IN THE CAYMAN ISLANDS COURT OF APPEAL

CACR014/2012
(Ind. 75/11)
C#04517/2011

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and

Joshua Brown

Appellant

Before: **The Hon Mr. Justice Mottley** - **Justice of Appeal**
The Hon Mr. Justice Conteh - **Justice of Appeal**
The Hon Mr. Justice Ground - **Justice of Appeal**

Appearances:
James Corbett Q.C., instructed by Michael Wingrave of Stenning & Associates for the appellant. Trevor Ward, Deputy Director of Public Prosecution for the Crown.

Heard: 24 & 25 April 2013
Reasons for Judgment released: 12 August 2013

MOTTLEY, J.A.

[1] Following a trial before Mr. Justice Panton without a jury, Joshua Alexander Brown, the appellant, was convicted on an indictment containing two counts. The first count alleged that, on 8 September 2011, the appellant was in possession of a Springfield Colt hand gun without having a firearms user's

licence. The second count alleged that he had in his possession six .45 caliber rounds of ammunition also without a firearms user's licence. The appellant was sentenced to a term of imprisonment of 12 years on each count to run concurrently. The court ordered that time spent in custody was to be taken into consideration.

[2] After the hearing of the appeal, the Court announced that the appeal would be allowed. The Court quashed the conviction and set aside sentence. The Court ordered that the appellant be retried. In the light of this, the Court will refrain from commenting on the facts except when the Court considers that it is absolutely necessary.

[3] The case for the prosecution was that early on the morning of 8 September 2011, around 2am, a report was made to the Police via 911 that an accident occurred in Prospect when a motor car collided with a wall. The person who made the report alleged that when the man who was driving the car alighted from the vehicle following the collision, a firearm dropped from his waistband.

[4] The registration number of the vehicle alleged to have been involved in the collision with the wall matched the registration number of the vehicle owned by the appellant's mother. Following enquires made at the residence of the appellant's mother around 2:50am that same morning, the police concluded that the vehicle could be found at the residence of Ms. Darcia Parchment, a lady with whom the appellant stated that he was romantically involved, at 14 Lemon Breeze, Marina Drive, Prospect.

[5] Later on 8 September 2011, a search warrant was executed by the police at the premises occupied by Ms Parchment. As a result of the search, a firearm, a Springfield Colt .45 together with six .45 caliber rounds were found by the police wrapped inside a t-shirt and hidden inside a freezer drawer within a fridge-freezer unit at Ms Parchment's apartment. This apartment was not the property of the appellant but was in fact leased to Ms Parchment.

[6] Swabs were taken from the exterior of the firearm; these were later analyzed and were found to include DNA which matched the appellant's DNA. He was found to be a major contributor. DNA from another person whose identity was not established was also found on the swabs taken from the exterior of the

firearm. Swabs were also taken from the interior of the firearm; examination of these swabs showed DNA from at least two donors. While the appellant could not be confirmed as one of the two contributors, he could not be excluded as a source of the DNA. No DNA was detected on the ammunition.

[7] At the commencement of the trial, counsel for the appellant made a request of the prosecution to disclose certain information. The request sought information concerning the following: (a) whether Ms Parchment, the appellant's girlfriend the other occupant of 14 Lemon Breeze, Marina Drive, Prospect, was a police informer; (b) the reason why Ms. Parchment was not charged with offences similar to those with which the appellant has been charged and is now before the court; (c) the recording of the 911 call made to the police about the traffic accident which triggered the search at the apartment and the subsequent investigation; and (d) the basis for the application for the search warrant.

In relation to (c), counsel on behalf of the prosecution indicated that the prosecution had served a transcript of the 911 call. However, counsel indicated to the judge that the appellant was seeking a copy of the actual recording as the appellant wanted to hear the voice of the person who made the call.

[8] It was against this background that the prosecution made the *ex parte* application in Chambers before Mr. Justice Paton for an Order for non-disclosure by the prosecution of the information sought on the grounds of Public Interest Immunity (PII).

[9] Having heard the application, the judge, in granting the application for non-disclosure, made the following rulings:-

> "The request, as I understand it of the part of the defence, is really to get information as to who may have been an informant and I take note of the fact that the defence has a particular line to take. There is nothing to prevent the defence taking the line that it intends to take by the Order that I am making which is aimed at protecting whoever the informant is so the application of the Crown is granted."

