Lesieli Tai. (I should make it clear that in this judgment, when I refer to "prosecution" I mean it as including, inter alia, all of such bodies as the police, Crown Solicitors and counsel,and forensic experts (say scientists, psychiatrists, doctors as examples) who are engaged to advise the police, prepare reports and give evidence - see R v Ward (1993) 96 Cr App R 1 at 23).

First the defence refer me to and rely on s. 143 Evidence Act (cap 15) as showing that "the court has an absolute discretion to require production of previous statements". Whatever s.143 does say (and mean) it is entirely clear that it does not, and cannot, directly relate to this type of situation before me (but I will return, later, to certain incidental effects s.143 does have).

S.143:

(a) given its placement in Pt. VIII of the Evidence Act "Of Judicial Procedure"; and

(b) given its position in the Evidence Act and the surrounding sections (particularly ss 138 to 142 inclusive and 144 to 149 inclusive); and

(c) given its own wording;

clearly relates to matters arising in cross-examination of a witness at trial.

The proviso, on which the defence places reliance, is abundantly clear: " ..... the court may at any time during the trial require the writing to be produced for its inspection .....". The underlinings are mine. The section is a provision which regulates the cross-examination on a prior inconsistent statement and it permits the court to have control of and prevent abuse of the procedure by allowing the court to call for and see the claimed inconsistent statement.

So s.143 does not directly help the accused. It does not relate to pre-trial disclosure.

The defence then turn to the common law of England for assistance (in the absence of any other statutory provision - ss.3 and 4 Civil Law Act (Cap 25)).

I am referred to cases such as R v Bryant & Dickson (1946) 31 Cr. App. R 146 at 151 (and I note also such other older cases as Dallison v Caffery [1965] 1 QB 348); R v Howes (27 March 1950 - unreported, CCA); R v Hall (1958) 43 Cr. App. R. 29; and R v Xinaris (1955) 43 Cr App R 30 (note). (Again I add to those last 2 cases, cases such as Mahadeo v R [1936] 2 All ER 813; Baksh v R [1958] AC 167; R v Clarke (1930) 22 Cr App R 58; R v Charlton [1972] VR 758).

The effect of the Bryant and Dallison cases is well summarised, in my view, in a New Zealand case of R v Mason [1975] 2 NZLR 289 which concerned the duty of the prosecution to disclose information which it did not intend to produce in evidence. The

production of statements of persons interviewed by the police, but not to the called as witnesses, was sought by the defence. In the judgment it was said that "if the police have interviewed a person who can give evidence upon a material subject and the prosecution does not intend calling him, then, whether the prosecutor considers him creditworthy or not, it must make his name and address available to the defence". It was for the prosecutor to decide whether the evidence was "material" but that decision must be reached with "complete fairness" to the defence (the passages cited are from p.292). (This matter and all the other duties and responsibilities of a prosecutor, which I will go on to refer to, are a part of the prosecutor's duty of fairness as an "objective minister of justice").

The judge in Mason went on to say (p 294) "that there is no general duty placed upon the prosecution to make available to the defence the written statements that the police have obtained from the persons who, in this case, will come within the ambit of my order "(i.e. those persons about whom the prosecution have to supply their names, addresses and phone numbers).

The judge (at pp 295-6) went on to suggest that production of such statements may be required in exceptional cases, saying "At the same time I am inclined to the view, although I make no decision upon the matter, that in truly exceptional cases, a refusal by the prosecution to comply, at least to some carefully considered extent, with a request for the production of statements of this kind might result in unfairness to the defence and even, perhaps, a miscarriage of justice". To that should be added this observation of Lord Denning in Dallison v Caffery [1965] 1 QB 348 at 369: "The duty of a prosecuting counsel ... 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 the witness himself or make his statement available to the defence". My underlining and I emphasise the word "credible". A "credible" witness to material matters not called by a prosecution would surely fall within the "exceptional" category - especially when the evidence tends toward innocence. In addition Lord Denning went on thus "If the prosecuting counsel ... knows of 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" (p.369). Lord Diplock in that same case (a civil case) affirmed and applied the Bryant case; as did the Court of Appeal in England in R v Lawson (1989) 90 Cr App R 107.

