[2001–02 Gib LR 106]

R. v. SHIMIDZU and MARTINEZ

SUPREME COURT (Pizzarello, A.J.): November 14th, 2001

Criminal Procedure—prosecution case—disclosure of relevant information—prosecution to disclose previous complaints against prosecution witness if requested by defence, reliability of witness relevant to issues in case and compelling reasons for request—if witness is police officer, disclosure of training manual relevant but not arrest statistics

The defendants were charged with assault occasioning actual bodily harm to a police officer and obstructing him in the execution of his duties.

The defendants requested the disclosure of information from the prosecution, including any previous complaints which had been made against the police officer concerned. He had been presented as a witness of truth and the defendants wished to question his credibility (a) by leading evidence of his previous improper behaviour, which might suggest bias on his part; and sought (b) disclosure of the police training manual, on the basis that if he had not followed the prescribed procedures in respect of handling evidence, this was relevant to the reliability of his evidence; and (c) a copy of his record of service including arrest statistics.

The Crown submitted that (a) the disclosure of unadjudicated complaints would be wrong; (b) the training manual was irrelevant to any issue at the trial; and (c) the arrest statistics would be difficult to use to reach a meaningful result.

Held, granting disclosure in part:

(1) The defendants would be granted access to previous complaints made against the police officer, as his reliability was an issue in relation to the charges against the defendants, which should be tested. The defence needed to request information about an officer, though it should do so only in clearly relevant cases, and the prosecution had a duty to disclose it when it was relevant to the issues in the case. There were compelling reasons for the request in this case as there had already been five complaints against the officer in his short career. The disclosure of any unadjudicated complaints would not interfere with any disciplinary measures that might later be taken by the Police Complaints Board and the court would be able to make a more informed decision and help in curbing any improper behaviour (paras. 15–16).

(2) The defendants should also have access to the training manual on their undertaking not to use or disclose the contents save for the purposes of the present trial. The contents would nevertheless not advance a complaint against the officer, as his conduct had to be tested against the law and not against the administrative procedures laid down by his employers (para. 18).

(3) The defendants would not, however, be provided with a copy of the officer's arrest statistics, as the complexities in comparing statistics would obscure the real issues at the trial and public policy did not support the disclosure of material which might be misleading (para. 17).

Cases cited:
(1) *D.P.P.* v. *P.*, [1991] 2 A.C. 447; [1991] 3 All E.R. 337, referred to.
(2) *R.* v. *Busby* (1981), 75 Cr. App. R. 79, referred to.
(3) *R.* v. *Edwards*, [1991] 1 W.L.R. 207; [1991] 2 All E.R. 266; [1991] Crim. L.R. 372, considered.
(4) *R.* v. *Funderburk*, [1990] 1 W.L.R. 587; [1990] 2 All E.R. 482; [1990] Crim. L.R. 405, considered.
(5) *R.* v. *Shaw* (1888), 16 Cox, C.C. 503, referred to.
(6) *R.* v. *Ward*, [1993] 1 W.L.R. 619; [1993] 2 All E.R. 577; [1993] Crim. L.R. 312, followed.
(7) *R.* v. *Z*, [2000] 2 A.C. 483; [2000] 3 All E.R. 385, *dicta* of Lord Hutton followed.

C. Pitto, *Crown Counsel*, for the Crown;
D. Hughes for the defendant Shimidzu;
Miss A. Balestrino for the defendant Martinez.

1 **PIZZARELLO, A.J.:** In the matter of the trial of Takashashi Shimidzu and Kevin Martinez, both are indicted for assault occasioning actual bodily harm to Damian Fabre, a police officer and of obstructing him in the execution of his duties, the former contrary to s.89(1) of the Criminal Offences Ordinance and the latter contrary to s.26(4)(a) of the Drugs (Misuse) Ordinance.

2 The defence requests disclosure of unused material: (a) the issue of any complaints which have been made against P.C. Fabre with the evidence thereon; (b) the police training manual; and (c) arrest statistics, in particular relating to P.C. Fabre.

3 Counsel for the defendants have intimated, as I understood Mr. Hughes who led the submissions, that the defence will be that the allegations made by P.C. Fabre are untrue. Insofar as there will be a conflict between the evidence of P.C. Fabre on the one hand and the defendants on the other, that is a matter to be resolved by the jury in the normal way. However, the police officer has been put forward by the prosecution as a witness of truth and so the jury will have to take a view

as to his credibility and truthfulness and it will be important for the defence to lead evidence to show that his evidence ought not to be accepted.

