IN THE GRAND COURT OF THE CAYMAN ISLANDS
IN THE CIVIL DIVISION

Cause No: G 111 of 2020 &
G 158 of 2019

BETWEEN:

ROHAN GIDARISINGH

APPLICANT

AND:

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

IN OPEN COURT

Appearances:	Mr. Rupert Wheeler of Samson Law Associates for the Applicant Ms. Marilyn Brandt of the Attorney General's Chambers for the Defendant
Before:	The Honourable Mr. Justice Robin McMillan
Heard:	27, 28, 29, 29 and 30 October 2020
Draft Judgment Circulated:	3 December 2020
Judgment Delivered:	9 December 2020

HEADNOTE

The common law duty of disclosure in criminal proceedings in the Cayman Islands. – The scope and application of a separate duty of disclosure where material has come to light following the end of criminal proceedings. – No continuing right of convicted persons to indefinite re-examination of their cases.

JUDGMENT

Introduction

1. This matter concerns an Application for Judicial Review on behalf of Rohan Gidarsingh ("the Applicant") against the Director of Public Prosecutions ("the Defendant") as thus described.

2. The Relief sought is as follows:

> *"1. An order of certiorari to review and quash the Defendant's decisions to refuse to disclose to the Claimant items it holds in the context of historic criminal proceedings against RG, namely Bed Sheets, a Knife, and Clothing ("the items");*
>
> *2. An order of mandamus compelling the Defendant to disclose the items to the Claimant forthwith;*
>
> *3. A declaration that the Defendant has acted unlawfully in refusing to disclose the items;*
>
> *4. Such further or other relief as this Honourable Court shall deem appropriate;*
>
> *5. All necessary and consequential directions."*

3. The Notice of Motion consolidates two claims for Judicial Review, namely Causes 158 of 2019 and 111 of 2020. Leave has been granted in both matters. On the 26th August 2020, this Court ordered that a Consolidated Notice of Motion be prepared and that the matters be heard together.

4. Mr Rohan Gidarisingh applies for Judicial Review of decisions of the Defendant, the Cayman Islands Director of Public Prosecutions ("DPP"), namely the refusal to provide him with disclosure of certain items under his control ("the decisions"). The items were seized in the course of a criminal investigation into allegations of rape, for which the Applicant was ultimately convicted on the 25th April 2017.

5. The dates of the challenged decisions and the items are, respectively:

   i. 2nd September 2019 – Bed sheets and a knife involved in the incident (Cause No. 158 of 2019);

   ii. 20th February 2020 – Clothing worn by the complainant Donique Thompson during the incident (Cause No. 111 of 2020).

6. The Applicant seeks disclosure of those items so that *"new lines of enquiry relevant to his criminal appeal – forensic testing – can be undertaken. This is with a view to seeking to admit fresh evidence in an appeal against conviction under section 16(b) of the Court of Appeal Law (2011 Revision)"*, as set out in paragraph 4 of the Introduction to the Motion.

7. The Application is brought under Order 53 of the Grand Court Rules (1995 Revision).

8. In summary, the Applicant submits that when making the decisions the Defendant fell into error of law by misinterpreting the common law duties of the prosecution in regards to post-conviction disclosure. In error of law the Defendant is alleged to have interpreted the common law in an overly restrictive manner by relying solely on the United Kingdom Supreme Court ("UKSC") case of *R. (Nunn) v Chief Constable of Suffolk Constabulary* [2014] 2 Cr. App. R. 22 and failing to have regard to (i) the ruling of the Chief Justice of the Cayman Islands in *In the Matter of Euro Bank Corporation* [2002 CILR 15], and (ii) the ruling of the Privy Council in *McDonald v HM Advocate* [2008] UKPC 46.

9. He submits that the common law of the Cayman Islands imposes a wide and continuing duty to disclose material that might cast doubt on the safety of his conviction, unless there is a good reason to withhold it. The Applicant wishes forensically to examine the items. If the results of those tests are favourable to him, he argues that it will affect the safety of the conviction and that there is no good reason to withhold the items from him.

10. The Applicant submits therefore that the Defendant acted in error of law when making the decisions, and asks the Court to quash the decisions and to compel the Defendant to provide the items to him.

The Background Facts

11. On the 25th April 2017, the Applicant was convicted of rape contrary to section 127 of the Penal Code (2013 Revision) (Count 1) and possession of a prohibited weapon (a knife) contrary to section 79 of the Penal Code (2013 Revision) (Count 2). This was following a trial before Swift J and a jury. He was sentenced to 13 years imprisonment.

12. The prosecution case can be summarised as follows: At the relevant time he was working as a chef at the Treasure Island resort. One of his colleagues, Ms Karlene King ("KK"), had a daughter called Ms Donique Thompson ("DT"). DT alleged that the Applicant raped her on the morning of the 7th November 2014 at the Holiday Inn hotel.

13. On the 6th November 2014, he was working at the resort with KK. On that evening DT came to the resort to visit KK. DT and the Applicant began talking. On it transpiring that it was DT's birthday, the Applicant offered to take her out to celebrate. DT agreed and the two went out for drinks.

