ANTHONY LAWSON

COURT OF APPEAL (Lord Justice Parker, Mr. Justice Alliott and Mr. Justice Schiemann): June 19, 1989

Evidence - Material Witness - Statement Taken by Prosecution - Statement by Person Not Called as Prosecution Witness - Duty to Defence.

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.

Bryant and Dickson (1946) 31 Cr.App.R. 146 considered.
Dictum of Lord Denning M.R. in *Dallison* v. *Caffery* [1965] 1 Q.B. 348, 369BCapplied.

Thus, *inter alia*, where the prosecution had failed to disclose to the defence statements taken from a material witness, and the appellant was convicted, and on appeal prosecution counsel submitted that in pursuance of paragraph 6(ii) of the Attorney-General's guidelines on the disclosure of information to the defence in cases to be tried on indictment (1982) 74 Cr.App.R. 302, 303, [1982] 1 All E.R. 734, he was entitled to exercise his discretion to withhold a witness statement, that the defence knew that there was a vital witness, knew who it was, and could have taken their own statement:

Held, allowing the appeal, that, as counsel conceded, it was an error of judgment and a wrong exercise of the discretion on his part; accordingly, on that ground, the conviction would be quashed.

Per curiam: Injustice could result from an inflexible application of *Bryant and Dickson* (1946) 31 Cr.App.R. 146.

[For statements made by persons who are not to be called as prosecution witnesses, see *Archbold* (43rd ed.), para. 4-178.]

Appeal against conviction.

On July 17, 1987, at the Central Criminal Court (Judge Richard Lowry, Q.C.).

The appellant Lawson and the applicant, Andrew Kay, (whose application does not call for report) were convicted on two counts of conspiracy and were sentenced, Lawson to two years' imprisonment concurrent, with 12 months of that sentence suspended; and Kay to three years' imprisonment on count 1 and to six months' imprisonment concurrent on count 2.

The facts appear in the judgment.

The appellant Lawson appealed on the certificate of the trial judge pursuant to section 1(2) of the Criminal Appeal Act 1968, in the following terms:

"The Court of Appeal ought to consider (1) whether or not each conviction is under all the circumstances unsafe or unsatisfactory; and/or, (2) whether or not there was a material irregularity in the course of the trial?"

The Court refused Kay's application for leave to appeal against sentence.

Geoffrey Rivlin, Q.C. and *Nigel Shepherd* (both assigned by the Registrar of Criminal Appeals) for the appellant.

Michael Worsley, Q.C. and *Anthony Leonard* for the Crown.

PARKER L.J.: On May 11, 1987, at the Central Criminal Court, before His Honour Judge Lowry and a jury, the trial began of the appellant Lawson, the applicant Kay and three others, Hobday, Neill and Conolly on two counts of conspiracy. Count 1 of the indictment charged a conspiracy to handle dishonestly in the United Kingdom the proceeds of certain Bearer Bonds stolen in the United States knowing or believing the said proceeds to be the proceeds of the said stolen bonds. Count 2 alleged a like conspiracy but relating to other securities. The value of the bonds, the subject of count 1, was some U.S.$252,000. The value of the securities, the subject of count 2, was some U.S.$3 million.

On July 17, 1987, all, save the defendant Conolly, were convicted. Conolly was acquitted. The sentences which were passed were as follows. The appellant was sentenced to two years on each count concurrent with 12 months suspended. The applicant was sentenced to three years on count 1 and six on count 2 concurrently. Hobday was sentenced to 12 months on count 1 and two years concurrent on count 2. Neill was sentenced to nine months on count 1 and 18 months concurrent on count 2—they were concurrent *inter se* but consecutive to a three-year sentence for blackmail which he was then serving.

The appellant appeals against conviction pursuant to a certificate of the trial judge dated July 24, 1987, that is to say, just one week after the verdict. On the same day the appellant was granted bail and has been on bail ever since. The applicant Kay applies for leave to appeal against sentence, his application having been referred to this Court by the registrar. He has previously been granted an extension of time by this Court.

