APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 46
HCA/2017/27/XC

Lord Justice Clerk
Lord Menzies
Lord Turnbull

STATEMENT OF REASONS

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

ADAM LUNDY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: A Brown QC, Armstrong; Callahan McKeown & Co, Renfrew
Respondent: I McSporran QC Sol Adv; Crown Agent

18 January 2018

Background

[1] The appellant's conviction for murder was quashed on appeal on 18 January 2018, on the basis that (a) during the Crown speech to the jury the Advocate Depute had relied on irrelevant emotional considerations, misrepresented crucial scientific evidence and relied on evidence of statements by co-accused inadmissible against the appellant; and (b) the trial judge had failed to take swift and decisive action to address these defects, which related to

the central issue in the case. The Crown sought authority to bring a new prosecution in terms of sections 118 and 119 of the Criminal Procedure (Scotland) Act 1995.

Submissions

[2] In advancing his motion the Advocate Depute relied on the circumstances and nature of the crime and the strong public interest that such crimes should be prosecuted. The graver the crime the stronger was that public interest. Fault on the part of the Crown, as occurred here, was a relevant but not decisive factor. There had also been error on the part of the trial judge. It appeared from the court's decision that the faults would have been capable of being corrected by firm direction, and might not themselves have rendered the trial unfair, although the Advocate Depute was at pains to acknowledge that it was the Crown's conduct which had put the trial judge in the position of requiring to give suitable directions. The degree of fault was also relevant: in the present case it did not affect the evidence which was available.

[3] Four specific points were advanced:

1. Where the crime is murder, above all crimes, the public interest requires that prosecution proceed. The public interest includes consideration of private interests of the next of kin of the deceased. Where life has been taken, Articles 2 and 13 of the ECHR in combination require that there be an adequate investigation and provision of an effective remedy.

2. There has not been such a delay as might prejudice the rights and interests of the appellant. The evidential position has not altered. The Crown fault did not impinge upon the sufficiency of evidence.

3. The case is unusual in that there is no dispute that appellant was responsible for the killing. Any suggestion that following *Miller* v *Lees* 1991 SCCR 799 there must be some special circumstances to justify granting authority where the Crown have been at fault was not accepted. Such an approach was not consistent with *Fraser* v *HMA* (unreported, 17 June 2001), where there was not only fault on the part of the Crown, but the fault related both to the pre-trial investigation and the presentation of the case, yet authority was granted. In the present case the absence of any doubt that the fatal wounds were inflicted by the appellant points away from refusal.

4. The appellant's right to a fair trial will be preserved in any subsequent prosecution.

[4] In reply counsel for the appellant submitted that it was clear from *Fraser* that fault on the part of the Crown remained a relevant factor to take into account. There were numerous cases where the question whether there had been such fault was a critical issue. Even in murder, authority has been refused: *McCreight* v *HMA* 2009 SCCR 743. The effect of articles 2 and 13 added another layer of right, but was simply a reflection of the fact that the homicide is at the extreme end of the criminal canon.

Analysis and decision

[5] The question whether the Crown had contributed to the miscarriage of justice leading to granting of the appeal was identified at an early stage as a relevant factor in whether to grant authority to bring a new prosecution (*Mackenzie* v *HMA* 1982 SCCR 499). In subsequent cases the question whether the Crown had contributed to the miscarriage of justice which resulted in the appeal succeeding, was identified as a central factor in whether authority should be granted (see for example *Cunningham* v *HMA* 1984 JC 37; *Wilkinson* v *HMA* 1991 SCCR 856; *McDade* v *HM Advocate* 1994 JC 186; *Thomson* v *HMA* 1997 SCCR 121).

[6] *Renton & Brown,* Criminal Procedure, sixth edition, states at para 30-33.2 that:

> "Authority to bring a fresh prosecution is likely to be granted where the ground of appeal does not involve any fault on the part of the Crown, and the evidence is sufficient for conviction."

