[2013] JMCA Crim 30

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 33/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

NICKOY GRANT v R

Bert Samuels and Aon Stewart instructed by Knight Junor & Samuels for the applicant

Miss Keri-Ann Kemble for the Crown

8 April 2013 and 5 July 2013

LAWRENCE-BESWICK JA (Ag)

[1] On 6 August 2010, Mr Derran Currie received an injury to his eye whilst he was walking along a road in Portland. On 11 August 2010, the applicant, Mr Nickoy Grant, was arrested for inflicting the injury and was charged with wounding Mr Currie with intent to cause him grievous bodily harm, contrary to section 20 of the Offences Against the Person Act. A preliminary enquiry was held on 15 September 2011, in the Resident Magistrate's Court for Portland and Mr Grant was tried by a jury in the Circuit Court for Portland between 12 and 14 March 2012. His defence was an alibi. In his unsworn statement he stated that he had been at home when he received information and went

to the community centre where he saw Mr Currie lying on the ground. He does not know who hit him or why. The defence's witness supported that account.

[2] At the trial, the evidence of the nature and extent of the injury to the complainant, Mr Currie, came from the complainant himself, and he testified that he could not see from one eye as a result of the injury. There was no medical evidence from a doctor as to the condition of his eye. No medical certificate was produced at the trial despite the evidence at the preliminary enquiry that the investigating officer had collected a medical certificate from the Port Antonio Hospital. The prosecution's records were inconclusive as to whether they had actually served the defence with a medical certificate or medical certificates, and if so, when.

[3] Mr Currie's evidence was that he had gone to four hospitals. Port Antonio Hospital was first then he was transferred to St Ann's Bay Hospital. He then went back to Port Antonio Hospital, was transferred to Kingston Public Hospital (KPH) then returned to Port Antonio Hospital. He had also been admitted to "University UC [sic]". At no point during his stay at any of the hospitals was there surgery, as he stated that he could not afford it, but he received pills and was x-rayed.

[4] Mr Grant was convicted of the offence and on 22 March 2012, was sentenced to a term of imprisonmen of seven years at hard labour. He has appealed his conviction and sentence.

[5] Subsequent to his sentencing, the applicant's mother swore an affidavit dated 9 October 2012, indicating that sometime after the trial, on 26 March 2012, she had overheard Mr Currie say in a conversation that he had never lost total vision in his left eye and that he could always see from it.

[6] On 11 December 2012, a single judge of this court gave leave to the applicant to "adduce fresh evidence" in the form of medical reports on the condition of Mr Currie's left eye following his medical treatment which commenced on 6 August 2010, at the Port Antonio Hospital and subsequently at KPH. The learned single judge also made an order that the Director of Public Prosecutions must serve Mr Grant's attorney-at-law with copies of all the medical reports and certificates of Mr Currie in her possession on or before 14 December 2012.

[7] On 12 December 2012, Mr Grant's attorney-at-law was served with a copy of a medical certificate from only one of the hospitals at which Mr Currie was treated, the Port Antonio Hospital. This medical certificate is before this court. It states that Mr Currie had been treated on 6 August 2010, at the Port Antonio Hospital and that he was suffering from:

> "1. 4 cm laceration [sic] left eyelid
> 2. 4 cm laceration [sic] left face
> 3 head injury (mild)
> 4. fracture [sic] left orbital floor
> 5. injury to left eye (decreased vision)
> 6. contact [illegible] for (4) and (5) for detail."

There was no mention of blindness nor was there any indication as to whether the injuries, or any of them, were likely to be permanent.