[10] In this appeal, the sole issue is whether the judge was correct in making the order for non–disclosure on the grounds of PII.

[11] PII in England is governed by the Criminal Procedure and Investigation Act 1996 and Rules made thereunder. In the Cayman Islands, no statutory underpinnings exist. The position as developed in England under the Common Law therefore applies to the Cayman Islands. In **Connolly and Brandt v R [2006] CILR 103**, it was held that "(t)he established English practice should be followed in the Cayman Islands."

[12] In the opinion of the Court, the approach adopted by the Grand Court in Connolly's case is correct. The rule of Common Law developed in England prior to the enactment of the Criminal Procedure and Investigation Act 1996 should be applied in the Cayman Islands.

[13] For many years the rule existed that it is in the public interest that the identity of informers ought to be protected and not disclosed. In **Regina v Hennessy [1978] 68 Cv App R 919,** at p426 it is stated:

> "The Court appreciates the need to protect the identity of informers, not only for their own safety, but to ensure that the supply of information about criminal activities does not dry up. In general this should be the approach of the Courts but cases may occur when for good reason the

need to protect the liberty of the subject should prevail over the need to protect informers. It will be for the accused to show that there is good reason.

Once the issue of PII arises in relation to non-disclosure, the burden of proof is transferred to the defendant to establish that good reason exists for the disclosure of the identity of the informant."

[14] In **D. v National Society for the Prevention of Cruelty to Children [1978] AC 171**, Lord Simon of Glaisdale at p 232 observed:

"Then the law proceeds to recognize that the public interest in the administration of justice is but one facet only of larger public interest – namely, the maintenance of the Queen's peace. Another facet is effective policing, but the police can function effectively only if they receive a flow of intelligence about planned crime or its perpetrators. Such intelligence will not be forth coming unless informants are assured that their identity will not be divulged. See Lord Reid in **Conway v Rimmer [1968] A.C. 910, 953 C-954A**. The law therefore recognizes (here another class of) relevant evidence which may –indeed- must- be withheld from forensic investigation – namely, sources of police

information; **Rex v Hardy [1794] 24 Slate Ttv 199, 808; Hennessy v Wright 21 Q.B.D. 509, 519; Marks v Beyfus 25 Q.B.D. 494.**"

[15] Lord Simon however went on to point out that, to this statement ,the law adds a rider which he expressed in the following terms :

> "The public interest that an innocent man should not be convicted of crime is so powerful that it ought to weigh the general public interest that sources of police information should not be divulged, so that, exceptionally, such evidence must be forth coming when required to establish innocence in a criminal trial."

[16] In **Regina v Agar [1989] 90 Cr. App. R. 318** at p 324 Mustill L.J. (as he then was) in dealing with the issue of PII stated:

> "Now it is certainly not the case that a defendant can circumvent the rule of public policy so as to find out the name of the person who has informed on him, for his own future reference and possible reprisal simply by pretending that something is part of his case when in truth it adds nothing to it. And it maybe – and we emphasize 'may' – that of the defence is manifestly frivolous and doomed to failure the trial judge may

conclude that it must be sacrificed to the general public interest in the protection of informers"

[17] Public policy requires that the identity of informers should be protected and not disclosed. Intelligence from informers about actual or proposed criminal activity in society is essential to assist the police in fighting crime and protecting society. Without such intelligence to assist them, the police would be handicapped in their task of fighting crime. However, this requirement of public policy may conflict with another requirement of public policy; this latter public policy requires that no innocent person should be convicted of a crime which he did not commit. To this end, the public interest of non-disclosure must give way if the disclosure is required by the defendant to establish his defence.

[18] The court is required to carry out a balancing exercise between the two aspects of public interest claimed. In **Regina v Keane [1994] 1 W.L.R. 746** at page 751, Lord Taylor Gosforth, Chief Justice, posed the question as to what approach a court ought to adopt when the prosecution seeks to rely on public immunity. In arriving at his conclusion, the Chief Justice adopted the observations of Mann L.J. in **Regina v Governor of Pentonville Prison, ex parte Osman [1991] 1 W.L.R.** 281 to 288:

"Suffice it to say for the moment that a judge is balancing on the one hand the desirability of preserving the public interest in the absence of disclosure against, on the one hand, the interest of justice where the interest of justice arises in a criminal case touching and concerning liberty... the weight to be attached to the interest of justice is plainly very great."