4 Counsel asks me to accept that one way of doing so is to show by way of similar fact evidence that P.C. Fabre had indulged in the same sort of behaviour in other cases, and the jury should be made aware of this officer's propensities in these other cases in which the defendants have not been involved. In these other cases, five or six in number, complaints have been made against P.C. Fabre. It is trite law that P.C. Fabre can be cross-examined as to credit on the basis of adjudicated complaints when the complaints have been upheld and a finding has been made against an officer. However, only one of these complaints has been investigated so far and on this complaint the finding was made in favour of P.C. Fabre. Insofar as the other unadjudicated complaints are concerned, Mr. Hughes concedes that he cannot cross-examine P.C. Fabre on the fact that the complaint has been made, but that is not his application.

5 He submits that he may cross-examine P.C. Fabre on the facts on which the complaints were based, including the facts in the matter on which the finding has been made in his favour. He refers to *R.* v. *Z* (7) as authority for the proposition. The headnote to that case in the *Law Reports* reads: "[R]elevant evidence was not inadmissible merely because it showed or tended to show that the defendant had in fact been guilty of a previous offence of which he had been acquitted." Lord Hutton said ([2000] 2 A.C. 500): "evidence which is relevant is not inadmissible because it shows that he was, in fact, guilty of the earlier offence of which he had been acquitted." These then would be similar facts and therefore in accordance with the judgment of the court in *R.* v. *Ward* (6) anything which may help the jury should be disclosed to the defence if it is admissible. Their Lordships said ([1993] 1 W.L.R. at 645):

> "We would adopt the words of Lawton L.J. in *Reg. v. Hennessey (Timothy)* (1978) 68 Cr.App.R. 419, 426, where he said the courts must
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> > 'keep in mind that those who prepare and conduct prosecutions owe a duty to the courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence. We have no reason to think that this duty is neglected; and if ever it should be, the appropriate disciplinary bodies can be expected to take action. The judges for their part will ensure that the Crown gets no advantage from neglect of duty on the part of the prosecution.'
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> That statement reflects the position in 1974 no less than today. We would emphasise that 'all relevant evidence of help to the accused'

> is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led."

6 Mr. Hughes submits that it would be unfair not to bring to the knowledge of the court similar facts (when these exist) in the same manner as the prosecution may bring similar fact evidence against a defendant, including evidence in respect of which a complaint has been dismissed, following *R.* v. *Z* (7). In the instant case, facts become material because they show bias against the defendant and show that the police are prepared to go to improper lengths to secure a conviction: *R.* v. *Funderburk* (4) ([1990] 1 W.L.R. 587–591). They go to the issue and not to credibility, though they may both shade into each other and if there is a distinction without a difference, the court should take the route of allowing it. In *R.* v. *Edwards* (3), which considered *R.* v. *Funderburk*, the matter was put thus ([1991] 1 W.L.R. 215):

> "The distinction between the issue in the case and matters collateral to the issue is often difficult to draw, but it is of considerable importance. Where cross-examination is directed at collateral issues such as the credibility of the witness, as a rule the answers of the witness are final and evidence to contradict them will not be permitted: see Lawrence, J. in *Harris v. Tippett* (1811) 2 Camp. 637, 638. The rule is necessary to confine the ambit of a trial within proper limits and to prevent the true issue from becoming submerged in a welter of detail.
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> There are however exceptions to that rule, of which one of the most important is to show bias on the part of the witness: *Reg. v. Shaw* (1888) 16 Cox, C.C. 503. 'Facts showing that the witness is biased or partial in relation to the parties or the cause may be elicited on cross-examination: or, if denied, independently proved:' *Phipson on Evidence*, 14th ed. (1990) p. 265, para. 12–34.
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> It has been suggested—see *Reg. v. Funderburk* [1990] 1 W.L.R. 587, 591—that a further exception now exists, namely to show 'that the police are prepared to go to improper lengths to secure a conviction.' That proposition is drawn from the decision in *Reg. v. Busby* (1981) 75 Cr.App.R. 79. In that case the prosecution had adduced evidence from police officers about statements suggesting guilt made by the accused man. The officers were cross-examined to suggest that they had fabricated the accused man's remarks and were biased against him. This they denied. The defence then called a witness to give evidence on another aspect of the case. From this witness they also sought to obtain evidence that the same two police

officers had made threats against him (the witness) to prevent him giving evidence on behalf of the accused man.

