SHERIFFDOM OF GRAMPIAN, HIGHLANDS AND ISLANDS AT ABERDEEN

[2017] SC ABE 66

ABE-2017-004357

NOTE BY SHERIFF ANDREW MILLER

In the cause

HER MAJESTY'S ADVOCATE

Against

NOEL DENNIS LUKE WEAVER

Accused

Act: Townsend; Procurator Fiscal Depute
Alt: McAllister, Solicitor

Aberdeen, 5 October 2017

Introduction/Background

[1] This indictment called before me for first diet in terms of S 71 of the Criminal Procedure (Scotland) Act 1995 ('the 1995 Act') on 26 September 2017. The indictment libels eight charges against the accused. Charge 1 alleges that on 29 August 2016 at 24 Seaton Place East, Aberdeen the accused assaulted Shareen Reid, his partner, by punching her on the head to her injury. The charge carries a bail aggravation. The accused is remanded in custody pending trial.

[2] At the first diet the procurator fiscal depute, Mr Townsend, lodged a notice under S 259(5) of the 1995 Act which sought to have admitted at trial evidence of two 'statements' (the status of which was disputed by the defence, as explained below) noted from a woman named Helena Broad, who died on 11 May 2017.

[3] On behalf of the accused, Mr McAllister stated that the S 259 application was to be opposed. After a brief adjournment for discussion between Crown and defence, I heard submissions on the matter.

The Two 'Statements'

[4] According to the S 259 application, the statements were noted from Ms Broad by police officers on 29 August 2016 "sometime after 1545 hours", in the case of one statement (noted by PC Taylor) and "between 1535 hours and 1600 hours", in the case of the other (noted by Sergeant Smith). Each of the notebook extracts comprises a number of pages from the relevant officer's notebook and contains information which bears to have been noted by that officer from Ms. Broad. In fact it appears to me that each of the notebook extracts contains notes of comments said to have been made by Ms. Broad on a single occasion, in the presence of both of these officers.

[5] The first of the two notebook extracts appears to indicate that PC Taylor attended at Seaton Place East, Aberdeen at about 1545 hours on 29 August 2016, that by that time other officers had a male under restraint outside a particular flat and that, within that flat, PC Taylor saw a distressed female who had a swollen nose. It appears therefore that PC Taylor arrived at the locus in the aftermath of the incident to which charge 1 relates. The notebook then contains other notes apparently relating to PC Taylor's initial attendance at this incident, before recording that at 1620 hours the same day he attended at the home of Helena Broad. The notebook then records the following:

> "Helena states that she has seen male (Noel Weaver) punch Shareen to the face once outside 24 SPE [Seaton Place East]. Has also seen male kicking at door of no 12".

These notes do not bear the signature of Helena Broad.

[6] PC Taylor's notes from the time of his initial attendance at the incident make reference to an unidentified female witness who is said to speak to an incident between a male and female but who "flatly refuses to disclose any details or provide a statement". It is not clear from PC Taylor's notebook whether this unidentified female witness was Helena Broad or someone else. However, the defence position as explained by Mr McAllister was that Helena Broad told police officers that she did not want to provide a statement or to be involved as a witness in any criminal proceedings. That position was not disputed by Mr Townsend for the Crown.

[7] The second of the two notebook extracts to which the Crown's S 259 application related comprises pages from the notebook of another police officer, Sergeant Smith, containing notes apparently taken between 1535 hours and 1600 hours on the same date, 29 August 2016. Once again the notes bear to contain information noted from Helena Broad. The notebook contains the following passage:

> "Shareen refusing to say anything but disclosed to Helena that Noel had punched her to the face and kicked her when outside on street…Helena speaks to Noel and Shareen arguing in her flat earlier in the day, leaving and taking the argument up the street.
>
> "Above uncorroborated but in presence of PC Taylor and myself Helena states that she saw Noel punch Shareen once to the face whilst outside 24 Seaton Place East".

Again, these notes are not signed by Helena Broad. They do not appear to contain any indication of Helena Broad's attitude towards becoming involved as a witness in any criminal proceedings or towards the provision of a formal statement. However, once again Mr McAllister's position for the defence was that Ms. Broad made it clear that she did not wish to provide a signed statement or to be a witness in any subsequent criminal proceedings. Once again, this was not disputed by Mr Townsend for the Crown.

[8] It was not suggested to me by Crown or defence that there was any need for evidence to be led in order to enable me to determine this issue. Thus I approached the matter on what appeared to be the clearly accepted basis that each of the two notebook extracts contains notes of information said by the officers to have been provided by a person, namely Helena Broad, who claimed to have been a witness to the incident to which charge 1 on the indictment relates and who was willing to provide police officers with her account of the incident but who was not prepared to provide a signed statement and did not wish to become involved as a witness in any subsequent criminal proceedings. In my experience, this is an attitude which police officers frequently encounter in the course of investigations.