The implication seems to be that fault on the part of the Crown is likely to forestall any fresh prosecution. The force of some of the observations made about this issue in earlier cases may no doubt have contributed to what appears to have become a general perception that fault on the part of the Crown will generally be sufficient to rule out a fresh prosecution, regardless of other considerations, or at the very least will make it very difficult for that result to follow, absent special circumstances. For example, in *Miller* v *Lees*, the Lord Justice Clerk (Ross) recorded (emphasis added) that:

> "The advocate-depute recognised that <u>normally</u> where there has been fault on the part of the Crown, the court would not be disposed to grant authority to bring a new prosecution, but he emphasised the special circumstances of this case."

[7] Later, giving the court's decision to allow such a prosecution he said that this was "<u>in the special circumstances</u> of the case, <u>despite</u> the fact" that the Crown had been at fault. In *McDade* the decision to grant authority for a fresh prosecution was expressed in these terms:

> "since the miscarriage of justice arose from misdirection on the part of the trial judge for which the Crown were not in any way responsible, we are satisfied that the Crown should be given authority to bring a fresh prosecution."

[8] A similar approach has been taken in numerous other cases. See *Thomson* ("The Crown bears no responsibility for what went wrong. In my view therefore we should... grant the Crown authority to bring a new prosecution…";) *McPhelim* v *HMA* 1996 JC 203 ("Having regard to the fact that ….. no fault can be laid at the door of the Crown, we are satisfied that it would be appropriate to grant authority to the Crown to bring a new prosecution".)

[9] In *Fraser* v *HMA* the court recognised the difficulty in identifying a rationale for considering fault on the part of the Crown as a relevant factor, noting that

> "It may be important to bear in mind the peculiar background in Scotland where virtually all prosecutions are at the instance of the Crown and where at common law the court controlled even the desertion by the Crown of indictments, lest the accused 'be harassed with repeated libels (*Hume on Crimes* II, p276)'".

The court concluded

> "Whatever precisely be the rationale for bringing into account, when deciding whether or not to authorise a retrial, any 'fault' on the part of the Crown, it is clear that this is a settled consideration in Scotland …to which this court, as presently constituted, must have regard."

[10] We proceed entirely on that basis. However, we think it appropriate to note that "fault" on the part of the Crown is simply one of the many factors which must be considered. It is not a consideration which bears more weight than other relevant factors. The discretion conferred by the statute is an unfettered one, the correct test for the application of which is whether it would be in the interest of justice. In *Love* v *HMA (No 2)* (31 August 1999, Appeal No C931/97), the court said this:

> "No limits are expressly prescribed to the circumstances in which the court may grant authority to bring a new prosecution in accordance with section 119. Nor are any criteria prescribed for the exercise of the power to grant such authority. In the absence of such prescription the question to be addressed, in our view, is whether, in the circumstances of the particular case, it is in the interest of justice to grant or refuse authority."

[11] Apart from "fault" on the part of the Crown, factors which have been identified as relevant include the nature of the charges (*Callan* v *HMA* 1999 SLT 1102), the fact that there remained a sufficiency of evidence (*McGhee* v *HMA* 1991 JC 119), the apparent strength of the case, or lack of it, (*McNicol* v *HMA* 1993 SCCR 242; *Farooq* v *HMA* 1991 SCCR 889) and the time which has elapsed since the alleged offence (*Drummond* v *HMA* 2003 SLT 295).

[12] In the present case, the charge is one of the most serious which may be imagined. It is clearly in the public interest that, where there is a sufficiency of evidence, a person accused of serious crime should be brought to trial and tried fairly. The points made by the Advocate Depute regarding articles 2 and 13 are reflections of the importance which our law gives to both these points. There remains a sufficiency of evidence. As to the strength of the case, the appellant acknowledges responsibility for stabbing the deceased to death, the issue for trial being restricted to the nature and quality of his actings. The time which has elapsed is not an unreasonable one, and is not likely to have any effect on the evidence which may be led. It is clear that a fair trial remains possible. The only argument against granting authority was that the Crown had been at fault. That is true, but the error was not one which in any way "tainted" the evidence or was likely to call into question the reliability of any evidence which might be led, and has had no effect on the question of sufficiency. In all the circumstances we were satisfied that this was a case in which it is in the interests of justice that we should exercise our discretion in favour of the Crown motion.