Before going further it is necessary to mention the very long delay in bringing this matter before the Court. It is now almost two years since the certificate of the trial judge. Such an apparently unsatisfactory situation caused me to make inquiries as to the cause. The result is that it is apparent that the Criminal Appeal Office has consistently pressed for the production of necessary transcripts with little or no success. Virtually the whole of the delay can be set at the door of that matter. In the event the delay has not been of as much importance as it might otherwise have been because the appellant Lawson has been on bail and the applicant Kay could not reasonably have expected a reduction in his sentence which could have affected the matter up to now. It is, however, still serious.

So far as Lawson is concerned, there was a certificate from the trial judge in plain

terms and he has had, albeit on bail, hanging over him a conviction for almost two years now which might well have been removed at a much earlier date. It is necessary to stress that in cases such as this in particular, every effort is to be made by the shorthand writers, as well as others, to ensure that the appellant gets before this Court on an appeal on conviction at the earliest moment.

It is now necessary to turn to the facts to some degree, but in the light of the way the appeal has proceeded they can be dealt with relatively shortly. The position was this. Kay desired to organise the disposal of the stolen bonds, the subject of count 1. For that purpose he purchased off the shelf a company called Origold Limited. The registered directors of that company appeared to be two people called Hanson and Jackson. The account which was to receive this money, and which in fact did receive the proceeds of the bonds, was opened by Hobday and Neill. However, by the time they came to withdraw the money, which they desired to do almost immediately after it had been paid in, the manager of the bank had ascertained that although the account had been opened by Hobday and Neill they did not appear to be directors of the company and not unnaturally he declined to act further on their instructions.

They thereupon went to the first solicitor, Mrs. Preston-Rouse. She observed that before the matter could be dealt with it would be necessary to take steps to have Hobday and Neill properly appointed directors of the company. She was aware that Kay was indeed a person called Kay and therefore was of no use for this purpose. They then left her.

Kay had a mistress by the name of Cindy Cantor (now Cindy Abbey). Cindy Abbey, as I shall now call her, had been well-known to the defendant Lawson, together with her family, for a considerable time. She directed him to Lawson on January 23, 1986, and took him to Lawson's office in Ewell. She had been there before. She knew Lawson well and Lawson knew her well. At that meeting it was arranged that Mr. Lawson should prepare and advise upon the necessary steps to enable Hobday and Neill to become directors of Origold in order that they might be able to withdraw the money from the bank.

The prosecution case was that Lawson had known from the outset that the person before him was Kay whereas Mr. Lawson's case was that he had no idea that the person before him was Kay but believed him to be Jackson, one of the two directors whose co-operation would be required in order to appoint Hobday and Neill in their place. At the trial Kay and Hobday both gave evidence that Lawson had known that Kay was indeed Kay and not Jackson from the start. That is as much as need be said about the first count, save only this, that on the following day four persons attended at Mr. Lawson's office, he having to get out of bed because he was ill to attend the meeting. Those persons were Hobday, Neill, Kay, whom at this stage Lawson said he still believed to be Jackson, and another gentleman whose name is thought to have been Hanson, but for all the Court is aware may have been somebody else impersonating the Hanson whose name appeared in the Origold papers. It matters not. There were before Mr. Lawson the people who appeared to be necessary to sign the documents to put the matter in order provided only that he believed that the person Kay was in truth the Jackson whose name was recorded in the papers.

