SUPREME COURT OF QUEENSLAND

CITATION:	*R v Colagrande* [2018] QCA 108
PARTIES:	**R** **v** **COLAGRANDE, Cesidio** (appellant)
FILE NO/S:	CA No 37 of 2017 DC No 364 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport – Date of Conviction: 6 February 2017 (Kent QC DCJ)
DELIVERED ON:	5 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	27 November 2017
JUDGES:	Sofronoff P and Gotterson JA and Henry J
ORDERS:	**1. Leave to adduce further evidence granted.** **2. Appeal allowed.** **3. Conviction quashed.** **4. Re-trial ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – MISCARRIAGE OF JUSTICE – where the appellant was convicted on a single count of unlawfully and indecently assaulting the complainant – where the appellant was a plastic surgeon whom the complainant had consulted for the purpose of undergoing a breast enlargement operation – where the complainant gave evidence that the appellant had pulled her close to him so that their crotches were touching, smacked her on the bottom and made sexual overtures in the course of a consultation – where the complainant gave evidence that the appellant discouraged her from undergoing a further operation, telling her, "you're perfect just the way you are" – where the appellant gave evidence that the complainant had requested for the appellant to perform a further breast enlargement operation for free or to give the complainant a refund – where the central issue in the trial was the credit of the appellant and the complainant – where the complainant attended a conference on 24 January 2017, before the trial, with the Crown prosecutor and another Director of Public Prosecutions officer during the course of which she explained that she did not wish to proceed with the matter – where a file note made in the course of this

conference was disclosed to the defence prior to the trial – where the defence counsel made a forensic decision not to use this information at trial – where the complainant also gave a statement to police on 16 December 2016 indicating that she did not wish to proceed with the trial and gave detailed reasons for this decision – where the statement by the complainant to police was not furnished to the defence until day five of the trial, after the evidence had concluded – whether the statement by the complainant to police on 16 December 2016 was relevant to her credit, such that the failure of the prosecution to disclose that statement to the defence until after evidence in the trial had concluded occasioned a miscarriage of justice

Criminal Code (Qld), s 590AB, s 590AH, s 590AJ

Grey v The Queen (2001) 75 ALJR 1708; [2001] HCA 65, cited
R v Brown [1994] 1 WLR 1599; [1995] 1 Cr App R 191, cited
R v HAU [2009] QCA 165, applied
R v Rollason and Jenkins, ex parte Attorney-General [2008] 1 Qd R 85; [2007] QCA 65, cited
Wilde v The Queen (1988) 164 CLR 365; [1988] HCA 6, cited

COUNSEL: T Game SC, with A J Edwards, for the appellant
D Balic for the respondent

SOLICITORS: Jacobson Mahony Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** The appellant was charged with a single count of unlawfully and indecently assaulting the complainant. The complainant had sought to withdraw her complaint. She gave prosecutors a written statement to that effect. That statement was only disclosed to the defence at the end of the trial. The question in this appeal is whether that failure to disclose resulted in a miscarriage of justice.

[2] The appellant was a plastic surgeon whom the complainant had consulted for the purpose of undergoing a breast enlargement operation. After an initial consultation, the complainant paid for the operation in advance and the appellant successfully performed it on 12 May 2014. Between the date of the operation and 1 May of the following year, the complainant attended at the appellant's surgery four times. The final consultation took place on 1 May 2015.

[3] According to the complainant, the appellant took a photograph of her breasts in an examination room. This was a normal procedure to create a record of the state of her breasts after the operation. After she had dressed, the complainant and appellant went into his office and the complainant sat down in a chair. The appellant sat on the arm of the chair. The complainant said that the appellant said to her, "Don't get bigger lips, don't get bigger boobs, you're perfect just the way you are." He said, "If I was your boyfriend I would have you in bed with me." He then grabbed her and pulled her in towards himself. One hand was behind her back and he slid it down to her bottom and pressed her in towards him so that their crotches were touching. He smacked her bottom and said, "Look at that arse. I would like that

bouncing up and down on top of me." He then whispered in her ear, "Don't you want to fuck?" The complainant said she kept trying to push him away and was saying "no" and was telling the appellant that she had to go. He finally released her and she left. She made no complaint to the receptionist. However, once she was in her car she immediately telephoned her boyfriend. According to her own evidence and according to her boyfriend's evidence, she was crying and hysterical. She told him what had happened. He told her to go to the police and she immediately did so and made a complaint.