Objection was taken, and the judge excluded the evidence on the ground that it went solely to the credit of the officers. Eveleigh, L.J. delivering the judgment of the Court of Appeal held that the evidence should not have been excluded. It would have tended to support the defendant's case that the officers concerned were prepared to go to improper lengths to secure a conviction. It was therefore, it was said, relevant to an issue which had to be tried.

A close study of the decision in *Reg. v. Busby* seems to show however that its true basis may well have been the suggestion of bias against those particular defendants in that particular case."

7 And the matter was left as to whether questions should be permitted as to (a) complaints against the officer not yet adjudicated, (b) discreditable conduct by other officers in the same squad, and (c) circumstances where the officer has given evidence which has resulted in an acquittal or quashing of a conviction (*ibid*., at 216):

"This is an area where it is impossible and would be unwise to lay down hard and fast rules as to how the court should exercise its discretion. The objective must be to present to the jury as far as possible a fair, balanced picture of the witnesses' reliability, bearing in mind on the one hand the importance of eliciting facts which may show, if it be the case, that the police officer is not the truthful person he represents himself to be, but bearing in mind on the other hand the fact that a multiplicity of complaints may indicate no more than what was described before us as the 'band-wagon' effect."

8 Mr. Hughes submitted that it was clearly accepted in *Edwards* (3) ([1991] 1 W.L.R. at 215) that facts showing that a witness is biased or partial in relation to the parties or the cause may be elicited on cross-examination or if denied, independently proved, referring to *R*. v. *Shaw* (5). To determine similar facts and bias, Mr. Hughes submits that the defendant has to know and therefore be told who has complained in order to establish the facts on those cases and so determine in the first place whether it is a case of similar fact evidence and whether it can support bias. It is in the prosecution's knowledge, or if it is not, the prosecution can readily obtain it. One cannot expect the defendant to put out an advertisement searching for persons who have complaints to come forward. There may be persons other than the complainants, but complaints there are and they should be enabled to be brought to the court's attention to rebut if necessary the evidence of P.C. Fabre. Therefore, he seeks disclosure by the prosecution of the names of the complainants who have complained against P.C. Fabre and any

statements obtained in respect of them, on the analogy of the defendant's right when the prosecution leads similar facts. He comes back again to *R.* v. *Ward* (6) already referred to ([1993] 1 W.L.R. at 645):

> "We would emphasise that 'all relevant evidence of help to the accused' is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led."

9 Furthermore, submits Mr. Hughes, it would also be pertinent to know (and therefore it is relevant and admissible evidence) to have P.C. Fabre's record of service in statistical form. That will be supportive of an allegation of bias and of any similar fact evidence. If arrest statistics are kept, they will lend support to an allegation that P.C. Fabre is prepared to fabricate allegations against the defendants, as to do so would increase his number of arrests and make his arrest statistics more impressive. The statistics of other officers are also relevant to show the number of arrests made by P.C. Fabre, as compared with other officers. Having heard the evidence of Sgt. Ignacio, who is in charge of statistics, he suggests these statistics should not be difficult to compile and of course one would narrow down the search for statistics to officers on the shifts, since the evidence of Sgt. Ignacio was substantially that for the first two years of a probationer's career, he is detailed into shifts and a comparison between members of shifts can be the only fair comparison. P.C. Fabre was a probationer at the time. He had commenced his service in 1999 and the statistics which concern him are in the data contained in the computer system of the Royal Gibraltar Police.

10 Allied to this, Mr. Hughes for the defendants seeks disclosure of the police training manual, on the basis that if P.C. Fabre has not followed procedures laid down in respect of handling evidence, this is relevant to assessing the reliability of such evidence. The suggestion is that if officers are prepared to break rules, this is logically probative of an allegation that he is prepared to break rules of law to secure the conviction of the defendant.

