APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 20
HCA/2023/153/XC

Lord Justice General
Lord Pentland
Lady Wise

OPINION OF THE COURT (No.2)

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the

NOTE OF APPEAL

by

HIS MAJESTY'S ADVOCATE

Appellant

against

JM

Respondent

Appellant: L Ewing KC AD; the Crown Agent
Respondent: Renucci KC; Paterson Bell

24 May 2023

Introduction

[1] This opinion should be read in light of the earlier one ([2023] HCJAC 19) which accompanied the court's decision to refuse leave to amend the appellant's Note of Appeal to introduce a new ground based on Articles 3 and 8 of the European Convention. The appeal concerns whether, in terms of an email sent to the respondent's agents by a member of the

Crown Office and Procurator Fiscal staff, the appellant had clearly and unequivocally renounced her right to prosecute the respondent.

COPFS Instructions

[2] Within the COPFS there are Operational Instructions (No 23 of 2014), which are issued to all staff, in relation to intimating to accused persons, or their agents, that no action or no further action is to be taken. The key point is that any intimation must contain "a standard wording to ensure that it is clear that there is no renunciation of the Crown's right to prosecute". The standard wording is then set out. This states that the decision to take no action, or no further action, should be qualified by the words "at this time" and that the right to prosecute at a future date is reserved.

[3] There is a Ready Reckoner for those staff who work at the COPFS National Enquiry Point. This states, in red:

> "Do not advise the accused person of the no action/no further action marking decision. To do so could result in significant problems including an inability to take or re-raise proceedings… Accused persons should not be advised by NEP that it is a 'no action' or 'no further action' decision."

Identical advice is given, in purple, about what to say to defence law agents. Thus far, the instructions could hardly be clearer, although just how these are conveyed within the COPFS was not explored.

The correspondence

[4] The respondent's appearance on petition had been on 7 December 2020, but there was no pressing urgency when his case came up for marking for prosecution or otherwise

just over a year later. This was because of the extension to the normal 12 month time limit brought about by the emergency legislation (Coronavirus (Scotland) Act 2020, Sch 4 Part 4).

[5] Solemn non-sexual offence cases (such as the present prosecution), which are not destined for the High Court, are no longer reported to Crown Office. They are not marked by Crown Counsel but by senior Procurators Fiscal Depute, known as indicters, under delegated authority.

[6] On 16 December 2021 an indicter marked the respondent's case as "no further action". The marking is done digitally and takes a form as if it were an instruction from Crown Counsel. The court was not told where the marking had been done, but it was not necessarily in Glasgow, to which Procurator Fiscal's office the case had been reported. The court was not shown what was recorded on the relevant digital file, but it was told that it was simply, as already noted, "no further action". The reason for the marking decision was a lack of sufficient evidence; perhaps a lack of corroboration. The instruction would be picked up electronically by the Glasgow PFD "with responsibility for the case". On 18 December that PFD instructed his staff that the decision be intimated to the respondent's agents. It was explained by the Advocate depute that the expectation would be that the relative letter would contain the standard wording (above).

[7] On 20 December 2021, the complainer was advised, presumably by a PFD, of the "no further action" decision. That decision came to be relayed, through the parties' daughter, to the respondent. He, in turn, contacted his law agents. On the same date, the law agents sent an email to the PF's office in Glasgow, marked for the attention of the Sheriff & Jury Unit, requesting an update on the case. On the next day, they sent an identical email, again for the attention of that unit, to the COPFS National Enquiry Point. An NEP operator, who was described as a COPFS "administrative member of staff" forwarded this email to the Glasgow

PF's office "for their attention and response". The forwarding email did not identify the intended recipient more specifically. It intimated, although this was already known to the relevant Glasgow PFD, that "This case has been marked no further action".

[8] On 23 December, the Glasgow PF's office replied to the respondent's agents as follows:

> "Good afternoon,
> There are to be no further proceedings in this case.
> Kind regards".

The email was neither signed in any manner, nor did it name the sender. It was clear, however, from the email address that it had emanated from the Glasgow PF's office and from the subject line that it related to the charges against the respondent. It was sent by a "fiscal officer", which is a junior administrative grade, who had been tasked with monitoring the generic Glasgow PF email inbox to which the NEP message had been sent.

[9] Meantime, on 21 December, a letter said to be from a PFD at the Glasgow Office, but which is neither signed nor contains the name of the sender, was sent by post to the respondent's agent intimating, in terms of the standard wording, that there was to be no further action "at this time" but that the appellant reserved the right to prosecute at a future date. This letter did not reach the agent until after the email of 23 December had been received and the respondent had been advised of its content. It was probably received during the agent's Christmas/New Year holidays and was ultimately just filed. Its content was not conveyed to the respondent.