[4] The appellant gave evidence. He said that on 1 May 2015 he had a discussion with the complainant during which she complained that her breasts were still too small. She told him that she wanted bigger breasts. She worked as a pole dancer and stripper. She told him that she would be able to make more money if her breasts were bigger. He said she asked him whether she could get a further operation for free. The appellant said she could not but that in any case he was not willing to do a further operation. In his opinion, a larger implant would jeopardise her health. The appellant said that the complainant insisted that she wanted to increase the size of her breasts. She then asked for a refund, which the appellant refused. She also wanted to enlarge her lips. She used the expression "blow job lips, porn star tits". He said that the complainant was unhappy when he refused to give her a refund and left.

[5] The central issue in the case was, therefore, the credit of these two witnesses. The Crown prosecutor made the following submission to buttress the credit of the complainant:

> "In my submission, that's just implausible that she would make something up like this. Essentially, what my learned friend is suggesting to you that [the complainant] would go through the complaint process, she'd go to see the police, she'd go to the committal hearing and give evidence at the committal hearing, she'd come to this court and give evidence in this court, subject herself to cross-examination about her adult entertainment history, be shown photos and so forth, that she would go through something that traumatic and unpleasant just because she was dissatisfied with her implants and wanted even bigger ones for no cost. What a convoluted way to get what she wanted."

[6] Defence counsel at the trial, who was not counsel on appeal, submitted to the trial judge that that submission was improper. This was because on 24 January 2017, about a week before the trial, the complainant had attended a conference with the Crown prosecutor and another officer of the DPP which became the subject of a file note made by those officers. Relevantly, the file note said:

> "Explanation was given as to why the Crown is proceeding with the matter despite indication that [the complainant] does not want to proceed. Reason – public interest to proceed.
>
> [The complainant] was asked how she felt about going to court on Monday – [The complainant] said that the experience of going to court makes her feel sick."

[7] This note had been given to the defence before the trial. Defence counsel informed the trial judge that a forensic decision had been made not to use this information at the trial. He explained the reasons for that decision. He submitted that the information falsified the Crown prosecutor's submission which I have set out above. He invited the trial judge to refer expressly to that submission and to direct the jury:

> "As to that submission you should know that on 16 December 2016 [the complainant] wanted to withdraw her complaint.
>
> The DPP elected to proceed with the matter despite that indication."

[8] The prosecutor submitted that no such direction need be made but that if a direction was given, then the words "because of the long and difficult process" should be inserted as the reason for the complainant's disinclination to proceed at that point.

[9] The learned judge ruled that it would be wrong to direct the jury about facts not in evidence. He explained that the limited direction that was sought would not do justice to the question of the complainant's willingness and unwillingness to proceed at various points of time. In particular, it would not address the complainant's evident willingness to give evidence at the trial. Such a direction might also be misleading because it gave an incomplete picture.

[10] The trial judge asked the defence counsel whether he was making an application to discharge the jury. Defence counsel said that he was not.

[11] As I have said, the file note had been given to the defence before the trial. On 3 February 2017, when this matter was raised with the trial judge, the prosecution furnished the defence with further documents. The first of these was a statement that the complainant had given to police on 16 December 2016 when she attended at a police station to inform police that she wished to withdraw her complaint. Relevantly, the statement said:

> "3 The reason for this statement today is to provide my reasons on why I want to withdraw my complaint.
>
> 4. This matter occurred on the 1st of May 2015.
>
> 5. This more than a year and a half and this has allowed me time to reflect and move on.
>
> 6. Since the event I have had support, help and treatment from Family, Friends, Victims of Crime and my Phycologist (sic) [name redacted].
>
> 7. I don't feel the stress anxiety of victimisation from what occurred anymore from all this. I feel as if I want to move on with my life and attending court will just trigger old trauma and recommence the personal journey that I went through above.
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> 8. Personally, I feel that Dr COLGRANDE has now felt some punishment from the investigative process, and that from reporting the matter I feel that he has learnt that 'It is not okay' and will reflect on his behaviour and practices towards patients.

