IN THE SHERIFF COURT OF TAYSIDE, CENTRAL AND FIFE AT ALLOA

[2018] SC ALL 33

JUDGMENT

of

SHERIFF JAMES MACDONALD

in the cause

PROCURATOR FISCAL, ALLOA

against

CLAIRE McINTOSH and JANET HUTCHISON or MCINTOSH,

Minuters

Solicitor for Accused: Miss K Howe
Procurator Fiscal Depute: Mrs S Hutchison

Alloa; 27 March 2018

Decision

I sustain the preliminary issues set out within the Compatibility Minutes presented by both Accused; and desert the trial diet scheduled for 27 March 2018 *simpliciter*.

Background

The proceedings

[1] The Minuters have been charged on summary complaint at Alloa Sheriff Court in the following terms:

> "On 18 July 2017 at 47 Drysdale Street, Alloa you CLAIRE MCINTOSH AND JANET HUTCHISON or McINTOSH did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did spit and gesticulate in a threatening and abusive manner; contrary to section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010"

[2] At an Intermediate Diet on 7 March 2018, the Minuters each lodged a Compatibility Minute in terms of section 288ZA of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"), wherein they challenge the ongoing legality of the proceedings. The ground of challenge relates to an items of real evidence, namely closed circuit television footage, which has been destroyed and so is unavailable for inspection by those acting for the Minuters and further, that it cannot be used in evidence at a subsequent trial diet.

[3] Both Minuters were cautioned and charged by the police on 30 July 2017, some twelve days after the date of the alleged offence. They were liberated by the police for attendance at Alloa Sheriff Court on police undertakings. These were originally due to call on 17 August 2017. The date was however subsequently changed to 24 August 2017. Both Minuters pled not guilty. Since then, the case has acquired a substantial procedural history. Some of that appears to have been due to enquiries as to whether the evidence forming the subject of the Minutes had truly been lost.

[4] On 7 March 2018, both Minuters tendered their Compatibility Minutes. Consideration was continued to 14 March 2018, where I heard substantial submissions in respect of same.

The issue in the present case

[5] The locus is covered by public area closed circuit television ("cctv"). It is accepted that this system can be accessed by the police, who routinely request that footage be retained and copied for evidential purposes. If no such request is made the system's contents are overwritten every thirty days. It is accepted that footage existed of the locus on the date libelled.

[6] There are two civilian Crown witnesses, each of whom is anticipated by the Crown to be able to give evidence as to the commission of the offence by the Minuters. In addition, there are two police officers listed as Crown witnesses. The police witnesses have provided statements to the Crown, and in turn these were disclosed to those acting for the Minuters.

[7] The re-scheduling of the first calling date of the complaint took the proceedings to beyond the normal thirty day deadline for retention of the cctv.

[8] Following the tendering of not guilty pleas, the solicitors for the Minuters submitted a request to the Crown that the cctv images be retained. The Procurator Fiscal conveyed a request in similar terms to the police, albeit that the precise date of this request is not known.

[9] The police officers state that they had viewed the cctv. The cctv was said not to show either Minuter spitting and further, it was unclear as to whether the first accused had gesticulated. The police officers' statements also refer to the caution and charge of one of the Minuters. One of the officers was subsequently precognosced by the Minuters' solicitors. In precognition that officer offered the interpretation that the cctv footage showed neither spitting nor gesticulating on the part of either Minuter.

[10] The above represents the evidential position as the parties anticipate it to be. Neither Crown nor defence invited me to appoint an evidential hearing in this matter. I will accordingly proceed to determine the matter on the above anticipated evidential basis.

The Minutes

[11] The Minutes presented on behalf of the Minuters are identical in terms of the proposition in law advanced, namely that the destruction of the cctv footage prevents a fair trial from being possible under Article 6 of the European Convention on Human Rights ("ECHR"). There is an unhelpful reference in both at the first two sub-paragraphs of

paragraph 2 to section 57(2) of the Scotland Act 1998, where there should instead be reference to section 288ZA(2)(a)(i) of the 1995 Act, and further to section 6 of the Human Rights Act 1998 ("HRA").

