



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 77
HCA/2018/000013/XM

Lord Menzies
Lord Drummond Young
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

PETITION TO THE NOBILE OFFICIUM

by

JC

Petitioner

Petitioner: Sudjic (sol adv); Paterson Bell Solicitors, Edinburgh (for Black and Guild, Kirkcaldy)
Accused: C M Mitchell; Gleeson McCafferty Solicitors, Glenrothes
Crown: Goddard QC, AD

19 October 2018

[1] The petitioner in this application to the *nobile officium* is one of the complainers in a criminal trial due to be heard the High Court in which the accused person is Paul Neil McMillan (“the accused”). He faces an indictment containing 8 charges of which JC is the complainer in 5. In this petition JC seeks to challenge the grant of an order authorising the accused to recover and gain access to her medical records. On 19 October 2018, having heard submissions, we granted the prayer of the petition and quashed the

interlocutor granting commission and diligence. We indicated that we would give reasons in writing and this we now do.

Background

[2] The petitioner and the accused are former partners. The charges concerning JC span the period between August 2015 and May 2017. They lived together, at least on and off, throughout much of this period. The charges which are of relevance to this petition are the following:

Charge 4 – a charge of assaulting JC on various occasions between August 2015 and May 2017 at addresses in Glenrothes.

Charge 5 – a charge of sexually assaulting JC with intent to rape her on various occasions between August 2015 and January 2017 at addresses in Glenrothes, contrary to section 3 of the Sexual Offences (Scotland) Act 2009.

Charge 6 – a charge of assaulting and attempting to rape JC at an address in Glenrothes on an occasion between August 2015 and January 2017, contrary to section 1 of the Sexual Offences (Scotland) Act 2009.

Charge 7 – a charge of raping JC on various occasions between August 2015 and January 2017 at addresses in Glenrothes contrary to section 1 of the Sexual Offences (Scotland) Act 2009.

Charge 8 – a charge of engaging in a course of conduct which caused JC fear or alarm between August 2015 and May 2017, contrary to section 39(1) of the Criminal Justice and Licensing (Scotland) Act 2010.

[3] The accused first appeared at a preliminary hearing in the High Court on 23 May 2018. On that occasion it was noted that he had lodged a special defence of self-defence in relation to charge 4 and a special defence of consent in relation to charges 5, 6 and 7. On 1 August 2018 a warrant was granted for service of a petition for commission and diligence seeking recovery of documents at the instance of the accused. At a hearing on 7 September, having heard from the solicitor advocate for the accused in support of the petition and the

solicitor advocate appearing for JC in opposition, the judge granted the prayer of the petition and appointed a commissioner to take relevant extracts from the documents recovered in terms of the specification annexed to the petition and to report thereon. Thereafter JC raised the present petition seeking to challenge that order of the court.

The Specification of Documents and the basis for the application

[4] The specification attached to the petition identified the documents which were sought to be recovered. In the body of the petition it was narrated that these were held by JC's general practitioner. The specification was in the following terms:

“Medical records of [JC] date of birth (given) relevant to any mental health issues, psychiatric conditions or anger management issues which she has had.”

[5] It can therefore be seen that the application sought (and was granted) access to the entire life history of this adult woman's medical records, in so far as anything within those records was “relevant” to *any* mental health or psychiatric condition of whatever kind, with whatever symptoms and at whatever stage of her life such a record related to. Access was also sought (and granted) to records which were “relevant” to *any* anger management issue, again of whatever kind, with whatever symptoms and regardless of whatever stage of her life such an entry related to.

[6] The averments within the petition for commission and diligence which were said to justify such a wide-ranging intrusion into the private and confidential records of the present petitioner were as follows:

“4. That the Petitioner states that the complainer (JC) has made up the allegations contained in charges 4 to 8 on the indictment. He believes that one explanation for that lies in the poor mental health of the said complainer. He also has a defence of self defence for part of charge 4. His position is that the said complainer had anger management issues and he required at times to defend himself against her attacks upon him.