I move now to the second count about which I need say even less. The securities had not yet been stolen, unlike the situation in the first count where they had been stolen some considerable period before, at the time when Kay began the process of arranging for the immediate disposal of the bonds when, having been stolen, they arrived. For that purpose he desired to use a stockbroker by the name of Conolly and to have the proceeds paid into a company of Kay's known as CPM in Jersey. In

order for that to be done he wished to obtain a letter of authority to Conolly to dispose of the bonds. In this case and by this time it appears that Lawson did know that the person he had hitherto thought to be Jackson was not Jackson at all. So by this time he had become aware that what had occurred on January 23 and 24 was an improper transaction, but ill-advisedly perhaps he did not then and there terminate his relationship. That, however, is not a matter which immediately concerns the Court. It is common ground that if the appeal were to succeed on count 1 it is necessary and follows, as night follows day, that he must also be acquitted on count 2 because count 2 will have been coloured by the previous events.

The offences were quickly discovered. By the time that they were discovered, the bulk of the proceeds had not yet been removed out of the country. They had been paid into a deposit account in the name of CPM, as I understand it, and instructions were given for some $2 million plus to be transferred to an account in Switzerland. Those instructions we are told, although it is not a matter of concern on the appeal but on the application for leave, had been given before Kay became aware that the transactions were under suspicion, which he did by learning of the interview by the police of his co-defendant.

The first ground of appeal that it is necessary to mention is that the verdicts are unsafe and unsatisfactory because they are inconsistent with the acquittal of Conolly. That ground was conceded by Mr. Worsley, on behalf of the Crown, to be a good ground of appeal and accordingly he conceded that on that ground the appeal should be allowed. That concession was in the view of this Court rightly made. As compared with the case against Conolly, the case against Lawson was as one strand of a spider's web to a nine-inch hawser and it is impossible to understand how the jury reached the conclusion which they did. The Court must necessarily be left on that ground alone with the feeling that these verdicts are unsafe and unsatisfactory. That was not, however, the first ground of the notice of appeal. The first ground of the notice was that the prosecution had failed to disclose to the defence a statement which had been taken from Cindy Abbey in the United States of America by British police officers and was dated August 2, 1986.

Cindy Abbey was clearly a witness of the very greatest importance. She was the only person, other than Kay and Lawson, present at the very first meeting. She was therefore in a position to know how she had introduced Kay to Lawson or how Kay had introduced himself to Lawson. She knew and must have been known by both the prosecution and the defence to know what was the truth of the matter. That statement had been held ever since August 2, 1986, by the prosecution. On the second page of that statement, having disclosed that she had become the mistress of Mr. Kay and that she was aware that he had been to one set of solicitors with whom he was not satisfied, she says:

> "My girlfriend told me at dinner that she really had no interest in him"—that is Kay—"and it was at that point that I decided that I was quite fond of him. Our acquaintance continued and sometime in January 1986 he asked me to introduce him to a firm of solicitors, as he was not happy with the one he was using. At some point during the course of that week I was with him in the car when he stopped in Thayer Street W1. I now believe these to be the offices of the solicitors he was using. Prior to my introducing him to Davies Lawson I phoned Mr. Lawson, and asked him for an appointment to see him. He agreed and set a time."

To that point so far, in the extract which I have read, it is not suggested that Cindy Abbey was telling otherwise than the strict truth. Every sentence is confirmed by other evidence and indeed is not challenged. She then goes on:

> "On the journey down to Ewell, Mr. Kay asked me to introduce him under a

different name. The reason for this being Mr. Kay was still married and pending a divorce, and wished that certain transactions to take place without the knowledge of his wife. I believed this to be true, and didn't doubt him, so did what he asked. We arrived at Mr. Lawson's office at approximately 12.30."

That too was confirmed.

"At this point I can't remember if I introduced Andrew Kay as Mr. Jackson, or if he introduced himself by the same name. If he did introduce himself, then I did not at that point contradict him. I simply believed the reason he had given me, in the car earlier which I now know to be a lie. At that meeting I was present. The contents of my meeting from my memory were centred around a property deal, in which Mr. Lawson mentioned a few names. I was not particularly paying attention to the meeting as I was more concerned in Mr. Kay's divorce. Mr. Kay had told me that the reason he wanted to pose as Mr. Jackson would benefit our future, and that I shouldn't worry."

