APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 25
HCA/2018/000078/XC
HCA/2018/000077/XC

Lord Justice Clerk
Lord Malcolm
Lord Pentland

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEALS UNDER SECTION 74 OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

(1) JEAN-FRANCOIS PERREAULT and (2) IMRAN ZAFAR SYED

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

First Appellant: McCall, QC; Kennedys, Edinburgh
Second Appellant: Kerrigan, QC; R S Vaughan & Co, Glasgow
Respondent: Taylor, Sol Adv, AD; Crown Agent

4 April 2018

Background

[1] The two appellants are airline pilots; they were each indicted *inter alia* for a contravention of Section 93(1) of the Railways and Transport Safety Act 2003 in respect that on 18 July 2016 near to Gate 27D, Glasgow Airport, Paisley they did perform an activity

ancillary to an aviation function at a time when the proportion of alcohol in their blood was in excess of the prescribed limit set out in Section 93(2) of that Act. Section 96(1) of that Act provides that in relation to such an offence the provisions of section 15 of the Road Traffic Offenders Act 1988 ("the 1988 Act"), which relate to the taking and use of specimens in relevant proceedings, apply. Section 15(5) of the 1988 Act provides:

> "Where, at the time a specimen of blood or urine was provided by the accused, he asked to be provided with such a specimen, evidence of the proportion of alcohol or any drug found in the specimen is not admissible on behalf of the prosecution unless—
>
> (a) the specimen in which the alcohol or drug was found is one of two parts into which the specimen provided by the accused was divided at the time it was provided, and
>
> (b) the other part was supplied to the accused."

[2] It was a matter of agreement that following the giving of positive breath samples the appellants were both arrested and arrangements made for them to provide specimens of blood. In each case the specimen was divided in two parts, marked "A" and "B"; in each case the appellant asked to be supplied with one part; and in each case they selected the phial marked "B"; and in each case that phial was placed within the appellant's property held by the police. On 19 July the appellants were remanded in custody and transferred to HM Prison Low Moss. Their property, in sealed bags and including the relevant phials, was transferred with them. On 26 July the appellants were fully committed and released on bail. At that time the relevant phial "B" was not in the property returned to either of them.

Proceedings before the Sheriff

[3] A preliminary issue was raised by each appellant objecting to the admissibility of evidence relating to sample "A" on the basis that sample "B" had not been supplied to them in terms of the 1988 Act; and that *esto* such supply had taken place, it would be unfair and

oppressive at common law to admit it. There was an associated compatibility minute asserting that to admit the evidence would result in a breach of the appellants' article 6 rights. The appellants have appealed against the sheriff's decisions repelling the arguments advanced in respect of each minute. The primary focus of the arguments in the appeal was that the terms of section 15(5) had not been complied with. Only if that argument did not succeed would the issues at common law or under article 6 arise for consideration.

[4] Before the sheriff, the parties entered into a joint minute which stated:

> "That during the period from 28 July 2016 to date, there have been regular meetings between the Agents for the first accused Jean-Francois Perrault (sic) and the Agents for the second Accused Imran Zafar Sayed where a joint approach to investigations relative to these proceedings has been discussed. On 18 July 2016, during the first of these meetings, the intention to obtain the Accused's blood samples for independent analysis was discussed. This was further discussed on 26 July and 1 August 2016."

[5] Evidence was led from which the sheriff was able to draw conclusions about what had happened to the relevant samples "B", and the communications which the appellants' agents had engaged in thereanent.

[6] When the samples were placed within the appellants' property, it was not suggested in evidence that they were accompanied by instructions as to their storage, their purpose, or the procedure which might be followed in respect of them. There was, within the prison generally, or within the health centre in the prison, no protocol in place in respect of the reception and storage of such samples. At the time of the appellants' reception into the prison, the security manager, who in 20 years' service had never had experience dealing with such items, suggested that they be destroyed. The appellants did not agree to this, and the first appellant asked that the samples be stored in a fridge pending arrangements for their analysis. This was not done. Instead, the security manager removed the items from the appellants' property, and instructed a nurse to destroy them. She did not do so

immediately, but put them in her desk drawer. On learning that the appellants had been released from custody, she destroyed the samples. No record was made of any of these steps, from receipt into the prison onwards.

