



**IN THE SUPREME COURT OF BERMUDA**

**APPELLATE JURISDICTION**

**CRIMINAL APPEAL 2012: No. 33**

**BETWEEN:**

**TRE STEFFAN SIMONS**

**Applicant**

**and**

**FIONA MILLER  
(Police Sergeant)**

**Respondent**

**JUDGMENT  
(In Court)**

Date of Hearing: 12th October, 2012 and 7th November 2012

Date of Judgment: 16<sup>th</sup> November 2012

Mr. Edward Bailey, Edward Bailey & Associates for the Applicant

Ms. Tawana Tannock, Department of Public Prosecutions – Attorney for the Respondent

**INTRODUCTORY**

1. The Appellant was convicted on 7<sup>th</sup> May 2012, before a Magistrate on a charge of unlawfully doing grievous bodily harm, contrary to Section 306(a) of the Criminal Code Act 1907. He appealed against his conviction prior to sentence.

**THE UNDISPUTED FACTS**

2. The evidence for the Prosecution was that the Complainant called the Appellant to make payment for some drugs earlier purchased. The outstanding sum was \$50 of which the Complainant now offered \$6 and some change.

The Appellant took the \$6 and left on a cycle saying he would be back. The Complainant made further calls to the Appellant and was told by him to meet him at a certain field.

Upon arriving at the field the Complainant was set upon and beaten by the Appellant and some other men resulting in injuries which included, facial contusion, forehead laceration, nasal bone fracture, bilateral rib fractures 7,10 and 12<sup>th</sup>, fracture of the L2 and 3 Lumbar transverse processes.

The Complainant eventually got to the hospital where he was treated by a doctor. A report was made to the police.

A few days later, the Appellant appeared at the police station, presented a torn \$50 note and alleged that the complainant attempted to rob him of the \$50 note and that he responded in self-defence. He was charged, tried and convicted.

At the trial, the Prosecution relied upon the evidence of the Complainant, a police officer who had interviewed the Appellant and the doctor's evidence which was read in. For the defence, only the Appellant testified.

The Magistrate accepted the version given by the Complainant, rejected that of the Appellant and convicted him.

During Cross examination of the police officer by defence counsel, it was revealed that the Appellant had been interviewed by the officer.

It is accepted that though at the end of the interview, the interviewing officer had informed the Appellant that he could have a copy of the interview or have it served on his counsel and that the Appellant said he wanted it served on both, the interview was never served on any and defence counsel never got to see that interview until some weeks after the trial and conviction of the Appellant. In fact it is accepted that on three occasions, including up to the day of the trial, the Prosecutor had by email requested a copy of the interview from the police without success. It is further established that the other statements, including that of the officer, had been served on defence counsel prior to the trial and that in the officer's statement, he had referred to the conducting of the interview.

It is further accepted that the interview was a mixed statement and that without any knowledge of the interview or its content the Magistrate convicted and inter alia reasoned as follows:

*I find the complainant notwithstanding his history a credible witness who gave an honest account of what transpired...he was extensively cross examined by counsel for the defendant....I accept his version....On the other hand, I find the defendant was not a witness of truth...he gives a completely different account of this encounter. During the course of his evidence, the defendant testified to and made allegations of various matters which were*

*never put to the complainant by his counsel during cross examination. These were highly material matters that any experience counsel would certainly have put in cross examination if instructed as part of the defence case. The allegations I refer to include, inter alia, the suggestion that the complainant was in an anxious type of mood, was begging and aggressive, kept harassing the defendant, started to fight him and put him in a head lock and verbally tried to kill him. That he punched complainant in the stomach and then the face to loosen the grip. The defendant was also extensively cross examined. In my judgement his evidence and credibility were severely discredited.*

## **THE GROUNDS OF APPEAL**

3. Grounds 1 and 2 were argued together. The appellant was denied a fair trial pursuant to Section 6 of the Bermuda Constitution by reason of the suppression and non-disclosure of the defendant's interview to defence counsel until after the conviction.

## **THE SUBMISSIONS**

4. Counsel for the Appellant submitted that he was not aware of the existence of the interview until during his cross examination of the officer. He said had he been aware of it and its contents, he would have been in a better position to present the Appellants self-defence case and though it is arguable that the verdict might have been the same, it is also arguable that the verdict might have been different since the Magistrate might have realised that the Appellant's version at the trial was not a recent invention but that it was what he had maintained from the outset. For support he specifically relied upon that part of the magistrates reasoning where he said, "*these were highly material matters that any experience counsel would certainly have put in cross examination if instructed, as part of the defence case*".

In the circumstances submits counsel for the Appellant, the conviction is unsafe.

5. The Respondent conceded that the interview should have been disclosed, but submitted that its' non-disclosure did not materially affect the defence case. They submit that some of the indicia the Magistrate highlighted in his reasons were from the evidence of the Appellant and were not included in the interview. Further not only was the interview referred to in the officer's statement which was disclosed to defence counsel but that he had access to the Appellant who would have given him instructions.

## **DECISION**

6. There is merit in the arguments of the Appellant. It was the duty of the prosecution to disclose the interview to the defence. *R v DPP, ex p. Lee* [1999] 2Cr. App. R. 304. DC; *R v H*[2004]UKHL 3, 2 AC 134, para 14, per Lord Bingham. She did not. Despite having difficulty herself in retrieving the interview up to the morning of the trial, she proceeded with the trial without informing counsel of its existence or her difficulty in obtaining it. It is true as the Respondent submitted, that some of the

material in the interview was not in the defendant's evidence and was put by defence counsel. It is also true that some of the material in the interview was absent in the evidence and not disclosed or put during evidence.

7. In some cases a failure in the duty to disclose may not be material but in this case having regard to the manner in which the Magistrate reasoned, it is clear that the absence of knowledge of the interview and its contents played a significant role in his findings. Though there is some merit in the argument that on the facts before him the Magistrate could have convicted, even if the interview had been available and though there is some sympathy for the Respondent's argument that some fault did lay at the feet of the defence, in my opinion, such misfeasance on the defence's part is not meritorious enough to defeat their claim in this case.
8. The basic common law principle relating to the duty of the prosecutor to disclose is well expressed at Archbold 2010 Ch12-49 as follows: "*...the prosecutor must always be alive to the need to make disclosure of material which he is aware either from his own consideration of the papers or because his attention has been drawn to it by the defence and which he, as a responsible prosecutor, recognises should be disclosed at an early stage. He should ask himself what, if any, immediate disclosure justice and fairness require him to make in the particular circumstances of the case.*"
9. In the circumstances the appeal is allowed, the conviction is set aside and the matter is remitted to the Magistrate's Court for retrial before a different magistrate.

**Dated this 16<sup>th</sup> day of November, 2012 \_\_\_\_\_**

**GREAVES C, J**