BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal Nos. 8 and 10 of 2005

BETWEEN:

JULIAN OSCAR FRANCIS
Appellants
JUNIOR QUIMBY

AND

THE QUEEN
Respondent

Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice, the Hon. Peter Williams, Justice of Appeal and the Hon. John Connell, Justice of Appeal

2006: 27 November
2007: 30 March

Mr. Tariq Khan and Mr. Bryan Weekes for the appellant Francis
Appellant Junior Quimby in person
Mr. Alliston Seale for the respondent

DECISION

Introduction

SIMMONS CJ: On 27 November 2006 we granted the appellants (Francis and Quimby) leave to appeal against their convictions and sentences. They had been jointly charged with theft of a motor car belonging to Rhonica Hinds on 3 December 2001. Quimby was also separately charged with handling the motor car, knowing or believing it to have been stolen. They were convicted before Greenidge J and a jury on 7 February 2005 and sentenced on 11 March as follows: Francis, 6 years' imprisonment; Quimby, 7 years' imprisonment. We dismissed Quimby's appeal against conviction but allowed his appeal against sentence, reducing the term to 4 years. Thereafter, we heard argument from Mr. Khan and Mr. Seale on a preliminary point taken by Mr. Khan that Francis's right to a fair hearing had been violated on the ground that he "had no pre-trial disclosure". We reserved our decision since Mr. Khan's application for pre-trial disclosure raises important questions of law and practice in this jurisdiction.

[2] At their trial, Francis and Quimby were unrepresented. They were in possession of the depositions taken at the preliminary inquiry into the charges. Neither appellant applied for disclosure of relevant materials in the possession of the prosecuting authorities. The trial proceeded in accordance with accepted practice. Each appellant cross-examined the prosecution witnesses. Francis requested a voir dire to test the admissibility of a written statement given to Sgt. 131 Catwell. He alleged that he had been beaten to sign the statement. The trial judge heard evidence on the voir dire and ruled that the statement was admissible. After the close of the prosecution case, Francis and Quimby elected to give sworn evidence. Francis called 4 witnesses including his co-accused, Quimby. They both addressed the jury.

The Issue of Pre-trial Disclosure

[3] Ground 6 of Francis' grounds of appeal alleges that he was deprived of his constitutional right to a fair trial under s.18 of the Constitution because he "had no pre-trial disclosure". Mr. Khan raised the issue of pre-trial disclosure in this way. In a letter of 7 November 2006 written to the Deputy Registrar, Mr. Khan requested that:

"an additional two items be added to the settling of the record in the instant appeal. These items comprise the pre-trial disclosure and the depositions submitted for the purpose of the preliminary inquiry in the instant case."

Then, without leave of this Court, he filed an affidavit on 15 November 2006 in which Francis deposed, without more, and in a single paragraph:

"1. That during the course of the preliminary inquiry held by the Magistrate, I was never provided with or have since been provided with full pre-trial disclosure relating to the matter currently under appeal."

Counsel produced to us correspondence passing between Mr. Khan and the substantive Director of Public Prosecutions and/or Mr. Seale on behalf of the Director as follows in paras. [4] and[5].

[4] On 10 November 2006, Mr. Khan wrote to the Director (copying Mr. Seale):

"Dear Director,

Re: Criminal Appeal No.10 of 2005
Julian Oscar Francis vs. The Queen

You will be aware that Mr. Alliston Seale and I met with the Deputy Registrar to settle the record on October 30, 2006.

At the meeting I recall that I asked for copies of the pre-trial disclosure that should have been provided to the Accused at the PI stage. This is

particularly critical as the Appellant was unrepresented at both the PI and the High Court Trial.

I formally wrote the Registrar on November 7 asking that pre-trial disclosure be included as part of the record for the appeal. I was contacted by Mr. Seale today who advised me that he would be objecting to its inclusion in the record.

I am grateful that he sought to warn me in advance of his objection. I also understand that the Registrar intends to call all parties together to finalise the record in this matter.

In the meantime and notwithstanding the above, I must now ask for the pre-trial disclosure.

Yours sincerely
M. Tariq Khan"

[5] On 16 November 2006 Mr. Seale replied to Mr. Khan:
"**Re: Julian Francis v. The Queen Appeal No.10 & 8**

Pursuant to the Court of Appeal decision in Dib Camille El Habre v The Queen we wish to inform that requests for disclosure are satisfied by the preliminary inquiry. All witnesses upon whom the prosecution intended to rely, gave evidence at the preliminary enquiry hence the defence had adequate opportunity for cross-examination. These depositions were recorded and the accused was furnished with a copy.

Nothing by way of unused material remains in the possession of the Department of Public Prosecutions since the matter has long been concluded and all police files have been returned to the Police Department.

Alliston Seale
Senior Crown Counsel (Ag.)
For Director of Public Prosecutions"

Thereafter, on 22 November 2006 Mr. Khan wrote to Mr. Seale in the following terms:
"Dear Mr. Seale

Re: Criminal Appeal No.10 of 2005
Julian Oscar Francis vs. The Queen

I refer to your letter dated November 16, 2006 received at chambers today which is in response to my formal request for pre trial disclosure made to the Director on November 10.