The Chief Justice went on to point out that, at p 290, Mann L.J. said:

"In those cases, which establish a privilege in regard to information leading to the detection of crime, there are observations to the effect that the privilege cannot prevail if the evidence is necessary for the prevention of a miscarriage of justice no balance is called for. Its admission is necessary to prevent miscarriage of justice balance dos no arise."

[19] Lord Taylor pointed out that Mann L.J. was saying that the court was in fact performing a balancing exercise. His Lordship indicated that:

"If the disputed material may prove the defendant's innocence or prevent a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it."

[20] In **Paul David Turner [1995] 2 Cr. App. R. 94**, Lord Taylor, having commented on the balancing exercise which the judge has to conduct on an *ex parte* application for non-disclosure by the prosecution, referred to the principles he had earlier set out in Keane's case and confirmed a statement from his judgment in that case where he stated:

> "... when the Court is seized of the material, the judge has to perform the balancing exercise by having regard on the one hand to the weight of public interest in non-disclosure on the other hand, he must consider the importance of the documents to the issues of interest to the defence, present and potential so far as they have been disclosed to him or he can see them."

[21] The House of Lords had occasion to deal with PII under the Criminal Procedure and Investigation Act in **Regina v H and others [2004] 2 A.C. 134**. Lord Bingham of Cornhill commented on the criteria which must be observed by courts when dealing with applications by the prosecution for non-disclosure of confidential information on the grounds of PII. His Lordship stated at paragraph 14:

"Fairness ordinarily required that any material held by the prosecution which weakens its case or strengthens that of the defendant, is not relied as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made."

[22] Later at paragraph 36, Lord Bingham pointed to a series of questions which must be considered by a court when the issue of derogation from this golden rule of full disclosure arises. These are:

"(1) What is the material which the prosecution seeks to withhold? This must be considered by the court in detail.

(2) Is the material such as may weaken the prosecution's case or strengthen that of the defence? If no, disclosure should (subject to (3) (4) and (5) below) be ordered.

(3) Is there a risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If no, full disclosure should be ordered.

(4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interest of the defence?

This question requires the court to consider, with specific reference to the material which the prosecution seeks to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seeks to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or in the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge. In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected (see paragraph 22 above). In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4).

(5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If No,

the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure."

[23] After the hearing of the *ex parte* Application for non-disclosure in Chambers, Mr. Justice Panton in open court, and prior to his Ruling, enquired of counsel who appeared at the trial for the appellant why was it that the appellant needed more than the transcript of the 911 call. Counsel informed the judge that part of the appellant's defence was a denial that he was in possession of the firearm which was found in the freezer at the apartment at 14 Lemon Breeze. In addition, counsel indicated to the judge that the appellant was alleging that he was being framed by Ms Parchment and he therefore required the actual audio recording of the 911 call to determine whether the anonymous caller was in fact Ms. Parchment.

[24] The court was not left in any doubt as to what was being requested by the defence and the reason for such request. Counsel made it abundantly clear that the defence wanted more than the transcript of the 911 call. The defence wanted the opportunity to listen to the actual 911 call to ascertain whether the person who made the call was Ms. Parchment. It should be pointed out that

the request was renewed by the defence later in the trial. However, like the earlier request, it was refused by the judge.

[25] The question which the judge ought to have asked himself is whether the playing of the recording of the actual 911 call when the defendant could have heard the voice of the person who actually made the call may have had the effect of weakening the prosecution's case or strengthening that of the defence. This Court is not in a position to say who made the 911 call. It does not appear from the *ex parte* hearing that the identity of the person was disclosed to the Mr. Justice Panton. In our view the judge to have obtained from the prosecution, if they were aware of it, the identity of the person who made the 911 call. This information was essential to enable the judge to conduct the balancing exercise between the two competing aspects of public policy. The appellant had informed the judge that his defence was that he was set up or was being framed by Ms. Parhment. Had the judge received information as to the identity of the person making the 911 call ,he would have been in a position to determine whether the appellant's interest could have been properly protected without such disclosure or that disclosure may have been ordered to such an extent or in such a manner which would have provided adequate protection to

the public interest in protecting the identity of the informer and at the same time protecting the interest of the appellant by ensuring that he had a fair trial.