14. In the early hours of the morning of the 7th November 2014, both the Applicant and DT went to the Holiday Inn hotel, where the Applicant booked a room. DT described in evidence that she had felt intoxicated and tired, and they had both gone to the room. Whilst in the hotel it was agreed between the parties that the Applicant performed oral sex on DT as she lay on the bed. After that, penetrative vaginal sex took place.

15. The issue at trial was whether DT had consented to the sexual intercourse. The Applicant contended that DT had consented. DT stated that she had not.

16. Of relevance to this application are the following matters:

17. First, DT claimed that she had both vomited and urinated on the bed during the incident. The Applicant agreed that she had vomited on him during sex but denied that she had ever urinated.

18. The bed sheets were retained by the police but never tested for urine. The fact of their retention is recorded in the Evidence Log prepared by Officer Camille Haughton.

19. Secondly, DT stated that she was threatened with a collapsible knife during the rape, where the Applicant held the blade against her neck in a firm manner. She also claimed that the knife was held to her side. He denied that he had threatened her with the knife at all, either to her neck or to her side.

20. The knife was seized by police but was never tested for the presence of DT's DNA on the blade.

21. Thirdly, in her evidence DT stated that during the incident the Applicant cut her tights with a knife. Conversely, he specifically stated that he did not cut her tights.

22. The prosecution did not put into evidence either the tights themselves or photographs of them.

23. The Applicant sought to appeal against his conviction to the Cayman Islands Court of Appeal. One of the grounds of the appeal was that the investigation had been inadequate. The criticism included allegations that the knife and the bed sheets should have been tested. The Court of Appeal stated that it was plain that the investigation had been inadequate.

24. However, the Applicant's application for leave to appeal was ultimately dismissed.

25. At trial, the Applicant was represented by Ms. Amelia Fosuhene, and at the subsequent application for leave to appeal by Mr. John Furniss.

26. Certain relevant passages of the Court of Appeal's Judgment are set out as follows at paragraphs 6-10:

"6. *"The first ground of appeal which he has sought to bring relates to the absence of proper investigation of material that plainly would have been available for the jury had that proper investigation taken place. It was alleged that there could have been produced, as the investigating officer's notebook revealed, further videos, which would have shown her state and movements and of the applicant before and after the rape was alleged to have taken place.*

7. *There were admissions that the knife that was produced did not contain any fibers from the complainant's underwear but, says the applicant, it was not tested to see whether it was free of not from the complainant's DNA, having regard to the allegation that the knife was pressed against her neck nor was the bed clothing examined and therefore it was not known whether there were signs of urine or not.*

8. *The telephones were not interrogated so as to see the content of the messages that it was said that she sent. All of this, in the context of a very delayed trial, where the investigating officer had left the service and was no longer on the island.*

9. *It is, in our judgment, plain that there was inadequate investigation but it is equally plain that that is of no avail to the applicant unless it can be said that a fair trial of the issues in this case was not possible. (see R on behalf of Ebrahim v Feltham Magistrates Court 2001 1 A11 ER 831) The judge warned the jury not to speculate as to whether what was contained in those items that should have been further investigated would have helped the Crown or would have helped the applicant. In that direction he was correct. We would only comment that his further direction was not, in our view, sufficiently forceful in favour of the defence. He said to the jury:*

> *"I direct you that such failures by the police and holes in the evidence that are left behind by those failures must not weigh against the defendant in any way"*

10. *In fact, of course the absence of evidence was an argument that it was perfectly proper for the defendant to deploy, underlining the absence of any evidence that might have otherwise been available to support the Crown and thus putting into stark highlight the fact that the Crown's case depended upon the complainant who had gone to that room in a drunken state. However, that direction was not, in our view, anything like a sufficient misdirection as to cast doubt upon the safety of the verdict of the jury. In those circumstances, it does not, in our judgment, afford any distinct ground of appeal."*

Request for Disclosure

27. The Notice of Motion then proceeds at paragraphs 24 – 34:

"24. On the 3rd June 2019, RG wrote to the Police Commissioner. In that letter he requested, inter alia:

i. The knife allegedly used in the course of the offending ("the knife");

ii. White sheets and pillowcases (exhibits CH4 – CH10), all recovered by police from the relevant hotel room on the 7th November 2014 ("the Bed Sheets");

iii. The dress, tights and underwear worn by DT and allegedly cut during the incident.

25. On the 4th June 2019, Ms Candia James-Malcom (the Acting Deputy DPP), replied to RG. In the letter she stated:

> *"All relevant material seized during the course of the investigation and in the possession of the RCIPS was disclosed to you prior to and during your trial."*

26. The letter stated that there was no post-trial duty requiring the prosecutor to disclose items that are merely requested for a re-investigation of the case. It concluded by refusing to disclose the items.