Grounds of appeal

[8] Counsel abandoned the original grounds of appeal filed and leave was granted to argue eight supplemental grounds. The supplemental grounds of appeal are that:

> "[1] The prosecution's non disclosure of material evidence prejudiced the Applicant [sic] in the preparation of his defence and consequently deprived the Applicant of a fair trial resulting in an 'unsafe and unsatisfactory' verdict.
>
> [2] The fresh evidence adduced impeaches the credit of the complainant so that no reasonable jury would have returned a guilty verdict.
>
> [3] The learned judge's pronouncement [sic] was manifestly excessive in the circumstances given the weaknesses which were respectfully [sic] overlooked by the learned judge in the prosecution's case.
>
> [4] The learned judge erred in law in failing to direct the jury, adequately, or at all, in relation to the weaknesses and/or inconsistencies on the prosecution's case as it related to the Applicant and consequently deprived the Applicant of a fair trial resulting in an 'unsafe and unsatisfactory' verdict.
>
> [5] The learned judge in finding that the virtual complainant was a witness of integrity or a witness on whom the court can rely and that the discrepancies are such [sic] to discredit his evidence [sic].
>
> [6] That having regard to the fresh evidence, the injuries would have been substantially reduced [sic] that the lesser offence of unlawful wounding is the only offence that could have been left to the jury and hence the sentence is now manifestly excessive [sic].
>
> [7] The learned judge erred in erroneously shifting the burden of proof to the accused.
>
> [8] The verdict is unreasonable and cannot be supported having regard to the evidence."

Submissions of the applicant

Ground one – Non Disclosure – Unfair trial

[9] Mr Samuels, counsel for the applicant, submitted that the main issue to be argued is the lateness of the service of the medical certificate. He argued that from as early as 15 September 2011, at the preliminary enquiry in the Resident Magistrate's Court, the prosecution knew of the existence of the medical certificate which showed the nature of the complainant's injury. The prosecution, he argued, had in fact embarked on putting it into evidence during the preliminary enquiry, but had abandoned the process and never made it available either for the Resident Magistrate or, later, for the jury. Counsel also argued that it is the norm for the medical certificate to be made available at the preliminary enquiry so that the correct charge to be pursued could be determined. By not disclosing the medical certificate at that time, he submitted, the applicant had been deprived of the opportunity to explore being indicted for the lesser offence of unlawful wounding.

[10] Further, he argued, at the trial before the jury, that medical evidence would have provided material to help the jury to assess the complainant's credibility, since he had been insisting that he was unable to see, whereas the medical certificate did not show that he was blind. The applicant had therefore, been deprived of exploring the complainant's credibility in that regard, he submitted.

[11] Mr Samuels submitted further that the jury, by being deprived of hearing the expert medical evidence, may have erroneously accepted that the complainant became

blind as a result of the incident. Mr Samuels argued that expert medical evidence may have altered the result of a submission at the trial that there was no case for Mr Grant to answer, which, in turn could have resulted in his acquittal at that stage.

[12] Counsel observed further that during the sentencing phase of the trial, the learned trial judge had appeared to be disturbed by the alleged extent of the complainant's injury and in fact referred to his loss of an eye as if it were a proven fact, when the medical certificate shows otherwise. He submitted that that meant that the applicant was deprived of the possibility of a non-custodial sentence because of the absence of that medical evidence.

[13] Counsel also submitted that the prosecutor's failure to reveal the medical evidence amounted to prosecutorial misconduct because none of the reports from any of the hospitals at which the applicant had been treated was produced at the trial. Further, he argued, the prosecution has continued to disobey the order of this court to produce medical evidence because the report disclosed, was from only one of the hospitals and what was disclosed was a medical certificate appropriate for proceedings in the Resident Magistrate's Court, not for proceedings before a jury where the evidence would have been given by a doctor.

[14] Counsel relied on ***Mallard v R*** (2005) 224 CLR 125 to support his submission that the prosecution may not suppress evidence which is material to the contested issues in the trial, especially where it may shed light on the credibility of the prosecution's witnesses. The common law right to a fair trial depends on disclosure as

part of the rules of natural justice: ***Leyland Justices ex p. Hawthorn*** [1979] QB 283. He submitted that it is the fact of non-disclosure which is important rather than the strength of the evidence which was not disclosed and cited ***R v Ward*** [1993] 2 All ER 577 and ***Randall v R*** (***Cayman Islands***) [2002] UKPC 19 in support of this submission. Non-disclosure, he submitted, prejudiced the preparation of the defence. He argued that a failure to disclose is an irregularity and the reason for non-disclosure is irrelevant: ***Maguire and Others*** (1992) 94 Cr App R 133. Counsel acknowledged, however, that an appellant must show that the non-disclosure, or the late disclosure, did in fact prejudice his fair trial: ***Ferguson v Attorney General*** (1999) 57 WLR 403.