Defence Submissions

[9] Against this background the defence opposition to the Crown S 259 application was based on the assertion that neither of the notebook extracts attached to the application could properly be regarded as containing a statement given by Helena Broad. Each simply contained information which, though provided by Helena Broad, was filtered through the mind of the police officer who made the notes. By implication, at best the notebook extracts could be regarded as precognitions taken from Helena Broad. Each extract simply contained information noted by a police officer following discussion with Helena Broad. Neither of the notebooks was signed by Ms Broad and she had made it clear that she did not wish to provide a statement or be a witness in any criminal proceedings. These factors were significant in relation to the question of whether either of the notebook extracts could be regarded as a statement for the purposes of S 259 of the 1995 Act.

[10] Mr McAllister founded on the case of *Beurskens* v *HMA* 2014 SCCR 447 in support of his proposition that neither of the notebook extracts could be regarded as a statement.

[11] Mr McAllister submitted that the fairness of the trial would be prejudiced by the admission of evidence of the contents of the notebook extracts because the defence would be unable to cross-examine Helena Broad about her refusal to provide a signed statement or about her reluctance to become involved as a witness in any subsequent criminal proceedings. Mr McAllister did however accept that, in the event that I granted the Crown's application, S 259(4) of the 1995 Act would entitle the defence to introduce evidence in relation to these matters, or indeed in relation to any other issue bearing upon the credibility or reliability of the information provided by Helena Broad.

Crown Submissions

[12] In his response on behalf of the Crown, Mr Townsend referred me to the definition of a 'statement' for the purposes of S 259 of the 1995 Act, which is contained in S 262(1) of the Act, and which provides that:

> "(1) For the purposes of the said sections 259 to 261A of this Act, a "*statement*" includes –
>
> (a) **any representation, however made or expressed, of fact or opinion** (emphasis added)**;** and
>
> (b) any part of a statement,
>
> but does not include a statement in a precognition other than a precognition on oath".

[13] Mr Townsend also referred to S 262(2) of the 1995 Act, which provides that:

> "(2) For the purposes of said sections 259 to 261A a statement is contained in a document where the person who makes it –
>
> (a) makes the statement in the document personally;
>
> (b) makes a statement which is, **with or without his knowledge,** embodied in a document by whatever means or by any person who has direct personal knowledge of the making of the statement (emphasis added); or

(c) approves a document as embodying the statement".

[14] Mr Townsend submitted that each of the notebook extracts contained a representation of fact or opinion provided by Helena Broad on the same day as the incident to which charge 1 relates and, apparently, within a comparatively short time of the incident. To that extent, each of the notebook extracts contained a statement of Helena Broad within the meaning of S 262(1) of the 1995 Act. There was no requirement in terms of S 262 for a "representation ... of fact or opinion", if embodied in a document, to be signed by the maker of the representation in order to constitute a statement within the meaning of S 262(1). Although Helena Broad had declined to provide a signed statement and had made clear her reluctance to become involved in criminal proceedings as a witness, S 262(2) was directly applicable to these circumstances since each of her statements was "... with or without [her] knowledge, embodied in a document ... by any person who has direct personal knowledge of the making of the statement,", namely by the police officers to whom Helena Broad had spoken.

[15] The Crown's position was that in the case of each of the notebook extracts, what the Crown sought to lead in evidence was a contemporaneous, clear, concise, factual description of the incident to which charge 1 relates, given by Helena Broad to a police officer. An example was the very brief passage in the notebook of Police Sergeant Smith which states: "Helena states that she saw Noel punch Shareen once to the face whilst outside 24 Seaton Place East". That was an example of a passage which clearly contained information provided by Helena Broad and noted by the police office to whom it was provided, with no scope for the information to be filtered through the mind of the officer.

[16] Helena Broad made clear her reluctance to become involved as a witness in criminal proceedings. However that was not a decision for her to make and her views in that regard were not determinative of the question whether the notes made by the police officer to whom she spoke could be regarded as a statement for the purposes of S 259 of the 1995 Act. There was no requirement for the notes to be signed by Helena Broad before they could be treated as a statement for these purposes. The fairness of the proceedings, in the event that the S 259 application was granted, would be safeguarded by S 259(4) of the 1995 Act and by the trial sheriff's directions to the jury with regard to their assessment of the hearsay evidence of Ms. Broad's statements.

Decision and Reasons

[17] I adjourned the court in order to consider the issues raised. When I reconvened the court I repelled the defence objection and granted the Crown S 259 application in relation to both of the notebook extracts.

[18] I was satisfied that there was a clear basis upon which I could decide the issue. There was no dispute about the timing of the notes made by the two police officers or about Helena Broad's stated reluctance to become involved as a witness in any subsequent criminal proceedings or her refusal to provide a signed statement. It was not suggested to me by Crown or defence that it was necessary for me to hear evidence about the precise circumstances in which the notes were made. It remains open to the defence at trial to cross-examine the police officers with regard to the precise circumstances of their contact with Helena Broad insofar as those circumstances may shed light on the credibility and reliability of the information provided by her (S 259(4)).