27. *On the 14th June 2019, Samson Law (instructed on RG's behalf) sent a letter to the DPP. The letter reiterated the requests and took issue with the DPP's interpretation of the law of continuing disclosure.*

28. *On the 17th June 2019 the DPP replied to Samson Law, and again refused to provide the requested items. In that letter the DPP erroneously stated that the bed sheets had not been seized by police. It is now accepted by the prosecution that they were seized by PC Camille Haughton on the 7th November 2014 and labelled exhibits CH4 – CH10.*

29. *On the 25th June 2019, Samson Law sent a further letter to the DPP. Again, issue was taken with the DPP's interpretation of the law.*

30. *On the 25th June 2019, the DPP replied to Samson Law by email. The email stated "[m]y position regarding disclosure remains the same and I do not intend to continue repeating same ad infinitum". That email repeated the error that the bed sheets had not been seized during the investigation.*

31. *On the 25th June 2019 Samson Law replied to the DPP. The email maintained that the DPP was in error and stated that Samson Law had been asked to consider legal remedies. It stated that "simply providing Mr Gidarisingh with the knife will be a more proportionate means of resolving this issue, rather than resorting to litigation."*

32. *On the 25th June 2019 the DPP responded stating "[y]ou are entitled to consider whatever legal remedies you deem appropriate in the circumstances." Samson Law replied on the same day indicating that they would be in touch.*

33. *On the 20th February 2020, Samson Law sent an email to the DPP. The email set out the significance of the clothing and requested an opportunity to view it.*

34. *On the 20th February 2020 the DPP replied to Samson Law, refusing to provide the clothing. The email stated that "the clothing was the subject of cross-examination". In fact, neither DT nor the investigating officer was cross-examined about the physical state of the clothing during the trial. The letter repeated that there was not an ongoing duty of disclosure."*

Application for Leave to apply for Judicial Review

28. On the 13th November 2019, Mr. Justice Kawaley heard the application for leave ex parte in respect of Cause No. 158 of 2019 (the bed sheets and knife). The learned Judge granted leave to apply for judicial review.

29. On the 26th August 2020, Mr. Justice McMillan granted leave in respect of Cause No. 111 of 2020.

30. It should be noted that on the 8th April 2020 the Applicant has given notice that he intends to bring a second appeal, but this is not an aspect which concerns the Court in the instant matter.

The Evidence of the Applicant

31. The Applicant has produced two Affidavits in relation to the grounds of his Application. It is important to set them out in turn as they indicate what may fairly be described as the personal and subjective nature of his complaints. They appear to have been sworn on 24 September 2019 and on 1 May 2020 respectively.

32. The First Affidavit proceeds thus:

"The Clothing

3. *I understand that the clothes worn by Donique Thompson on the night of the incident were seized as part of the police investigation. From her oral evidence, I understand that she was wearing a floral mini dress, some underwear and tights. This clothing was never disclosed to me in the criminal proceedings. I have not seen it since the night of the incident. I have never had an opportunity to examine it. I have never had an opportunity to check whether the tights were cut in the way described by Ms Thompson.*

4. *The clothing was not produced in evidence by the prosecution as part of their case to support what Ms Thompson had said. No photographs were ever shown to me or the jury.*

5. *I did not cut the tights or any of the clothing. The failure of the prosecution to provide me with the actual clothing, or comprehensive photographs of it, meant that I was not in a position to use the condition of the clothing to contradict what Ms Thompson had alleged.*

6. *The prosecution therefore deprived me of my right to conduct my defence effectively.*

33. The Second Affidavit proceeds thus:

"The Bed Sheets

3. *During the criminal proceedings against me, I was not aware that the bed sheets from the incident had been seized by police. Conversely, I was informed that they had not been seized. In the course of the trial I made requests for them to be provided. The answer that was given by Ms Candia James-Malcolm, prosecuting counsel, was that they had not been seized by police. I have been shown the email of Candia James-Malcolm to my attorney Rupert Wheeler dated the 25th June 2019 [tab16], in which she states" [t}he sheets and the bedding were not seized during the investigation". This was the impression that was given to me throughout the proceedings.*

4. *I am now aware that the bed sheets from the room where the alleged offending took place were seized by police officer Camille Haughton and were exhibited by her within a schedule as CH4-CH10. I had not seen this schedule until after the criminal proceedings against me concluded. My attorney made the request for the sheets as early as my Police interview. I do not know whether my attorney later became aware that the sheets had been seized; this was never brought to my attention. Had I known that the sheets had been seized, I would have asked for their disclosure given how important I feel that they would have been in the trial.*

5. *I seek the disclosure of the sheets so that they can be forensically examined for the presence of Donique Thompson's urine. She claimed that she urinated on the sheets during the incident. This is something I deny. Testing will show that she did not tell the truth in her evidence to the jury.*

6. *By claiming that the bed sheets had not been seized, the prosecution deprived me of the right to fully conduct my defence.*

The Knife

7. *Prior to the trial I wanted the knife to be tested for DNA. This was never done by either the police or my attorney, despite my requests.*

8. *Prior to my appeal I made a request in October 2018 for the knife to be provided, but the DPP and police did not answer me. I made further requests to the Commissioner of Police the 10th April 2019 and the 3rd June 2019 [see attached correspondence at tab 28] [exhibit RG/1]. On the 5th June 2019 I received a response from the Commissioner of Police stating that the request would be reviewed and an update would be provided. I have never received a further update.*

9. *I wish to have the knife tested for the presence of Ms Thompson's DNA, given that she states the blade was held against her side and neck. This test will show that she was not truthful in her evidence."*

34. What is not obvious or apparent from the contents of either Affidavit is that the Applicant was in fact represented throughout his trial by competent and experienced Counsel, or indeed that for his appeal application he was again represented by competent and experienced Counsel, whom he was able to instruct as he saw fit and appropriate to do.

