APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 13
HCA/2023/000382/XC

Lord Justice Clerk
Lord Doherty
Lord Matthews

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

LESLEY CLARKSON

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Culross; John Pryde & Co
Respondent: McKenna, AD, sol adv; the Crown Agent

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23 April 2024

Introduction

[1] The appellant was convicted of two money laundering offences committed between January 2016 and November 2017. The same property was involved in both charges viz. £63,766 in cash, that figure having been amended at the end of the Crown case from the sum

of £69,416 originally libelled. The appeal arises out of the Crown's failure to disclose a report before the trial and the alleged consequences thereof.

Circumstances

[2] The case against the appellant was a circumstantial one. There were three main threads of evidence. These were (i) evidence of her relationship with a David Togher, about whose criminal lifestyle, involvement in drug offences and association with known criminals evidence was led at trial; (ii) transactions on various bank accounts in the name of the appellant, the details of which were agreed in a Joint Minute; and (iii) a search of her address during which officers recovered cash of £14,571.20 spread across fifteen locations in bags, boxes and envelopes, two expensive watches and papers which included notebooks and lists containing names, numbers and sums of money.

[3] The appellant maintained that the main source of the cash in the account came from her assisting Mr Togher to realise his share of his roofing business and sell his equipment. Some of the cash was also from her parents, in particular her father.

The expert evidence

[4] The Crown led evidence from two experts. Gavin Black, and Kenneth Murray who both gave evidence about the suspicious nature of the cash recovered from the appellant's home, the unusual transactions on her accounts during the relevant period, and patterns observed in the way the accounts were operated. Mr Murray, in particular, noticed various "identifiers" of money laundering across the accounts, which included "smurfing" (splitting up larger sums and staggering payment over a period of time), "layering" (transfer of the sum deposited into a series of bank accounts) and "conversion" (using the sums in a

purchase or transfer elsewhere), all under reference to specific entries in the accounts. The defence had commissioned and lodged a report by another expert, John O'Donnell.

The disclosure issue

[5] The focus of the appeal relates to evidence given in connection with certain transactions on the appellant's account totalling £4,650 and consisting of £1,500 and £2,100, paid to Thomas Cook for a holiday, and another sum of £1,050. Mr O'Donnell's report suggested that the source of the £4,650 was the appellant's father, the former two sums (£1,500 and £2,100) having been transferred from his account to the appellant's account to fund the major part of a family holiday and the latter sum (£1,050) relating to factoring fees for a property which he and the appellant jointly owned. Mr Black conceded these matters during his evidence.

[6] In examination-in-chief Mr Murray, under reference to the relevant part of his report, referred to these sums as cash deposits. He noted aspects of smurfing and layering in relation to them, indicating in his opinion that they had been laundered. When Mr O'Donnell's report on these sums was put to him in cross-examination he made reference to a supplementary report in which the source of these was acknowledged to be BACS transfers from the appellant's father. This was the first intimation to the defence that such a report existed. It is clear that in giving his evidence Mr Murray had throughout been under the assumption that the supplementary report was before the court.

[7] There followed a discussion in which the procurator fiscal depute indicated that the Crown did not dispute the appellant's contention regarding these transfers, and therefore she had not considered it necessary to lodge or disclose the report, the conclusions of which agreed, to some extent at least, with the defence expert's conclusions on the matter. The

report was then disclosed and an adjournment granted, over a weekend, to enable the defence to consider the report.

[8] When the court resumed the defence sought desertion *simpliciter* on the basis that the Crown had deliberately failed to disclose the supplementary report and had led evidence known to be untrue. Leading evidence about these sums being unaccounted cash deposits, which was known to be untrue, had been highly prejudicial to the appellant. It was submitted that the jury would not be able to put that erroneous evidence out of their minds. The sheriff disagreed. He considered the matter could be dealt with by direction. He refused the motion.

[9] No further motion was made by the defence. Prior to the resumption of evidence, parties entered into a second joint minute, agreeing that the three deposits totalling £4,650 were transfers from the appellant's father's account rather than cash deposits, and this was read to the jury. In further cross-examination of Mr Murray he accepted this to be the case. At the end of the Crown case, the charges were amended to reduce the overall sum by these amounts.

Submissions for the appellant

[10] The essence of the first three grounds of appeal is that the Crown acted in a manner which was oppressive, which ought to have led to desertion *simpliciter*, and which has resulted in a miscarriage of justice. There had been a breach of the Crown's duty of disclosure. The libel should have been amended at the outset to reflect the true position. The Crown led evidence they knew to be inaccurate and which they had no intention of relying on before the jury (*HM Advocate* v *Rutherford*, unreported, per Lord Turnbull). The joint minute was not signed until the first day of the trial, at which time they already had

possession of the supplementary report. Proceeding only with the first joint minute and leading the evidence of the original report suggested a lack of good faith on the part of the Crown, whose actions must be deemed to be oppressive. The prejudice was so grave as to be incapable of being cured by direction or by the effect of cross-examination. The defence required to expend considerable further time during cross-examination in order to undermine Mr Murray's position in respect of the payments in question. The sheriff should have deserted *simpliciter* or at least *pro loco et tempore* to allow the defence further time to consider whether further consultation with the defence expert was necessary.