In the Mason case the New Zealand Court of Appeal (R v Mason [1976] 2 NZLR 122) affirmed the judgment below, agreeing that there must be some circumstances which would justify more than the disclosure of the names of such persons, but declining to set limits on a judge's discretion to make an order in favour of the defence (I emphasise the judges discretion - and the Court of Appeal described that discretion as one which "always resides in the trial judge to order production if the interests of justice demand it" - p.123). The New Zealand Court of Appeal had expressed some reservations about Lord Denning's observations in the Dallison case, observing that those observations went well beyond those of Lord Diplock; and went on to refer, with approval, to remarks made by the Full Court of South Australia in Re Van Deelen (1974) 9 SASR 163 at 249 as follows: "... the principle enuciated by Lord Denning postulates three attributes of the evidence which it is within the power of the witness to give. It must be credible, in the sense ... of having a show of truth, reasonableness and worth; of being capable of belief. It must be material in the sense of being admissible and relevant to the issues, or the vital facts in issue. And it must tend to establish the innocence of the prisoner." Which reinforces the

view I have already expressed. If the statement in issue fits those three criteria, then surely the matter must be within the "exceptional" category. And, given what I have said, there is not, in my view, any clash or conflict between the Bryant case and Lord Denning in Dallison (as has been suggested by some commentators and by some judges).

If I had come to it, in this case in looking at the issue of disclosure relating to persons interviewed but not to be called as witnesses, I would have been guided by the principles set out , above; being I believe the relevant common law principles although somewhat extended and more flexibly applied now in England than previously as I will discuss below - and I would adopt a similar flexible stance. But in the end both defence counsel have not pursued anyorder under this line of the common law cases.

I should also note a very clear, and necessary, categorical exception to any remaining principle that there is no general duty to disclose statements of persons interviewed but not to be called. That exception, a common law exception, concerns identification evidence - R v Turnbull [1976] 3 All ER 549 (and much earlier eg in identification by description in the 1930 Clarke case mentioned above. Particulars of such identification evidence should be supplied on request; and this exception applies as well to statements of persons interviewed who are to be called as prosecution witnesses.

The second line of common law cases (eg. Howes, Hall, Xinaris) relied on by the defence relates to disclosure of statements made to the police by witnesses to be called by the prosecution to give evidence (and it is under this second general head that the defence have sought the alternative orders mentioned by me above).

Formerly there was no general rule in the common law requiring the prosecution to supply the defence with copies of all statements made by persons who were to be called to give evidence - see eg R v Charlton [1972] V R 758 at 761. There were some exceptions (over and above the identification exception above).

The first related to previous inconsistent statements. Where the witness's statement was seriously at variance with his actual or intended testimony at trial, defence counsel was entitled to see the statement - Mahadeo v R [1936] 2 All ER 813 at 816-7 (P.C.) Although production had been ordered in a number of cases (refer eg to Howes, Clarke, Hall and Xinaris above) it was said that the duty to disclose did not extend to statements which exhibited only minor discrepancies with oral testimony. What triggered the duty to disclose was a material inconsistency.

The second exception applied to witness statements shown to an accused whilst he was being interviewed by the police (see as an example: R v Church [1974] 2 NZLR 117 at 118).

What I have set out would seem to have been the position through the 1970s and 1980s and, in considering the request for disclosure of previous statements of witnesses to be called by the prosecution, I would be guided by the principles set out , above, but subject to more recent extensions to them and a far "less rigid" approach to those principles as I will discuss below .

I should add this to what I have said I am guided by I do not apply, I cannot as a matter of Tonga law apply, the (U.K.) Attorney General's "Guidelines for the disclosure of 'unused materials' to the tried on indictment" : Practice Note [1982] 1 All ER 734 (although I will return to those Guidelines later in this judgment and the effect which they have had in the ever-developing common law). (I also add that there is nothing in the case law which would support a general proposition that material held by a prosecution is

privileged because it was supplied in confidence, nor does either s 134 or s 132 of the Evidence Act support such a proposition).

But I am also guided by 3 general rules or principles which must be allowed sway and influence in this area of the criminal law:-

(a) for a prosecutor (or a court) to adopt an inflexible approach to, and within, the guidelines I have mentioned can work an injustice (and see e.g. what was said in R v Lawson (1989) 90 Cr App R 107 at 115 - "an inflexible application of Bryant can lead to an injustice").

(b) particularly that will be so given that it is for a prosecutor to decide whether eg. (i) a case is exceptional and does require the handing over of statements made by persons not to be called as witnesses; or (ii) the discrepancy between a prior statement and testimony is not minor but falls within the category of a material inconsistency;

(c) the interests of justice are paramount.

In exercising the functions and duties, and particularly those set out in para 18b(ii) above, the prosecutor must have in mind s 143 Evidence Act and the right which is thereby given to cross-examine as to previous inconsistent statements. Such a right could be (and must not be) rendered entirely nugatory by a prosecutor adopting an inflexible or unduly restrictive approach. Justice - the interests of justice - would not be served.