Different Approaches to the Governing Principles of Law

35. The central legal submission of the Applicant appears at paragraph 43 of the Consolidated Motion:

"43. It is submitted that the Defendant's decision to refuse disclosure of the items was made in error of law. In making its decision, the Defendant relied solely on the United Kingdom Supreme Court case of Nunn. For the reasons set out below, the common law position in the Cayman Islands imposes a broader duty of disclosure on the Defendant, than that in the United Kingdom."

36. This criticism is specifically derived from the making of certain statements by Ms. Candia James-Malcolm, Deputy Director of Public Prosecutions (Acting).

37. In a letter to the Applicant dated 4 June 2019 she states that where the trial process has been completed the common law does not recognise *"a duty of disclosure and inspection which is the same as that prevailing prior to and during the trial."* Ms. James-Malcolm then adds that a duty of disclosure arises post trial only in circumstances where new material has come to light which might cast doubt on the safety of a conviction, citing the *Nunn* case for that principle.

38. Ms. James-Malcolm repeats this contention in a letter to Mr. Rupert Wheeler stated 17 June 2019, stating that a duty of disclosure arises post trial only in circumstances where new material has come to light which might cast doubt on the safety of a conviction. She then adds:

"There is no new evidence which may cast doubt on your client's conviction. There is also no real prospect that any further enquiry might reveal anything which may affect the safety of the conviction. The public interest at this stage, your client having exhausted his appeals, is in finality."

39. In regard to these differences of approach, Mr. Wheeler places emphasis on the *dicta* of Smellie CJ in the *Euro Bank* case and in particular for present purposes on paragraph 29 where the learned Chief Justice states:

"29. The guiding and overarching principle must always be that the prosecutor must ask himself what it is, in the circumstances of the case, that justice and fairness demand by way of disclosure, and act accordingly. This requirement arises from the general responsibility of the prosecutor to act in the character of a minister of justice assisting in the administration of justice. And the duty of disclosure exists whether or not a specific request is made by the defence and continues at all stages throughout the criminal proceedings."

40. It is important to add that the learned Chief Justice derives this principle from the common law of the Cayman Islands, as he has previously indicated at paragraphs 18-19:

"18. Lord Hope of Craighead, in delivering the main speech on behalf of the House of Lords in R. v. Brown (3), said ([1998] 1 Cr. App. R. at 70):

"If a defendant is to have a fair trial he must have adequate notice of the case which is to be made against him. Fairness also requires that the rules of natural justice must be observed. In this context, as Lord Taylor of Gosforth C.J. observed in Keane ... the great principle is that of open justice. It would be contrary to that principle for the prosecution to withhold from the defendant material which might undermine their case against him or which might assist his defence."

19. These are the fundamental rules of common law which had already found expression in decisions of the courts and upon which ss. 3, 7 and 9 of the Criminal Procedure and Investigations Act 1996 of the United Kingdom are based. So, although those statutory provisions which were applied in R. v. Brown do not yet apply in the Cayman Islands, the position in law for present purposes, must be regarded as being in principle the same."

41. On this basis Mr. Wheeler then proceeds to summarise his central legal submission at paragraph 54:

"54. There is no Cayman Islands authority on the specific issue of post-conviction disclosure. It is therefore submitted that Eurobank continues to be the leading case on the issue of criminal disclosure in this jurisdiction, and should be followed by the Defendant. As elaborated upon below, Eurobank requires disclosure of any relevant material and the duty continues at all stages throughout the criminal proceedings [45]."

42. The legal question for this Court therefore is whether this expansive interpretation is correct.

43. Separate and distinct from this question is also the critical question as to whether on the basis of whatever legal test may be engaged there is in reality any failure to disclose fully and properly at all.

44. Mr. Wheeler further relies on the Attorney General's Guidelines on Disclosure in England and Wales including this Guideline at paragraph 46:

"46. Prosecutors only have knowledge of the matters which are revealed to them by investigators and disclosure officers. The schedules are the means by which that revelation takes place. Therefore it is crucial that the schedules detail all of the relevant material and that the material is adequately described. This process will also enable defence practitioners to become appraised of relevant material, at the appropriate stage of the investigation."

45. An addition, if relatively minor, source of complaint is as to the way in which unused material was presented by the Crown to the Defendant at trial, in that although in substance it may well have met fundamental requirements nonetheless the precise form of it fell short of the prescriptions in Guidelines paragraphs 47 – 48:

"47. Schedules must be completed in a form which not only reveals sufficient information to the prosecutor, but which demonstrates a transparent and thinking approach to the disclosure exercise.

48. Descriptions on the schedules must be clear and accurate and must contain sufficient detail to enable the prosecutor to make an informed decision on disclosure."

46. Mr. Wheeler also places reliance on certain *dicta* in *McDonald v HM Advocate* [2008] JCPC 42, a Privy Council authority dealing essentially with aspects of Scottish criminal procedure.