The sheriff's decision

[10] Following upon a successful review, by the complainer, of the decision under the *Lord Advocate's Rules: Review of a Decision not to Prosecute*, the respondent was indicted in

April 2022. The marking AD had been unaware of the email of 23 December. A plea in bar of trial was duly tabled and sustained. The sheriff explains that the Crown had accepted that, although the administrative staff were not authorised to take a "no action" decision, they did have the authority to communicate a decision, which had been taken by a PFD, to others. She reasoned that, on the basis of *HM Advocate* v *Cooney* 2022 SC 108 and *Thom* v *HM Advocate* 1976 JC 48, receipt of the email of 23 December had well-understood consequences. The email, which responded directly to the enquiry from the respondent's agent, was a clear and unequivocal renunciation of the right to prosecute. The sheriff states that she had regard to all the circumstances, including the later receipt of the letter of 21 December. The key factor was the receipt of the information in the email by the respondent or his agent.

Submissions

[11] The Advocate depute recognised that a clear and unequivocal statement that a prosecution would not take place amounted to a renunciation of the right to prosecute (*Thom* v *HM Advocate*). It was the equivalent of a motion to desert *simpliciter* (see also *HM Advocate* v *Cooney*). All relevant circumstances required consideration (see *HM Advocate* v *Weir* 2005 SCCR 821).

[12] The sheriff had failed to consider all the circumstances, notably the letter of 21 December. The focus should not be solely on the information conveyed by the email of 23 December. Rather, there should be an objective assessment of the public statement made by the appellant. The sheriff failed to give any weight to the differences in the two statements (the email and the letter) in terms of form and content. The sheriff had failed to consider that the letter was sent on the instructions of a legally qualified person with authority to issue it. The fiscal officer did not have authority to send the email. The sheriff

erred in failing to consider the context of the email as distinct from its terms. In the circumstances, the email was not a clear and unequivocal renunciation. There was a need to identify the decision of the appellant to which she was being held bound. She had not made such a decision; the email being an administrative or clerical error.

[13] The respondent replied that the issue of whether the email was a clear and unequivocal renunciation depended upon whether: it was a clear renunciation; it properly identified the appellant; and it related to the relevant charges (*HM Advocate* v *Cooney* at para [37]). All three matters were demonstrated. It was not for the court to act as a review body of the internal workings and practices of the Crown any more than it was the court's function to review the appellant's exercise of her discretion on whether to prosecute (*HM Advocate* v *Cooney* at para [223]). It was not a situation where no decision had been made (cf *HM Advocate* v *Weir*).

Decision

[14] In *HM Advocate* v *Cooney* 2022 JC 108 it was acknowledged (LJC (Lady Dorrian), delivering the opinion of the court, at para [13] and following *Thom* v *HM Advocate* 1976 JC 48) that the Lord Advocate was entitled to renounce the right to prosecute and that a clear and unequivocal renunciation will be binding. It was the equivalent of a desertion *simpliciter* in cases in which a process on indictment was in dependence. The making of a public statement or the writing of a letter is "a deliberate and voluntary decision taken by the Lord Advocate or those with her authority in the full awareness of the consequences" (*ibid* para [14]).

[15] The Lord Justice Clerk in *Cooney* continued:

> "[17] The right to make a decision renouncing her intention to prosecute – and the obligation to be held to it – are reciprocal elements stemming from the absolute discretion of the Lord Advocate to decide whether or not to prosecute. The notion that the Lord Advocate should be held to a clear and unequivocal statement that she will not prosecute a named individual for a particular criminal offence is a corollary of the absolute power of decision making in this area which vests in the Lord Advocate, and which prevents the court from making inquiry into, or interfering with, the exercise of her discretion on such matters."

[16] When considering a letter or email containing an apparent renunciation, it is, of course, necessary to look at the surrounding circumstances, but that will seldom involve having regard to events which occurred after the letter or email has been received by the accused. In *HM Advocate* v *Weir* 2005 SCCR 821 there had been a letter from the PF's clerk to an accused's law agent apparently renouncing the right to prosecute, albeit that the letter bore the reference number of a different case. There had been a decision not to prosecute in the case to which the reference related. The letter had been sent to the accused's agent in error. There had been no decision on behalf of the Lord Advocate not to prosecute. The clerk had made a mistake in sending the letter to the wrong accused. He had not been authorised to send that letter to the correct accused. The letter could not therefore bind the Crown in his case (see LJC (Gill), delivering the opinion of the court, at para [12]). These circumstances are not replicated here.

[17] The circumstances of the present case are fundamentally different from those which arose in *Weir*. Here, there was a properly authorised decision not to prosecute the respondent. Whatever the Crown's general operating instructions or ready reckoner might say, that decision was recorded digitally on the COPFS system. When the enquiry came into the National Enquiry Point, the operative would have seen, on interrogating the system, that that decision had been taken. She forwarded the enquiry to the PF's office in Glasgow with a request for that office to "respond" accordingly. That is what was done. The fiscal officer

may not have been authorised to take any decision not to prosecute on behalf of the Lord Advocate, but she was authorised to communicate decisions which had been duly made by a PFD. That is what occurred. A letter received after that communication had been made to the accused is not capable of altering matters where the email received earlier contains an unqualified statement that there "are to be no further proceedings" in the case.

[18] The words used in the email, in the context in which the email was sent, are clear and unequivocal. They amount to a renunciation of the right to prosecute. The appeal is therefore refused.