You have cited Dib Camille El Habre v The Queen as authority for your contention that the request of disclosure was satisfied by the preliminary inquiry. You are aware that the appellant has deposed in his affidavit that he did not receive pre trial disclosure at the preliminary inquiry or any time thereafter. I have pulled the case Dib Camille El Habre v The Queen a copy of which I have enclosed for your perusal and am hard put to find the authority upon which you base your response. Please advise or guide me if this is the case you refer to or direct me to the case which acts as the authority for your contention.

Notwithstanding the above, your response with regard to unused material being returned to the Police Department is wholly unsatisfactory and I am aware that it is within the gift of the Director of Public Prosecutions to retrieve such information if he desires.

Accordingly, I wish to put you on notice that if I do not receive the pre trial disclosure I requested on November 10 by Friday November 24, I shall make an application for pre trial disclosure to the Court of Appeal on the date of hearing and will seek an adjournment to properly consider the pre trial disclosure with regard to the prosecution of the appeal.

Yours faithfully
M. Tariq Khan
Attorney-at-Law"

The Submissions
[6] Mr. Khan advanced three arguments before us. First, he submitted that every person, whether represented or not, has a right to be provided with "pre-trial disclosure as a matter of course". There is a common law duty on the part of the prosecution to provide "pre-trial disclosure". Secondly, the prosecution must prepare a bundle of materials and hand them over to an accused in accordance with its common law duty. Thirdly, pre-trial disclosure materials include all witness statements, evidence of oral admissions, evidence proving the existence of documents which may have been used at the preliminary inquiry; evidence which may have been obtained but was not used; and "any reference to station diaries and police notebooks which may have been used".
[7] Mr. Seale, for the respondent, accepted the proposition that accused persons should be supplied with pre-trial disclosure but submitted that disclosure should be on request to the appropriate person, namely, the Commissioner of Police. He explained that when requests are made of the Director of Public Prosecutions, the latter will write to the Commissioner requesting copies of the materials to be disclosed. These are then forwarded to counsel. Above all else, Mr. Seale opposed the present application to the Court of Appeal on the ground of its lateness. Both counsel suggested that this Court should set out guidelines relating to disclosure at common law and we shall endeavour to do so later in this decision.

Discussion of the Legal Authorities
[8] The legal position regarding disclosure of materials in the possession of the prosecuting authorities in Barbados rests upon common law

principles, a Practice Direction handed down by the then Chief Justice, Sir Denys Williams, in the Court of Appeal on 29 July 1988 and "Guidance on pre-trial disclosure in Paper Committals" issued by the Director of Public Prosecutions, Mr. Charles Leacock Q.C. on 19 January 1996 (DPP's Guidance). On the other hand, in England, these matters are now governed principally by the Criminal Procedure and Investigations Act, 1996. The Court of Appeal of Barbados has, twice before the present appeal, considered aspects of the law of disclosure in criminal cases.– see, Richard Bourne v. R. (1998) 56 WIR 95 and Dib Camille el Habre (Criminal Appeal No.72 of 1994, unreported decision of 7 July 2000).

[9] In Bourne (a remission of a petition from the Judicial Committee of the Privy Council (JCPC) to the Court of Appeal), the Court of Appeal upheld a submission by counsel for Bourne that the defence had been prejudiced by the Crown's failure to give the defence access to a report and opinion of a consultant psychiatrist who had seen and examined Bourne shortly after the offence. The Court of Appeal heard and accepted evidence from the consultant that, when she examined Bourne he was suffering from paranoid schizophrenia and was unfit to plead or to instruct counsel. Bourne's conviction was quashed and a retrial ordered. No authorities were referred to in the Court of Appeal's decision.

[10] On the other hand, in el Habre the Court of Appeal reviewed a number of the leading authorities on disclosure in criminal cases, some of which we also consider in this decision. el Habre was convicted of two offences against the Drug Abuse (Prevention and Control) Act, Cap.131. On his appeal, he submitted that the Crown's failure to disclose relevant evidence (itemised in 21 sub-paragraphs of an affidavit) constituted a material irregularity before and during his trial. The Court of Appeal directed the Crown to make disclosure within 28 days "of any material which is of relevance to the issues in these proceedings but which has not yet been disclosed….so that the substantive appeal can be set down for hearing without further delay".

[11] We propose to examine the legal principles that apply to disclosure in indictable offences, offences triable "either way", (that is summarily or on indictment), and summary offences including "petty offences". It is necessary, however, briefly to locate the applicable principles in their historical and juristic context.

[12] 'Disclosure' in criminal cases is concerned with the obligations on the part of prosecuting authorities to make available to the defence those materials which form part of their case; and materials which are in their possession but which are not used in a trial (unused materials). The requirement for disclosure owes its existence to the necessity for ensuring a fair trial. The right to a fair trial is a constitutional guarantee to every person accused of a criminal offence. – s.18(1) of the Constitution. An accused must have adequate information of the case against him. Section 18(2)(c) of the Constitution requires that an accused person must be given "adequate time and facilities for the preparation of his defence". It is arguable that "facilities" include materials relevant to the issues in the case and which are in the hands of the prosecution – see the observations of Lord Woolf in Franklyn and Vincent v. R. (1993) 42 WIR 262 at 271 referring to the views of Forte JA expressed in the Court of Appeal of Jamaica in R. v. Bidwell (26 June 1991) unreported. The way in which the defence case is prepared and presented will often depend upon the nature and extent of materials disclosed to the defence before trial.