She then goes on with a long account of how her relationship with Mr. Kay had slowly deteriorated and finally determined. At the end of the statement she was challenged by the police in a series of questions and answers which are recorded. At p. 10 she comes to this question and answer:

"Q. Have Kay, Lawson, Martin suggested to you that you should lie about the introduction of Kay to Lawson?

A. No. The statement I have given and the dates are the best of my ability. I introduced Mr. Kay as Mr. Jackson for one reason only, to keep him with his divorce. If this be false, which apparently now has become clear it is, then I can only say that unfortunately for myself and my family, the wool has once again been pulled over my eyes."

So on challenge she was firm that the end production had been either a self-introduction or an introduction by herself to Mr. Lawson as Jackson and not as Kay.

During the trial Kay and Hobday both gave evidence, and of course were supported by the prosecution, that Mr. Lawson had known from the outset that Jackson was not Jackson at all but Kay. The defence case was of course wholly different and was in accordance strictly with the statement of Cindy Abbey which had been in the hands of the police since August 1986.

Before the trial, a request had been made in writing by the defendant's solicitors on April 29, close to the trial, in this form:

"We should also be grateful if you would formally confirm that you have now disclosed all the witness statements in the possession of yourselves and the Police Officers. We say this bearing in mind that our Client's files were unknown to you, actually in the hands of the Officer in the case. Please confirm that we have been supplied with copies of all papers in the possession of the Police and yourselves."

That request was not complied with. Nor was it explained that it was not going to be complied with as to any particular statement or for any particular reason.

On May 1, the defendant's solicitors pursued the matter asking that there should be disclosed all statements intended to be relied upon and material intended to be relied upon and also for the disclosure of unused material. That produced nothing, but in the early stages of the trial it became apparent that the prosecution had a statement from Cindy Abbey. It appears that at that stage they were asked to disclose it but declined. The defence did not know, as was the true fact, that that statement was a statement made under caution. That is the statement which I have just read.

The facts regarding this statement are recorded in a document which has been

helpfully supplied to us by counsel, and which is agreed. I have already stated the substance of the first paragraph. I read the remainder:

"2. (a) The Defence knew that Cindy Abbey then"—that is at the time of the trial—"resided in the U.S.A. but did not know her address.

(b) The Appellant told the Court in evidence that he knew her and her family. He had met her socially and he had acted as solicitor to both her brother and her mother.

(c) Cindy Abbey had moved from the address given to the police in the statement.

3. The Defence Counsel had no reason to imagine let alone believe that in that statement she supported the Appellant on the crucial issue of Kay's true identity.

4. It was always the Prosecution case that the Appellant's introduction into the case by Cindy Abbey was fortuitous as a result of the defendants Kay, Hobday and Neill not getting what they wanted from Mrs. Preston-Rouse.

5. [This is a very important paragraph] During the evidence of the Appellant on the morning of July 1, 1987 he was cross-examined on behalf of Kay about Cindy Abbey and he said he was unaware of her actual address. At 2 p.m. that day Michael Worsley, Q.C. spoke to Geoffrey Rivlin, Q.C. and offered to supply her last known address to the defence. Geoffrey Rivlin declined the address and commented that there was [quotation taken from Mr. Worsley's notes] 'never any question of Cindy Abbey being called for Lawson because she was in Kay's pocket and because of the photographs' . . . ."

It appears that the photographs showed her and Kay in the United States together.

"6. The Appellant was convicted on 17th July 1987. During the week following the Appellant's conviction Michael Worsley telephoned Geoffrey Rivlin from the South of France. He said that 'the penny had suddenly dropped' to the effect that due to the reference in the words, just cited in the previous paragraph, as to the girl 'being in Kay's pocket,' Mr. Rivlin might have been under a misapprehension as the then state of the relationship between Kay and Cindy Abbey and revealed in the content of Cindy Abbey's statement. Geoffrey Rivlin said he wished to see the statement and indicated the Appellant's intention to appeal.