[12] The third sub-paragraph of both Minutes is identical, and – perhaps rather inelegantly – identify Articles 6(1) and 6(3)(b) and (d) as the applicable parts of Article 6 engaged by the Minutes. I will comment in detail on the nature of the minimum guarantees conferred by Article 6 of ECHR below.

[13] In the penultimate sub-paragraph of each Minute, it is averred that in electing to prosecute the Minuters, the Lord Advocate is continuing to act in contravention of section 6. There can be no doubt in the present case that the Minuters seek an end to these proceedings on the basis of what is averred to have been an infringement of their Article 6 rights.

Submissions

For the Minuters

[14] Miss Howe appeared for both Minuters, on the basis that the position in support of the Minutes was a common one. She invited me to sustain the Minutes and desert the complaint. She invited me to the view that it was possible in the present case to conclude in advance that the forthcoming trial could not be fair.

[15] Miss Howe did not suggest that there had been any deliberate destruction of the cctv evidence. The evidence would have been capable of undermining the credibility and reliability of the civilian Crown witnesses, and so was exculpatory. The evidence had a probative value that ought to have been obvious to the police officers who viewed it, and further, to the Procurator Fiscal who had been alerted to it from the outset by virtue of the content of the police officers' statements. Even were that not so, there had been a request

made to preserve the cctv evidence made on behalf of the Minuters soon after not guilty pleas were tendered.

[16] Miss Howe referred me to the conjoined cases of *R (Ebrahim)* v *Feltham Magistrates Court; Mouat* v *DPP [2001] 1 WLR 1293*, and to the judgment of Brooke LJ at paragraphs 12, 13, 18, 24 and 74. The Court of Appeal had, she said, identified common issues of principle but had applied these in different ways to the facts of each.

[17] Miss Howe submitted that, notwithstanding clear terminological differences evident in the report, there were similar issues of principle identified in the *Ebrahim and Mouat* cases to those applicable in Scotland. Cases where a stay of proceedings is sought due to "abuse of process" can be divided into two categories. First are those where a defendant cannot receive a fair trial, in terms of article 6 of ECHR. The second is where it would be unfair for the defendant to be tried. The latter category generally involves culpability or bad faith on the part of the prosecutor of those acting under the prosecutor's direction. The former does not (paragraphs 18 and 19).

[18] Whilst accepting that there were express duties in place regarding the retention of video evidence in terms of both a police Code of Conduct and Guidance from the Attorney General, Miss Howe submitted that the underlying principles of retention of material evidence in order that it may be viewed in preparation of, and offered in evidence during, a trial diet were common principles lying at the heart of a fair trial system.

[19] The approach to be adopted accordingly is that summarised by Brooke LJ at paragraph 74, namely:

i. Identify whether there has been a breach of duty. If not, there can be no further consideration;

ii. If a breach of duty can be identified, the impact of the missing evidence upon the fairness of the trial should be assessed; and

iii. Regard should then be had to the approach taken by the court in previous cases.

[20] Miss Howe further referred to the Scottish cases of *McQuade* v *Vannet 2000 SCCR 19* and *Lennox and Paton* v *HM Advocate 2010 SCCR 837*.

[21] She submitted that *McQuade* should be distinguished from the present case on the basis that i) the missing video evidence in that case had unknown content and so any issue as to materiality was speculative and ii) in any event *McQuade* was a case where the point raised relating to the missing evidence was one of oppression at common law.

[22] Miss Howe invited me to follow the decision of the Appeal Court in *Lennox*. This case was, she said, directly in point. It concerned the proposal by the Crown to lead secondary evidence of what was said to have been captured on cctv (now lost). What was material in the view of the Court was that not only could there be no meaningful challenge to the secondary evidence at trial without the footage, but also the loss of it had prevented the appellants' advisers from viewing the footage in advance of the trial diet. That was, she said, precisely the difficulty created in the present case by the loss of the cctv evidence.