Given the interests of justice, although the duties set out in above are properly those of a prosecutor, the court must have an over-riding and supervisory role, if necesary (see eg. R v Ward (1993) 96 Cr App R 1 at 26 - where the English Court of Appeal said "that the ultimate decision as to evidence which was otherwise disclosable should be withheld from disclosure on the grounds of public interests immunity was one to be made by the Court").

Subject then to what I have said above, where the defence seeks disclosure, and whether prior to or at trial, and order may be made for production of the information. It is a matter within a trial judge's discretion.

It became settled law in England (and certainly became cemented in, in the law , at the time of the infamous IRA bombing cases such as R v Maguire & ors (1992) 94 Cr App r 133 at 146 and R v Ward (1993) 96 Cr App R 1 at 22 and [1993] 1 WLR 619) that the failure of the prosecution to disclose to the defence evidence which ought to have been disclosed was an "irregularity in the course of the trial" (s.2(1)(c) Criminal Appeal Act 1968 - UK), that why there was no disclosure was irrelevant, that the duty of disclosure was a continuing one,and that if that which was not disclosed ought to have been disclosed the irregularity (in trial) would be a "material" one resulting in conviction being set aside on appeal. The above summarises the effect of Maguire (at 146); and Ward (at 22) said this: "The obligation to disclose only arises in relation to evidence which is or may be material in relation to the issues which are expected to arise, or which unexpectedly do arise, in the course of the trial. If the evidence is or may be material in this sense, then its non-disclosure is likely to constitute a material irregularity". (My under-lining).

But having referred to the above 2 cases (Maguire and Ward) that leads me to what is, apparently, a less rigid approach, a more flexible (and just) approach by the courts in England in the last few years, no doubt as a response to the injustices now known to have been prerpetrated in such cases as the IRA bombing ones. (see R v Davis [1993] 1 WLR 613 as well, applying Ward (and saying, at 617, "we recognise that open justice requires

maximum disclosure and whenever possible the opportunity for the defence to make representations on the basis of fullest information" - Taylor L.C.J; R v Livingstone [1993] Crim LR 597 - the prosecution has a duty to present to the accused all material "of relevance to the defence" and I add who is to be the arbiter of that - how can it be the prosecution?; and R v Keane [1994] 2 All ER 478). I quote from Ward at p 25 as follows (my emphasis added):-

> "To return, however, to the position in 1974, Mr Mansfield submits, rightly, that paragraphs 443 and 443a of Archbold (38th ed.) were by no means exhaustive" (i.e. Archbold summarising such cases as Bryant Howes, Clarke, Baksh, Hall, Xinaris, and Dallison, I comment) "They were merely aspects of the defendant's elementary common law right to a fair trial which depends upon the observance by the prosecution, no less than the court, of the rules of natural justice. No authority is needed for this proposition but it is illustrated by the decision of the Divisional Court in Leyland Justices exp. Hawthorn [1979] Q.B. 283. On the broad basis of this right, the defendant is plainly entitled (subject to statutory limitations on disclosure, and the possibility of public interest immunity, which we discuss below) to be supplied with police evidence of all relevant interviews with him. We would adopt the words of Lawton L.J. in Hennessey (1979) 68 Cr. App. R. 419, 426, where he said that the courts must,
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> > "... keep in mind that those who prepare and conduct prosecutions owe a duty to the Courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence. We have no reason to think that this duty is neglected; and if ever it should be, the appropriate disciplinary bodies can be expected to take action. The judges for their part will ensure that the Crown gets no advantage from neglect of duty on the part of the prosecution."
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> That statement reflects the position in 1974 no less than today. We would emphasise that "all relevant evidence of help to the accused" is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led. We believe that in practice the importance of disclosing unused material has been much more clearly recognised by prosecutors since the publication of the *Attorney-General's Guidelines*. The current Code of Conduct for the Bar, reflecting the words of Lawton L.J. which we have quoted, provides that::
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> > "Prosecuting counsel should bear in mind at all times that he is responsible for the presentation and general conduct of the case and that it is his duty to ensure that all relevant evidence is either presented by the prosecution or made available to the defence."
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> So far as the law is concerned, however, the only practical difference between 1974 and 1992 in the present case is that in 1974 the police and the Director of Public Prosecutions were entitled as a general rule to adopt the Bryant and Dickson (1946) 31 Cr. App. R. 146 rather than the Dallison v Caffery [1965] 1 Q.B. 348, approach to the statements of persons who could give material

evidence but were not to be called, that is to say, they were not generally obliged to disclose more than the name and addressof the person concerned and the fact that he had made a statement."

(This passage is also to be found in R v Ward [1993] 1 WLR 619 at 645-6).