[13] Three overarching principles are central to the law on disclosure. First, the prosecution's duty to act fairly to an accused; secondly, the principle of "equality of arms" which requires that the criminal justice process should, as far as practicable, ensure equality and fairness as between the prosecution and the defence; and thirdly, the principle of open justice now colloquially described in civil procedure as "cards on the table".

[14] In the English case of Winston Brown [1995] 1 Cr.App.R. 191, Steyn LJ explained the context in which the common law rules about disclosure have developed. He said (p.198):

"….[I]n our adversarial system, in which the police and prosecution control the investigatory process, an accused's right to fair disclosure is an inseparable part of his right to a fair trial. That is the framework in which the development of common law rules about disclosure by the Crown must be seen."

[15] But in R. v. Hennessey (1978) 68 Cr.App.R. 419 Lawton LJ had presaged the virtual sea-change which was later to affect the law on disclosure in criminal matters as a consequence of the landmark decision in R. v. Ward [1993] 2 All ER 577. Lawton LJ said at p.426:

"[T]hose 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."

In Ward, Glidewell LJ stressed at p.601:

"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."

[16] The scope of the duty of disclosure was widened by Hennessey. In Ward, the English Court of Appeal found that there were grave miscarriages of justice where the prosecution had failed to disclose material evidence relating to alleged confessions and important scientific evidence. The Court of Appeal laid out the principles of law and practice which then governed the disclosure of evidence by the prosecution before trial. Subsequently, the validity of some of the principles adumbrated in Ward has been doubted in the House of Lords case of Mills [1997] 3 All ER 780. In delivering the leading speech in Mills, Lord Hutton also expressly overruled the earlier Court of Appeal decision in R. v. Bryant and Dickson (1946) 31 Cr.App.R. 146, where Lord Goddard CJ seemed to suggest that the supply of names and addresses was sufficient for making a witness available to the defence.

[17] The decided cases require disclosure of documents or information which may be "material". In R. v. Keane [1994] 2 All ER 478, Lord Taylor of Gosforth CJ approved at p.484 a test propounded by Jowitt J in the unreported decision of R. v. Melvin and Dingle (20 December 1993) where Jowitt J said:

"I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real (as opposed to a fanciful) prospect of providing a lead on evidence which goes to (1) or (2)."

[18] The Jowitt test was approved by Steyn LJ at the Court of Appeal stage in Winston Brown. When Winston Brown went to the House of Lords – see ([1997] 3 All ER 769), Lord Hope also expressly approved the view of Steyn LJ that the phrases "an issue in the case" and "all relevant evidence of help to an accused" must be given "a broad interpretation". He continued at p.775:

"But the common law rules are concerned essentially with the disclosure of material which has been gathered by the police and the prosecution in the course of the investigation process for use in the case to be made for the Crown. In the course of that process issues of fact will have been identified which may assist or undermine the Crown case. The prosecution is not obliged to lead evidence which may undermine the Crown

case, but fairness requires that material in its possession which may undermine the Crown case is disclosed to the defence. The investigation process will also require an inquiry into material which may affect the credibility of potential Crown witnesses. Here again, the prosecution is not obliged to lead the evidence of witnesses who are likely in its opinion to be regarded by the judge and jury as incredible or unreliable. Yet fairness requires that material in its possession which may cast doubt on the credibility or reliability of those witnesses whom it chooses to lead must be disclosed…."

[19] Mr. Khan cited the judgment of the Supreme Court of Canada delivered by Sopinka J in R. v. Stinchcombe (1991) 68 CCC (3d) 1. In that case the Crown decided not to call a witness who was considered unworthy of credit by Crown Counsel even though the witness could have given evidence directly relevant to the issues arising at the trial. The Crown also refused to disclose the witness's statements to the defence. The Supreme Court held that Crown Counsel had misconceived his obligation to disclose the statements because, in his view, the witness was not worthy of credit. Sopinka J said:
"This was not an adequate explanation. The trial judge ought to have examined the statements and erred in holding that the Crown Counsel was not under an obligation to make disclosure of the statements. The failure of the Crown to make disclosure impaired the right of the accused to make full answer and defence….The absence of this evidence might very well have affected the outcome."