[23] Miss Howe reminded me that the *Lennox* case arose from an objection to evidence taken at trial, rather than the taking of a preliminary issue under Article 6. This distinction however was not to be viewed as material. The *Lennox* case had approved an unreported first instance decision of Lord Emslie in *HM Advocate* v *Haggerty (2003 Glasgow High Court, unreported)*, where a challenge to missing cctv evidence had been taken under Article 6 but decided by the trial judge with reference to the common law, applying the test for oppression.

[24] Miss Howe invited me to distinguish the case of *Anderson* v *Laverock 1976 JC 9*. That case, she submitted, related to the competence and admissibility of secondary evidence, the

primary evidence having been perishable and so lost. The evidence in the present case was not perishable and accordingly she submitted that there could be no argument as to it being reasonably impracticable to retain it.

[25] Miss Howe accepted that there was a conceptual distinction between the rights conferred by Article 6 of ECHR and the test for oppression. She however highlighted that the *Lennox* case should be seen as an example of there being scope for significant overlap between the concepts. She submitted that the missing cctv evidence caused actual prejudice to the preparation of and conduct of, the Minuters' defence.

[26] In addition, Miss Howe reminded me that the materiality of video evidence in general had been enhanced by the full bench decision in the recent case of *Gubinas* v *HM Advocate 2017 SCCR 463*.

For the Crown

[27] The Procurator Fiscal Depute invited me to repel the Minutes. She invited me to continue the case to the trial diet previously fixed. She further criticised the Minutes as lacking specification, especially as to identifying a remedy. She appeared however to have had sufficient notice of the issue to be able to respond.

[28] The Crown accepted that it was clear from an early stage of the proceedings that the cctv would not be available as evidence. Further, the Crown saw no need to call either police officer who had viewed the cctv as a witness. The Crown would, Mrs Hutchison said, simply rely upon the evidence of the two civilian witnesses. There would accordingly be sufficient evidence to convict both Minuters as libelled.

[29] Mrs Hutchison accepted that the interpretation of the cctv footage by the police officers was not supportive of either specification in the libel. It did not necessarily follow however that the cctv evidence was to be regarded as damaging to the Crown case.

[30] With regard to retention of the cctv, the officers had prepared a report to the Procurator Fiscal in accordance with normal practice. The cctv had not been retained. A request had been issued to the police by a Procurator Fiscal Depute to retain the cctv. Mrs Hutchison was unaware of the exact date of this request. However, the request had not been complied with due to staff shortages and absences.

[31] Mrs Hutchison submitted that, following *McQuade* v *Vannet*, the materiality of the cctv evidence was speculative. Neither Crown nor Defence had had the opportunity to view the same. Further and in any event, it was open to the Defence to call the police officers as witnesses as to what they saw on the cctv and their interpretation of it. That would, she submitted, permit adequate testing of the evidence of the civilian Crown witnesses.

[32] The Crown submission was that only after all the evidence had been led at trial could any view be properly taken as to the fairness of the proceedings as a whole. It would be open to the Minuters to renew their challenge at that stage, if so advised. Any issue of unfairness or prejudice to the Minuters was at this stage potential rather than actual.

[33] Mrs Hutchison sought to distinguish the case of *Lennox*. The present case, she submitted, was one where there would be sufficient evidence without any reference to the missing cctv.

[34] Further, the Procurator Fiscal Depute sought to distance the Crown from the circumstances of the loss of the cctv evidence. The Crown had sought the retention of the evidence but this had not been acted upon. The Crown was unaware of, and so cannot be

responsible for, the acts or omissions of the police prior to the unsuccessful request for retention being made.

Analysis

The scope of the Article 6 rights

[35] Article 6 of ECHR provides inter alia that:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…
>
> (3) Everyone charged with a criminal offence has the following minimum rights:
>
> …
>
> (b) to have adequate time and facilities for the preparation of his defence
> …
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

[36] "Fairness" is a wide concept. It does not convey any differing meaning under Article 6 than it would under the pre-HRA common law. It involves an assessment of the totality of the trial process. It is however not necessary in order to succeed under Article 6 for an accused person to show that he or she has suffered prejudice (*Crummock (Scotland) Ltd* v *HM Advocate 2000 SLT 677, per Lord Weir at 679A-B*). Prejudice may nevertheless be present in the circumstances.