Here the accused are charged with murder, a capital offence. Insofar as one accused (Fungavaka) is concerned the preliminary inquiry before the Magistrates Court was done pursuant to s.42 Magistrates' Courts Act (cap 11) i.e. a committal without calling evidence with the prosecution lodging (as they were only obliged to so do) "a fair summary of the statements of the prosecution witnesses" together with a list of exhibits and a copy of documentary exhibits. The other accused (Tapu) chose the different route and evidence was called at the preliminary inquiry (per s 34 Magistrates' Courts Act). In that evidence it became apparent that there was, at least arguably, some difference between what was said by the witness Lesieli Tai in her evidence in chief and what was set out in the Fungavaka "fair summary" of her (Tai's) statement - and in an area which I accept may well be critical to the accused Tapu at trial i.e. whether after a punch allegedly inflicted by him on the deceased, the deceased fell to the ground and whether his head hit the ground. I accept that, under cross-examination in the court below, the witness seems to have said that she did not see the deceased fall and hit his head on the ground but I comment: first, because questions and answers are not recorded the matter is not entirely clear; and secondly, why should not - fairness - the accused have the (apparently inconsistent) statement available to them for use at trial, if needs be, under s 143 Evidence Act? Indeed as presently advised, if it came to it, I would see the alleged difference, between the deposition's evidence and the police statement, as a "material" discrepancy - not a minor one. It certainly touches on matters which are, or may be, material in relation to the issues expected to arise at trial - it is a "material" discrepancy whether viewed in terms of Mahadeo, or Bryant, or Dallison or Ward, and is of relevance to the defence in terms of Livingstone.

Accordingly I would have ordered, in any event, the specific disclosure, to both defence counsel, of any (and all) statements to the police by Lesieli Tai, (although, I add, as I am now told today, Lesieli Tai's statement has been handed to the accused's counsel by the prosecution).

I say "in any event". But given:

(i) what I have set out above as to the more flexible - and just (in my view) - approach to disclosure as evidenced e.g. in Hennessey, Lawson, Maguire, Ward, Davis, Livingstone and Keane;

(ii) the fact that this trial is on a capital count, for each accused;

(iii) the fact that one accused (Fungavaka) has not had the benefit of a preliminary inquiry where witnesses were examined (but only has a "fair summary"); and

(iv) the one presently known discrepancy already mentioned (the witness Tai);

I order in this particular case, in these circumstances, (and I emphasise those words) that the prosecution should disclose to both defence counsel, pre-trial, all the statements of all witnesses for the prosecution (and make available copies of all those statements to defence counsel).

To make it clear - if there has been more than one statement taken from a witness

all the statements of that witness should be disclosed.

The potential to work an injustice must be avoided.

In my view, in this particular case and in these particular circumstances, such an order is in keeping with the prosecution obligation (of fairness) to ensure that all relevant evidence of help to these accused is made available to the defence noting, as was said in Ward, that it is of help to an accused to have the opportunity to consider all the material evidence which the prosecution gathers and from which the prosecution makes it s own selection of evidence to be led. The accused must be given every opportunity to make representations on the basis of fullest information (Davis).

I order disclosure accordingly and as set out in detail above.

As, in effect, a postcript to this judgment I add that in the course of considering this matter I have given thought, as well, to the relevant provisions of the (UK) Criminal Procedure and Investigations Act 1996. As at the time of this judgment it has not been able to be ascertained whether this Act has come into force and effect yet. But whether it is in force or not I do not believe that it is a statute which should be applied in Tonga (pursuant to the Civil Law Act). First the English statute covers many areas (in one comprehensive code), a number of which are already the subject of extensive legislative enactments in Tonga (look in the English statute at some of the sections in Part V Committal, Transfer, Etc; Part VI Magistrates' Courts' Part VII Miscellaneous and General, as some examples only). The English statute is one code containing many interlocking, mutually dependent, sections - provisions in one Part are dependent on what has been done (to the law) in other Parts. Secondly many of the provisions (whether as individual measures and/or because of their interlocking with other provisions) are not suitable and appropriate to Tongan conditions and circumstances.

However (and this is important), the English statute underlines the necessity for prosecution disclosure (and I note that many other common law jurisdictions have now legislated for this) and recognises (eg. in s 21) the existence of rules of common law relating to disclosure (and it is those rules and their development that I have set out - or attempted to - above). Some thought should be given, in the Kingdom, to providing some suitable statutory regime of disclosure coupled with a revision of the relevant provisions of the Magistrates' Courts Act relating to preliminary inquiries and perhaps, introducing concepts of "hand-up" proofs of evidence and the statements on which such proofs are based.