47. Notably Lord Hope of Craighead refers at paragraph [20] to a *"cultural revolution as to the disclosure by the Crown to the defence of material in its possession".*

48. At paragraph 50 Lord Rodger of Earlsferry states *inter alia*:

"Put shortly, the Crown must disclose any statement or other material of which it is aware and which either materially weakens the Crown case or materially strengthens the defence case ('disclosable material')."

49. Lord Roger adds at paragraph [55] that the *"duty to disclose...subsists unless, unusually, it is waived by the defence."*

50. This is a small but important distinction because it is a matter for the defence to determine how far, once disclosure is made, it wishes to pursue a particular matter further. There may, for example, be tactical reasons not to explore the matter at all. This is an aspect of the facts in this case to which the Court will later return.

51. At paragraphs 73 – 75 Lord Roger states:

"73. Of course, a ground of appeal may be a good one, even if it is raised late. And the Solicitor General rightly accepted, on behalf of the Crown, that if, when preparing for an appeal or at any other stage, the Crown became aware of any material which had not been disclosed and which ought to have been, the Crown would be obliged to provide it to the appellant who could then use it, if appropriate, to support an existing ground of appeal or to formulate a fresh ground of appeal.

But that is very different from an obligation on the Crown actually to reinvestigate the entire position on disclosure in all solemn cases which are under appeal.

74. *For essentially the same reasons as apply at first instance, in my view there is no such obligation on the Crown. Rather, the Crown's obligation at the appeal stage was correctly identified by the Solicitor General in argument. He accepted that, while the Crown need only prepare to meet the existing grounds of appeal, the duty of disclosure in terms of Art 6(1) was not confined to material relevant to those grounds of appeal. It would extend to material which should have been disclosed at an earlier stage, or which had become disclosable in the light of developments in the appeal or which was disclosable but had only come to the attention of the Crown since the trial. An obligation in these terms is already enshrined in the Crown Office Disclosure Manual (para 26.1.3). Consistently with that approach, by the time of the hearing before the Board, the Crown had disclosed the previous convictions of various Crown witnesses and the witness statements of the witnesses on the Crown list at the trial. Such statements and convictions are readily identifiable, without investigation, as material which should have been disclosed before trial. By contrast, the Crown is not under any obligation to look through all the material in its possession in order to see whether some other item might have been disclosable if identified before trial. Not only would such an obligation be unduly burdensome, but it would often be quite inappropriate at the appeal stage. By then, the real issues in contention between the parties will have been focused at the trial. In this new situation material which might have seemed to be of potential significance for the defence before the trial (for instance, as weakening the identification evidence of a witness to a murder) may now be seen to have actually been irrelevant (because for instance, the accused admitted that he killed the deceased, but pleaded self-defence). For the same reason, an admitted failure to disclose statements of witnesses on the Crown list will often prove to have been of little or no practical significance in the light both*

of their contents and of the way the issues were focused at the trial. It will therefore provide no basis for challenging the conviction.

75. It follows that, as already explained, if the Crown had failed to disclose the statements of Crown witnesses or, subject to the Art 8 point, the convictions and outstanding charges of such witnesses, the appellants would have been entitled to an order requiring their disclosure. In fact, however, the Crown has made these disclosures and it is now up to the defence to see whether the new material is of any assistance. Similarly, if the appellants were able to satisfy the court that material would have a bearing on an issue in contention between the parties in the appeal, the court would have the power to order its production, even if it was not material."

52. It is especially significant to note therefore that at paragraph 25 of the *Nunn* case Lord Hughes states regarding the *McDonald* case that the result was reached in relation to Scottish law *"where the content of the duty of disclosure was then in a transitional state."*

53. The decision in the *Nunn* is extremely fully summarised in the Headnote at pages 313 – 314 as follows:

"Held, dismissing the appeal, that the principle of fairness informed the duty of disclosure at all stages of the criminal process. It did not, however, follow that fairness required the same level of disclosure at every stage, and what fairness required varied according to the stage of proceedings under consideration. The Criminal Procedure and Investigations Act 1996 imposed the statutory duty of disclosure which displaced the common law duty from the time a case on indictment entered the Crown Court until the trial ended. The common law duty continued to exist thereafter, but in a modified form, to meet the needs of the particular stages of the proceedings. Although the common law duty applied to sentencing and appellate proceedings, and prosecutors were obliged to disclose any relevant material which was not already known to the defendant and which might assist him in the proceedings, such disclosure did not involve a re-performance of the entire disclosure

exercise. Similarly, where the trial process was complete, the common law did not recognise a duty of disclosure and inspection which was the same as that prevailing prior to and during the trial. The position of a convicted defendant was different in kind from that of a defendant at trial. The latter was presumed innocent until proven guilty and might defend himself in any proper way in answering the charge against him. The former was presumed guilty and had had that opportunity. The public interest until conviction was in the trial process being as full and fair as possible. After conviction, and apart from the question of its safety, the public interest was in finality. There was no indefinitely continuing duty on police or prosecutors to respond to whatever enquiries the defendant might make for access to case materials to allow re-investigation. Where after the conclusion of the proceedings material came to light which might cast doubt on the safety of the conviction, the prosecutor was obliged to disclose the material to the defendant unless there were good reason not to do so, and, further, where there was a real prospect that further enquiry might reveal such material, there was also a duty to make that enquiry; but that was not this case (post, [20]–[32], [34], [38],[42], [44])."