> 9. I am appreciative for the investigative process and the court process by all including the Queensland Police, Office of Health Ombudsman and Prosecutors, however the process has been long and difficult.
>
> 10. I now have personal closure, I am now detached towards the outcome of the court process.
>
> 11. I now wish to just move on with my life. This is a truly personal decision I have come to on my own terms. I have not been convinced to make this decision by anyone or any extenuating circumstances."

[12] On the same day, the complainant signed a formal "withdrawal of complaint" form stating that she no longer wished to proceed with her complaint. In the form she cited as her reasons those given in the statement that I have just quoted.

[13] These further documents informed the defence for the first time about the complainant's actual reasons for her attitude. They also revealed that she had consulted Victims of Crime and a psychologist.

[14] In his submissions to the learned trial judge, defence counsel pointed out that the defence had been denied the opportunity to cross-examine the complainant about these matters on a Basha inquiry and had also been denied the opportunity to investigate, by way of subpoena or otherwise, the records of Victims of Crime and of the psychologist in order to determine whether information in those records might assist the defence.

[15] In the absence of any application for a stay or any application to discharge the jury, the learned trial judge continued with his summing up and directed the jury in the following terms:

> "She then made a submission which is something I just have to deal with because it does involve a legal concept that has to be considered with some precision. She argued to you that it was implausible that the complainant would make this all up, and why would she go through all of this process, the complaint, seeing the police, evidence at the committal hearing and evidence in this Court. Why on earth would she do that just to produce this kind of result?
>
> Well, you have to be very careful, and, in fact, I am really directing you should disregard that submission, for this reason. What it has a tendency to do, that kind of idea, is reverse the onus of proof. In other words, it – in a way in its logic places an onus on the defendant to try and explain why she would falsely do this kind of thing, and that is improper, because the onus of proof is and remains on the prosecution, and, really, the real question, and the only question, is whether you accept the complainant's evidence on the relevant points beyond reasonable doubt. So it is her evidence that you have to evaluate in light of all the evidence, including Dr Colagrande's sworn denials, and see if you accept that beyond a reasonable doubt. It is not a matter of rhetorically asking yourself, "Oh, why would she make it up?" Because that tends to reverse the onus, and so that should be – that idea and that submission should be disregarded."

[16] The jury convicted the appellant.

[17] Sections 590AB, 590AH and 590AJ of the *Criminal Code* provide, relevantly, as follows:

> "590AB Disclosure obligation
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> (1) This chapter division acknowledges that it is a fundamental obligation of the prosecution to ensure criminal proceedings are conducted fairly with the single aim of determining and establishing truth.
>
> (2) Without limiting the scope of the obligation, in relation to disclosure in a relevant proceeding, the obligation includes an ongoing obligation for the prosecution to give an accused person full and early disclosure of–
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> (a) all evidence the prosecution proposes to rely on in the proceeding; and
>
> (b) all things in the possession of the prosecution, other than things the disclosure of which would be unlawful or contrary to public interest, that would tend to help the case for the accused person.
>
> 590AH Disclosure that must always be made
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> …
>
> (2) For a relevant proceeding, the prosecution must give the accused person each of the following–
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> …
>
> (e) for each proposed witness for the prosecution other than a proposed witness mentioned in paragraph (d)–
>
> (i) a copy of any statement of the witness in the possession of the prosecution.
>
> 590AJ Disclosure that must be made on request
>
> …
>
> (2) For a relevant proceeding, the prosecution must, on request, give the accused person–
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> …
>
> (e) a copy of any statement of any person relevant to the proceeding and in the possession of the prosecution but on which the prosecution does not intend to rely at the proceeding; and
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> (f) a copy or notice of any other thing in the possession of the prosecution that is relevant to the proceeding but on which the prosecution does not intend to rely at the proceeding."

[18] In *R v Rollason and Jenkins, ex parte Attorney-General*,[1] the Court of Appeal cited with approval the statement of Steyn LJ in *R v Brown*[2] that:

> "[I]n our adversarial system, in which the police and prosecution control the investigatory process, an accused's right to fair disclosure is an inseparable part of his right to a fair trial."