[15] Counsel urged the court to accept that the non-disclosure by the prosecution should be viewed by the court as being so gross and/or prejudicial and/or irremediable in preventing the proper preparation of the defence as to have resulted in an unsafe and unsatisfactory verdict and to find that the applicant was deprived of a fair trial. Mr Samuels concluded that the failure to disclose the medical evidence in a timely manner caused Mr Grant to be deprived of a fair hearing. This, he submitted, amounts not only to a breach of the common law, but more importantly, a breach of section 16 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 of Jamaica (the Charter) and the result of this appeal should therefore be an acquittal, whether or not the non-disclosure was deliberate or malicious. He cited ***Randall*** at para 28 and ***Maguire*** to bolster this submission.

Grounds two, five and six – Fresh evidence - Discrepancies - Lesser offence

[16] Mr Samuels argued grounds two, five and six together. He submitted that if the defence had been served with the medical certificates for the trial it could have called the authors of the reports to obtain expert evidence as to the true condition of the complainant's eye, and therefore challenge his credibility and also the correctness of the charge.

Grounds four and seven and eight – Unsafe and unsatisfacatory verdict

[17] Mr Aon Stewart, in arguing these grounds on behalf of the applicant, submitted that the evidence at the trial was fundamentally tenuous and thus could not support the conviction. The conviction was thus unreasonable and ought to be quashed, he submitted. He referred to evidence concerning identification pointing out that there was no evidence as to the distance from which the complainant had identified the applicant as he approached in the crowd.

[18] Further, he referred to what he regarded as improper directions by the judge on inconsistencies. He referred in particular to the complainant giving evidence at the trial that the applicant stood right in front of him and swung an object, hitting him in the face [page 67 transcript], but not remembering having said in his statement to the police that it was when he heard a voice say, "Look out", that he turned around and saw the applicant with a piece of iron in the air, which he then swung and hit him on the left side of the face. That portion of the police statement was exhibited.

[19] Counsel also argued that the learned trial judge erred in shifting the burden of proof of guilt from the prosecution and placing a burden on the applicant to prove his innocence. He highlighted two passages where, he submitted, the learned trial judge had erroneously directed the jury. One is at page 140, where the learned trial judge said:

> "... If having heard him he fails to prove his innocence, that is, you don't believe him, you must consider all the evidence before you can convict him."

[20] The other is at page 202 of the transcript where the learned trial judge directed the jury that if the evidence of the applicant's witness convinced them of his innocence, they must acquit him.

[21] Mr Stewart recognised that the learned trial judge had also directed the jury that the applicant had no burden to prove his innocence but argued that in giving these conflicting directions, it was open to the jury to entertain the view that the applicant himself and his witness bore the burden to prove his innocence. He relied for this submission on ***R v Byfield Mears*** (1993) 30 JLR 156, where the court held that where the judge made an error it could only be saved by a retraction, and there was none here. He submitted that this direction shifting the burden resulted in a grave miscarriage of justice as the applicant had been prejudiced and the conviction and sentence ought to be quashed.

Grounds three and eight - Excessive Sentence - Verdict being unreasonable

[22] In arguing this ground together, Mr Samuels submitted that the sentence of seven years at hard labour is manifestly excessive in the circumstances, as it has now become evident that the complainant's injury was less than what the learned trial judge had understood. The complainant had not in fact lost his vision, he argued, and the social enquiry report was most favourable to the applicant. He urged the court to regard the time spent as being sufficient and order his immediate release.

Submissions by the Crown

[23] Counsel for the Crown, Miss Kemble, submitted that in dealing with fresh evidence the correct approach is to determine if it would have affected the outcome of the case. She argued that in this matter the medical evidence would not have altered the verdict. The defence had always been an alibi and there had not been an issue as to the extent of the injury nor, indeed that the complainant had been hit to the left of his face. Counsel maintained that the defence was concerned with the credibility of the complainant and whether the applicant had been correctly identified, not with the medical evidence.