54. These passages bring the Court to the central legal question here. According to *Nunn*, there are three stages of enquiry.

55. First, under the Criminal Procedure and Investigation Act 1996 there is a duty of disclosure which replaces the common law duty from the time a case on indictment enters the Crown Court until a trial ends. Under this duty disclosure applies to any material which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.

56. Secondly, after the trial ends the common law duty continues to exist thereafter, but in a modified form, to meet the needs of the particular stages of the proceedings. Prosecutors are obliged to disclose any relevant material which was not already known to the defendant and which might assist him in the proceedings; but such disclosure does not involve a re-performance of the entire disclosure exercise.

57. Thirdly, where the trial process is complete, the common law does not recognise a duty of disclosure and inspection which was the same as the prevailing prior and during the trial. Where after the conclusion of the proceedings material comes to light which may cast doubt on the safety of a conviction, the prosecutor is obliged to disclose the material to the defendant unless there is good reason not to do so, and further, where there is a real prospect that further inquiry might reveal such material there is also a duty to make that enquiry.

58. It is important to set out the respective tests in great detail because of the contrasting positions taken by both the Applicant and by the Director of Public Prosecutions.

59. On the one hand, the Applicant asserts that there is even after the conclusion of criminal proceedings a broad and overreaching duty of disclosure. On the other hand, it is asserted for the Defendant that the only form of disclosure applicable and relevant after the conclusion of criminal proceedings is that where material subsequently comes to light.

60. As we have seen, Mr. Wheeler further contends that the Crown in the Cayman Islands has a broader duty of disclosure than in England and Wales. He seeks to fortify this argument by pointing out that in England and Wales a convicted person whose case has been dismissed by the Appellate Court is able to make representation to the Criminal Cases Review Commission ("CCRC"). He describes the CCRC as a safety net that exists to prevent miscarriages of justice and correctly emphasises that there is no equivalent body in the Cayman Islands.

61. Ms. Brandt in contrast draws authority from the third limb of the *Nunn* principles and relies upon this statement by Lord Hughes at paragraph 38:

"It does not, however, follow from cases such as this that the law ought to impose a general duty on police forces holding archived investigation material to respond to every request for further enquiry which may be made of them on behalf of those who dispute the correctness of their convictions. Indeed, the potential for disruption and for waste of limited public resources would be enormous if that duty were to be accepted. The claimant's initial requests in the present case for investigation of the finances of the deceased, as well as his earlier applications for sight of the entire investigation files, afford good illustrations of the kind of speculative enquiry which such a rule would encourage. There is no such duty. If the duty of disclosure pending appeal is limited, as it plainly is, to material which can be demonstrated to be relevant to the safety of the conviction, it is all the clearer that after the appellate rights which the system affords are exhausted the continuing obligation cannot be greater than that stated in the Attorney General's guidelines, read as explained in [30] above."

62. Ms. Brandt also states at paragraphs 38 – 41 of her Written Submissions dated 20 October 2020:

"38. The request for post-trial disclosure was refused by the Acting Deputy Director on the basis that there is no continuing duty at this stage on the police or prosecutors to respond to enquiries a defendant might make to access case materials to allow re-investigation. A duty of disclosure arises post-trial only in circumstances where new material has come to light which might cast doubt on the safety of a conviction.

39. In arriving at the decision, the Acting Deputy Director placed reliance on the case of R. Nunn v Chief Constable of Suffolk Constabulary [2014] 2 Cr. App. R 22 wherein it was held that while the principles of fairness informed the duty of disclosure at all stages of the criminal process, it did not follow that such fairness required the same level of disclosure at every stage.

40. Where the trial process was complete, the common law did not recognise a duty of disclosure and inspection similar to that which prevailed before and during trial. There is therefore no indefinitely continuing duty on police or prosecutors to respond to whatever enquiries the defendant might make for access to case materials to allow re-investigation.

41. As stated, the counsel for the Plaintiff had access to the sheets prior to the trial, he knew the knife had been recovered and the clothing was inspected by his counsel during the course of the trial. The Plaintiff, in his Second Affidavit (undated), states that he was not aware that the sheets from the incident has been seized by the police. He opined that he is unable to confirm whether his attorney knew but it was never brought to his attention."

63. The Court will now address the merits of the respective positions and the extent to which the principle of finality has a bearing on which approach may be correct.

Finality

64. Lord Hughes analyses the concept of finality at paragraph 32 of his Judgment in this manner:

"32. The position of a convicted defendant is different in kind from that of a defendant on trial. The latter is presumed innocent until he is proved guilty, as he may never be. The former has been proved guilty. He is presumed guilty, not innocent, unless and until it be demonstrated not necessarily that he is innocent, but that his conviction is unsafe. The defendant on trial must have the right to defend himself in any proper way he wishes, and to make full answer to the charge. The convicted defendant has had this opportunity. The public interest until conviction is in the trial process being as full and fair as it properly can be made to be. After conviction there is of course an important public interest in exposing any flaw in the conviction which renders it unsafe and in quashing any unsafe conviction, but there is also a powerful public interest in finality of proceedings. All concerned, including witnesses, complainants, the relatives of the deceased and others, have a legitimate interest in knowing

that the legal process is at an end, unless there be demonstrated to be good reason for re-opening it."

