APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 87
HCA/2019/91/XC

Lord Justice General
Lord Drummond Young
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

FRANCIS CAIRNEY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: S Collins (sol adv); Collins & Co (for Gilroy & Co, Glasgow)
Respondent: A Prentice QC (sol adv) AD; the Crown Agent

27 November 2019

Introduction

[1] This appeal raises an important question concerning the Crown's duty of disclosure of a complainer's previous convictions, where these have taken place in England. Hitherto, the Crown has not routinely searched for such convictions.

General

[2] On 14 December 2018, at the Sheriff Court in Hamilton, the appellant was convicted of seven charges of indecent assault (charges 1, 4, 6-10) and two charges of lewd, indecent and libidinous practices (charges 2 and 5). The offences covered a period from 1965 to 1986. Four of the complainers (charges 1, 2, 4 and 5) had been members of a church boys' football team, which the appellant coached. One of the complainers (charges 5 and 6), and four other teenagers (charges 7-10), were members of Celtic Boys Club, which the appellant also coached. During the trial, the appellant disputed whether one of the complainers, namely WA (charge 8), had been in the Celtic Boys Club team.

[3] On 7 February 2019, the sheriff sentenced the appellant to consecutive periods of 4 months on each of charges 1, 2, 4, 6, 7, 9, and 10, 8 months on charge 5 and 1 year on charge 8. The total was therefore 4 years imprisonment. Charge 8 was regarded as more serious than the others as it involved the appellant forcing WA to masturbate him to the point of ejaculation.

The evidence

[4] There were eight complainers in total, all of whom, now middle aged men, gave evidence. The sheriff reports that of all the complainers, WA was the most forcefully cross-examined. This was on the basis that he had not, as he said he had, played for Celtic Boys Club at under 16 level. In his speech to the jury, defence counsel had said that WA's testimony deserved special attention. His evidence was an insult to everyone in the court room and a nonsense. What WA had said had happened to him had been on a different scale from the incidents involving the other complainers. He ridiculed WA's account of being unable to have a bath since 1974, when, according to WA, the appellant had made him

have cold baths while he (the appellant) held a bag of sweeties, drooling. The sheriff reports that any further challenge to the credibility of the witness, which was based on previous convictions, would have paled into insignificance. There had been an abundance of evidence and, in a number of respects, what had been said by one complainer had been echoed by what had been said by another. This was so, even although there was no suggestion that the complainers had had contact and may thus have colluded with each other. Some had not even been born when the abuse had happened to others. The ways in which the appellant had been described as picking on the complainers, by isolating them in a hall, while pretending to treat them for injuries, and inviting them alone into his car, were remarkably similar. The sheriff did not consider that an added line of cross, relative to previous convictions, would have made a material difference to the verdicts.

The previous convictions

[5] The appellant had appeared on petition in April 2017. In accordance with normal practice, enquiries were made by the Crown to ascertain whether any of the complainers had criminal records in Scotland, with a view to determining whether these should be disclosed. In November 2017, an electronic printout from the Scottish Criminal Records Office revealed that, in 2013, WA had been issued with a procurator fiscal's fine for contraventions of sections 38 and 39 of the Criminal Justice and Licensing (Scotland) Act 2010 (statutory breach of the peace and stalking). He had pending charges for a further six contraventions of sections 38 and 39. The indictment was served in February 2018. The respondent had been aware that, in September 2017, the pending matters had resulted in the imposition of 2 years probation and a community payback order with a condition that the appellant be banished from the Isle of Bute. An instruction was noted to the effect that this

information should be disclosed to the appellant's agents. The information was sent from the respondent's Hamilton office to that in Glasgow. It was to be put on a pen drive for the appellant's agent to uplift. For unknown reasons, this was not done. Prior to the commencement of the trial, the appellant's agents were told, in response to a specific enquiry, that the complainers had no previous convictions.