[20] The Supreme Court ordered that the statements be produced. Partly in reliance upon s.7 of the Canadian Charter of Rights and Freedoms, the Supreme Court took a very wide view of the duty of disclosure on the ground that "the fruits of the investigation which are in [the Crown's] possession, are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done". – per Sopinka J. So much for decisions outside the Commonwealth Caribbean. We next turn to discuss three cases decided by the JCPC in appeals from Jamaica and Trinidad and Tobago.
[21] In Ferguson v. Attorney General (1999) 57 WIR 403, the Court of Appeal of Trinidad and Tobago held, per de la Bastide CJ (as he then was) that, in aid of its case at a preliminary inquiry into an indictable offence, the prosecution may call such witnesses as it thinks fit. But it is under a duty at common law to disclose to the defence material statements made by persons who are not called by it as witnesses. This duty extends to disclosure at or before the preliminary inquiry. The Court of Appeal, however, readily acknowledged an exception to these general principles. Thus, in an appropriate case, the duty of disclosure may be postponed in order to avoid or reduce a risk of physical harm to the maker of the statement or his family. At p.422 de la Bastide CJ, drawing upon a dictum of Sopinka J in Stinchcombe, hastened to qualify the overriding duty of disclosure in these words:
"….[S]ince the timing and manner of disclosure are matters which are subject to some discretion exercisable by the prosecution, I would qualify the duty to disclose at the preliminary inquiry stage by recognising that such disclosure may be postponed if this is considered necessary in order to avoid or reduce the risk of physical harm to the maker of the statement or his family. It is obviously a dictate of public policy that persons who have information about crimes should be encouraged to share it with the police. I would not, therefore, formulate any rule of disclosure which was so strict that it would put persons assisting the police in jeopardy before it becomes absolutely necessary to do so. I would emphasise, however, that this qualification only justifies postponing disclosure until the trial."

[22] Ferguson was concerned with the appellant's claim to relief for breach of an alleged constitutional right arising from non-disclosure of documents and failure to call a witness helpful to the defence. de la Bastide CJ at p.407 observed:
"Whatever the form of proceeding, it seems to me that when these complaints are made, the basic question is whether the person making the complaint has been the victim of unfairness. I use the word 'victim' advisedly, because it connotes that the person complaining has suffered some prejudice. This means that the court to whom the complaint is made, must investigate whether, but for the breach complained of, the proceeding out of which the complaint arises, would have had, or at least might have had, a different outcome."

The Chief Justice also emphasised that breach of the duty of disclosure does not automatically give rise to an acquittal or a constitutional remedy. The person complaining must show that he suffered prejudice. At p.421, de la Bastide CJ said:
"This he may do either by showing that, but for the non-disclosure, he would not have been committed at all or that he would have been committed for a bailable instead of a non-bailable offence, typically manslaughter instead of murder, or that the failure to disclose at that early stage impaired in some significant way his chances of an acquittal at a subsequent trial at which he was convicted."

[23] The Court of Appeal's formulation of the applicable principles was not contested on the subsequent appeal to the JCPC. There, the issue was whether failure to disclose amounted to breach of the constitutional right to a fair hearing. The JCPC rejected the contention that it did – see per Lord Steyn in Ferguson (Herbert) v. Attorney-General (2001) 58 WIR 446 at para.[14].
[24] In Linton Berry v. R. (1992) 41 WIR 244, the JCPC discussed the common law of disclosure as it applied in Jamaica. They approved three other reported decisions of the Jamaica Court of Appeal namely, R. v. Purvis and Hughes (1968) 13 WIR 507, R. v. Barrett (1970) 16 WIR 267 and R. v. Grant and Hewitt (1971) 12 Jamaica LR 585. One of the issues in Berry was that on a charge of murder, the defence had not been furnished in advance with three statements made by the victim's husband and sister respectively. The statements alleged that the appellant had confessed to the murder and had previously threatened to kill the victim. The appellant's defence was accident. The Privy Council allowed the appeal and remitted the case to the Court of Appeal to determine whether an acquittal or retrial should be ordered. It was held that the failure to disclose was a material irregularity. Lord Lowry said at p.257:
"Had the statements been supplied, the defence could have planned their campaign, prepared a more effective cross-examination, been ready to object, if challenging admissibility, and been prepared to let the judge and jury see the statements if that course appeared to offer prospects of success."

[25] In Franklyn and Vincent, the issue before the Board was the extent of the obligation on the prosecution to disclose the evidence on which the prosecution was proposing to rely prior to the commencement of the summary trial of a serious offence before a resident magistrate. The then practice was to refuse to provide statements of proposed prosecution witness to the defence as a matter of course. It was held that this practice was inappropriate. Here again, it had been contended that failure to provide disclosure to the defence violated the appellant's right to a fair hearing under s.20 of the Constitution of Jamaica. Delivering the advice of the Board, Lord Woolf of Barnes held that the constitutional right to a fair hearing was no more than a codification of the common law right to a fair trial. The provisions of the Constitution do not contain any specific requirement as to what is to be provided to an accused before trial. A determination of whether the Constitution has been contravened by a failure to provide the defence with statements from prosecution witnesses depends upon an assessment of the facts of the particular case as against the general standards of fairness prescribed by the Constitution – see pp.267 to 268.