11 For the prosecution, Mr. Pitto submits that the prosecution's duty is to disclose material matters and so is limited to matters which "on a sensible approach" can be (a) relevant or possibly relevant to an issue in the case, and (b) possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use. The prosecution does not have to disclose matters which are not relevant or matters covered by public interest immunity. It is his submission that the disclosure of an unadjudicated complaint is wrong and contrary to the judgment of Lord Lane, C.J. in *Edwards* (3) who said ([1991] 1 W.L.R at

216): "Nor do we think that complaints to the Police Complaints Authority which have not been adjudicated upon would properly be the subject of cross-examination." That evidence is not relevant to the issues, but is in substance directed to a collateral issue. The defendants' submission proposes to avoid the rule and bring the collateral matters into issue via the back door. If the matter has been adjudicated, this is relevant only for cross-examination as to credit, and as the defendants have specifically said they did not want this information for the purpose of cross-examining as to credit, the court ought not to grant that request. In considering the authorities put forward by the defendants, care has to be taken to have regard to the facts of the particular cases concerned, as noted in *R.* v. *Edwards* (*ibid*., at 219):

> "Relevance, and therefore admissibility, is a matter of degree and has to be considered not by rule of thumb but against the background of each individual case. One of the considerations, we repeat, is the necessity of keeping the criminal process within proper bounds and avoiding the pursuit of side issues which are only of marginal relevance to the jury's decision. It will accordingly, as the judgment in *Reg. v. Thorne (John)* 66 Cr.App.R. 6 made clear, be rare that the judge in his discretion will allow cross-examination about the activities of a witness in other cases and the outcome of those cases. The reason is that an acquittal, save in exceptional circumstances, by no means necessarily means that the jury has disbelieved the police officer who has given evidence of the defendant's admissions."

12 Mr. Pitto submits that *Funderburk* (4) dealt with statements which were inconsistent. In *Edwards* (3), Lord Lane, C.J. made it plain, having considered *Funderburk*, that these are collateral matters, and insofar as the defence being entitled to call evidence as to an alleged course of conduct or system by police officers to defeat the provisions of the Police and Criminal Evidence Act 1984, by way of similar facts borrowed from the prosecution's right to call similar fact evidence in certain cases, he said ([1991] 1 W.L.R. at 220): "This submission seems to us to be misconceived. There is, so far as we can see, no legal basis for it." Mr. Pitto submits that only the prosecution can call evidence of similar facts. Another consideration is the danger that the court will be usurping the functions of the Police Disciplinary Board if the court hears about the facts regarding a pending complaint, as the verdict of a jury will undermine its responsibilities. And, he suggests, the difficulties it gives rise to are enormous. There will be an incursion into all sorts of problems and evidence will have to be led to sort these out. What will be the parameters for the trial? Again, *Edwards* is being circumvented and there is no legal basis for it. *D.P.P.* v. *P.* (1) does not come into the equation: that authority does not mean that similar fact evidence should be given in

collateral issues and *Edwards* clearly states that no question should be put to a police officer in respect of an unadjudicated complaint. *D.P.P.* v. *P.* does not impact on what *Edwards* says. It is wrong for Mr. Hughes to pin his argument on Henry, J.'s judgment in *Funderburk* ([1990] 1 W.L.R. at 591) because what was said is *obiter*, insofar as the judge relied on *R* v. *Busby* (2) as the basis for his formulation. One should not rely on that which is largely *obiter* and not approved in *Edwards*.

13 With regard to the training manual, Mr. Pitto submits that it is not relevant. The protection of defendants does not arise from what is contained in the training manual. Protection comes from the law, the judge's rules and the rules of evidence. What an officer is tested on in a trial is in relation to these matters. Any failure to comply with the training manual will in no way invalidate an officer's evidence, if he has complied with the law. The training manual does not relate to any issue at the trial and so the request for it must be denied. Mr. Pitto states that, as a matter of fact, there is no training manual as such. Probationers are given certain basic information which is expanded upon by notes as and when they are issued at training courses and any matters explained to them in lectures. In any case, whatever is contained in the training manual is confidential.

14 Mr. Pitto says that statistical compilations of arrest statistics would need to be created, as there are none. There are questions as to whose statistics are needed—those of P.C. Fabre or arrests made by others? There are also issues of who would be the correct comparator and what shifts should be used to create the statistics. The relevance of this evidence is questionable, as if P.C. Fabre has more arrests than others, what does that show—that he is keen and not afraid of getting involved? The circumstance of any incident and the assessment of his overall performance would also have to be established.