[24] Counsel further submitted that the learned trial judge had dealt sufficiently with identification and with inconsistencies. She argued further that the medical certificate did not contradict the complainant's account. Rather, it confirmed that he had been wounded to the left eyelid, had decreased vision and a fracture on 6 August 2010, the day of the incident, she argued. Counsel urged the court to accept that fresh medical

evidence would not have affected the charge for which the complainant was indicted. He had been charged with wounding with intent and even if the fresh medical evidence had been considered before the trial, he could still be properly charged for wounding with intent as that charge did not depend on the extent of the injury, but rather, on the intent.

[25] Counsel relied on ***Bonnett Taylor v R*** [2013] UKPC 8, a recent judgment of the Judicial Committee of the Privy Council, where the evidence which had been omitted went to the root of the case and seemed to suggest that the alleged eye-witness did not in fact witness the murder. Counsel argued that in this case the evidence which had been omitted did not reach that level. She submitted further, that although the medical certificate had not said if the injury were likely to be permanent, the evidence was that he was unable to see from that left eye when he was at the trial and there was no evidence that the complainant had had any prior difficulty seeing out of his left eye. She acknowledged that there continued to be no disclosure of any medical reports from the other hospitals at which the complainant received treatment for his injuries.

[26] Counsel relied further on ***Taylor*** to submit that non-disclosure did not mean automatic acquittal. Instead, counsel argued, the fresh evidence concerning the medical condition of the complainant would not affect the conviction but might affect the sentence imposed on the applicant. In any event the learned trial judge had not during the sentencing process, said that the complainant was blind.

Discussion and Analysis

Non-disclosure and late disclosure

[27] The Charter provides for protection of an individual's right to due process. He is entitled to a fair hearing within a reasonable time by an independent and impartial court established by law (section 16).

[28] Section 16(6) provides further that:

> "Every person charged with a criminal offence shall -
> (a) …
>
> (b) have adequate time and facilities for the preparation of his defence."

This provision requires the prosecution to inform the defendant of the nature and extent of the allegations being made against him. The prosecution therefore has a duty to disclose to the defendant the evidence which is material to the case in a timely manner to allow for the preparation of his defence.

[29] The matter of non-disclosure was one of the principal issues discussed by the Judicial Committee of the Privy Council in the Jamaican case of ***Taylor***. In that case the prosecution had in its possession the statement of a witness who had not been called to testify at either of the two trials which had been held. The defence had the statement but it was not clear as to how or when they had come into possession of it. The question to be determined by the Board was the effect of the late disclosure/non-disclosure of the statement.

[30] In ***Taylor***, the evidence was that the deceased had been shot dead at his home in Portland by the appellant and that a witness, Mr Grey, was present throughout the killing and thereafter ran to the yard of neighbours, Mr and Mrs Hartley, and gave an account to them of what he had seen. The neighbour, Mr Hartley, testified at the trials, supporting Mr Grey's evidence of having reported to him, Mr Hartley, as to what he said he had seen. At the first trial the jury failed to arrive at a verdict. At the second trial, the appellant was convicted of murder. Mrs Hartley, however, had given a different account of Mr Grey's whereabouts at the time of the murder. Her statement was on the prosecution's file but she had not been asked to testify. In her statement she said that Mr Grey had been at her house throughout the night and in fact had remained there until the next morning. The Board recognised that Mrs Hartley's evidence might suggest that Mr Grey had not been present at the shooting next door and would therefore not have witnessed it, but said that that must be balanced against the weight that there were elements of Mr Grey's evidence that he could have only known if he had been present at the killing. The nature and direction of the injuries present on the deceased's body formed one such element. In addition, there was the evidence of Mr Hartley supporting Mr Grey's testimony. The Board found that the balance lay so far in favour of accepting Mr Grey's account as being true and that there was no reasonable possibility that the jury would have arrived at a different verdict. Lord Hope, in delivering the majority judgment, stated that the relevant test as to the effect of the non-disclosure of a statement was whether, after taking all the circumstances of the trial into account, there was a real possibility of a different outcome – that the jury

might reasonably have come to a different conclusion as to whether the appellant was guilty of murder.