[7] Meanwhile, the appellants having been remanded shortly after 1600 hrs on 19 July, at 1822 hrs on that date, the agent for the first appellant e-mailed the Crown on behalf of the first appellant, and again on 20 July on behalf of both appellants, asking for the sealed phial "B" to be provided for testing. The response was that the reporting officer would be contacted immediately to ascertain where the samples were. The sheriff heard no evidence as to whether any action was taken in this regard; and before us the Advocate Depute was unable to provide any explanation as to what happened. The agents tried to ascertain whom to contact within the prison to gain access to the samples, and on 27 July had a conversation with the governor's PA, who e–mailed them that day suggesting that this was a matter for the NHS. From that e mail it does not appear that the prison authorities understood that the issue related to samples which had been received in the prison within the prisoners' property. The agents, on 2 and 3 August, asked the Crown for access to the "A" samples for testing. This request, and further correspondence, was not responded to until February 2017, when it was wrongly stated that the "B" samples had been destroyed at the prison with the appellants' consent. Correspondence in the interim, seeking to ascertain what had happened, had been met with replies stating that investigations were underway.

[8] The sheriff concluded that the meaning of the word "supply" had to be determined as a matter of fact under reference to the purpose for which the word was used in the particular statute. The purpose of section 15(5) was to enable the accused to obtain independent analysis of the part specimen. The terms of the subsection had to be strictly complied with, supply of the part specimen being a condition precedent of admissibility of

evidence as to analysis of blood specimens provided by the appellants. In his submissions the Advocate Depute accepted this analysis, stating that what was required under section 15(5) was an "effective" supply in the sense that the sample had to be supplied in circumstances which reasonably allowed for the statutory purpose to be fulfilled.

[9] We are satisfied that this is a correct analysis of the applicable law. In other words, whether there has been a supply is substantially a question of fact to be assessed in the light of the purpose of the supply, which is to enable an independent analysis to be carried out within a reasonable period of time. The question was therefore whether the "B" specimens had been transferred or made available to the appellants in circumstances which would reasonably enable that purpose to be effected.

[10] The sheriff concluded that there had been a supply for the purposes of section 15(5) in the present case, and that the evidence relating to sample "A" was admissible. In explaining his reasons for reaching that conclusion, the sheriff referred to *R* v *Jones* [1974] RTR 117 where supply had been achieved by placing the sample within the appellant's property. In *O'Connell* v *DPP* [2006] EWHC 1419 (Admin) it had been recognised that the terms of the section could be satisfied by an indirect form of supply. In *Johnson* v *DPP* [1995] CLY 4415 (a case which had not been cited in argument), supply had been effected when the specimen had been placed in the police station fridge during questioning of the accused, who had failed to take the sample with him when he left the police station.

[11] The sheriff acknowledged that at no time was either accused "handed" the specimen, and at no stage was the specimen within their physical possession. However, he concluded that the placing of the specimen within their property constituted supply in the sense required by section 15(5) of the Act.

[12] In advancing the argument that there required to be "effective" supply, meaning a supply such as to enable an independent analysis to be carried out if the appellant wished that done, reference had been made to *Perry* v *McGovern* 1986 [RTR] 240. In that case the conviction was overturned where the defendant had wrongly been told by police that a sample supplied in an unsealed envelope could not be used for the purpose of analysis. The sheriff considered that the case could be distinguished, since in that case the defendant had been misled by the police into thinking that her part sample could not be analysed. The sheriff considered that in the present case neither the Crown nor the police frustrated the purpose of the supply and repelled the objection. In any event, *Perry* v *McGovern* had been distinguished in *Butler* v *DPP* 1990 [RTR] 377 where the court concluded that mis-labelling did not invalidate a supply.

