APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 23
HCA/2022/000175/XC

Lord Woolman
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD WOOLMAN

in

Appeal

by

MA

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: N Shand; Philip Rooney & Co, Glasgow
Respondent: A Edwards QC; Crown Agent

9 June 2022

Introduction

[1] How far does the Crown's duty of disclosure extend? Specifically, must it disclose the prior convictions of an individual who has been incriminated, but who is not listed as a witness in the case? That is the sharp issue in this appeal.

Background

[2] The Crown alleges that the appellant sold a flat that he did not own. It has charged him, acting along with unknown others, with fraud and money laundering. The main prosecution evidence is the fact that the proceeds of sale went through the appellant's bank account. He denies any involvement in the crimes. He maintains that an individual called TA had access to the bank account at the relevant time.

Procedural history

[3] The indictment first called on 15 January 2021 at Glasgow Sheriff Court. Before the hearing, the appellant lodged two documents. They were a special defence of incrimination naming TA as the perpetrator (while acting along with others), and a defence statement which sought disclosure of "the entire case against [the appellant] and any evidence which may exculpate him and … any evidence which may undermine the prosecution case".

[4] The court scheduled a trial diet to begin on 16 August 2021. On that date, however, the sheriff adjourned proceedings on the joint motion of parties. The Crown had witness difficulties, while the defence wished to carry out further enquiries.

[5] In advance of the adjourned trial diet on 25 April 2022, the appellant lodged a second defence statement. It sought disclosure of the following information about TA:

(i) Any relevant previous convictions and pending cases from any UK jurisdiction.

(ii) Any information whatsoever suggesting that he has been involved in similar criminality in the past.

[6] Mr Shand explained that the defence (a) only sought disclosure of material suggesting dishonesty, (b) does not know whether any such material exists, and (c) intends to use any such information to decide whether to put TA's name on the witness list.

The sheriff's decision

[7] The sheriff refused the application. This appeal is taken against his decision. There is no need to rehearse his judgment, because the appellant advanced the same arguments in this court. One point, however, is significant. In his report the sheriff records that Mr Shand told him that he did not intend to lead TA as a witness. The Crown endorses the sheriff's recollection on this point. The judgment proceeded on that basis.

Grounds of appeal

[8] There are two interlinked grounds of appeal. First, the material had to be disclosed in terms of section 121 of the Criminal Justice and Licensing (Scotland) Act 2010. Second, the sheriff's decision breached the appellant's ECHR article 6 rights. Before turning to these contentions, we require to address three preliminary matters.

Competency of the application

[9] Defence statements are regulated by section 70A of the Criminal Procedure (Scotland) Act 1995. A new defence statement is only competent where it stems from a material change in circumstances: *McCarthy* v *HMA* 2021 SCCR 6 at para [22]. The appellant makes no reference to such a change in the second statement. Before us, Mr Shand accepted responsibility for that omission. He said that a second statement was required because (a) he was newly instructed in the case, and (b) the appellant had provided much

fuller information on the question of incrimination. With hesitation we conclude that the application is competent. We note that the Crown took no exception to the lodging of the second statement.

Accuracy of the sheriff's report

[10] The grounds of appeal do not query the accuracy of the sheriff's report. In the written note of argument, however, the appellant gives a different narrative. Mr Shand says that the sheriff asked him whether TA was going to be a witness. He responded by saying something along the lines of "as things stand we are not intending to call TA". If this point had been mentioned in the grounds of appeal, a supplementary note could have been requested from the sheriff. He in turn might have asked for a transcript of the hearing. It is significant because it changes the factual fulcrum. Fortunately, we are able to reach our decision on other grounds.

Listing TA as a defence witness

[11] This application has a degree of artificiality. It arises because the defence has elected not to place TA's name on the witness list. If it had done so, that would engage the Crown's duty of disclosure. We are not persuaded that there would be any prejudice to the defence in following that course.

Legal framework

[12] We now return to the grounds of appeal. Section 121 of the 2010 Act provides.

> "(2) As soon as practicable after the appearance or the recording of the plea, the prosecutor must—

(a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and

(b) disclose to the accused the information to which subsection (3) applies.

(3) This subsection applies to information if—

(a) the information would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused,

(b) the information would materially strengthen the accused's case, or

(c) the information is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused."

[13] Section 122 states:

"(2) As soon as practicable after complying with the requirement, the prosecutor must disclose to the accused details of any information which the prosecutor is not required to disclose under section 121(2)(b) but which may be relevant to the case for or against the accused."

First ground of appeal - does the requested material fall within section 123?

[14] We reject Mr Shand's elaborate argument to the effect that the Crown is bound to disclose anything that might conceivably bear upon the defence. That is too broad. The jurisprudence confines disclosure to information about actual witnesses: *Murtagh* v *HM Advocate* 1992 SCCR 496, *Holland* v *HM Advocate* 2005 1 SC (PC) 3, *Allison* v *HM Advocate* 2010 SC (UKSC) 19. A person cannot be regarded as a witness simply because he has been incriminated. In our procedure a witness is someone whose name has been put on a witness list. If Mr Shand's argument were correct, it would be open to the defence to incriminate any well-known criminal and then insist on disclosure of his previous convictions. But like Banquo's ghost such an incriminee would never materialise.

Second ground of appeal

[15] We reject the argument that the sheriff's decision infringed ECHR article 6. The right to a fair trial does not require information to be disclosed unless it is material: *Murtagh* at para [34]. We see no force in the "equality of arms" argument, which we understood to mean that the defence should be put in the same position as the Crown in listing witnesses. Mr Shand's suggestion that, if a particular individual is "under genuine consideration", their criminal record should be available to assist with that process, would be unworkable. In any event, the question of whether article 6 had been infringed because the appellant had not received a fair trial could only be determined after the conclusion of the prosecution, in the light of the totality of the procedure in the case.

[16] Mr Shand also submits that any material recovered under the second call would enable the appellant to lead similar fact evidence to support the defence of incrimination in line with the *Moorov* principle. This court has recently rejected that approach: (*JSC* v *HMA* [2021] HCJAC 49). Further the court refused leave to appeal to the Supreme Court: 2022 HCJAC 11. We see no reason to revisit that decision.

Conclusion

[17] The application has all the hallmarks of a fishing diligence. As in *McCarthy* it appears to us that the appellant "has no basis, apart from his own musings, for supposing that" the information exists para [24].

[18] If granted, the order would be an unwarranted invasion of TA's ECHR article 8 rights. That is because it is unclear how any of the material sought would be relevant evidence at the trial. Granting the order would also have wider, adverse consequences. It would usurp finite Crown resources.

[19] We refuse the appeal.