The Disclosure Regime in Barbados as published

(i) The Practice Direction

[26] The introductory paragraph of the Practice Direction reads as follows:

"At a sitting of the Court on July 29, 1988 the Chief Justice handed down the following Practice Direction with respect to Evidence by Written Statements – Disclosure of Information to Defence – Unused Material – Guidelines for Disclosure: This Practice Direction is intended to be applicable when the system of paper committals becomes operative. It is expected that the associated legislation will be brought into operation on October 1, 1998." (Our emphasis).

There are two Parts of the Practice Direction. Part I deals with the editing of statements to be used in paper committals and is not relevant for the purpose of this decision. On the other hand, we think that Part II is of special relevance generally in this case. We set it out in extenso since it appears that the existence of this Practice Direction is not widely known.

[27] "Part II

8. For the purposes of these guidelines the term "unused material" is used to include the following:

(1) all witness statements and documents which are not included in the committal bundles served on the defence;

(2) the statements of any witnesses who are to be called to give evidence at committal and (if not in the bundle) any documents referred to therein;

(3) the unedited version(s) of any edited statements or composite statement included in the committal bundles.

9. In all cases which are due to be committed for trial, all unused material should normally (i.e. subject to the discretionary exceptions mentioned in para. 13) be made available to the defence Attorney-at-law if it has some bearing on the offence(s) charged and the surrounding circumstances of the case.

10. (a) If it will not delay the committal, disclosure should be made as soon as possible before the date fixed. This is particularly important (and might even justify delay) if the material might have some influence on the course of the committal proceedings or the charges on which the magistrate might decide to commit.

(b) If however it would or might cause delay and is unlikely to influence the committal, it should be done at or as soon as possible after committal.

11. If the unused material does not exceed 50 pages, disclosure should be by way of provision of a copy, either by post, by hand or via the police.

12. If the unused material exceeds 50 pages or is unsuitable for copying, the defence Attorney-at-law should be given an opportunity to inspect it at a convenient police station or, alternatively, at the Attorney-at-law's office, having first taken care to remove any material of the type mentioned in para. 13. If, having inspected it, the Attorney-at-law wishes to have a copy of any part of the material, this request should be complied with.

13. There is a discretion not to make disclosure in the following circumstances.

(1) There are grounds for fearing that disclosing a statement might lead to an attempt being made to persuade a witness to make a statement retracting his original one, to change his story, not to appear at court or otherwise to intimidate him.

(2) The statement (e.g. from a relative or close friend of the accused) is believed to be wholly or partially untrue and might be of use in cross-examination if the witness should be called by the defence.

(3) The statement is favourable to the prosecution and believed to be substantially true but there are grounds for fearing that the witness, due to feelings of loyalty or fear, might give the defence Attorney-at-law a quite different, and false, story favourable to the defendant. If called as a defence witness on the basis of this second account, the statement to the police can be of use in cross-examination.

(4) The statement is quite neutral or negative and there is no reason to doubt its truthfulness, e.g. "I saw nothing of the fight" or "He was not at home that afternoon". There are however grounds to believe that the witness might change his story and give evidence for the defence, e.g. purporting to give an account of the fight, or an alibi. Here again, the statement can properly be withheld for use in cross-examination.

(Note: in cases (1) to (4) the name and address of the witness should normally be supplied.)

(5) The statement is, to a greater or lesser extent, "sensitive" and for this reason it is not in the public interest to disclose it. Examples of statements containing sensitive material are as follows:

(a) it deals with matters of national security; or it is by, or discloses the identity of, a member of the security services who would be of no further use to those services once his identity became known;

(b) it is by, or discloses the identity of, an informant and there are reasons for fearing that disclosure of his identity would put him or his family in danger;

(c) it is by or discloses the identity of, a witness who might be in danger of assault or intimidation if his identity became known;

(d) it contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he was a suspect or it discloses some unusual form of surveillance or method of detecting crime;

(e) it is supplied only on condition that the contents will not be disclosed, at least until a subpoena has been served on the supplier, e.g. a bank official;

(f) it relates to other offences by, or serious allegations against, someone who is not an accused, or discloses previous convictions or other matter prejudicial to him;

(g) it contains details of private delicacy to the maker and/or might create risk of domestic strife.

14. In deciding whether or not statements containing sensitive material should be disclosed, a balance should be struck between the degree of sensitivity and the extent to which the information might assist the defence. If, to take one extreme, the information is or may be true and would go some way towards establishing the innocence of the accused (to cast some significant doubt on his guilt or on some material part of the evidence on which the Crown is relying) there must be either full disclosure or, if the sensitivity is too great to permit this, recourse to the alternative steps set out in para.19. If, to take the other extreme, the material supports the case for the prosecution or is neutral or for other reasons is clearly of no use to the defence, there is a discretion to withhold not merely the statement containing the sensitive material but also the name and address of the maker.

15. Any doubt whether the balance is in favour of, or against, disclosure should always be resolved in favour of disclosure.
16. No unused material which might be said to come within the discretionary exceptions in para.6 should be disclosed to the defence until:

(a) the investigating officer has been asked whether he has any objections, and

(b) it has been the subject of advice by the Director of Public Prosecutions.

17. In all cases the Director of Public Prosecutions should be fully informed of what unused material has already been disclosed.

