ATTORNEY-GENERAL OF NORTHERN RHODESIA v ALFRED OLIVER TROLLOPE (1963 - 1964) Z and NRLR 146 (CA)

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COURT OF APPEAL

[Before the Honourable the Chief Justice, SIR DIARMAID CONROY, the Honourable Mr. Justice BLAGDEN and the Honourable Mr. Justice WHELAN on the 22nd September, 1964.]

Flynote

Extent of duty upon the prosecution to make available to the defence the statements of witnesses interrogated by the Crown, but not called as prosecution witnesses.

Headnote

The accused was convicted in the magistrate's court of being drunk in charge of a locomotive contrary to 157B (2) of the Penal Code. He appealed to the High Court, and had his appeal allowed, on the grounds that his fireman had been a material witness, and had made a statement in the accused's favour, but had not been called by the prosecution, nor had his statement been made available to the defence. It subsequently appeared that the fireman had been present in the magistrate's court at the time that the question of whether he should be called or not was canvassed.

Held:

(a) The fireman was available in court as a witness if the defence wished to call him.

(b) As the witness was present, the defence could have taken a statement from him, and in default, could not complain that the prosecution had not made the witness's statement available.

Appeal allowed.

Cases cited:

(1) *R v Bryant and Dickson* 31 Cr. App. R 146.

(2) *Dallison v Caffery* [1964] 2 All ER 610.

D A O'Connor, Crown Counsel for the Crown

C J I Cunningham for the respondent

Judgment

Conroy CJ: This is an appeal by the Attorney-General under section 12 (3) (a) of the Federal Supreme Court Act, because he is dissatisfied with the judgment of the High Court upon a point of law in the exercise of its appellate jurisdiction. The matter arises in the following way.

The respondent was convicted by the Senior Resident Magistrate, Lusaka, of being drunk in charge of a locomotive contrary to section 157B (2) of the Penal Code. The respondent first

appeared before the magistrate on 6th May, 1964, when he pleaded not guilty and the matter was then adjourned to 20th May. It was not possible to complete the hearing on 20th May, so the case was adjourned, part - heard, until 28th May, when the hearing was completed and judgment was reserved until 4th June. Throughout the trial, the respondent was represented by Mr. Cunningham.

At the hearing on 20th May the guard of the train gave evidence and the public prosecutor asked him what was the fireman's condition.

The following passage then appears in the record:

Defence Counsel: I object.

Court: Only relevant if fireman is to be called as witness to show if he was able to observe, etc.

Public Prosecutor: I shall not call him.

Defence Counsel: I do not think I will call him and in any event, if I did, Crown could call evidence in rebuttal of condition.

Court: In that case evidence should not now be called.

The fireman was available at the court that day, but he did not attend on the adjourned hearing on 28th May.

At the close of case for the prosecution, on 28th May, the accused elected to say nothing, and defence counsel told the magistrate that he had no defence witnesses. The public prosecutor then addressed the court, and so did defence counsel. In the course of his address, defence counsel posed the question why the fireman had not been called, as he was a " compelling " witness. The magistrate's note on defence counsel's address on this point reads:

Why did fireman not testify? Was he also drunk - if so, why not jointly charged? If not a participant in alleged offence, why wasn't he called?

In his judgment the learned senior resident magistrate said:

"Defence counsel's allegation that the Crown was wrong not to call the fireman may, for all I know, have some substance. In the normal course of events the Crown's obligation is to put all relevant witnesses before the court. However, they may have had the best of reasons for not calling the fireman, and as to whether they were right or wrong must at this stage remain a matter of conjecture. They did not call him, but neither, I would remark, did the defence."

I remark, obiter, that I think the magistrate was wrong to exclude the evidence as to the fireman's condition, as such evidence was both relevant and admissible. That exclusion produced the paradoxical position of defence counsel who, by his objection, had prevented such evidence being led, then raising, as a matter against the Crown, conjecture as to the fireman's condition.

The respondent appealed to the High Court against conviction on a number of grounds, one only of which is now relevant. It was as follows. The fireman had made a statement to the police which was favourable to the defence. When the prosecution decided not to call him, the failure to make the statement available to the defence constituted a miscarriage of justice as it deprived the respondent of a chance of acquittal.