[26] The judge was required to conduct the balancing exercise between the public interest in protecting the identity of the police informer and the public interest in ensuring that the appellant had a fair trial and that a miscarriage of justice should not occur by reason of the fact that an innocent man may be convicted. The transcript of the *ex parte* hearing shows that the judge was reminded of "the need to protect the identity of the informants not only for their own safety but to ensure that the supply of information about criminal activity does nor dry up". Later, the judge was reminded that the applicable test is whether information sought may undermine the prosecution's case and strengthen the case for the defence.

[27] On behalf of the appellant Mr Corbett Q.C. submitted that the appellant had suspected that Ms. Parchment, with whom he was romantically involved and was in the process of ending the relationship, had orchestrated the entire affair in order to punish him for trying to leave her and/or to prevent any other women from having him. It was further submitted that the appellant suspected

that Ms was the person who made the 911 call alleging that there was an accident and had subsequently placed his DNA on the firearm, wrapped it in a T-shirt and placed it in the freezer knowing that he would be at 14 Lemon Breeze when the police came to the apartment looking for the car which was involved in the accident and would most likely be executing a search warrant at the apartment looking for a firearm. Counsel for the appellant pointed out that the prosecution neither called Ms. Parchment as a witness nor charged her as a defendant. Counsel further submitted that, to the best of the appellant's knowledge, Ms. Parchment was not asked to give a sample for DNA testing to compare with the DNA found on the firearm.

[28] Counsel referred the Court to what he called anomalies. He stated that the investigation conducted by the Police on 13 September 2011 at the scene of the alleged accident did not reveal any signs of fresh damage to the wall that was supposedly struck by a motor car. He contended that the absence of such signs indicated that no collision had in fact taken place. Although the vehicle which belonged to the appellant's mother was in a damaged condition, that damage had been sustained in a road traffic accident which had occurred sometime previous to 8 September 2011.

[29] In addition, counsel also stated that the appellant was not identified by any one as being in physical possession of the car. He emphasized that, although the firearm which was found at the premises which did not belong to him, and, on the exterior of which DNA was found, no attempt was made by the prosecution to ascertain the source of the other DNA found on the firearm

[30] Mr Corbett submitted that the appellant did not know the source of the other DNA found on the firearm. He stated that it is not known whether samples were ever taken from Ms. Parchment for the purposes of DNA testing. He argued that the firearm and ammunition were recovered from Ms. Parchment's apartment and, in those circumstances, she was at least as good a suspect for the possession as the appellant. Counsel pointed out that had DNA from Ms. Parchment been found on the T-shirt and the firearm, the prosecution's cases against her would have been the same or stronger than the case against the appellant. He posed the question – how could Ms. Parchment fail to notice a firearm in her own freezer? Counsel contended that if Ms. Parchment's DNA was discovered on the offending articles, the appellant's defence that he had been set up by Ms. Parchment would have been supported; the suggestion was that Ms. Parchment's DNA came to be on the articles when she planted them.

[31] It was urged upon the Court by Mr Corbett that the prosecution refused to disclose information which, he argued, may have weakened the prosecution's case and may have strengthened the case for the defence. In particular, counsel suggested that if Ms. Parchment made the 911 call, she would have had to be considered as being hostile to the appellant and it would have had to be considered that it was possible that she was trying to cause the police to arrest the appellant, whatever her reason or motive was. Additionally, counsel stated that the presence of the T-shirt, firearm and ammunition found in Ms. Parchment's apartment required an explanation as, under the definition of possession under the Penal Code (2010 Revision), she would have been just as likely a target for prosecution as the appellant. However, he indicated that there was no evidence that she was charged or that any samples were taken from her for DNA testing and comparison. No reason was given by the prosecution for the testing not being done. It was suggested that, if Ms. Parchment was a regular police informer, she would be relatively confident that, in giving up the appellant, she herself would not be in any danger of being charged with the offence. Counsel indicated that these suggestions, and it should be noted they were only suggestions, together with Ms. Parchment's access to the DNA of the appellant and her motive to harm him would tend to support the appellant's case that he himself had never handled or possessed the firearm or

ammunition but would explain how his DNA came to be on the exterior of the firearm.

[32] In our view and, for reasons stated below these are issues which could only have been properly canvassed if the appellant had heard the actual 911 call or the identity of the person making the call had been made known to him by the prosecution.