[11] The fourth ground asserts that *esto* the prejudice could be removed by directions those given by the sheriff were inadequate. It was submitted that their "tone" had the effect of "rehabilitating" the evidence of Mr Murray. Particular reference was made to the passage where the sheriff stated

> "Mr Cameron was critical of Mr Murray and you can make what you will of his criticisms. Mr Murray accepted that he was partly at fault but his evidence about the money from the parents was only part of his evidence and he did correct it, and you heard what he said about the rest of his evidence.
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> In assessing Mr Murray's evidence as a whole, you can take into account what happened in the witness box and his exchanges with Mr Cameron in considering his evidence as a whole and whether it makes it less reliable if you wanted to do that, or you could conclude that it doesn't make it less reliable in relation to the matters on which there was no issue about erroneous evidence being given."

[12] The final ground asserts that even if the other grounds do not individually demonstrate a miscarriage of justice, they did so when taken in combination.

Submissions for the Crown

[13] The Crown accepts that they failed in their duty of disclosure and ought to have lodged the supplementary report, that the libel should have been amended prior to evidence being led, and that the evidence in question ought not to have been elicited from Mr Murray

in examination-in-chief. Nevertheless, the appellant had not established that there was a real possibility that the jury would have returned a different verdict had pre-trial disclosure of the report occurred (*Al Megrahi* v *HM Advocate (No 3)* [2021] HCJAC 3 at para [124], citing *McInnes* v *HM Advocate* 2010 SC (UKSC) 28 at para [24]).

[14] The defence were informed at the first diet on 4 April 2023 that the Crown accepted that the source of the sums in question was the appellant's father's account. This is not recorded in the minutes but is recorded in the notes of the PFD. At a meeting on 31 May 2023, both sides agreed that this evidence would be elicited in cross-examination, on the view that amending the joint minute might risk confusion anent figures mentioned in the experts' reports. The Crown acknowledged that this had been an error, albeit made in good faith. The appellant could not now complain about an approach to the leading of evidence which the parties had agreed to before the trial. The test to be met for oppression was a high one (*McFadyen* v *Annan* 1992 JC 53). The depute did not act in bad faith (*Potts* v *PF Hamilton* 2017 JC 194).

[15] In any event, disclosure during the trial could remedy failures in pre-trial disclosure (*HM Advocate* v *Higgins* 2006 SCCR 305). The defence solicitor had the opportunity to consider the supplementary report, cross-examine on it, and make reference to it in his speech. The second joint minute was read to the jury before Mr Murray resumed his evidence. The joint minute was referred to in speeches and in the charge, so the position would have been clear to the jury. There remained a compelling case against the appellant. It could not be said that no reasonable sheriff would have refused the motion to desert.

[16] There was no misdirection. The sheriff was correct to tell the jury that what they made of Mr Murray's evidence and the defence criticism of it was a matter for them (*Younas* v *HM Advocate* 2015 JC 180 at para [55]-[56]).

Analysis

[17] The Crown's approach to this case at trial was incomprehensible. Whatever may have been agreed between the parties, the Crown categorically should not have led evidence known to be inaccurate, in the knowledge that the expert also accepted it to be inaccurate, and which it was known would not be relied upon in seeking conviction. The report should have been disclosed upon receipt, and the libel should have been amended at the start of the trial. It is nonsense to suggest that an agreement as to the source of the £4,650 would have caused confusion in relation to the figures provided in the expert reports, especially when those sums were the subject of a supplementary report. Leaving aside the failure to disclose the report and the decision not to put these facts into a joint minute pre-trial, at the very least the Crown ought to have elicited in examination-in-chief, the clarifications or changes to the expert's opinion. The approach taken prolonged the evidence of the expert, wasted court time and obfuscated the true issues in dispute. The Crown's concessions that there was a breach of the duty of disclosure, that the libel should have been amended at the outset, and that the evidence of the original report in relation to these transactions should not have been elicited are well made. We have no reason, however, to think that the errors were made on the basis of bad faith, rather than lack of competence or a wholly misguided view as to what was appropriate.

[18] The court is very concerned that this situation should have arisen. Nevertheless, the ultimate question for the court is whether the trial was unfair and resulted in a miscarriage of justice. It is difficult to identify exactly where the enduring prejudice to the appellant is said to lie. It was submitted that the leading of untrue evidence that these sums were unaccounted cash deposits created a risk of prejudice so great that it could not be corrected

by cross-examination bringing out contrary evidence, or by direction. We cannot accept that submission. Any erroneous impression given regarding the three payments was incontrovertibly, and conclusively, corrected by the joint minute and the amendment of the libel. The jury were specifically told that the contents of the joint minute had to be regarded by them as conclusively proved, and that "you must accept these facts as true and you must take account of them in your deliberations". The matter could not have been made any clearer. The jury could have been under no illusions regarding it. It is impossible to disagree with the trial judge's statement in his report that by the end of cross-examination no one could have been left in any doubt that the £4,650 were not proceeds of crime.

