



APPEAL COURT, HIGH COURT OF JUSTICIARY

2022 HCJAC 11
HCA/2021/83/XC

Lord Justice General
Lord Pentland
Lord Matthews

STATEMENT OF REASONS

issued by LORD MATTHEWS

in the application for permission to appeal to the Supreme Court of the United Kingdom

by

JSC

Applicant

against

HER MAJESTY'S ADVOCATE

Respondent

Applicant: Shand; Paterson Bell (for Murray Ormiston, Aberdeen)
Respondent: Prentice QC (sol adv) AD; the Crown Agent

3 February 2022

The appeal

[1] The applicant was indicted on three charges. He appealed against his conviction in respect of: charge 1, lewd and libidinous practices and behaviour against one complainer, H; and charge 3; lewd and libidinous practices and behaviour towards and sodomy of a second complainer, L. Charge 2 was found not proven. The appeal proceeded on multiple

grounds, including an alleged failure by the Crown to disclose certain material information. That is the only ground upon which he now seeks permission to appeal to the Supreme Court of the United Kingdom. He avers that this court erred in not finding that the Crown's failure to disclose certain information breached the applicant's rights under Articles 6(1), 6(3)(b) and 6(3)(d) of the European Convention on Human Rights.

The information

[2] The applicant maintained that the Crown had failed to disclose three pieces of information. The first was an oral account by C, given to the police. The complainer H had said in her police statement that C was present when the abuse, which was the subject of charge 2, took place. When the police requested a statement from C, she told them that the applicant had never abused her, and that H needed psychiatric help. The applicant's defence team were told that C had "nothing to report".

[3] The second piece of information was an oral account given to the police by MC. MC had also told officers that she had never been abused by the applicant. H testified that the applicant had abused MC and CC. The defence were told that MC had "nothing to report".

[4] The third piece of information was a police statement obtained from D, who was the applicant's uncle. In that statement, D said that H's mother had a history of accusing people of sexually abusing her in the hope of obtaining compensation. She "coerced" other women into saying that they had been sexually abused for financial gain. H had falsely accused him of abusing her in the past. He had shared a room with the applicant during the period of charges 1 and 2, and never saw the applicant behaving in an inappropriate manner. Whilst the applicant acknowledged that much of this would not be admissible in evidence, if it had

been disclosed, it would have merited further enquiry which could have revealed admissible evidence concerning the activities of H's mother.

The court's decision

[5] The defence had been told that C did not support the evidence of H. This was put to H in cross-examination. There was no material difference between what had been disclosed and what is now desiderated, thus no material failure of disclosure. If the defence had been told that C denied ever being abused by the applicant, and that she denied that H had ever been abused by the applicant, this could have been put to H, but it would not have constituted evidence. In so far as C expressed an opinion about H's mental faculties, that would not have been admissible. In any event, the applicant was acquitted of charge 2, which libelled the abuse which H had said that C had witnessed. It was impossible to find that a miscarriage of justice had occurred on that basis.

[6] The allegation made by H during her evidence, that the applicant had abused MC and CC, was not libelled and was not admissible. Any exploration of that would have been regarded as collateral. Once that information had been volunteered in court, it would have been open to the defence team to precognosce MC and CC, presumably on the basis of the applicant's instruction that he did not abuse them.

[7] Much of the material contained within D's police statement and subsequent affidavit was hearsay. None of it was relevant. D's account that H's mother was mentally unstable was irrelevant. Whether H had falsely accused him of abuse in the past was collateral. There was nothing in the information which C, D, MC and CC provided which was relevant, other than the fact that C did not support H in H's assertion that C was present whilst H was raped. The ground was without merit.

The application for permission

[8] The applicant seeks permission to appeal on the basis that the information in question met the relevant test for disclosure, in that it might have materially weakened the case for the Crown and materially strengthened that for the defence. He submits that the court erred in its application of the test in *McInnes v HM Advocate* 2010 SC (UKSC) 28, in that it approached matters on the basis that the Crown's obligation of disclosure did not cover material which the defence ought to have been able to discover during its own preparations. He maintains that the case raises issues of general public importance, namely, whether, and to what extent, the responsibilities of the Crown under Article 6, and the test for a miscarriage of justice, are modified in light of the suggestion that the defence ought to have carried out more investigations. This raised a question of the extent to which the Crown can seek to rely on that failure in circumstances in which it knew the true position, and passed inaccurate information to the defence.

Decision

[9] The Crown has a duty to disclose material to the defence which might materially weaken the Crown case or materially strengthen the defence case (*McInnes v HM Advocate*, para 19; Criminal Licensing and Justice (Scotland) Act 2010, s 121(3)). Any failure by the Crown to disclose material that satisfies this test is incompatible with the accused's Article 6 Convention rights. All police statements of any witnesses on the Crown list must be disclosed to the defence before the trial (*McDonald v HM Advocate* 2010 SC (PC) 1, para 51). There is no suggestion that this regime, which formed the basis of the Court's decision, is incompatible with the Convention. No compatibility issue arises.

[10] None of the information which was the subject of this appeal was relevant, with the exception of C's denial that she witnessed the applicant raping H. The fact that C did not support H was, however, put to H in cross-examination, and the applicant was acquitted of charge 2. It cannot be said that the information about C's denial differed in any material respects from what was disclosed and might have materially weakened the Crown case or materially strengthened the defence case in relation to the charges on which he was convicted. There was no material failure of disclosure. D was not on the list of witnesses. His statement did not fall within the ambit of the rule in *McDonald*.

[11] A trial is in any event not to be taken to have been unfair just because of an instance of non-disclosure. The significance and consequences of the non-disclosure must be assessed. The test that should be applied is whether, taking all the circumstances of the trial into account, there was a real possibility that the jury would have arrived at a different verdict (*McInnes v HM Advocate*, at para 20). By dint of the court's finding that there was no material difference between what the defence were told and what they now allege they should have been told, the *McInnes* test was not and could not have been met.

[12] The court did not suggest, as is now asserted, that the Crown's obligation does not cover material which the defence might be expected to find out for themselves. The court's comments in this regard were in the context of discussing what the defence might do when material was disclosed or otherwise revealed to them.

[13] The applicant is essentially complaining about the court's application of the correct test in the particular circumstances of the case. This does not raise an arguable point of law or one of general public importance. For these reasons, permission is refused. The non-disclosure of the information relied upon did not prejudice the fairness of the applicant's trial.