65. The Applicant was convicted after trial by jury of rape and possession of a prohibited weapon and has subsequently applied for leave to appeal against his conviction and sentencing with the application being dismissed. There is not merely some public interest in finality of proceedings but a powerful interest. As Lord Hughes makes clear, in cases of this nature all concerned have a legitimate interest in knowing that the legal process is at an end, unless there be demonstrated to be good reason for re-opening it.

66. With that caution firmly in mind, the Court has reviewed and considered the various learned submissions made as to the applicable disclosure principles in the Cayman Islands.

67. The Court considers that upon their true and accurate construction the *dicta* of the learned Chief Justice in the *Euro Bank* case address, and only address, the duty of disclosure at all stages throughout the criminal proceedings. In the case of Mr. Gidarsingh, those proceedings have now ended.

68. In light of that inescapable reality, both Ms. Brandt and indeed Ms. James-Malcolm rely on what may be described as the residual scope of the duty to disclose set out as the third limb of the *Nunn* principle.

69. However, and with great respect to Ms. Brandt, there is as a matter of jurisprudence a logical flaw in simply adopting and applying the notion of a residual common law principle.

70. The doctrine as to disclosure of material coming to light after the conclusion of proceedings is explicitly described in *Nunn* as a modified form of the common law duty, modified by the Criminal Procedure and Investigations Act 1991 having itself displaced the common law duty itself.

71. In the Cayman Islands there has been no such statutory displacement and therefore no residual common law duty can arise in the form in which it arose in *Nunn* and for the specific reason for which it arose in that case.

72. It appears to this Court that in keeping with the public interest in the finality of proceedings, and in keeping with the broad duty of disclosure so eloquently set out by the learned Chief Justice, there is ample justification at common law for supplementing and supporting these *Euro Bank* principles with a further principle. The principle is one which satisfies the criteria as to material which comes to light after the conclusion of proceedings and which parallels the test in *Nunn* but which is neither technically derived from it nor based upon it.

73. In this way it becomes possible to identify a suitable framework with which to address issues of disclosure which otherwise fall outside the criminal proceedings themselves and therefore for which the *Euro Bank* doctrine is not directly or indirectly applicable.

74. Accordingly, the Court accepts in substance if not quite in theory the submission of Ms. Brandt at paragraph 38 of her Submissions.

75. Under Cayman Islands law convicted persons do not have a continuing right to indefinite re-investigation of their cases.

76. Upon that basis the Court will now consider the relevant facts.

A Review of the Facts and Circumstances

77. Ms. Brandt makes the following observation at paragraph 42 of her Submissions:

> *"42. It is quite remarkable that the Plaintiff has made a number of assertions that he was not provided access to various material, however there is no statement from his counsel in support. The obligation on the Crown does not extend in instances where the attorney for the plaintiff strategically choose not to utilize certain evidence in the trial. If the Plaintiff is suggesting that he was not adequately represented at trial, then the appropriate course would have been to file an appeal on the basis of incompetence of counsel."*

78. As we have already seen, the distinction drawn is one which the Applicant himself has expressly made in the course of his First and Second Affidavits.

79. Bearing all of that in mind, it is now necessary to consider what has actually happened. There are two aspects to this question. The first aspect concerns the untested material of which the Crown provided written notices. The second aspect concerns what transpired at the trial and at appeal, and conversely what did not transpire.

80. Ms. James-Malcolm swore an Affidavit dated 11 May 2020, confirming at paragraph 19 in relation to pre-trial disclosure that *"an index to the unused material and the coversheet"* was served on 16 April 2016. The exhibited Scene of Crime Report at CJM4 details *inter alia* the recovery of bedding form the hotel room, including sheets and pillow cases, as set out on the second page of the Report.

81. Then Ms. James-Malcolm swore a further Affidavit dated 12 August 2020. She points out at paragraph 5 ii that the Applicant's counsel Ms. Fosuhene had requested sight of the clothing seizures from the Complainant, during the trial and that Ms. Fosuhene examined the clothing at Court during the course of the trial and in the presence of the Applicant:

"In said Affidavit the Applicant asserts that he was never given the opportunity to examine the clothing of the Complainant to determine whether the clothing was cut. He also proclaims that he was not shown any comprehensive photographs of same. I do not agree with the statements made by the Applicant and can confirm the following:

i. The clothing seized from the complainant was available for inspection at the time of Applicant's trial.

ii. The Applicant was represented at trial by experienced counsel, Ms Amelia Fosuhene. Ms Fosuhene requested sight of the clothing during the trial and same was produced by the officer in the case. Ms Fosuhene examined the clothing at court during the course of the trial and in the presence of the Applicant."