[37] Section 6(1) of the Human Rights Act 1998 provides that it is "unlawful" for a public authority to act in a way which is incompatible with a Convention right. Public authorities for the purposes of section 6 include the Court (section 6(3)(a)), the Crown and the police (section 6(3)(b)).

[38] Prior to the insertion of section 288ZA into the 1995 Act, Convention issues in criminal proceedings were brought under section 57 of the Scotland Act 1998. Since the amendment of the 1995 Act, the principal basis for an argument under ECHR in criminal proceedings is section 6 of the HRA, and that such a challenge is a Compatibility Issue (section 288ZA(2)).

[39] Section 6 of HRA does not require in every case that the proceedings be brought to an end. ECHR is concerned, as the European Court of Human Rights has stated on many occasions, with remedies that are "practical and effective". The remedies that may be provided under section 6 unlawfulness can indeed include termination of proceedings but may also include measures short of that, including in some instances, a pecuniary remedy only.

[40] Article 6 applies to preliminary investigations with a view to criminal proceedings: *Imbrioscia* v *Switzerland (1994) 17 EHRR 441, paragraph 38*. The police at those investigative stages are under the supervision of the Lord Advocate or his representative. This was the foundation of the challenge to the compatibility with ECHR of detention proceedings in *Cadder* v *HM Advocate 2010 SLT 1125*.

[41] There is accordingly no merit in the Crown submission in the present case that any breach of ECHR rights was by the police and not the prosecutor.

[42] The question of fairness for the purposes of Article 6 applies to the trial as a whole. It is accordingly unusual, but not incompetent, to determine Article 6 issues in advance of the trial diet. The test to be applied when considering Article 6 in advance of the trial is whether it is possible for the Accused to receive a fair trial (*Rose* v *HM Advocate 2003 SCCR 569, paragraph 6*).

[43] Issues of competence or admissibility of evidence are primarily questions for the domestic law, the Convention being concerned with the fairness of the entire trial process: *Asch* v *Austria (1993) 15 EHRR 597, paragraph 26*; *Doorson* v *Netherlands (1996) 22 EHRR 330, paragraphs 67 and 78*. The Court may examine whether admission of a piece of evidence has resulted in an unfair trial: *Holland* v *HM Advocate 2005 SC (PC) 3, per Lord Rodger of Earlsferry, paragraph 39*.

The presence of prejudice

[44] As discussed above, it is not necessary for actual prejudice or the risk of same to an accused person to give rise to a claim of unfairness under Article 6 of ECHR. Under pre-ECHR Scots common law principles however, the material risk of prejudice is an essential ingredient. A plea in bar of trial on the ground of oppression will only be sustained where there is a risk of prejudice to the accused so grave that – in summary proceedings – no judge could be expected to put it out of his mind and reach a fair verdict (*McFadyen* v *Annan 1992 SCCR 186, court of 5 judges, Lord Morison dissenting*). This approach was applied in the cases of *McQuade* and *Lennox* (supra).

[45] Where the proceedings are found to be oppressive they cannot be permitted to continue: *HM Advocate* v *JRD 2015 SCCR 413, per Lord Uist at paragraph 11*. This is to be contrasted with the remedies available under Article 6 and section 6 of HRA.

[46] The approach adopted by parties in the present case demonstrates the common tendency to conflate the issues of Article 6 and oppression. For the reasons set out above, there can be significant overlap between the two concepts. This is especially so where there is said to be the risk of prejudice to an accused. Nevertheless, the remedies available differ. Bringing proceedings to an end must be seen as an exceptional course of action. An

infringement of Article 6 does not necessarily lead to that conclusion. A finding of oppression does.

[47] In this case it is clear from the above that the legal basis has not been properly narrated in the Minutes. The Procurator Fiscal Depute however plainly was not placed at any disadvantage, as she was able to answer the Minuters' arguments.