Reasoning and decision

[13] In our view, the sheriff failed to take sufficient account of the factual circumstances in which the sample had been placed in the appellant's property; failed to take sufficient account of the appellants' lack of effective control over the samples, or to recognise that this was a factor which distinguished some of the cases upon which he relied from the present; and did not give due and adequate consideration to the purpose of the section.

[14] As has repeatedly been pointed out, the question of whether there has been supply for the purpose of the section is one which depends on the circumstances of each case. It is therefore difficult to draw conclusions from comparisons of the circumstances of one case as against another. Further, in considering the cases which were referred to by the sheriff it is often difficult to ascertain the stage at which the issue was being discussed; although the analysis regularly appears to be based on whether there has been supply in terms of

section 15(5), the cases often treat that as a jury question, rather than as a preliminary issue relating to admissibility in the way in which such matters are dealt with in our own procedure. Furthermore, the language used is frequently the language one would expect to find in connection with an objection based on fairness, oppression or the like, rather than an exclusionary provision such as section 15(5); to that extent care must be taken when drawing any conclusions from the cases cited. The factual background against which the decision was made may be vitally important.

[15] *Perry* v *McGovern* is a case in point. It concerned the predecessor section, section 10(6) of the Road Traffic Act 1972. The sample given to the appellant was not placed in the appropriate sealed and signed envelope. When she called the police station a few hours later to inquire about this, she was told that as a result the sample provided for her could not be submitted for analysis; she accordingly did not do so. The question posed for the opinion of the court was "whether the justices were correct in law in deciding that the provisions of section 10(6)…had been complied with in view of the fact that the defendant had been told by a police officer that the specimen she had selected could not be submitted for independent analysis". Although concluding that had the appellant been told at the time of handing over the sample that it could not be analysed this would not have met the statutory requirement, the court did not specifically answer the question asked of them. It is not entirely clear whether the court allowed the appeal on the basis that "although she had been duly provided with a sample, it was a sample which according to the advice of the police could not be used for the statutory purpose implicit in subsection 6" (p245), and thus was not a "supply" for the purposes of that subsection; or on the basis that the conviction should be overturned, essentially as a matter of fairness, the appellant having been misled by the police to desist from seeking to have the sample analysed (p246). Other than the

emphasis placed on the purpose of the statutory provision, namely to enable the accused person to obtain an independent analysis of the sample provided to the police, we find it difficult to see that anything instructive for the purposes of the present case can be taken from *Perry* v *McGovern*. The discussion of the issue in *Butler* advances matters no further; in that case all the proper procedure had been followed, save that the doctor had written the wrong name on the appellant's sample. An independent analyst had refused to test it, no reasons for that being stated in evidence, and the appellant had taken no further action. The essential *ratio* of the decision was that physical supply to the defendant was proved, there was no reason why the sample could not have been tested, and the purpose of the section had been met.

[16] *Johnson* v *DPP* was a case where the sample was taken and divided when the defendant was at the police station for questioning. His part sample was given to him and then placed in the police station fridge during further questioning. The defendant was not kept in custody but was released after questioning and did not seek to take the sample with him. He was perfectly at liberty to do so, and was in a clear position to exercise control over the sample when he left the police office, but the conclusion on the evidence was that he chose not to.

[17] In *O'Connell* the sample could not be handed directly to the defendant who was in hospital, flat on his back, with both arms incapacitated. He was in A&E, possibly needing surgery and was not in a ward with a locker where the sample could be placed. It was handed to a friend of the defendant for safekeeping, and so that he could have it analysed. The friend was told the purpose for which the sample was handed to him, and given a booklet which explained the necessary procedure. In an appeal against his conviction it was

held that the district judge was entitled to find that "supply" within the meaning of the Act had taken place.