18. If the sensitive material relates to the identity of an informant, attention should be paid to the following passages from the judgments of (a) Pollock CB in A-G v. Briant (1846) 15 M & W 169 at 185, 153 ER 808 at 814-815:

"…..the rule clearly established and acted on is this, that, in public prosecution, a witness cannot be asked such questions as will disclose the informer, if he be a third person. This has been a settled rule for fifty years, and although it may seem hard in a particular case, private mischief must give way to public convenience….and we think the principle of the rule applies to the case where a witness is asked if he himself is the informer…"

(b) Lord Esher MR in Marks v. Beyfus (1880) 25 QBD 494 at 498:

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

19. If it is decided that there is a duty of disclosure but the information is too sensitive to permit the statement or document to be handed over in full, it will become necessary to consider whether it would be safe to make some limited form of disclosure by means which would satisfy the legitimate interests of the defence. These means may be many and various but the following are given by way of example.

(1) If the only sensitive part of a statement is the name and address of the maker, a copy can be supplied with these details, and any identifying particulars in the text, blanked out. This would be coupled with an undertaking to try to make the witness available for interview, if requested, and subsequently, if so desired, to arrange for his attendance at court.

(2) Sometimes a witness might be adequately protected if the address given was his place of work rather than his home address. This is in fact already quite a common practice with witnesses such as bank officials.

(3) A fresh statement can be prepared and signed, omitting the sensitive part. If this is not practicable, the sensitive part can be blanked out.

(4) Disclosure of all or part of a sensitive statement or document may be possible on a counsel-to-counsel basis, although it must be recognised that counsel for the defence cannot give any guarantee of total confidentiality as he may feel bound to make use of the material if he regards it as his clear and unavoidable duty to do so in the proper preparation and presentation of his case.

20. An unrepresented accused should be provided with a copy of all unused material which would normally have been served on his Attorney-at-law if he were represented. Special consideration, however, would have to be given to sensitive material and it might sometimes be desirable for counsel, if in doubt, to consult the trial judge.

21. If, either before or during a trial, it becomes apparent that there is a clear duty to disclose some unused material but it is so sensitive that it would not be in the public interest to do so, it will probably be necessary to offer no, or no further, evidence. Should such a situation arise or seem likely to arise then, if time permits the Director of Public Prosecutions should be consulted.

22. The practice outlined above should be adopted with immediate effect in relation to all cases so far as is practicable, that is to say, immediately after the associated legislation is brought into operation."

(ii) DPP's Guidance on Pre-trial Disclosure – Paper Committals
[28] The DPP's Guidance reiterates that the Practice Direction must be followed "for all paper committal proceedings". Then it provides at para (b) that:

"All "Unused Material" having a bearing on the case is to be disclosed to the defence subject to the following exceptions. Paragraph 13 of the said Practice Direction provides a discretion not to disclose inter alia:

(1) If there are grounds to fear that disclosure could lead to attempts being made to cause a witness to retract his statement.
(2) If the statement is believed to be only partially true.

(3) If due to loyalty or fear the witness may give the defence a false story favourable to the defence.

(4) National security renders the statement "sensitive" in the public interest.

(c) A ruling in the English case of Judith Ward (1992) relating to a miscarriage of justice has added uncertainty. Forensic evidence was withheld from the defence. The Court of Appeal made a liberal ruling and unused material such as police notes, sketches and photofits have been included in the wide definition. The Court held that the defence should have the same opportunity of reviewing all the available material and selecting therefrom as the Crown. To what extent this ruling would be adopted in Barbados is yet to be seen. Suffice it to say, that there is a presumption of disclosure in the Practice Direction of 5 September, 1988.

Recently, defence counsel has been requesting copies of all statements in order to decide whether to request paper committal. There is no authority for this practice. As a result, the response to such requests must be a request for a clear choice of paper committal or preliminary inquiry.

Preliminary Inquiries

The general rule in these matters is that defence counsel should be informed that all of the evidence on which the prosecution intends to rely will be given on oath with ample opportunity for cross-examination.

In any case where there is any statement on file that is favourable to the defence or any evidence that tends to cast doubt on the guilt of the accused, such evidence MUST be given to the defence.

In Anthony Lawson (1990) 90 Cr.App.R. 107 it was said:

"Where the prosecution have taken a statement from a person who they know can give material evidence but decide not to call him as a witness, they are under a duty to make that person available as a witness for the defence and should supply the defence with the witness' name and address. They are not under a further duty of supplying the defence with a copy of the statement they have taken. However, if the prosecuting counsel or solicitor knows of a witness he does not accept as credible, the defence should be informed of that fact so that they can call him if they wish."

The overriding rule in all criminal trials is FAIRNESS to an accused with respect to the disclosure of information in the possession of the prosecution. The development of this rule has envisaged that any material discrepancy that is contained in a witness' statement but, not included in the depositions should be disclosed to the defence.

For example, the failure of a witness to identify an accused in a written statement but, a subsequent identification during a preliminary inquiry would be a material discrepancy.

Again, deliberate failure to disclose a confession whether written or oral in a police statement should result in its exclusion during any subsequent hearing or trial.