Scottish lost evidence cases

[48] *Anderson* v *Laverock* involved a charge of illegal possession of salmon contrary to section 7(1) of the Salmon and Freshwater Fisheries (Protection)(Scotland) Act 1951. Police officers and a water bailiff seized and thereafter inspected the fish found in possession of the appellant. The fish however had been destroyed – consumed – prior to the institution of criminal proceedings. There thus had been no opportunity for any person on the appellant's behalf to carry out an inspection of the fish. An objection was taken to the leading of evidence at trial about the condition of the fish by those who inspected it, this being secondary evidence. The primary evidence was said to be the fish itself. The sheriff repelled the objection and convicted the appellant. The Court held on appeal that, since the fish was perishable and it was not reasonably practicable or convenient to retain it, secondary evidence of its condition was competent. Where however a person lawfully seizes a fish intends disposing of it, the accused should be informed of that intention and should be allowed an opportunity to examine it first. As this had not occurred it was held by the Court that the appellant had suffered material prejudice. The conviction was accordingly quashed.

[49] In *McQuade* v *Vannet*, the appellant was charged with assault in a public place which was surveilled by cctv operated from a local block of flats. A police officer attended there and viewed the footage. The officer indicated in precognition that there was nothing of

evidential value on the footage. The footage was thus not retained as a production and in due course was overwritten. The appellant argued that this footage would have been a potentially useful item for his defence. It was accepted that the sheriff had correctly identified that the test in *McFadyen* should apply, but it was submitted that he had reached the wrong conclusion in repelling a plea in bar of trial.

[50] In delivering the opinion of the Court, Lord Sutherland expressed his view thus at page 20B-C:

> "The problem in the present case, as the sheriff recognised, it is not really known what, if anything, may have been on this particular video tape... Accordingly it is by no means impossible that this video would not show anything that happened in the car park at the material time…The sheriff, having set out as is accepted, the correct test on the matter, says that any prejudice arising from the non-availability of the video tape was possible rather than factual and could not be said to be so grave until more was known about it."

[51] *Rose* v *HM Advocate* concerned a similar issue but approached it from the perspective of Article 6 of ECHR. The case concerned a charge of assault in nightclub premises. The incident had been recorded on cctv tape but that recording had been overwritten. A club steward was expected to give evidence for the Crown at the trial that the Appellant was seen on cctv footage committing the assault, and that further, he had been injured prior to engaging with the complainer (so undermining the appellant's defence).

[52] In delivering the opinion of the Court Lord Justice General Cullen (as he then was) held at paragraph 7 that it was open to the appellant to found upon the steward's secondary evidence where it remained controversial as to what could be seen on the footage or as to its quality. The Court was not prepared to hold that the appellant could not receive a fair trial.

[53] *Lennox and Paton* v *HM Advocate* also concerned a charge of assault in a nightclub. The locus was covered by cctv cameras. The footage however had been destroyed prior to those acting for the appellants having the opportunity to view it. The Crown sought to lead

evidence at trial from witnesses who had viewed the incident on the cctv footage. This was not the only evidence in the Crown case. The Crown would have had sufficient evidence to ask a jury to convict even without the disputed cctv evidence, or indeed the secondary evidence of its content.

[54] A preliminary objection was taken to the admissibility of the secondary evidence of those witnesses who had viewed the cctv footage on an earlier occasion. In reaching its decision the Court approved an approach adopted by the trial judge (Emslie) in *HM Advocate* v *Haggerty*. In the *Haggerty* case, a challenge to the fairness of the trial under Article 6 was made in similar circumstances where video evidence had been destroyed. At paragraph 8 of *Lennox*, the Court (Lord Kingarth delivering the Opinion) quoted the following passage from the opinion of Lord Emslie in *Haggerty*:

> "Weighing all these matters up as best I can against the background of the information provided to me during the hearing, it seems to me that the risk of prejudice to the Minuter, if the Crown were allowed to lead identification evidence from the two police officers at his trial, based on their viewing the lost cctv images, would indeed be so grave that no direction from the trial judge could be expected to remove it. In my opinion such evidence could not be tested or challenged on the minuter's behalf in any meaningful or objective way, and it is denial of that opportunity which, from the very outset, militates strongly against a fair trial and exposed the minuter to a material risk of injustice. In the absence of such opportunity for testing or challenge, it is difficult to see how a jury could properly evaluate the officers' evidence, and in that situation there would be a real risk of the crucial issue of identification becoming a matter of mere speculation. The circumstances here, where the evidence in dispute is acknowledged to be central to the Crown case, are quite different to those in McQuade, where the lost cctv images were thought to have no evidential value at all. It was thus not surprising that in that case the Court declined to hold ab ante that grave prejudice to the accused existed."