7. Immediately thereafter, as the result of Geoffrey Rivlin's request, Detective Constable Highley found out from Cindy Abbey's family her whereabouts and telephone number and telephoned her with the results contained in his statement (subject to one modification). The results of that contact and her telephone number were communicated to the Defence."

Highley's statement is the next one but I need not read it.

The subsequent course of events in relation to Cindy Abbey is recorded in the affidavit of the appellant's solicitor which has been supplied to the Court for the purposes of this appeal. It amounts to this, that she was not prepared, when contacted, to have anything to do with the matter or to give evidence and she had also stated at an earlier stage that she would not be prepared to come and explain matters shortly after the trial. Not surprisingly, the defence were probably as shocked by the fact that the statement had not been made known to them during the course of the trial as was everybody apparently by the jury's verdict of guilty of Mr. Lawson as compared with the acquittal of Mr. Conolly. The learned judge, in certifying this case as being a fit and proper case to be appealed did so on the ground that the Court ought to consider: whether or not each conviction is under all the circumstances unsafe or unsatisfactory; and/or whether or not there was material irregularity in the course of the trial.

The reasons for the certificate, as set out by the judge, are very clear. He says this:

"The starting point of the Prosecution case against the 5th Defendant, Lawson, was that the first defendant, Kay, went to Lawson's office on Thursday 23 January, 1986, and that the two men agreed that Kay should impersonate 'Paul Jackson.'"

Then he sets out the purpose of the impersonation which I have already stated. He goes on:

"Lawson, in his defence, said that he was the innocent dupe of Kay, and then genuinely believed that Kay was called Paul Jackson.

Consequently, what did, or did not, take place between Kay & Lawson in Lawson's office on 23 January was of crucial importance not only as to Ct. 1 but also to the whole case including Ct. 2.

. . . Cindy Abbey, the then mistress of Kay [was also present]. The Prosecution had in their possession a statement from Cindy Abbey dated 2nd August 1986. . . . The words of this statement support Lawson's evidence concerning 23 January; they are inconsistent with Kay's evidence; and they are inconsistent with the prosecution case against Lawson.

The contents of this statement were not disclosed to the defence of Lawson until after the trial.

Had the defence of Lawson had access to this statement:

(i) it would have provided a further basis for cross-examination of Kay,

(ii) it would have had a material bearing on whether or not they themselves should call Cindy Abbey as a witness.

The failure to reveal was disclosed to me on 24 July 1987, when the defence applied to me on various grounds that I should certify the case as fit for appeal. I heard counsel on both sides. I have certified in the terms set out and for the reasons given."

Since that time, and within the last few days, the learned judge has written to the registrar expressing disquiet about the fact that the matter had not long since been disposed of and the appeal allowed. Copies of that letter were properly provided to the Court and both counsel, but I do not propose to refer further to it.

Mr. Worsley concedes that, looking back, it would be possible to concede, indeed I think he does concede, that on the ground of the non-disclosure in all the circumstances the Court could properly be left with a lurking doubt. But he submits that he did nothing wrong with regard to the statement. We say at once that nobody accuses Mr. Worsley of any deliberate wrong-doing whatever or any desire to secure injustice or anything of that sort. The matter which he principally relies upon is the content of paragraph 6(ii) of the Attorney-General's guidelines on the Disclosure of Information to the Defence in Cases to be tried on indictment (1982) 74 Cr.App.R. 302, 303, [1982] 1 All E.R. 734, although he had also referred us to three authorities and to the Code of Practice of the Bar. Paragraph 2 reads:

"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 paragraph 6) be made available to the defence solicitor if it has some bearing on the offence(s) charged and the surrounding circumstances of the case."

Paragraph 6 reads:

"There is a discretion not to make disclosure—at least until counsel has considered and advised on the matter—in the following circumstances: . . . (ii) The statement (*e.g.* from a relative or close friend of the accused) is believed to be partially untrue and might be of use in cross-examination if the witness should be called by the defence."

