Indexed as:

# R. v. Romain (Ont. Ct. (Gen. Div.))

Between
Her Majesty The Queen, Respondent, and
Rick C. Romain, Appellant

[1992] O.J. No. 2309
Action No. 250/92

**Ontario Court of Justice - General Division**
**Toronto, Ontario**
**McCombs J.**

Heard: June 23, 1992
Judgment: August 18, 1992
(9 pp.)

Mark J. Sandler, for the Appellant.

Linda C. Price, for the Respondent.

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**McCOMBS J.**:— The appellant was found guilty and granted a conditional discharge on a charge of mischief to private property valued at less than $1,000. His appeal raises two issues:

1) Did the Crown have a duty to disclose, prior to trial, an inconsistent statement made by a prospective witness?
2) If the Crown had that duty, does its failure to make that disclosure entitle the Appellant to a new trial?

THE FACTS

The appellant owned a unit in a condominium apartment complex. He was not happy with upkeep of the common areas of the building, particularly the mail room, and had frequently complained about the "junk" mail which was often allowed to accumulate there. On September 7, 1991, during a mail strike, Bell Canada left a number of telephone bills in the mail room for residents of the building. The Crown alleged that the appellant, frustrated by the mess, ripped the bills up and threw them in the garbage.

The case turned on the question of whether the appellant knew that the material he destroyed included the Bell Canada bills.

At trial, the appellant acknowledged that he had destroyed the bills but maintained that when he did so he believed that they were part of the junk mail which had accumulated in the mail room.

In addition to the appellant's testimony, the defence relied on the evidence of Mr. Perry. He testified that he had been with the appellant at the relevant time, along with a Mr. Talangbayan. He essentially corroborated the testimony of the appellant and acknowledged that he too had ripped some of the Bell Canada bills thinking that they were junk mail.

The final defence witness, Mr. Talangbayan, had originally been under subpoena by the Crown. He was the third person present when the bills were destroyed, and he confirmed the accuracy of the appellant's and Mr. Perry's story.

THE NON-DISCLOSURE

During cross-examination, Crown counsel forcefully questioned Mr. Talangbayan about an undisclosed statement allegedly made to a third person, Mr. Michael Wong. Part of this statement was potentially quite damaging to the credibility of Mr. Talangbayan. Although he denied it, he was alleged in cross-examination to have said:

> Off the record, he ripped them, but if anyone asks me, I'll deny it.

MOTIONS BY THE DEFENCE

When cross-examination was concluded, defence counsel immediately advised the Court that the alleged statement by Mr. Talangbayan to Mr. Wong had not been disclosed. In the discussion that followed, the trial judge observed that non-disclosure of the Wong statement "would be pretty crucial to the case".

Following an adjournment to allow both counsel to consider their positions, defence counsel moved for a stay of proceedings, or alternatively, a mistrial. She submitted that she had believed she had full disclosure when she made her decision to call Mr. Talangbayan as a witness. She said that in the middle of the cross-examination of Mr. Talangbayan, she had been "sucker-punched" by the previously undisclosed evidence of the alleged prior inconsistent statement. She also informed the court that if she had known of the alleged statement, she would not have called the witness. She submitted that the defence case had been irreparably damaged as a result of the non-disclosure.

THE RULING ON THE MOTION BASED ON FAILURE TO DISCLOSE

In making his ruling, the trial judge found:

1) The defence sent details, including statements by potential defence witnesses, to the prosecution in order to create a spirit of full cooperation.
2) During the course of cross-examination of Talangbayan, it became apparent that a contradictory statement had been made to a Mr. Michael Wong.
3) The Crown's failure to disclose the statement given by Wong the day before the trial began, had been inadvertent.
4) The statement by Wong had sufficient impact upon the Crown that he decided not to call Talangbayan as a witness even though he (Talangbayan) was under subpoena by the Crown.

The trial judge then referred to the decision of the Supreme Court of Canada in R. v. Stinchcombe, (1991) 68 C.C.C. (3d) 1, which imposes a general duty upon the Crown in cases involving indictable offences to disclose all relevant information to the defence. He acknowledged that the Court of Appeal for Ontario had recently held that Stinchcombe applied to summary conviction matters such as this case. (see R. v. Kutynec (1992), 70 C.C.C. 289, Per: Finlayson, J.A., at p. 299).

The trial judge concluded that there had been no duty to disclose the information. He apparently was of the view that since the evidence related to a collateral matter, it was not relevant to a matter in issue. He stated:

> In the case at bar I, do not find that the evidence that is the subject of this application is relevant or material to a matter in issue but it only goes to the credibility of a witness other than the accused. It is the opinion of this court that the evidence in issue could only be considered as collateral evidence in accordance with the principles laid down in Krause v. The Queen, 29 C.C.C. (3d) 385 and therefore should not be considered

> relevant and material for the purposes of an analysis and application of the principles laid down in Stinchcombe v. The Queen, supra. (emphasis added)

WAS THERE A DUTY TO DISCLOSE?