[55] In *Lennox*, the challenge to the evidence was taken with reference to Article 6. The Appeal Court however held at paragraph 9 that the outcome would have been the same had the challenge been made according to the "well established principles of the common law".

[56] At paragraph 12, Lord Kingarth continued:

"It is not suggested that the appellants could not receive a fair trial, and no plea in bar of trial is advanced (as it was for example in McQuade v Vannet …). It was accepted nevertheless that the test which falls to be applied is whether leading of the proposed evidence could be said to be unfair and to create a risk of prejudice so grave that no direction by the trial judge could be expected to remove it. We readily accept that in many cases it may not be possible in advance of trial to decide whether, and to what extent, the accused may be prejudiced by the absence of primary evidence… In this case however the Crown have very frankly set out what they expect the witnesses to say what they could see. It appears clear that the evidence, although not essential to the Crown case, is seen as being of potential material assistance to the Crown on what, it appears to be accepted, would be the critical issue at the trial, namely whether the complainer was indeed assaulted. The evidence which is proposed is secondary evidence, consisting of the interpretation of cctv images, where the primary evidence which has been studied has been lost or destroyed while in the hands of the police or of third parties subject to their direction, in circumstances where neither the appellants nor their advisers have had the opportunity to see those images, and where they could not reasonably challenge or test the evidence in any meaningful way… We recognise that the proposed evidence in HM Advocate v Haggerty related to identification, and that that was the only evidence of identification available to the Crown, but we are not persuaded that these can be seen as material distinctions… We are in particular not persuaded that the existence of other evidence could be said to lessen the prejudice which arises from the proposed evidence in question."

[57] From the above cases it is possible to draw the following conclusions:

a) That any suggestion that the absence of destroyed or lost evidence is or will be unfair must be based on knowledge of what the evidence would contain if available.

b) Secondary evidence where the primary evidence has been lost, is competent, but that does not of itself suggest that it is permissible.

c) The use of such evidence may render a trial unfair even where there is other evidence available as proof of guilt. Indeed, the issue may still arise where it is not necessary for the Crown to use the secondary evidence at all.

d) The absence of an opportunity for an accused's representative to inspect the lost evidence in preparation for the trial may of itself give rise to an issue of unfairness of the trial as a whole.

e) Where secondary evidence of that evidence has sought to be led, the lack of opportunity to test it has been held to be render the trial unfair.

f) The above two propositions lie at the heart of the proper preparation and conduct of an accused person's defence. It follows that lost evidence which may be exculpatory must logically be approached in a similar manner.

The probative value of video evidence

[58] At the time that the *Lennox* case was decided, the use that could be made of video evidence was that set out by the decision of the Court in *Donnelly* v *HM Advocate SCCR 861*. Put short, the use to be made of such evidence was held to be as a means to check the reliability and credibility of witnesses, who gave evidence as to what the video evidence contained.

[59] *Donnelly* was overruled by a Court of five judges in *Gubinas* v *HM Advocate 2017 SCCR 463*. The Court held that where the provenance of the video evidence has been established or agreed, the video evidence is to be regarded as real evidence in causa. Accordingly, the fact finder is entitled to draw conclusions of fact from the content of the video evidence, irrespective of concurring or conflicting testimony (Lord Justice General (Carloway) at paragraph 59).