[6] In March 2019, it came to the attention of the appellant's agent that WA did have previous convictions, both in Scotland and in England. Upon enquiry by the respondent, a printout revealed that this was the case. The convictions in England had occurred between 1980 and 2000 and were for theft, five offences of obtaining property by deception, possession of controlled drugs, criminal damage, obstruction, causing grievous bodily harm and failing to surrender to bail. The offence involving causing bodily harm attracted a 3 year prison sentence. The others were dealt with by non-custodial (but including suspended) sentences.

Submissions

[7] The appellant submitted that the nature of the complainer's convictions was such that they would have been relevant to his credibility. The Crown had checked WA's name against the Criminal History Service database, to which it had access and on which all Scottish convictions were recorded. The Crown had not accessed the Police National Computer, to which the police had access and which recorded all UK convictions. The Crown could readily have checked the PNC, which regularly provided data on previous convictions for use in prosecutions. The Crown ought to have disclosed the convictions (*HM Advocate* v *Murtagh* 2009 SCCR 790 at paras 22, 28-30). The credibility of WA had been central to the appellant's defence on charge 8. It had been a major focus of the cross-

examination of that complainer and the appellant's speech to the jury. No witness had confirmed that the appellant had played for the Celtic Boys Club team. One witness, who had been in the team, had no recollection of the appellant. It could not be said that the lack of the opportunity to cross-examine the complainer about his convictions might not possibly have affected the verdict (*Holland* v *HM Advocate* 2005 SC (PC) 3 at para 82). The failure to disclose amounted to a miscarriage of justice on charge 8. There was a real possibility that the jury would have reached a different verdict (*Hay* v *HM Advocate* 2011 JC 173 at para [19], citing *McInnes* v *HM Advocate* 2010 SC (UKSC) 28 at para 20).

[8] The Crown accepted that the data about WA's Scottish convictions had been held by the Scottish Criminal Records Office, who were an external government agency. The Crown could and did access that data. The Crown had no right of access to the PNC, other than through the police. There was a duty on the Crown to disclose the criminal history of complainers (*HM Advocate* v *Murtagh* (*supra*)) if known, but no routine check was carried out to find criminal records in jurisdictions other than Scotland. In terms of *Holland* v *HM Advocate* (*supra*), the obligation was limited to information held by the SCRO. Only if there had been a reasonable belief, that a complainer had relevant previous convictions elsewhere, would these records be sought (see COPFS Disclosure Manual, para 5.5 and Coulsfield: *Review of the Law and Practice and Disclosure in Criminal Proceedings in Scotland* (2007) para 11.5). There had been no failure to disclose information which was in the possession of the Crown. WA's police statement in 2013 had confirmed that he had moved to England fairly soon after the events libelled and that he had family residing there. That residency might have provided a reason for checking whether WA had a criminal history there. This had not been done by the Crown.

[9] It was accepted that the evidence of previous convictions, which demonstrated dishonesty, could be admitted in order to challenge credibility. The Scottish convictions did not indicate any dishonesty. Their use would have been open to objection as an attempt to establish collateral matters (*LL* v *HM Advocate* 2018 SCCR 189; *M (M)* v *HM Advocate (No. 2)* 2007 SCCR 159 and *CJM* v *HM Advocate* 2013 SCCR 215). The charge involving WA was one to which section 274 of the Criminal Procedure (Scotland) Act 1995 applied. The appellant would have had to have applied to the sheriff to allow questioning designed to elicit evidence that WA was not of good character. It may be that such an application would have been allowed in respect of the convictions of dishonesty.

[10] The test for determining whether a miscarriage of justice had occurred was whether there was a real possibility that there would have been a different verdict if the failure to disclose had not taken place (*Alison* v *HM Advocate* 2010 SCCR 277 at para 9 and *Hay* v *HM Advocate* (*supra*)). It was speculative to consider what effect the dishonesty convictions would have had. The sheriff reported upon the robust challenge. He doubted whether the crimes of dishonesty would have had much of a bearing on the jury's assessment of WA's credibility and reliability. WA had described the layout and practices of the Celtic Boys Club, which he could only have known if he had, as he said, been a member of the team. There had been no suggestion of collusion with other complainers.