[19] As to the directions given by the sheriff, these were both accurate and adequate. The sheriff also reminded the jury that "the experts have not all expressed the same view as in all matters (*sic*) and you just have to assess their evidence and decide what you take from it". He advised them not to speculate or guess.

[20] It is now submitted that, failing desertion *simpliciter*, the sheriff should have deserted *pro loco et tempore* to allow the defence more time to consider whether further consultation with the defence expert was necessary. The problems with that submission are (i) that it was not made at the time; and (ii) the purpose or benefit to be gained from this course of action are not identified. By the time the court reconvened, the defence were aware of the full contents of the supplementary report. They had been given the opportunity to consider its contents over the weekend. It was not suggested then that more time was required to consider the report, or to consult with the defence expert. It seems reasonably clear that if that had been the defence position the sheriff would have been sympathetic. It was not contended that the supplementary report, or its late disclosure, had a significant bearing on any issue beyond the three sums referred to and their source. The content of the defence

speech made it plain that the most important issue was Mr Murray's concession that he had given false evidence in examination-in-chief, thus, the defence argued, undermining his evidence as a whole. It is not suggested that this approach could have been strengthened by further time to consider his supplementary report.

[21] For all these reasons the appeal will be refused.

Postscript

[22] The court notes with alarm the lamentable procedural history of the case, which suggests both a lack of enthusiasm on the part of the parties to progress the case, and a concerning lack of case management by the various sheriffs involved. The chronology is as follows:

27 July 2021 –first diet discharged, on joint motion; new first diet 3 September 2021.
19 August 2021 –diet of 3 September discharged; new first diet 28 September 2021.
24 September 2021 –diet of 28 September discharged; new first diet 26 October 2021.
25 October 2021 –diet of 26 October discharged; new first diet 9 December 2021.
9 December 2021 –diet adjourned until 3 February 2022 "for investigations".
3 February 2022 –diet adjourned until 10 March 2022 for expert report to be made available.
10 March 2022 –diet adjourned until 28 April 2022 "for further investigations".
28 April 2022 –diet adjourned until 23 June 2022 for defence expert report to be prepared. Time bar extended.
23 June 2022 –diet adjourned until 22 July 2022 for final reports. Time bar extended.
22 July 2022 –diet adjourned until 26 August 2022 for "further time to prepare". Time bar extended.
26 August 2022 –diet adjourned until 16 September 2022 for further discussions and personal appearance of the accused. Time bar extended.
16 September 2022 – trial diet assigned for 6 February 2023. Time bar extended.
6 February 2023 – trial diet discharged. Intermediate diet assigned for 4 April 2023 and new trial diet for 5 June 2023. Time bar extended.
4 April 2023 – case continued to the trial diet.
5 June 2023 – trial diet commences.

[23] The first diet was discharged on four occasions, adjourned on a further seven and the trial diet was also discharged once. It is of note that most of the adjournments were for further investigation, further discussion or for the preparation and consideration of expert

reports. None of this should have been necessary: as Lord Bracadale noted in *HM Advocate* v *Forrester* 2007 SCCR 216:

> "[16] It is clear from the statutory provisions relating to preliminary hearings that Parliament had in contemplation that the preliminary hearing would be the **end-point of preparation** rather than the starting point…"

[24] That observation applies with equal force to first diets in the Sheriff Court (see Criminal Courts Practice Note No 3 of 2015, page 2). Time bar extensions were required for every hearing after April 2022, yet this case should clearly have been able to proceed to trial and be concluded prior to that date with adequate case management.

[25] Those who conduct and preside over first diets and preliminary hearings should always bear in mind the need to avoid churn, as has repeatedly been made clear in the Appeal Court. See for example *RS* v *HM Advocate* [2023] HCJAC 41 and *BS* v *HM Advocate* [2023] HCJAC 5, in the latter of which the court observed (para 11) that:

> "Sheriffs who preside over First Diets must ensure that this type of pointless saga does not happen. … routine continuations of FDs for further time to prepare, further investigation and disclosure or similar causes should be refused in favour of fixing a trial diet for a time which allows any additional preparatory work to be completed and/or granting a time limited order for the provision of whatever relevant information is required."

[26] It should be possible to fix a trial diet in most cases even if further investigation is required or reports need to be obtained, without the case having to call again in the interim. Use can be made of section 75A if a matter arises before trial which requires the intervention of the court. If it is thought nonetheless that continuation of the first diet will be necessary then an accurate estimate of the time within which the investigations or report can be finalised is essential. This court appreciates the burden on busy sheriffs, especially in the larger courts, but needless diets only increase the problem exponentially. Regard may be had to the guidance in chapter 6 of the Preliminary Hearings Bench Book. It must also be

borne in mind that court minutes should accurately reflect any discussion which takes place. As has been indicated, there was no proper record of the diet of 4 April 2023, meaning that the next sheriff dealing with the matter would not have known what had taken place and this court was left in the dark until the Crown provided the requisite information.