[60] In my judgment, the *Gubinas* case has a significant effect upon the view that must now be taken of the Court's earlier decision on the merits in the case of *Rose*. I do not demur from the test at paragraph 6 of *Rose* as to the determination of Article 6 issues ab ante, as this has been readily applied in subsequent cases. In light however of the recent decision of a larger court in *Gubinas*, I express doubt as to whether the Court would reach the same conclusion on the facts were the *Rose* case to be considered today. I consider the effect of the *Gubinas* case to be the basis of a material distinction between *Rose* and the present case.

The position in England and Wales

[61] Miss Howe placed significant reliance upon the conjoined cases of *Ebrahim and Mouat*. Those are cases where the Court applied an identical test but reached opposite conclusions.

[62] It is worthy of note that in England and Wales, the retention of video evidence is expressly regulated. At the time that the above cases were decided on appeal, the applicable regulations were in the form of a 1997 Code of Practice issued by the Association of Chief Police Officers. There was an express requirement to retain any such relevant material, that is to say any material that may have some bearing on an investigation (and where in doubt, to err on the side of preservation).

[63] It was this duty to record and retain that founded the appeals and in turn, informed the reasoning of the Court of Appeal. It is clear from paragraph 74 of the judgment of Brooke LJ that the identification of whether the investigator and prosecutor owed a duty must be the starting point of any examination where proceedings are sought to be stayed due to unpreserved evidence. If there is no such duty, the matter ends there. If there is and evidence has not been preserved or retained, then there must be consideration of whether there can be a fair trial, in terms of Article 6 of ECHR.

[64] At paragraph 27, Brooke LJ opined thus:

> "27. It must be remembered that it is a commonplace in criminal trials for a defendant to rely on "holes" in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which if believed would justify a safe conviction, then a trial should proceed, leaving the defendant to persuade the jury or justices not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence".

[65] At paragraph 28, the Court went on to cite the judgment of Lord Lane CJ in *Attorney General's Reference (No 1 of 1990) [1992] QB 330 at 644*, wherein it was held that where a stay in proceedings is sought a defendant must show that he will suffer serious prejudice were the trial to continue. This case of course pre-dated the enactment of HRA, and so the Lord Chief Justice did not have Article 6 of ECHR in mind.

[66] The Court refused the judicial review application of *Ebrahim*. It was a case that was on its facts quite similar to those of *McQuade* v *Vannet*. The defendant had been charged with assault in a supermarket. A police officer had attended and had interrogated the cctv system at the premises. The incident had not, according to the officer, been captured on any of the system's cameras, that is to say, the footage contained nothing of evidential value. The footage was not retained and in due course was overwritten. The Court held that the magistrates were correct to refuse to bring proceedings to an end. The decision at first instance was based substantially upon the fact that there was no certainty that the incident had been recorded on cctv, and hence no duty to further scrutinise the cctv footage was incumbent upon the investigating authorities (paragraph 69).

[67] The Court however allowed the appeal in the case of *Mouat*. This involved video footage filmed by police officers themselves. It was taken from a police vehicle that had been following the vehicle driven by the appellant. The appellant was then stopped by the officers and issued with a fixed penalty notice for speeding. The footage was not retained. The appellant did not accept the fixed penalty and at trial sought to lead a defence of duress, his driving having been caused by the manner of driving of the police car. The appellant was convicted at trial. He had represented himself. The issue of fairness had not been raised. The Court's decision was based significantly upon inconsistent information as to the applicable policy for retention of video footage provided to the court below. The decision of the inferior

court thus could not stand. The approach taken on the merits of *Mouat* offers little assistance to the present case.

[68] There are some similar issues of principle set out in the reasoning of the Court of Appeal to those identified in Scottish cases, there are also significant differences. Most importantly, the cases of *Ebrahim* and *Mouat* were determined on the issue of whether or not there was a breach of express duty to preserve and retain evidence. I was not alerted to the existence of any corresponding provision in Scotland. I quite accept that there are cases where lost evidence has disadvantaged the prosecutor as well as the defence, in the manner highlighted by Brooke LJ. I am not however concerned with such a case. The Crown in the present case is content to proceed as if the cctv had never existed and thus is in no way disadvantaged.

[69] The above in my view amount to material distinctions.