[18] The sheriff himself recognised that the case of *R* v *Jones* could be distinguished, because there the appellant had been offered the sample but on the evidence did not want it, and did not want to have it analysed. He was being held in custody on other matters. Had he not been in custody on other matters he would either have taken the sample with him, had he wanted it; or left it behind if he did not. In these circumstances, all of which featured in the court's reasoning (p 123A-E) it was held enough for the purposes of the predecessor section to place the sample within his property.

[19] The circumstances of the cases relied upon by the sheriff in support of his decision are far removed from those of the present. In only one of them, *R* v *Jones*, had the appellant been detained in custody, and in that case he had already indicated that he did not want the sample or to have it analysed. In all the other cases the sample had been made available when the appellant was in a clear position to take control of it, and make arrangements for it to be tested. In the present case, somewhat to the (perhaps understandable) surprise of the appellants' agents, the Crown opposed bail, and the appellants were remanded in custody. The Crown would be aware that the remand in custody would have certain consequences regarding the "B" samples. The Advocate Depute frankly recognised that it would be known that the samples would not be given directly to the appellants; that they would be placed with their property; that they would not, whilst in custody, be entitled to take the sample with them to their cells, or to intromit with the sample at their own request; that the samples would therefore be held under the *de facto* control and possession of the prison authorities; and would, during the period of remand only be released with Crown co-operation. These are all known matters of fact which the Crown would require to take into

account in assessing what steps they would require to take to ensure proper and realistic compliance with section 15(5). They are factors relevant for the court to consider in addressing the question whether the duty under section 15(5) has been complied with. One might add to them that when the Crown were asked by the appellant's solicitors to take the steps necessary to release the samples, they failed to do so.

[20] This is not, as the Advocate Depute submitted, to hold the Crown responsible for the acts of others; rather it is to hold the Crown responsible for considering whether the circumstances are such as would reasonably enable the purpose of the section to be effected. The submissions for the Crown were in our view lacking in consistency. On the one hand the Advocate Depute submitted that the Crown required to prove that there had been "effective" supply, in the sense that the supply would have enabled the purpose of the section to be achieved; but on the other hand he argued that the mere fact of placing the sample in the property of an appellant, even whilst not under his control, nor likely to be whilst in custody, was an indirect supply sufficient for that purpose. In our view the matter is not to be determined on such a narrow basis. The reality is that the samples were never in the possession or control of the appellants. On the contrary, as subsequent events demonstrated, they were always under the control of the police, then the prison, and ultimately the Crown.

[21] The Advocate Depute also submitted that there were public policy considerations in play and that the court should not adopt an approach which might encourage technical points about compliance with the requirement to supply to be taken on unmeritorious grounds. It seems to us, however, that in the present context the predominant public policy consideration that is in issue is the need to ensure that accused persons are not unfairly denied the right given to them by statute to obtain an independent analysis of a blood

sample where this is a step that they wish to take. In the evidence before the sheriff, it was explained that there is always a possibility of error in the analysis carried out for the prosecuting authority.

[22] In the circumstances of the present case there was no effective supply of the "B" samples to the appellants in terms of section 15(5) of the 1988 Act. For this reason we were satisfied that the appeal must be allowed on the basis that the sheriff erred in repelling the objection taken in relation to the Crown's compliance with the requirements of section 15(5). We accordingly remitted the case to the sheriff with a direction that he should sustain the objection to the admissibility of the evidence of the proportion of alcohol found in the appellants' blood specimens (i.e. the point taken in paragraph 3.1 of the preliminary issue minutes lodged on behalf of each of the appellants).

[23] In conclusion we note that it seems likely that the absence of any protocol or procedures for dealing with the supply of the samples to the appellants played a part in the unfortunate circumstances which are likely to have serious consequences. No doubt the perhaps unexpected remand of the appellants was a particular feature of the case, but it should have been thought about in advance, and, in any event, appropriate steps taken after it occurred. It is to be hoped that lessons have been learned by the Crown, Police Scotland, and the Scottish Prison Service.