The trial judge's conclusion that the Crown did not have a duty to disclose the Wong statement is consistent with the traditional view that no such duty exists unless the statement bears directly on the issue of the guilt or innocence of the accused.

Ontario's Disclosure Directive, in effect since 1989, does not expressly require Crown disclosure of evidence which is relevant only to the credibility of a prospective witness. The Directive is currently under review by the advisory committee of the Attorney General under the chairmanship of the Honourable G.A. Martin, Q.C. (see R. v. Kutynec, supra, at p. 299).

In my opinion, recent pronouncements of the Supreme Court of Canada have established that non-disclosure of impeachment evidence for use in cross-examination is no longer permissible.

In Stinchcombe, supra, Sopinka, J. observed that there are sound policy reasons for a rule requiring that the Crown make full disclosure of all relevant material. Two of his conclusions are particularly apt to the case at bar:

> (a) ...I am of the opinion that, subject to the discretion to which I have referred above, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses (p. 15).
>
> (b) ...counsel for the defence is entitled to know whether the witness she/he is calling would give evidence that will assist the defence or whether the witness will be adverse and necessitate an application to cross-examine on the basis of a prior inconsistent statement...Most counsel faced with this prospect would likely opt not to call the witness, a matter which bears on the right to make full answer and defence. (p. 17) (emphasis added)

The foregoing passages make it clear that the Crown is under a continuing duty to disclose all relevant statements of prospective witnesses, whether or not the Crown intends to call them.

Even prior to Stinchcombe, the Supreme Court of Canada had ruled that if evidence could affect the credibility of a witness, it is relevant and must be disclosed. In R. v. C. (M.H.) (1989), 63 C.C.C. (3d) 365 (S.C.C.), McLachlin J. concluded that the Crown had a duty to disclose that the complainant in a sexual case had made a statement inconsistent with her evidence as to whether she had ever been asked if she had been sexually abused. McLachlin J. stated, at p. 395, that the withheld evidence:

> ...could conceivably have affected the jury's conclusions on the only real issue, the respective credibility of the complainant and the appellant (emphasis added).

In the case at bar, the evidence which was withheld was also relevant to the only real issue: the respective credibility of the Crown and defence witnesses. The trial judge was therefore in error when he held that the Crown had no duty to disclose the statement.

DOES THE FAILURE TO MAKE DISCLOSURE ENTITLE THE APPELLANT TO A NEW TRIAL?

The learned trial judge denied the Crown's request to call Mr. Wong as a reply witness, because of his conclusion that the evidence was collateral. He also concluded that, alternatively, if he was in error, the appellant could nevertheless receive a "full and fair trial" because refusing to permit reply evidence was a suitable remedy under s. 24(1) of the Charter.

The respondent argues that the learned trial judge did not improperly consider the evidence which had been withheld by the Crown and used to impeach the witness in cross-examination. A careful review of the evidence and the reasons for judgement, however, leads me to conclude that the impermissible cross-examination may have influenced his decision. Some of the reasons for that conclusion are set out below.

The trial Judge apparently viewed his rejection of Mr. Talangbayan's evidence as having a "domino effect" on the otherwise reasonably strong evidence of the Appellant and defence witness Mr. Perry. This is particularly disturbing in light of the fact that the defence would not have called Mr. Talangbayan as a witness if she had known of the undisclosed statement. During the course of final argument, the trial judge stated:

> Mr. Perry and Mr. Romain stand very firm on their positions, ... They seemed to weather the cross-examination with reasonable strength. Mr. Talangbayan who should have been the third solid force of the three comes across very differently and it is almost like, I suppose, a domino effect which I begin to sense is happening here... (emphasis added)

The learned trial judge's stated reasons for rejecting the evidence of Mr. Talangbayan were tenuous:

a) Mr. Talangbayan said Mr. Romain threw the material into the garbage can while Mr. Romain described "very deliberate tearing and stuffing".
b) Mr. Talangbayan said he did not see what the other witness, Mr. Perry, was doing, even though he was right there for two minutes. (Mr. Talangbayan testified that he had been talking to the Appellant)
c) Mr. Talangbayan told the police officer who interviewed him that he didn't want to get involved.
d) Mr. Talangbayan's evidence conflicted with the testimony of a Crown witness whose evidence the trial judge had said he would scrutinize closely.

On that basis, the learned trial judge then rejected the entire defence in favour of the Crown witnesses.

Given the tenuous basis for rejecting the evidence of Mr. Talangbayan, and his use of that disbelief to reject the entire defence, the possibility exists that the trial judge's conclusions were influenced by the evidence which had been withheld by the Crown. The finding of guilt must therefore be set aside (see Stinchcombe, supra per Sopinka J. at p. 17).

In the result, the appeal will be allowed, the finding of guilt set aside, and a new trial ordered.

McCOMBS J.