Decision and reasons

[70] This is undoubtedly a complex case. I am very grateful to Miss Howe and Mrs Hutchison for their diligent efforts in preparation and conduct of their respective arguments.

Article 6

[71] This is a case where it is known that the cctv footage contained relevant material. This is not a situation akin to that which prevailed in *McQuade* v *Vannet*.

[72] Whilst the destruction of the video evidence in this case is not said to have been deliberate, I do not understand how it could ever have been seen as anything other than pertinent by the officers who had viewed it. These officers were instrumental in the investigation of this case. It should have been obvious from the outset that it required to be preserved. This situation is not only highly regrettable but also was entirely avoidable.

[73] It would be competent for the Crown or defence to lead secondary evidence as to the content of the video footage. This would however not address the issue highlighted in both *Anderson* v *Laverock* and *Lennox*, namely that the Minuters' agents have not, and will not, be afforded an opportunity to inspect the footage in advance of the trial and so cannot be informed beyond the interpretation of others (indeed in brief terms) as to its content when preparing cross examination of the two civilian Crown witnesses.

[74] Following *Gubinas*, were this footage available, it would have been evidence in causa, capable of contradicting the principal Crown witnesses, irrespective of the position adopted by any other witness in the case. Evidence of this type may be capable of giving rise to the reasonable doubt as to guilt.

[75] In the cases I have referred to, the point was made that the interpretation by witnesses of incriminating video evidence could not be challenged or tested in any reasonable or meaningful way. The present case concerns exculpatory evidence. It seems to me however that the corollary to the position in *Lennox* must apply, namely that it would be impossible in this case to accredit the accuracy of the video footage in any reasonable or meaningful way by secondary evidence.

[76] Further, the *Gubinas* case confers a legal right for the content of video evidence to be determined, where its provenance is established or agreed, without recourse to any further evidence of interpretation. This right has been permanently lost in the present case.

[77] The issue raised in this case is in terms of Article 6 of ECHR. The one case involving lost video evidence decided by reference to Article 6 in Scotland is *Rose*. Following the test set out in that case, I consider that it is possible in this case to decide the issue ab ante. This is so because the expected facts of the case are in short compass, and the likely impact of the cctv footage on the Crown case is clear. The video evidence is lost and cannot be retrieved.

The question is therefore whether, in the circumstances of this case, the Minuters can ever receive a fair trial.

[78] I consider that the loss of the cctv footage does infringe the Article 6 (1) right of both Minuters to a fair trial. The lost evidence is in my view material. It per se may have been sufficient to persuade the Court to acquit. There would be a significant risk of injustice were this case to be permitted to proceed to trial.

[79] The Crown's stated intent simply not to lead any evidence as to the content of the cctv affords no solution. This case concerns exculpatory evidence.

[80] As I highlighted above, prejudice to the Minuters is not necessary to establish a contravention of their Article 6 rights, but may nevertheless be present. In this case, it undoubtedly is. They have lost the opportunity to inspect and, if so advised, lead primary exculpatory evidence. They have lost the legal right for the Court to form conclusions as to the content thereof. I am not considering a case where there is a risk of prejudice. Real and material prejudice has already been caused to both Minuters in the present case.

[81] Under Article 6 of ECHR and section 6 of HRA, I hold that it would be unfair and so, unlawful for this trial to proceed without the cctv footage. Having so decided I must identify a remedy that is practical and effective. No trial, even if conducted impeccably, can ameliorate the unfairness I have identified. The only remedy available is to take the exceptional course of bringing the proceedings to an end. The appropriate disposal therefore must be desertion simpliciter.

Oppression

[82] Whilst the foregoing would adequately address the issue raised in the Minutes, I would add some further comments. I have already observed that there can in many cases be

considerable overlap between issues under Article 6 and the common law concept of oppression. It is not disputed in this case that the test for oppression is that set out in *McFadyen*.

[83] I have already established that there is material prejudice in this case. For the reasons already set out, I consider this is so grave that no sheriff would be able to put it out of his or her mind and reach a fair determination at trial. I would also hold therefore that it would be oppressive for the Crown to maintain a prosecution of the Minuters.