15 All counsel are agreed that it is only relevant evidence that is admissible, and only that can go before the jury. Relevant evidence is that which goes to the issues in this case and it seems to me when, as here, the defence puts in issue the reliability of the police officer, that this should be capable of being tested at large because it is an issue in this case. It is clear that the defence is entitled to put forward facts to show bias, if bias is involved. Lord Lane, C.J. in *Edwards* (3) was of the view that similar fact evidence ought not to be adduced if the matter is collateral to the issue of credibility. But I think that if the live issue and credibility shade into one another, that has to be dealt with, which of course begs the question, is the evidence sought relevant? The prosecution has a duty to disclose it if it is. In this case, Mr. Pitto has acknowledged that the prosecution has knowledge of a number of complaints. The prosecution here, for the reasons that Mr. Pitto has put forward, believes that there is no duty to disclose. And as I see it, there may also be technical

difficulties, since the Attorney-General oversees the prosecution of crime and his role, if any, in complaints against the police is quite different.

16 But I am of the opinion that the prosecution should give such information as they can to the defence, in respect of any complaints which have been made against the police officer. Only then can counsel for the defence take a view on whether it can be so considered as relevant evidence and it is then for the defence to make the necessary application to the trial judge to allow it, for it is the trial judge alone who can control the proceedings in his court. It is only the trial judge who will be able to assess whether the evidence, as similar fact evidence, is sufficiently probative to be relevant evidence. If it is, he has a discretion to allow it in. Because this is not the prosecution's application, the judge's discretion to exclude it is not concerned with weighing its prejudicial effect on the officer's evidence. In my opinion, it has to be weighed against the public interest in keeping the trial within proper bounds, *R.* v. *Edwards* (3) and the "band-wagon effect" referred to in that case would have to be considered. That, as I understand it, is nothing more than heaping more of the same thing on to one another. There is the danger too that in a trial where an application of this sort is made, where there is more than one officer involved alleged to be doing the same thing, it will be well on its way to become unmanageable. This is a sound reason to stick closely to the opinion of Lord Lane, C.J., but I do not think it would be fair that that should be so as a matter of course. Another reason is that adduced by Mr. Pitto, namely, that the trial process will impugn on the function of the Police Complaints Board. I do not think that would happen and the opposite side of the coin is that the courts will be enabled to limit the excesses, if any, of police officers. Now, while I am of the opinion that the prosecution should give such information as it can, that, it seems to me in cases of this sort, may only be done on the application of a defendant. On this point, I would expect defence counsel to be chary of making this sort of application, unless counsel has cogent reason to make it. In the instant case, I am fairly satisfied, keeping in mind the band-wagon effect, that five complaints in his short career are sufficient to give defence counsel reason to make the application. The reason why I consider that it is for the defence to make the application and in support give fairly specific instances to the prosecution, is that it may not be in any way apparent to the prosecution that such evidence might be pertinent and it will be intolerable otherwise for the prosecution to have to trawl every case in which an officer has been concerned. To some extent, the application in the instant matter can be viewed as fishing, because the defence knows not the answer, but the end result is what matters: is there or is there not evidence of similar facts? A word of warning to defence counsel: in this rather broad brush approach, I have made little distinction between bias on the one hand (which is a recognised exception) and similar facts. If

bias is to be relied on it must be bias against these defendants and not in respect of other persons.

17 I would accept the reasons put forward by Mr. Hughes on the value of statistics for the internal purposes of police command, but those reasons are irrelevant for the purposes of this application. I agree with Mr. Pitto that statistics have no value here. The complexities in comparing one officer's set of statistics against another's would lead to a detailed examination for an evaluation to be made and that detailed examination would obfuscate the real issues at the trial. On this ground I would not allow it. But there is another reason which I think is more important. If any store is to be set on such records for public consumption, it might lead to an unseemly situation within the Royal Gibraltar Police as officers might be tempted to vie with each other, not to mention rivalry between shifts, to enhance their record. Even if that did not happen, the perception would be there. It is not a scenario which attracts me and public policy, in my view, demands that the idea be given short shrift.

18 I agree with Mr. Pitto that the training manual will hardly advance any complaint against the police officer. What he has to be tested against is the law. Of course if the officer is to say that he acted in accordance with the manual such as it is and he had not done that, that would go to his credibility and the manual can be put to him in cross-examination. So in my view, defence counsel should have access to the training manual such as it is, on their undertaking not to use the contents of same or disclose it save for the purposes of this trial.

Order accordingly.