82. Ms. James-Malcolm continues at paragraph 5 iii – iv:

iii. *Further, it was an agreed fact at trial that there had been forensic analysis of the fibres from the complainant's clothing against the fibres on the knife held by the Applicant which showed that there was no match. A true copy of the forensic report dated 9th June, 2015 was served on the Applicant on 22nd July, 2016 and is exhibited as "CJMl ". This report was the basis for the admission at paragraph 2 of the agreed facts, a true copy of which is exhibited as "CJM2". (The signed copy of these admissions were submitted at trial to the presiding Judge.) This evidence was adduced in support of the Applicant's contention that he had not cut the complainant's clothing. It is therefore clear that the Applicant had notice of the fact that the' complainant's clothing was available.*

iv. *The complainant's clothing was not fresh evidence and therefore there was no basis in law to warrant further disclosure of same post-conviction."*

83. A copy of the relevant forensic analysis report is found at CJMI. It included reference to receiving a pair of underwear *"with an apparent cut across the waistband and upper front body."*

84. Turning to the trial itself, it is common ground that a knife was taken from the Applicant and that it was exhibited as CH1. It is also accepted that neither the tights nor the shirts and other bedding from the scene was exhibited by either the Crown or the Defence, even though as we have seen the Defence was aware of their existence and their availability. This availability would have extended to opportunity for testing as well as to opportunity for formal exhibiting.

85. The trial took place on 19, 20, and 25 April 2017 before the Honourable Mr. Justice Swift. Partial transcripts of the proceedings have been provided to this Court and in the course of her oral submissions Ms. Brandt refers extensively to excerpts from the transcripts. It is unnecessary to refer to all of the material. Instead the Court will confine itself to some representative examples.

86. At page 32 lines 15 – 25 and page 33 lines 1 – 25 the Complainant in examination-in-chief described the Applicant in the room putting the knife to her neck. At page 37 lines 1 – 20 she described being told to get on top of him and to put his penis into her vagina while he held the knife at her side.

87. She described urinating where that happened and that after that he continued to engage in sex (page 41 lines 15 – 25).

88. Under cross-examination by Ms. Fosuhene the Complainant described at page 146 lines 10 – 25 that she was examined by a doctor who took from her all of her clothing including tights which she said were cut with Mr. Gidarsingh's knife.

89. In examination-in-chief the Applicant at pages 57, 58 and 59 denied holding the knife to the Complainant's neck or at her side. At page 62, lines 15 – 25 the Applicant claimed that she had vomited but not urinated on top of him.

90. Then at page 71 lines 5 – 20 he denied cutting her dress or her tights.

91. This Court should point out that there also exists an Evidence Log of items reviewed by Scenes of Crime Officer Camille Haughton including references to the recovery of sheets, pillow cases and a white spread form the room at Holiday Inn. This log is to be distinguished from the Scene of Crime Report earlier identified.

92. Finally, as the Court of Appeal has stated in its Judgment, the knife did not contain any fibres from the Complainant's underwear. Certainly had the Applicant's Counsel at the time Mr. Furniss chosen to enquire into any/or conduct further tests in relation to the presence or absence of the Complainant's DNA on the knife, having regard to the allegation that the knife was placed against the Complainant's neck, that option still remained opened. It is an option which Counsel acting for the Applicant clearly chose not to exercise.

93. Mr. Wheeler contends in his Written Reply that the mere fact that the items were available to trial counsel does not mean that the duty of disclosure is therefore discharged. He argues that the duty of disclosure exists whether or not a specific request is made by the defence.

94. However, disclosure was already made in any event despite no specific request from the defence. That is the reality of the situation. The Court considers that the burden to disclose has been discharged; it has not simply been placed on the defence to request disclosure.

95. It is correct as Mr. Wheeler contends that the common law does not absolve the Defendant of his disclosure duty just because items were available on request. What is not correct, however, is that that duty to disclose items once discharged continues unabated at all stages thereafter following disclosures. As the learned Chief Justice states at paragraph 30 of the *Euro Bank* case unused material required to be disclosed should be disclosed *"at the proper time and in the proper manner."* It is clear to this Court that despite disclosure the Applicant did not want these items either at the proper time or in the proper manner, and therefore on the facts of this case the duty to disclose has been both satisfied and discharged.

CONCLUSION

96. As the Court has stated earlier, where criminal proceedings have already come to an end, the test in law is whether material has come to light which might cast doubt on the safety of Mr. Gidarsingh's convictions.

97. In refusing further to disclose to the Applicant the bed sheets, the clothing and the knife, has the Director of Public Prosecutions acted unreasonably, unfairly, or unlawfully?

98. Throughout the course of the trial these items were fully available to the Applicant and the Applicant's respective attorneys. Indeed, there was no obstacle in either law or fact in the defence causing the sheets and the tights in particular to be formally exhibited had the defence so wished. Correspondingly up to the time of the appeal forensic testing could likewise have been pursued. Whether such testing would have enhanced or diminished the credibility of the Complainant is at this stage at best speculative only. In normal circumstances the manner in which cases are conducted is a matter for Counsel and not for the Court. This criminal case has been no exception in that regard.

99. It is the conclusion of the Court that the Director of Public Prosecutions through Ms. Candia James-Malcolm came to decisions which he was lawfully entitled to reach. The decisions and the manner in which they were reached were neither unreasonable, unfair, nor unlawful in any material respect.

100. Accordingly, this Consolidated Motion is refused.

Robin McMillan

THE HONOURABLE MR. JUSTICE ROBIN MCMILLAN

JUDGE OF THE GRAND COURT OF THE CAYMAN ISLANDS