Another concern is the provision of statements prior to preliminary inquiries and summary trials. In Franklyn & Vincent (1993) 42 WIR 262 the rule is that disclosure should be allowed in cases of complexity. Of course, this could be a subjective matter as to what cases are complex. With the presumption in favour of disclosure it may be useful to provide at least a summary of the evidence that is intended for presentation in appropriate cases. However, defence counsel must be told that such applications should be made to the court.

Inspection of Station Diaries

An extract from the case of Hackney et at (1981) 74 Cr.App.R. 194 would suffice –

"These records, it should be emphasised do not prove themselves. The prosecution do not have to produce them without some notice which allows proper opportunity of proving and explaining their contents by the evidence of officers who actually made the records."

As a result, police records should be kept as required by police administrative policy and inspection allowed where appropriate but especially when ordered by the court. The general rule of advice is that the defence be informed that such applications should be made to the court for inspection of station diaries.

Doubtful Cases

In any case in which the police are unsure as to whether a particular matter should be disclosed to the defence, it must be remembered that the presumption is in favour of disclosure. However, any borderline case should be referred to this office for directions."

Application of the Practice
[29] We have been told by Mr. Seale that the practice which is currently followed (in cases other than paper committals where the Practice Direction applies) in indictable offences is along the following lines. When police officers investigate an offence, the statements taken from

potential witnesses are placed on an appropriate case file. In serious or complex cases, but not in all cases, copies of the witness statements are voluntarily disclosed to the defence by the prosecutor before the start of the preliminary inquiry. At the preliminary inquiry, the prosecutor makes a decision as to which witnesses he will call to give evidence. When he calls a witness to give oral evidence he will use the witness statement as the witness's proof of evidence. The oral evidence of each witness is recorded by the magistrate in the form of a deposition and is signed by the witness at the conclusion of his evidence. When the accused is committed to stand trial at the High Court, he applies for and is given a copy of the deposition of all the witnesses who testified at the preliminary inquiry.

[30] Where statements made by persons interviewed by the police but not to be called as witnesses at the preliminary inquiry remain on the case file, the prosecution makes these statements and other unused materials deemed relevant to issues in the case available to the defence. For example, in Shane Omar Nurse (Criminal Appeal No.34 of 2004, unreported decision of 22 February 2007) the prosecuting authorities were in possession of statements from three eyewitnesses whom they did not call as witnesses. However, they disclosed those statements to the defence who then called the persons from whom the statements were taken as witnesses for the defence.

Summary Trials

[31] What is the practice in respect of ordinary summary trials (not "either way" offences) before magistrates? In principle, the prosecution is under a duty of disclosure similar to that which applies to indictable or "either way" offences. Magistrates have to rule upon disputed issues of disclosure in much the same way as High Court judges in indictable cases – see Simon Brown LJ in R. v. Bromley Justices ex parte Smith and Wilkins [1995] 2 Cr.App.R. 285. Our magistrates have three types of jurisdiction in criminal cases. They hear and determine summary offences properly so called, including a vast number of "petty offences" under the Road Traffic Act, Cap.295; they hear and determine "either way offences" on application by the prosecutor for summary trial and with the consent of the accused. In addition, they hold preliminary inquiries into indictable offences.

[32] In our opinion, notwithstanding the overriding requirement for disclosure and, pending the procedure for disclosure being put on a statutory basis, there should be some differentiation in the rules between summary, "either way" and indictable offences. Variation in the application of the rules for disclosure must be understood as being necessary because of considerations of practicability, administrative and financial realities and the overriding need for the expeditious adjudication of criminal proceedings. This Court is aware that magistrates are being bombarded with requests for disclosure in petty offences. These stratagems, apart from creating huge administrative burdens for the RBPF, also lead to significant, unbudgeted increases in financial expenditure. Unless properly controlled, these stratagems will invariably cause delay in the disposition of relatively simple cases and will operate contrary to the purpose of summary trial which is the dispensation of swift, efficient and effective justice. Having regard to those considerations we direct as follows: (a) In the case of summary offences properly so called, where the offence carries a maximum penalty of 2 or more years' imprisonment and in the case of "either way" offences, after entry of a plea of Not Guilty, the accused should be asked whether he requires disclosure of relevant materials by the prosecution. If the accused answers in the affirmative, the prosecuting authorities should provide the defence with a schedule setting out discloseable materials and invite the defence to inspect those materials at a time convenient to all parties. After inspection, copies of any materials requested should be supplied to the defence except, of course, those materials for which claims of public interest immunity or legal professional privilege are made. Magistrates are reminded that it is their duty to adjudicate disputes concerning disclosure in a timely manner. (b) In non-imprisonable summary offences and offences carrying a maximum term of imprisonment of less than 2 years (typically minor traffic offences), following entry of a plea of Not Guilty, the prosecuting authorities should provide the defence, upon request, with a schedule as mentioned in (a) and invite inspection.

Preliminary Inquiries into Indictable Offences

[33] The directions which we issue in this Part of our decision do not apply to paper committals. The Practice Direction will continue to govern such cases. However, parts of the DPP's Guidance require revision and amendment in the light of developments in the law since 1998. We issue the following non-exhaustive guidelines which, in our view, represent the common law as it should apply in Barbados at the current time.