[31] Earlier, in ***R v Ward*** the English Court of Appeal was concerned with the prosecution's failure to disclose all relevant evidence. There, the applicant had been convicted of murder, among other charges, arising from the killing of persons by the explosions of bombs at a London railway station and at a defence college. The investigations had been extensive but some evidence, including scientific evidence, had not been disclosed to the applicant. The court reiterated the prosecution's duty at common law to disclose to the defence all relevant material, that is, evidence which tended either to weaken the prosecution's case or to strengthen the defence's case.

[32] In the instant case, a major issue is the credibility of the complainant. There is no dispute that Mr Currie was injured. However, did he speak truthfully when he said that his attacker was the applicant and when he described his resultant injury? This is a critical factor to be determined.

[33] The complainant described his injury on several occasions during the trial. He said:

> "… [Whilst going to the hospital] I notice I couldn't see out of this eye, the left eye."

In answer to the question,

> "Can you see out of your left eye now?" he replied, "No, sir."

He stated that he had had no difficulty in seeing out of the left eye before the injury.

[34] The medical certificate which was produced for the appeal proceedings refers to decreased vision. It does not indicate the extent of the decrease and if the decrease is expected to be permanent. It does not state that there is total loss of vision.

[35] Is there a reason for the complainant describing an absence of vision on the day of the incident whereas the doctor's report by way of the certificate shows a decrease in vision on that day? Is the doctor mistaken or is the complainant mistaken, lying, exaggerating or reducing the extent of the injury? The accuracy and veracity of the medical evidence could have been explored through cross-examination at the trial. This would have provided material to challenge the evidence of the complainant on the issue of his injuries.

[36] Where, as in this case, much turns on the credibility of the witnesses, every opportunity should be afforded to the defence to thoroughly test their credibility. Here, the applicant was deprived of an opportunity to properly cross-examine the complainant using all the pertinent medical evidence. A skilful cross-examiner would have been able to explore the complainant's account to expose such inconsistencies regarding his injuries as there may be.

[37] Any difference between the complainant's evidence and medical evidence from an expert would properly elicit questions as to whether the complainant was in fact blind, or had decreased vision, or whether the injuries were expected to be permanent. If the medical evidence contradicted the complainant's evidence and if it were

established as coming from an impartial expert, it would provide a solid platform from which the defence could launch an attack on the complainant's credibility in general. Questions could reasonably be asked as to whether the complainant was being truthful.

Instructions to the jury concerning the injury

[38] In summing up the case to the jury, the learned trial judge referred to the nature and extent of the injury to the eye. She reminded the jury not to have sympathy for the complainant now that he had been injured and could not see from the eye. Further, they should not put themselves in the position of the complainant and ask what they would want if they lost an eye. In both these instances, the learned trial judge referred to the injury as if it had been proved that Mr Currie could not see from the eye and indeed had lost an eye. Further, in reviewing the evidence for the jury, she recounted that Mr Currie had noticed that he could not see out of the left eye. In addition, the learned trial judge in instructing the jury about the meaning of "grievous bodily harm", described the complainant as suffering from some loss or impairment in his vision. The learned trial judge told the jury to question what the intention could be of a person who aims an object "at your face to the extent that it hit out your eye". All these references by the learned trial judge to the extent of the injury were based on the evidence presented at the trial by the complainant. There was no medical evidence to contradict or support it.

[39] In our view, by failing to disclose the medical evidence before or during the trial, the prosecution deprived the learned trial judge and the jury of evidence from a medical

perspective. If that evidence were available it would have allowed the learned trial judge to have properly directed the jury for them to consider the case from a more informed position. Their conclusions would thus include an assessment of scientific evidence from an expert alongside the evidence of the complainant.