5. That the Petitioner stated in his interviews conducted by police on 22nd June 2017 that the said complainer had “mental health problems”. The Petitioner states at page 3 of Crown Production 13 that the complainer has “got really big issues... she lies all the time... she’s got some kind of like serious mental health disorder.” He goes on to explain that this may be a personality disorder but he does know (sic) much about it nor the diagnosis. The said complainer in her statement given to DC Couper date 31st May 2017 states “I have struggled with my mental health since I was a teenager but this got worse during my relationship with Paul, and at the moment I am struggling to cope.” The Petitioner believes that evidence of the poor mental health of the said complainer and her difficulties with anger management will be relevant to undermining the complainer’s credibility and reliability. He believes is (sic) will assist in explaining why she made these false allegations against him.”

[7] In his report to this court the judge granting the application made by the accused explained that, in his opinion, the accused had advanced a proper reason why medical records of the complainer ought to be disclosed to his legal advisers and that they would serve a proper purpose. He noted that whilst the accused’s own views on the matter would not constitute a basis for granting such an order, there was evidence from the complainer herself that she has had mental health problems since she was a teenager and that these problems got worse during her relationship with the accused. The reasoning which satisfied the judge that he ought to grant the application is contained within the last three sentences in paragraph [9] of his report as follows:

“The accused’s position at interview about the complainer having mental health problems is thus supported by the terms of her own statement to the police. While it cannot at this stage be known whether any problems from which she did suffer will demonstrate a propensity to lie, confabulate or fantasise, the information before me provided a substantial basis justifying this application and it could not be said to be a fishing expedition. It seemed to me, in these circumstances, that the accused’s advisers should be given sight of relevant medical records to provide information on the extent of the mental health problems that the complainer has had, with a view to demonstrating that she may have suffered from some condition which could impact on her credibility and reliability and provide an explanation for what the accused maintains are false allegations.”

The hearing on the present petition

Petitioner

[8] At the hearing on the present petition Mr Sudjic appeared on behalf of the petitioner, as he had at the hearing on the petition for commission and diligence. He noted that the answers lodged on behalf of the accused included an averment challenging the competence of the present petition. He observed that no such point was taken in the lower court and since there was no other way in which the present petitioner could challenge that court's decision he submitted that a petition to the *nobile officium* was competent.

[9] Mr Sudjic submitted that the granting of the petition for commission and diligence constituted an unjustified breach of the petitioner's rights in terms of article 8 ECHR. He submitted that no proper basis had been set out in the petition for the granting of such an order. There was no connection set out between any mental health issues which the complainer may have suffered from and the contention that she had fabricated her account of the accused's conduct.

[10] Mr Sudjic explained that the Crown had taken a neutral position at the hearing in the lower court and, by that stage, had made no enquiry concerning the petitioner's health. However, on the morning of the present hearing he had been provided by the advocate depute with a police statement bearing to have been taken from a general practitioner at the petitioner's medical practice. In that statement the doctor summarised the complainer's mental health history and gave some further information about her condition and circumstances when presenting at the practice on various specific dates. Certain of the contents of the statement were read out by Mr Sudjic. On enquiry from the court he was unable to say whether or not the statement had been taken with the petitioner's permission or whether she had been advised of the Crown's intention to speak to her doctor.

Crown

[11] On behalf of the Crown the advocate depute accepted that the present petition was competent. He confirmed that the Crown had made no enquiry of any sort in relation to the petitioner's mental health prior to the hearing on the petition for commission and diligence. He stated that the Crown was at fault in not doing so. Without explaining the Crown's protocols in this regard to any extent, his explanation was that the Crown were bound to take account of any evidence available to them concerning a complainer's mental health. Thus, he explained, the Crown ought to have taken account of the information provided to the police by the accused in the present case. This duty was all the more obvious given the information provided to the police by the complainer herself. Having come belatedly to appreciate this obligation the statement to which Mr Sudjic had drawn attention was instructed.

[12] The advocate depute did not explain whether the complainer had yet been spoken to, either about her mental health or about the Crown's intention to instruct the taking of a statement from her doctor. He made no submissions on the merits of the present petition.