[34] Guidelines

(1) At the committal stage, the prosecution has the option of either calling a witness or making his statement available to the defence. The prosecution is not under a duty to call a particular witness at the preliminary inquiry, provided that it makes available to the defence any material statement given by a person not called as a witness.

(2) The prosecution may call to give evidence such witnesses as it thinks fit: Ferguson

(3) Where the prosecution is in possession of statements taken from persons whose statements may be helpful to the defence, the prosecution is under no duty to call the persons but must provide a copy of the statements of the persons to the defence. This duty is compulsory. It is no excuse that the defence were aware of the witnesses and could have taken statements from the witnesses. Put another way, material statements of persons who are not called as witnesses by the prosecution and which statements are in the possession of the prosecution and are helpful to the defence, must be disclosed to the defence.

(4) The prosecution must disclose to the defence material statements made by persons who are called by it to give evidence as well as material statements made by persons whom the prosecution does not intend to call as witnesses for the prosecution: Ferguson

(5) The prosecution must disclose material in its possession which may undermine its case: Brown

(6) Disclosure of such statements in the preceding sub-paragraphs must be made at or before the preliminary inquiry into the offence: Ferguson

(7) The duty of disclosure may be postponed in order to avoid or reduce the risk of physical harm to the maker of the statement: Ferguson

(8) The fact that the maker of the statement is not regarded by prosecuting authorities as a credible witness is no excuse for not disclosing the statement to the defence: Mills

(9) The duty of disclosure does not extend to material relating only to the credibility of defence witnesses: Brown

(10) In reality, the only material exempt from disclosure by the prosecution is irrelevant matter and material which may attract a claim to public interest immunity (Keane) or legal professional privilege: R v. Bromley Justices

(11) Breach of the duty of disclosure does not automatically give rise to an acquittal or a constitutional remedy. The appellant must show that he suffered prejudice: Ferguson

(12) Depending on the relevance and importance of undisclosed evidence, a failure to disclose may amount to a material irregularity within the terms of s.4(c) of the Criminal Appeal Act, Cap.113A: Ward

(13) When the Court of Appeal is called upon to review a failure to disclose, it must consider whether such failure impaired the right of the accused to make full answer and defence. This in turn depends on the nature of the undisclosed material and whether it might have affected the outcome of the trial: Stinchcombe

(14) This Court is of the view that the passage from Anthony Lawson (1990) 90 Cr.App.R. 107 cited in the DPP's Guidance is no longer good

law. It should not be followed. To the extent that it purported to state the law in accordance with R. v. Bryant and Dickson (1946) 31 Cr.App.R. 146, it has now been overruled by the House of Lords in Mills (supra).

(15) For the avoidance of doubt we wish to stress that the right of the defence to disclosure of unused materials is a right only to such unused materials which have some bearing on the offence charged and the surrounding circumstances of the case. In short, it is a right to materials relevant to an issue or relevant and helpful to an accused.

Conclusion

[35] We now return to the application before this Court. The affidavit in support of the application (apart from the fact that no leave was sought to file it) does not condescend upon sufficient particularity to identify the materials which may bear upon any issue in the appeal. Although during the argument, Mr. Khan did give examples of materials which could attract pre-trial disclosure, (see para.[6]), nowhere in Francis' affidavit or any other document were specific materials identified. And no attempt was made during argument to link any materials to any aspect of the trial to show that an absence of materials helpful to Francis prejudiced his trial. In those circumstances, to grant the application would be to license "a fishing expedition". The circumstances of this application are quite different from those in el Habre. There, the affidavit pointed to a number of specific documents or materials. – see para.[10] supra.

[36] Similarly, Mr. Khan's letter of 7 November 2006 was vague and certainly erroneous in one important respect. It will be recalled that he asserted that the items for which he sought disclosure "comprise of [sic] the Pre-Trial Disclosure and the Depositions submitted for the purposes of the Preliminary Inquiry in the instant case." In point of fact, when the trial began on 31 January 2005, the trial judge specifically inquired of Francis whether he had depositions with him. Francis said, "Yes, Sir!" – see p.3 of the record. So, having had disclosure via the depositions, why would he wish them disclosed again? The request rings hollow. We have no doubt that Francis was given adequate pre-trial disclosure in accordance with the practice which has obtained since 1988.

[37] We also wish to say that although the focus of the Practice Direction was directed to paper committals, many of the matters provided for in Part II should apply to preliminary inquiries conducted in the traditional manner. Finally, having assessed the facts and circumstances of this application, we are firmly of opinion that they do not disclose that Francis suffered any prejudice. He has not demonstrated that there was a breach of his rights which might have prevented his committal or caused his trial to have a different outcome. Nothing has been advanced before us to suggest that Francis was unable "to make full answer and defence".

Disposal

[38] The application for disclosure is accordingly denied. We, however, grant leave to argue the other grounds of appeal at a date to be fixed.

Chief Justice

Justice of Appeal **Justice of Appeal**