IN THE COURT OF APPEAL

THE TURKS AND CAICOS ISLANDS **CR-AP 21/2018**

BETWEEN

ANTHONY DALE NATION **APPELLANT**

And

REGINA **RESPONDENT**

Cor:-

Sir Elliott Mottley	**President**
The Hon. Mr N. Adderley	**Justice of Appeal**
The Hon. Mr. R. Hamel-Smith	**Justice of Appeal**

Appearances:-

Ms. Sheena Mair for the Appellant

Ms. Mickia Mills for the Respondent

Heard: **17th September, 2019**

Delivered: **30th January, 2020**

REASONS

Delivered by R. Hamel-Smith JA.

1 This appeal raises a fundamental right, that of a right to a fair trial. The appellant had been charged with four counts of unlawful carnal knowledge of a female under the age of fifteen. He was convicted on two of the counts and sentenced to five years imprisonment. He was acquitted on the other counts. On September 17, 2019 this Court allowed his appeal and quashed both convictions and sentences. We promised to give our reasons at a later date and we do so now.

2 The virtual complainant was under the age of thirteen when she met the appellant at a hurricane shelter in Grand Turk in September 2017. The appellant was 31 years old and allegedly a counselor and community worker when he befriended the complainant. They conversed and eventually exchanged telephone numbers.

3 After leaving the shelter they continued to communicate and during one telephone conversation, the appellant requested a kiss from her and later asked her to meet him at a beach in Grand Turk. They met and the relationship began to unfold. According to the complainant, the appellant had sexual intercourse with her on four occasions, namely, in October and November 2017 and in March 2018 at West Road, Grand Turk, and in January 2018 at North Wells, Grand Turk.

4 The complainant's father discovered that she was receiving telephone calls from the appellant and reported the matter to the police. An investigation got underway and the investigating officer had the complainant examined by a doctor. He produced a standard medical form in which the doctor had to record the victim's medical history and assault information.

5 It was in this setting that the appellant was charged with the four counts of unlawful carnal knowledge. According to the Crown, it had disclosed all material it had in its possession and what it was aware of. This eventually turned out to be somewhat misleading. The trial began on October 30, 2018 and the complainant was the sole witness to the unlawful sexual intercourse. The appellant denied that any intercourse

had taken place. The investigating officer testified for the Crown but made no mention of any medical report in his examination in chief.

6 In cross-examination, he attempted to give his opinion from what he claimed to be within his knowledge on the presence or absence of the complainant's hymen but the judge quite rightly, disallowed the evidence. When asked about the medical report, he claimed that the doctor did not provide a report. Pressed by the judge, he confessed to not having followed up with the doctor on the report. The Crown then contended that it was not relying on the medical report to prove its case. As a result, the trial proceeded without it. On November 3, 2018 the appellant was acquitted on the first two counts but convicted on the other two. He was sentenced to a total of five years imprisonment.

7 Several grounds of appeal were raised, one of which was that the prosecution was in 'bad faith', the basis for which was that the prosecution had failed to disclose the medical report. The prosecuting counsel said that she was not aware of the existence of the report. Nevertheless, during the hearing of the appeal, on her own volition, she made enquiries and was able to secure a copy of the report and it was tendered into evidence. We commend her for immediate action and sense of duty to the Court.

8 On examination of the report, one of the questions was in the following terms: "Was there penetration of (a) the vagina, and (b) the mouth?" The answer required was either '*Attempted*' or '*Successful*'. In relation to the vagina, the doctor inserted the answer given to him by the complainant as *Attempted*. The question was somewhat ambiguous in that it did not define precisely what was meant by *attempted* in relation to both the vagina and the mouth. In relation to the vagina, it could mean that penetration was not achieved, no matter how slight. As to the mouth, it became less clear. The evidence of the complainant was unequivocal. She maintained that the appellant had penetrated her vagina. Her answer in the report therefore was inconsistent with what she had said at the trial. In the circumstances, there could be no doubt that the report was material evidence that should have been disclosed to the appellant before the trial. It was certainly relevant to the credibility of the

complainant, more so given the fact that the appellant had denied any sexual contact with the complainant.