The accused

[13] On behalf of the accused Ms Mitchell (who had not appeared for him in the earlier application) withdrew the opposition to the competence of the present petition. She submitted that the decision of the first instance judge ought to be supported. Sufficient information had been placed before him to vouch the contention that the complainer suffered from mental health difficulties and anger management issues. The judge had applied the correct test in determining that the recovery of the complainer's medical records

would serve a proper purpose and he had conducted an appropriate balancing act in determining whether the application ought to be granted despite the admitted interference with the complainer's article 8 rights.

[14] Ms Mitchell also sought to draw some support from the terms of the police statement taken from the complainer's general practitioner. She had been given sight of the statement prior to the commencement of the hearing and was provided with a copy in order to advance her submissions. She identified the presence of certain comments within the statement concerning the complainer and submitted that these added weight to the content of the petition for commission and diligence, in particular in relation to the averments concerning anger management issues.

Discussion

Competence

[15] An application seeking commission and diligence for the recovery of documents held by a third party is a competent procedure by which an accused person may request an order of the court. This has been beyond doubt since the decision of the court of five judges in *McLeod v HM Advocate* 1998 JC 67. In the years which have passed since that decision was issued the number of cases alleging sexual offending and/or partner abuse has increased dramatically, both in the High Court and in the Sheriff Court. In such cases applications for the recovery of medical records of the (usually female) complainer are made with a degree of regularity. Any such application engages the complainer's right to respect for his/her private life, home and correspondence as guaranteed by article 8 of the ECHR. Medical records are likely to contain highly sensitive information about an individual. Respecting the confidentiality of health data is a vital principle in the legal system of all contracting

states to the Convention, not only for the protection of privacy of the patient but also to preserve his or her confidence in the medical profession and in the health services in general - see Reed and Murdoch, *Human Rights Law in Scotland* fourth edition paragraph 6.109 and *Z v Finland* (1998) 25 EHRR at paragraph 95.

[16] Although it was common enough for bodies holding records targeted by an application for commission and diligence (“the havers”) to be represented and to make submissions to the court, if appropriate, traditionally a complainer in a criminal trial whose medical records were sought was not in a position to present submissions directly to the court. The court looked to the Crown to protect the complainer’s interests in any such application. Since the Crown did not appear for the complainer but would take account of his or her interests, along with the public interest and any other interests which they required to balance, it might well be that the Crown would consent to the granting of an application even in the face of the complainer’s stated opposition to the recovery of the records.

[17] In the recent Court of Session case of *WF v Scottish Ministers* [2016] CSOH 27, in the context of an action for judicial review of a decision to refuse to provide legal aid to a complainer in a prosecution for assault and domestic abuse, Lord Glennie accepted the proposition that a complainer in a criminal case has a right to be heard before the court determines whether or not to grant a commission and diligence to the accused authorising recovery of her medical records. In doing so he drew upon both English and Strasbourg jurisprudence. He concluded that the proceedings through which a petition for recovery of documents was brought before the High Court were not part of the criminal proceedings against the accused but were proceedings “in connection with” those solemn proceedings.

[18] As appears from paragraph [4] of Lord Glennie's opinion, the petition for judicial review was intimated upon, amongst others, the Lord Advocate. The Lord Advocate did not instruct appearance but the submissions advanced on behalf of the Scottish Ministers included the proposition that article 8 did not require there to be a right of participation for the complainer (although it was argued that it was open to a complainer to make her views known to the court either directly or through the procurator fiscal – paragraph [16]).

[19] Lord Glennie's decision was not challenged on appeal by the Scottish Ministers and they subsequently made new regulations by The Advice and Assistance (Proceedings for Recovery of Documents) (Scotland) Regulations 2017 (SSI 2017 No 291). Those Regulations amended the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 so as to provide for the availability of Assistance by Way of Representation in relation to proceedings relating to an application for an order of recovery of documents in connection with criminal proceedings in which a client's medical or other sensitive documents are sought. Since then it is understood that complainers have presented submissions to the court through their representatives at hearings on petitions for recovery of documents on a number of occasions.

[20] Before the judge in the present case no point of competence was raised, either by the Crown or by the accused, concerning the receipt of submissions from the complainer's representative. In so far as a point of competence was mentioned in paragraph 8 of the answers for the accused to the present petition, it was limited to the proposition that the complainer, although entitled to make representations to the first instance judge, was not entitled to challenge his decision.