[19] The only issue which I required to resolve was whether the notebook extracts attached to the Crown S 259 application comprised statements within the meaning of S 259(1)(d) of the 1995 Act. That is ultimately a question of law (Renton & Brown's *Criminal Procedure*, 6th edition, para 24-141.2).

[20] In resolving that issue, I was entitled to draw any reasonable inference from the circumstances in which the 'statements' were made or otherwise came into being or from any other circumstances known to me including the form and contents of the documents which were said to contain the statements (1995 Act, S 259(8)(b)).

[21] *Beurskens* v *HMA* was the only authority to which I was referred. I was not referred to any authority in which the question of whether a statement embodied in a document requires to be signed or authenticated by the maker of the statement in order to comply with the requirements of Ss 259 and 262 of the 1995 Act was considered.

[22] The issue considered by the court in *Beurskens* v *HMA* was whether the documents to which the Crown's S 259 application in that case related were statements or precognitions, the critical issue being the stage in the police investigation at which the information contained in the documents had been provided by the witness. However, it seems clear that the 'statements' in *Beurskens* were authenticated by the witness, having been signed by her on each page. The appellant in *Beurskens* founded upon the previously recognised distinction between, on one hand, statements noted by police officers at an early stage in an investigation and, on the other, precognitions noted by police officers at a later stage, in the course of preparing for trial and following discussions with, or on the instructions of, the procurator fiscal.

[23] Having reviewed the evolution of the law with regard to the distinction between statements and precognitions, the Lord Justice Clerk, delivering the opinion of the court,

criticised the soundness of the traditional distinction between the status accorded to a statement and that accorded to a precognition and stated (para [28]) that:

> "This appears to leave standing the fundamental principle, which is apparent in both the 19th and 20th century cases, that the test is ultimately one of fairness. Unless the court considers that the jury could not rely on the content of the statement/precognition as accurately recording what the witness actually said, because of the circumstances in which it was taken, it ought to be admitted in evidence for all competent purposes".

[24] Although paragraph [29] of the opinion of the court in *Beurskens* states that:

> "…[A]t whatever stage statements are taken, the addition of the witness's signature to a document containing an account of events attributable to his knowledge will normally result in that document being classified as a "statement" by, and not a precognition of, that witness for the purposes of the provisions of the 1995 Act",

the court did not suggest that the absence of the signature of a witness from such a document would inevitably exclude the document (such as the relevant pages from a police officer's notebook) from being regarded as a statement for these purposes.

[25] I would add that, subsequent to the hearing on 26 September 2017, I have noted that the trial judge in *HMA* v *Beggs (No 3)* 2001 SCCR 891 granted the Crown's opposed S 259 application in that case despite the fact that the statement of the deceased witness to which the application related had not been signed by the witness. Although the absence of the signature of the witness was one feature of the defence opposition to the Crown's S 259 application in that case, it does not appear to have been fundamental to the defence position (paras [10], [13] and [17]).

[26] The decision in *Beurskens* appears to indicate that, whatever the form of a document which is put forward as a 'statement' for these purposes and whatever the stage at which or circumstances in which it is created, the critical issue is the fairness of the proposed admission of evidence of the content of the document and whether the court is satisfied that the jury, properly directed, could rely on the content of the document as accurately

recording what the witness actually said (*Beurskens* v *HMA* para [28], Renton & Brown's *Criminal Procedure*, 6th edition, para 24-141.2).

[27] Applying that approach to the Crown's S 259 application in the present case and having regard to the matters which I was entitled to consider in terms of S 259(8)(b) of the 1995 Act, I was satisfied that both of the notebook extracts, insofar as they contained factual accounts given to the police officers by Helena Broad, ought to be regarded as statements for the purposes of S 259. Each of the notebooks contained an apparently straightforward factual account of the incident to which charge 1 relates, provided within a short time of the incident. There is nothing to indicate that the accounts attributed to Helena Broad in either of the notebooks were filtered through the mind of either of the police officers or were otherwise distorted in any way. The attitude of Helena Broad in refusing to provide a signed statement and in expressing her reluctance to become involved as a witness in any subsequent criminal proceedings is not at all unusual but does not, of itself, lead to the conclusion that the information provided by her to the police officers was anything other than accurate, to the best of her knowledge.

[28] It remains open to the defence at trial to attack the credibility and reliability of the accounts provided by Helena Broad (S 259(4)). The jury will also require to be given appropriate directions by the trial sheriff in relation to their assessment of this hearsay evidence.

Other Orders

[29] Having given my decision and reasons in relation to this issue and having dealt with the other matters which I required to consider at the first diet, I appointed a trial diet in

terms of S 71B(1) of the 1995 Act for 9 October 2017, reserving four days of court time, and remanded the accused in custody meantime.

Andrew Miller
Sheriff of Grampian, Highland and Islands at Aberdeen

Note: The Accused pled guilty to charge 1 and a number of other charges on 10 October 2017.