



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 26  
HCA/2021/380/XC

Lord Justice General  
Lord Malcolm  
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

the Appeal under Section 107B of the Criminal Procedure (Scotland) Act 1995

by

HER MAJESTY'S ADVOCATE

Appellant

against

JONATHAN RICHARD PORTER

Respondent

**Appellant: Prentice QC (sol adv) AD; the Crown Agent**

**Respondent: Mackintosh QC, J Mulgrew (sol adv); John Pryde & Co (for Fraser & Co, Livingston)**

10 December 2021

[1] The respondent was indicted to a preliminary hearing at the High Court on 30 June 2021. The fifth charge was that he had conspired “with an undercover police officer known as officer K ... to commit sexual offences against a child”.

[2] On 25 May 2021, the appellant sought a witness anonymity order under section 271N of the 1995 Act in respect of officer K, on the basis that she was an undercover police officer, albeit that the request from the police did not expressly state that. The order was granted on

the basis that the appellant would supply the name of the officer to the court in terms of section 271P of the Act. This was duly done and the name is kept under sealed conditions by the court. It was provided that the witness could use the pseudonym officer K, a female adult.

[3] The trial took place in early October 2021. When officer K started to give evidence, it became clear that she was not a police officer; rather, she was an undercover authorised civilian officer. Objection was taken to the admissibility of her evidence on the basis that she was not the person described in the charge, or on the list of witnesses. She would otherwise have been speaking to certain chat logs involving the accused following upon an authorised surveillance operation. The contention was that the defence had in some way been misled.

[4] The trial judge noted that the witness was listed as a police officer. The witness who appeared was not a police officer and was therefore not the witness in the list. This amounted to a material irregularity. She therefore held the evidence inadmissible. The defence had been misled and there had been no opportunity to prepare and investigate the context in which the witness had spoken in the chat log to the appellant.

[5] The trial judge had anticipated the Crown then moving to desert the diet *pro loco et tempore*. That motion did not come. Rather, the advocate depute moved for leave to appeal under section 107B of the 1995 Act. Since leave was granted, and the appeal was not an expedited one, the diet was deserted in any event (1995 Act, s 107F(2)).

[6] The Crown maintained that the witness, who had appeared in court, was the one who was listed, albeit that the designation was incorrect. There had been no unfairness. There was no requirement to state the designation of a witness under the 1995 Act. In any event, that list could be amended (*Brown v HM Advocate* 1998 SCCR 461). Given that the evidence of the witness had been disclosed to the defence, there had been no prejudice. In

the event of the appeal being allowed, the Crown sought leave to pursue a new prosecution under section 107F(5) of the 1995 Act.

[7] The respondent maintained that, when he had been charged, he had been referred to as an undercover police officer. The disclosure statements from officer K bore to be from an unidentified police constable. The indictment had given due notice of the witnesses and productions. There had to be a proper description available to enable the defence to prepare for trial. There had been no objection to the anonymity order because the person concerned had been a police officer. Had the defence been made aware that the witness was not a police officer, the nature of any cross-examination would have been different.

[8] The witness who appeared at the trial was the person who had been granted anonymity previously and had been entitled to use the pseudonym "officer K", whether that witness was a police officer or otherwise. The true identity of the witness was provided to the court and no objection to that had been taken. Errors can occur in the description of witnesses. In this case, the description was immaterial and could have been easily cured by amendment to the indictment, notably to charge 5. In that event, the trial could have continued. As it is, the appellant will require leave to pursue a new prosecution. No doubt the indictment in that prosecution will correctly describe the witness in the charge and in the witness list. The appeal is allowed on that basis.