The learned judge allowed the appeal on this ground. In his judgment he outlined the history of the matter and stated that the fireman " had been in attendance when the case first came before the court, but not on the days of hearing." This is factually incorrect, and it would

appear that the learned judge was misinformed in this respect. The fireman was in attendance at court on the first full day's hearing on 20th May, when the public prosecutor said that he was not going to call him, and there was nothing to stop the defence counsel from then interviewing the fireman and taking a statement from him.

The learned judge held that it was the duty of the prosecution to make available to the defence evidence which the Crown was not going to call and which assisted the defence. He said:

"Making available evidence to the defence does not admit of any precise definition. Inherent in the phrase, is that the defence is at least informed of the witnesses whom the Crown does not intend to call but who have indicated that they can give evidence in respect of specified matters which may be material to the defence, and that the Crown has no objection to the defence interviewing them."

This practice was not infringed by the prosecution. Quite clearly the fireman was a material witness. On 20th May the prosecution told the defence that he was not being called as a Crown witness. He was then at the court.

We were referred to two authorities. The first was *R v Bryant and Dickson*, 31 Cr. App. R 146. In that case a man called Campbell, who could give material evidence, was not called by either side. After committal for trial by the magistrate's court the director of public prosecutions informed the defence that the Crown did not intend to call him and that there would be no objection to the defence taking a statement from him if they wished to do so. Neither side called Campbell, although he attended the trial, and the accused were convicted. They appealed on the ground that the prosecution, having taken a statement from Campbell and having decided not to call him as a witness, were under a duty to furnish the defence with a copy of the statement. Lord Goddard said, in giving the decision of the court:

". . . if the defence did not choose to take a statement and find out what he was prepared to say, that is not a matter with which the prosecution are concerned. In the opinion of the court it is quite wrong to say that it was the duty of the prosecution in these circumstances, having made Campbell available to the defence as a witness if they wished to call him, to go further and produce the statement which he made."

The second authority is *Dallison v Caffery* [1964] 2 All ER 610. At page 618, Lord Denning, M.R, said:

"The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish."

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CONROY CJ

Diplock, LJ, at page 622, had this to say:

"This contention seems to me to be based on the erroneous proposition that it is the duty of a prosecutor to place before the court all the evidence known to him, whether or not it is probative of the guilt of the accused person. A prosecutor is under no such duty. His duty is to prosecute, not to defend. If he happens to have information from a credible witness which is inconsistent with the guilt of the accused, or although not inconsistent with his guilt is helpful to the accused, the prosecutor should make such witness available to the defence (see *R v Bryant and Dickson* (sic) [1946] Cr. App. R 146)."

In the instant case the learned judge held that the Crown, by not making available to the defence the fireman's statement, had deprived the appellant of a chance of acquittal which would otherwise have been reasonably open to him. I do not agree. It must have been clear to everyone in general and to defence counsel in particular that the fireman travelling on the footplate of the locomotive with the respondent at the time of the offence charged, must have been a most material witness. When, in the early stages of the *Crown* case, the defence was told that the Crown was not going to call the fireman, it was the duty of the defence to investigate its case properly; the defence should have interviewed the witness, who was available at the court that day. Having failed to investigate his case properly, defence counsel was not entitled to blame the Crown for not making the witness available. In my view the law is correctly stated by Diplock, LJ., in *Dallison v Caffery,* and by the Court of Criminal Appeal in *Bryant*'s case. In so far as there is a conflict between the judgment in *Bryant*'s case and the dictum of Lord Denning in *Dallison*'s case, I think that the law is more correctly expressed in *Bryant's case*. The court there consisted of Lord Goddard, CJ, and Humphreys and Lynskey, JJ. The matter is one of day - by - day practice in the criminal courts, and with the possible exception of Avory, J, there has been, this century, no judge with a greater experience of such matters than Humphreys, J. In my view of the law, as the defence did not choose to take a statement from the fireman and find out what he was prepared to say, that was not a matter with which the prosecution were concerned.

I think the learned judge erred in this case, and I think his error arose from the fact that he was not told that the fireman was present on the day of hearing (20th May) when the public

prosecutor announced that he was not going to call the fireman as a witness. Mr. O'Connor, with his usual fairness, conceded that this was the fault of the Crown.

I would allow this appeal.

Judgment

Blagden JA: I agree.

Judgment

Whelan J: I agree.