[19] In *Grey v The Queen*,[3] the High Court had to consider whether a trial had miscarried because a document that was potentially relevant to the credit of a witness had not been disclosed to the defence by the prosecution. The prosecution had argued in the High Court that the case against the appellant was an overwhelming one. On the facts of the case as set out in the judgments, which it is not necessary to detail, that submission was plainly well made. However, the strength of the case was held to be irrelevant to the issue raised by non-disclosure because the withholding of the document deprived the appellant "of a full opportunity to discredit [the witness] who was, it was conceded, a key Crown witness against him".[4]

[20] Gleeson CJ, Gummow and Callinan JJ endorsed[5] the *dicta* of Brennan, Dawson and Toohey JJ in *Wilde v The Queen*,[6] in which their Honours had said:

> "Those authorities establish that where there has been a departure from the requirements of a properly conducted trial, it cannot be said that there has been no substantial miscarriage of justice if the applicant has thereby lost 'a chance which was fairly open to him of being acquitted' to use the phrase of Fullagar J in *Mraz v The Queen* [footnote omitted] or 'a real chance of acquittal' to use the phrase of Barwick CJ in *R v Storey* [footnote omitted]. Unless it can be said that, had there been no blemish in the trial, an appropriately instructed jury, acting reasonably on the evidence properly before them and applying the correct onus and standard of proof, would inevitably have convicted the accused, the conviction must be set aside …"

[21] Kirby J observed[7] that, although the jury might not necessarily have rejected the evidence of the relevant witness and although a verdict of not guilty did not represent the most probable verdict of a reasonable jury, nevertheless it was a definite possibility and one of which the appellant had been deprived.

[22] In *R v HAU*,[8] Keane JA, with whom Cullinane and Jones JJ agreed, said that where documents were not disclosed in breach of the prosecution's obligation, then the Court of Appeal cannot ignore "even a relatively slim possibility that the defence has been forensically disadvantaged by the non-disclosure".[9] His Honour said that non-compliance by the prosecution with its obligations of disclosure was such a serious breach of the pre-suppositions of a fair trial as to deny the application of the proviso, at least when the undisclosed material might have influenced the result of

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1 [2008] 1 Qd R 85.
2 [1995] 1 Cr App R 191 at 198.
3 (2001) 75 ALJR 1708.
4 Supra at [15].
5 Supra at [25].
6 (1988) 164 CLR 365 at 371-2.
7 Supra at [72].
8 [2009] QCA 165.
9 Supra at [40].

the trial.[10] The hurdle for the defence raised by non-disclosure is, therefore, a low one.

[23] The appellant has applied to lead further evidence on appeal. Leave should be given. That evidence shows that documentation now obtained, in reliance on the Crown's further disclosure, contains matters that are potentially relevant to issues of credit. Because of the orders that I propose should be made, I will not elaborate further. There is a real possibility in this case that the appellant has been disadvantaged.

[24] For these reasons I would allow the appeal, set aside the conviction and order a re-trial.

[25] I would add that I do not think that the submission made by the Crown prosecutor was improper. This is not a case like *R v Robinson*,[11] in which a question was raised whether it was proper to direct the jury about the accused's motive to lie. The submission was made to rebut the appellant's counsel's submission that the complainant had been motivated to fabricate a story imputing a criminal offence to the appellant in order to extort a further operation or, alternatively, to punish the appellant for not agreeing to give her a free operation. That explanation offered by the appellant to support the jury's rejection of the complainant's evidence meant that it would have been artificial and unbalanced for the prosecution to have been prevented from pointing out the fallacy in that proposition, namely that this is a hard and long method to adopt to gain the alleged purpose.

[26] However, the heat of disagreement about the character of that submission can be put to one side because, apart from its action as an igniting spark for that all that followed, it has no bearing upon the outcome of this appeal.

[27] I would give leave to adduce the further evidence, allow the appeal, quash the conviction and order a re-trial.

[28] **GOTTERSON JA:** I agree with the orders proposed by Sofronoff P and with the reasons given by his Honour.

[29] **HENRY J:** I have read the reasons of Sofronoff P. I agree with those reasons and the order proposed.

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10 Supra at [37] citing *Weiss v The Queen* (2005) 224 CLR 300 at 318 [46] and *R v Bryer* (1994) 74 A Crim R 456 at 478.

11 (1991) 180 CLR 531.