[33] On behalf of the prosecution, Mr. Ward submitted that the appellant had the burden of establishing that, when the judge conducted his balancing exercise, there was good reason that the scales be weighed in favour of the court identifying the informer. For this proposition, counsel relied on **R v Hennessey**, supra, where it was stated that the courts needed "to protect the identity of informers, not only for their own safety but to ensure that the safety of information about criminal activities does not dry up." He pointed out that the courts recognized that "cases may occur when for good reason the need to protect the liberty of the subject should prevail over the need to protect informers." Mr. Ward submitted that the arguments on behalf of the appellant did not discharged the burden to satisfy the court that the prosecution should disclose the identity of the informant. He argued that, given the nature of the defence, it was clear that the defence would have been the same whoever was

the informant. He urged upon the Court that the theory put forward by the defence to explain the presence of the DNA of the appellant on the firearm had been totally undermined by the forensic evidence. For this reason, counsel contended that knowledge of the identity of the assailant would not in any way have assisted the appellant's defence. Strong public interest, he argued, required that the source of the information ought to be kept secret. Counsel also relied on the statement from **R v Agar** to which the Court had earlier referred.

[34] Mr Ward submitted that the appellant's defence can be characterized as frivolous and doomed to failure in the light of what was stated in the *ex parte* proceedings. He argued that for the defence's theory to be remotely plausible the following sequence of events must logically have occurred. He contended that immediately following the impromptu argument between the appellant and Ms. Parchment in which she terminated the relationship, she promptly obtained a firearm. This is not the only interpretation which could be placed on this evidence. However, in view of the order for retrial, the Court refrains from making any further comment. Further, it required that Ms. Parchment to hatch and execute the plot to frame the appellant and secrete the firearm within a narrow window of opportunity between the time of the argument and leaving for work the following morning. Again, we do not accept that this is the only

interpretation to be drawn. The Court also refrains from making any comment, In so far as the DNA is concerned, Mr Ward argued that it would have required Ms. Parchment to have obtained a sample of the DNA of the appellant in a form which was sufficiently highly concentrated with which to smear the firearm. Counsel stated that the suggestion rest on the baseless assumption that Ms. Parchment knows about secondary transfer of DNA. The Court is of the view that this proposition by the prosecution ignores the evidence about the activities alleged to have occurred between the appellant and Ms Parchment on the previous night at Ms. Parchment's apartment. Again we decline to make any further comment.

[35] For the reasons set out above, the Court does not accept the characterization of the defence of the appellant as being frivolous and doomed to failure.

[36] The Court is of the view that the judge erred in making the order that the prosecution was not required to disclose the identity of the person who made the 911 call. The appellant requested that he be permitted to hear the actual recording of the 911 call relating to the accident and who observed the gun dropping from the driver of the car. In our view, this evidence may have

weakened the prosecution's case and may have strengthen the defence in that it may have been the basis of the evidence from which it may be inferred that the appellant was the victim of a frame-up. It is certainly not within the province of this Court to speculate what would have been the effect on the judge had the evidence of the identity of this person who made the 911 call been disclosed. The effect of this evidence and any evidence which may have been led had disclosure been ordered would have been a matter for the judge to weigh in coming to his verdict.

[37] The judge did not appear to have concluded a balancing exercise and weighted the issue raised by the defence. This was essential in determining whether to grant the Crown's *ex parte* application. The judge ought to have considered the effect of non-disclosure of the identity of the 911 caller against the need to ensure that "the golden rule of full disclosure" was followed so that the appellant would have a fair trial.

[38] In a criminal trial a defendant is entitled to a fair trial and nothing less than that will suffice. In **Attorney General's Reference** (No. 2 of 2001) cited above, Lord Bingham at paragraph 13 observed:

"13. It is accepted as "axiomatic" that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried for that offence, he should not be tried for it at all." **R v Horseferry Road Magistrates' Court Exo Bennett [1994] 1 AC** 42, 68.

[39] In the adversarial system of justice , a defendant is entitled to know the identity of the person who makes incriminating allegations against him. In certain circumstances public policy allows the prosecution to derogate from this principle and allow the prosecution to withhold such information. However, this public policy comes into conflict with another which requires the identity of informants to be disclosed to ensure that a defendant has a fair trial and that there is no miscarriage of justice. In the view of the Court, the making of the non-disclosure order prevented the appellant from having a fair trial which is guaranteed to him both at Common Law and now under the provisions of section 7 of the Constitution of the Cayman Islands.

Mottley J.A.

Conteh J.A.

Ground J.A.