Fresh evidence

[40] The fresh evidence adduced was in the form of a medical certificate from the Port Antonio Hospital as to the complainant's condition on 6 August 2010. In ***Orville Murray v R*** SCCA No 176/2000 delivered 19 December 2008, this court considered the principles upon which to act in appeals involving fresh evidence. There the court referred to those principles as being clearly set out in ***R v Pendleton*** [2001] UK HL66; [2002] 1 WLR 72 and as being repeated by the Privy Council in ***Dial and Another v State of Trinidad and Tobago*** [2005] 1 WLR 1660. In the ***Dial*** case, Lord Brown at paragraph 31 opined:

> "In the Board's view the law is now clearly established and can be simply stated as follows. Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, assuming always that it accepts it, to evaluate its importance in the context of the remainder of the evidence in the case. If the court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused it will dismiss the appeal. The primary question is for the Court itself and is not what effect the fresh evidence would have had on the mind of the jury…"

[41] In our view, the medical certificate raises questions as to the true extent of the complainant's injury and with it important questions of his credibility. Its absence from the trial was detrimental to the applicant. It is possible that the jury might reasonably

have come to a different conclusion as to whether the applicant was guilty of wounding with intent, if they had had the benefit of the complainant's veracity being tested against scientific medical evidence.

[42] The order of the court was that the Director of Public Prosecutions must serve Mr Grant's attorney-at-law with copies of all the medical reports and certificates of Mr Currie in her possession on or before 14 December 2012. One certificate was served. However, the applicant had also been given leave "to adduce fresh evidence in the form of medical reports on the condition of the complainant, Mr Currie's, left eye following his medical treatment which commenced on the 6th day of August 2010 at the Port Antonio Hospital and subsequently at the Kingston Public Hospital (KPH)".

[43] It is of much concern that despite the order of the court, there has been no information as to the complainant's medical treatment at KPH or any other hospital. The investigating officer testified as to collecting a medical certificate from the Port Antonio Hospital but made no mention of a certificate from any other hospital. The evidence is that the complainant had been to at least three other hospitals. In fact, the certificate from the Port Antonio Hospital speaks to the need to make further contact for details of the injury. There is no evidence as to whether this was done and indeed there is no certificate that purports to give the final condition of the complainant's injured eye or face and whether there is any permanent damage.

[44] It must not be forgotten that the duty of the prosecution to disclose material evidence includes the duty of other persons who are part of the prosecuting process, to so disclose.

[45] Breach of the duty to disclose occurred in ***Harry Daley v R*** [2013] JMCA Crim 14. There the arresting officer had refused to accede to a request by the defence to be provided with a file containing information about one of the applicant's accusers where that information would have been critical to obtaining a true understanding of the accuser's credibility. Panton P opined at para. [49]:

> "'The prosecution' means not just the prosecutors who appear in court but includes persons such as police officers and other state officials connected with the investigation and conduct of the case against the accused person."

[46] No explanation has been proffered here for the absence of the medical reports. That failure to provide the applicant with the medical reports must impact on the applicant's ability to properly and fairly prepare his appeal and it deprives him of access to information which might have assisted in the presentation of his defence.

[47] It is true that where evidence is absent, speculation is not permitted as to what its effect might have been, if it had been provided. The jury was deprived of considering the scientific evidence of the complainant's medical condition compared to the complainant's personal account. The fresh evidence made available to the applicant is incomplete. Even so, such fresh evidence as has been provided, is important in the

context of the remainder of the evidence in the case and underscores the effect of the late disclosure/non-disclosure of the medical reports.

Alibi

[48] At the trial, the applicant did not challenge the nature of the wound. His defence was an alibi. He stated that he was not present at the moment of the infliction of the injury. It may well be asked: why then should he concern himself with the fresh medical evidence about his injury? The answer is this - it is for the prosecution to prove his guilt, not for him to prove his innocence. He should know the entire case which the prosecution intends to mount against him before he prepares and presents his defence. It is well established law that an alibi is sometimes used to bolster what is in fact a genuine defence.

Alternative lesser offence

[49] Section 20 of the Offences Against the Person Act provides that:

> "Whosoever shall unlawfully and maliciously …wound any person… with intent ... to do some grievous bodily harm to any person …shall be guilty of felony …."