9 As things stood, the jury convicted the appellant on two counts of unlawful carnal knowledge and acquitted him on the other two counts. Although the appellant's attorney did not raise the issue of inconsistent verdicts, there was no apparent reason for the acquittal verdicts other than the jury had rejected her evidence on those two counts. There was little, if any, deviation from the exactitude of her evidence on all four counts and yet the jury acquitted him on two of them. The Crown suggested that the different locations may have been the reason for the differing verdicts. That seems unlikely, given that three of the locations were at West Road and one was at North Wells. In the circumstances, had the report been tendered the outcome of the trial may have been different.

10 The Crown's submission that it was not relying on the report to prove its case was misguided. The purpose of disclosure is not simply to assist the prosecution in proving its case; it extends to the accused, particularly where the information may be adverse to the case for the prosecution. Further, it was disingenuous on the part of the officer, having first claimed that the doctor did not provide the form, to say that he simply did not *follow up* on getting the report from the doctor. It was his duty to do so. Whether he was aware of the contents will probably remain a mystery but his willingness to express an opinion in the course of his evidence on the absence or presence of the hymen seems to point in a particular direction. It was in these circumstances that the Court was satisfied that the failure of the Crown to disclose what it considered material evidence in the form of the medical report was inexcusable.

11 In ***Randall v R (Cayman Islands***) [2002] UKPC 19, Lord Bingham reiterated the duty of prosecuting counsel which is not to obtain a conviction at all costs but to act as a minister of justice. He recalled the words of Rand J in ***Boucher v The Queen*** (1954) 110 Can CC 263, 270:

> *"It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel has a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of a prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, seriousness and the justness of judicial proceedings."*

12 This Court had to determine the effect the failure to disclose the report would have had on the appellant's case. A significant effect which was particularly damaging, was that the complainant's evidence was inconsistent with what she related to the doctor on the issue of penetration. This Court was mindful of the fact that she was a child and it was possible that she may not have understood the legal meaning of penetration. She did say that he had withdrawn in order to ejaculate outside of her and whether that meant, at least to her, that penetration therefore was not successful may be a possible explanation but is mere speculation nonetheless. From an objective point of view however, the concern must be in respect of the appellant's case in the absence of any explanation. He had denied having any sexual intercourse with the appellant and the contents of the report *per se* supported his case.

13 The only conclusion which one can draw is that the appellant was deprived of a fair trial because all the material facts known to the prosecution were not before the court. Notwithstanding the inconsistent verdicts for which there is no logical explanation and the effect of that on the appellant's credibility, the prospect of a complete exoneration on all the charges was denied the appellant as a result of the non-disclosure of the report.

14 The prosecution did submit that in light of the contents of the medical report, the Court could find the appellant guilty of a lesser offence of indecent assault pursuant to section 10 of the Court of Appeal Ordinance. The substitution for a lesser count would have to be in respect of the guilty verdicts only, given that the jury had

acquitted him on the other two. In our view, the non-disclosure of the report infected the entire trial to the extent that it deprived the appellant of his fundamental right to a fair trial. The substitution of a lesser offence not only disregarded that fundamental right but allowed the prosecution a way out of its own wrongdoing.

15 The Court also considered the question of a retrial (although not raised by the prosecution) but when all the circumstances were taken into account, including the unsatisfactory explanation proffered for non-disclosure, such a course would have allowed the prosecution an unfair advantage to rehabilitate its case. The prosecution must understand, and we are certain that it did, that an accused person is entitled to a fair trial no matter how outrageous the offence may seem to society. Lord Bingham, in ***Randall*** (above), was firm in his belief that the right to a fair trial was absolute. There will come a point, he said, when the departure from good practice is so gross, or so persistent, or so prejudicial or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe.

16 It was in these circumstances that we considered the convictions unsafe and we therefore set them aside and quashed the sentences imposed.

Dated this 30th day of January 2020

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Sir Elliott Mottley

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N Adderley J.A.

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R. Hamel-Smith J.A.