Decision

[11] *Holland* v *HM Advocate* 2005 SC (PC) 3 (Lord Rodger at para [72]) determined that, as part of the duty to disclose information which "would be likely to be of material assistance to the proper preparation or presentation of the accused's defence" (*McLeod* v *HM Advocate (No. 2)* 1998 JC 67, LJG (Rodger) at 79), the Crown required to disclose the previous

convictions of witnesses. This was because this information would, at the very least, help in assessing the strengths and weaknesses of the witnesses. This disclosure would respect the principle of equality of arms. It accords with the *dicta* of the European Commission on Human Rights in *Jespers* v *Belgium* (1983) 5 EHRR 305 (at para 58) that, in terms of Article 6(1)(b), prosecuting authorities must disclose material which is either in their possession or which they could have "collected", and which may assist in undermining the credibility of prosecution witnesses. The obligation is restricted to convictions which could have a bearing on credibility (*HM Advocate* v *Murtagh* 2009 SCCR 610, Lord Hope at paras 30 and 34), rather than requiring disclosure of the entirety of a witness's criminal past. Other than in the context of a plea of self-defence, which may permit the use of a complainer's convictions for violence, it is generally only convictions for dishonesty (*CJM* v *HM Advocate* 2013 SCCR 215, LJC (Carloway) at para [32]) or attempts to pervert the course of justice which will be admissible. Even then, those of a trivial and ancient nature may fall outwith the net (*HM Advocate* v *Murtagh* (*supra*), Lord Hope at para 32).

[12] The notion that the Crown has to be in physical possession of the relevant information before it requires to be disclosed must be regarded as outmoded. The duty must, if equality of arms is to be preserved, extend to information which is readily searchable on a database to which the Crown have, or could readily have, access and the defence have not. In this case, obtaining access to a complainer's UK-wide criminal record by interrogating the Police National Computer must fall into this category. It, or a similar database, is presumably routinely used in order to produce the schedule of previous convictions which is available at, for example, the very early stage of a summary prosecution.

[13] It is surprising that, in a prosecution of the nature under consideration, the police themselves did not forward a note of the complainers' criminal records when reporting the case to the procurator fiscal. It is equally surprising that the procurator fiscal did not forward this information when seeking Crown counsel's instructions on whether to prosecute and on what charges. After all, as was hinted at in *Holland* v *HM Advocate* (*supra* at para [72]), this is "precisely the kind of thing" that ought to be known not only to the defence but also to the Crown before embarking on such a prosecution. It can be an essential element in assessing the prospects of a conviction.

[14] It follows that the Crown ought to have disclosed the English convictions to the appellant. The Scottish record is of no moment and would not have been admissible to challenge credibility or reliability. It is only the convictions for dishonesty in England that would have been admissible. They would have been permitted as a line of cross-examination under section 275 of the Criminal Procedure (Scotland) Act 1995. There is some force in the sheriff's view that the convictions for dishonesty, being of some vintage and attracting non-custodial disposals, may not have had a material bearing on the appellant's conviction on charge 8. Due respect has to be paid to his view on this. However, it is noticeable that the jury's verdict on charge 8 was by a majority, rather than, as with almost all of the other charges, unanimous. The defence appear to have made progress in the challenge to WA's credibility on the basis that he was unsupported in his account of having been in the Celtic Boys Club team. The fact that there was no evidence of collusion with the other complainers hardly excludes the possibility that he had obtained information about the premises and general team set up from other sources.

[15] The use of the previous convictions for dishonesty may have had a material bearing on the jury's consideration of the complainer's credibility on charge 8, with its unique

features, albeit that it had many similarities to the accounts given by the other complainers. The court considers that the failure to disclose the convictions, which the Crown could have accessed quite easily, has resulted in a miscarriage of justice. It will accordingly quash the conviction on charge 8.