It is true that in proving the element of wounding in this offence, the wound itself need not be proved to be grievous or serious. It is the assailant's intention at the time of inflicting the wound, that must be proved to be an intention to do grievous, that is, really serious, bodily harm to a person. Intention, generally, is proved by drawing inescapable inferences from other proved facts. The nature of the wound inflicted would be a good starting place, to determine intention. Where the wound inflicted is

grievous in nature that would be a factor to be considered to decide if the intention were to do grievous bodily harm. Conversely where the wound inflicted is not grievous, that too would be a factor to be considered in determining the intention of the attacker.

[50] In this matter the learned trial judge could have instructed the jury that a verdict on the lesser charge of unlawful wounding would be available to them, if the circumstances had shown that such a direction were warranted, that is, where the evidence could be interpreted to show there was no intention to do grievous bodily harm. The applicant was deprived of the opportunity to have been found guilty of the lesser offence of unlawful wounding.

Burden of proof and inconsistencies

[51] The transcript is replete with references by the learned trial judge to the law that the burden of proof of the accused's guilt rests on the prosecution. On one such occasion she directed in clear terms:

> "… the law says, the burden of proving the case against the accused is on the prosecution throughout the case and that burden never shifts, so the accused man has nothing at all to prove to you."

She continued:

> "No burden rests on the accused man to prove his innocence."

There is, however, one instance where the learned trial judge appeared to shift the burden of proof to the accused where she said:

> "If having heard him he fails to prove his innocence …
> ."

However, she continued immediately after that clause, to complete the sentence and to explain what she meant by those words, and said:

> "… that is, you don't believe him."

[52] That direction to the jury, viewed as a whole, was that even if they did not believe the applicant's account, they should consider all the evidence and be satisfied that the prosecution had discharged its burden to prove guilt, before they could convict him. As it concerns inconsistencies, the learned trial judge had fully instructed the jury as to the law concerning inconsistencies and discrepancies. The directions on the burden of proof and on inconsistencies cannot be faulted.

Effect on sentencing

[53] The learned trial judge in explaining the rationale behind the sentence she was going to impose stated that she was starting the sentencing process by looking at the extent of the injuries. She referred several times to the injury to the complainant's eye. Twice she referred to the complainant having lost sight in one eye. Also, in referring to him, she said, "He has to walk around with one eye and probably half of an eye." She continued at page 240 of the transcript:

> "I have to look at the circumstances of what a simple touch led to, the loss of an eye. This is what aggravates it."

Later, she referred to "licking out an eye" and opined there that the complainant was motivated by compensation "although he has lost an eye".

[54] The learned trial judge dismissed the suggestion of "accommodation" arrived at between the parties indicating that the money being contemplated was insufficient for the "loss of an eye" and adding that "someone was badly injured that night".

[55] In our view, these comments show that the severity of the wound inflicted influenced the sentence imposed. The evidence which the learned trial judge would have been aware of was only that of the complainant himself, there being no medical evidence at the trial.

[56] The late disclosure/non-disclosure therefore deprived the applicant of the opportunity of a lesser sentence being considered for him by the judge, if it had been proved that the injury had not been as grievous as described by the complainant.

Conclusion

[57] The late disclosure/non-disclosure of medical evidence deprived the applicant of the opportunity to properly prepare his defence for his trial. Additionally, it wrongfully deprived him of the opportunity of challenging the complainant's credibility. Further, it deprived him of the possibility of being indicted and also of being sentenced for a wounding of a less serious nature.

[58] The prosecution must comply with its duty to ensure that the trial is fair to both the Crown and the defence. The late disclosure/non-disclosure of the medical evidence, viewed as a whole, showed a failure to discharge that duty and resulted in a miscarriage of justice.

[59] We therefore allow the appeal. In the interests of justice, we order a new trial with disclosure, at least 30 days before the commencement of the trial, of all medical evidence pertaining to the relevant injury, from all hospitals at which Mr Currie received treatment. We also restore bail to the applicant, pending trial, on the same terms as had previously been offered.