Mr. Worsley says that in pursuance of that statement he was entitled to exercise his discretion and withhold the statement, although he concedes that had he realised before the end of the trial that the defence were under the impression that Cindy Abbey was no longer a close, or indeed any friend, of Kay he would have felt it necessary to put the position right, although he says he would still not have disclosed the statement itself. He referred us also to a case upon which reliance is sometimes placed which is *Bryant and Dickson* (1946) 31 Cr.App.R. 146 and also to *Dallison* v. *Caffery* [1965] 1 Q.B. 348. Finally, he referred us to a case of which we have been helpfully supplied with a transcript, and which appears in what is known as the "red file," which was decided by this Court on November 9, 1978, the Court consisting of Browne L.J., Phillips and Michael Davies JJ. The paragraph in *Archbold* (43rd ed.) which deals with this matter appears at p. 413 and is the last paragraph of the numbered paragraph 4-178. I read it for two reasons: first for the comment of which this Court approves; and secondly, to point out that there is one omission in the paragraph which may be of some importance. The paragraph reads as follows:

> "Where the prosecution have taken a statement from a person whom they know can give material evidence but decide not to call him as a witness, they are under a duty to make the person available as a witness for the defence and should supply the defence with the witness' name and address. The prosecution are not under the further duty of supplying the defence with a copy of the statement which they have taken: *Bryant and Dickson* . . . Certain prosecuting authorities and prosecutors not infrequently use this authority as a justification for never supplying the defence with the statement in such circumstances. It should be borne in mind however, that an inflexible approach to these circumstances can work an injustice. For example the witness's memory may have faded when the defence eventually seek to interview him, or he may refuse to make any further statement. The better practice is to allow the defence to see such statements unless there is good reason for not doing so. Furthermore, it should be observed that the ruling in *Bryant and Dickson*, *ante*, cannot be reconciled with the observations of Lord Denning M.R. in *Dallison* v. *Caffery* [1965] 1 Q.B. 348, 369: '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 then show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence.'"

If one looks at the authority itself, Lord Denning continued immediately after that with these words (at p. 369BC):

> "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."

Mr. Worsley says, with force, the defence here knew that there was a vital witness: they knew it was Cindy Abbey: Mr. Lawson could easily have discovered from her family where she was and could have taken his own statement; and that he was justified in withholding the statement and cross-examining in the way he did without disclosing it, on the basis that if Cindy Abbey had been called it might have been necessary to use it and it would have been wrong to have given her the opportunity of tailoring her evidence.

With all respect to Mr. Worsley, this Court is unable to accept that the course taken was the right course. It is understandable that at the end of a trial lasting for some 47 days, and well into the trial when the matter arose, that errors of judgment

should be made. That this was in this case an error of judgment and a wrong exercise of the discretion, the Court has no doubt and it is to Mr. Worsley's credit that within a very short while thereafter, whilst on holiday, he was so concerned about that matter, not the Court observes about the inconsistencies of the verdict, that he telephoned defence counsel and disclosed the matter. This Court is clearly of the opinion that on that ground also this appeal must be allowed, and wishes to endorse the observation made in the paragraph in *Archbold:* that it must be remembered that an inflexible application of *Bryant and Dickson* (*supra*) can lead to an injustice. In the circumstances of this case, the Court has no doubt whatever that for that trial to proceed on the basis that it did, with the defence wholly unaware of the change in the relationship between these two witnesses and of the fact that the statement had been given, is the sort of injustice which may occur. It is not possible to make a ruling as to the circumstances in which it is or is not right to exercise the discretion one way or the other. In the vast majority of cases the experience and feeling of counsel will lead to the right decision being made but when a wrong decision is made then the matter has to be dealt with properly and the appeal allowed on that ground.

Appeal allowed.
Conviction quashed.

Solicitors: Crown Prosecution Service, Fraud and Bankruptcy.