[21] As mentioned above, the submission on competence was withdrawn by Ms Mitchell and the Crown conceded that the present petition was competent. We heard no submissions

upon the point of principle concerning whether a complainer in a criminal trial has a right to be heard in proceedings for recovery of documents such as feature in the present case. We therefore pass no concluded view on that matter and are content to proceed upon the basis that there was no challenge to the procedure which was followed. If a complainer has a right to be heard in proceedings for recovery of her medical records, as JC was, then it seems to us to be logical that she would be entitled to challenge the decision arrived at. No method of appeal is available to JC. Accordingly, we were prepared to proceed upon the understanding that the present petition to the *nobile officium* was competent.

The merits of the application for recovery of documents

[22] Neither at first instance nor in the present process was the court given the benefit of any reference to authority which might provide guidance on the circumstances in which an application for recovery of the medical records of the complainer in a trial for rape, or the like, could be granted

[23] In *McLeod v HM Advocate* the Lord Justice General (Rodger), with whom all of the other judges agreed said this at page 80 of the report:

“I consider, however, that an accused person who asks the court to take the significant step of granting a diligence for the recovery of documents, whether from the Crown or from a third party, does require to explain the basis upon which he asks the court to order the haver to produce the documents. The court does not grant such orders unless it is satisfied that they will serve a proper purpose and that it is in the interests of justice to grant them. This in turn means that the court must be satisfied that an order for the production of the particular documents would be likely to be of material assistance to the proper preparation or presentation of the accused's defence. The accused will need to show how the documents relate to the charge or charges and the proposed defence to them. Such a requirement imposes no great burden on an accused person or his advisers: the averments in the petition may be relatively brief and the court will take account of any relevant information supplied at the hearing.”

[24] In the present case the basis upon which the accused asked the court to order production of JC's medical records was the contention that she suffered from poor mental health and had anger management issues. The purpose to which the records were to be put was the undermining of her credibility and reliability.

[25] Mental health difficulties can be of many different sorts, ranging from mild depression through to psychotic conditions. Pathological lying has been recognised as a condition which may affect some.

[26] It is to be noted that there is an absence of information within the petition for recovery of documents explaining or describing the complainer's "poor mental health". Nothing further appears to have been presented to the first instance judge in oral submissions beyond an assertion that "she had difficulty separating fact from fantasy" (see paragraph [6] of his report).

[27] Whilst someone in the position of the accused might not be expected to be aware of the precise diagnosis of any illness for which his partner received treatment, it is to be expected that he would be able to provide some information about it. In the present case the accused provided no examples of how the complainer's condition manifested itself or with what frequency such manifestations occurred. He gave no examples of circumstances or situations in which the complainer had given false accounts of events as a consequence of her illness. He gave no information as to any treatment or medication provided to the complainer. He gave no information about what he termed her "anger management issues".

[28] It is also necessary to consider the purpose to which an application of the sort advanced by the accused in the present case is to be put. If an order sought by way of commission and diligence is to serve a proper purpose, and if the production of the particular documents is to be seen as being of material assistance to the proper preparation

and presentation of the accused's defence, then the court has to be satisfied that the material sought is capable of being used evidentially in the manner contemplated in the application.

[29] This raises the question of how production of a complainer's medical records could be used to undermine his or her credibility or reliability. At common law matters of credibility and reliability fall to be decided upon a jury's view of the demeanour of the witnesses in court, the inherent unlikelihood of the truth or accuracy of their testimony and, often most important, how that testimony compares and contrasts with other evidence in the case which the jury finds acceptable – see the opinion of the Lord Justice Clerk (Carloway) in *CJM v HM Advocate* 2013 SCCR 215 at paragraph [41].

[30] If a witness has an objective medical condition bearing upon his or her credibility or reliability then (and only then) expert medical evidence of that condition and its general effects may be admissible at common law (*CJM* paragraph [38]). The terms of section 275(1)(a)(ii) of the Criminal Procedure (Scotland) Act 1995 permit, in certain circumstances, the leading of evidence of “a condition or predisposition”. Those provisions do not introduce any lower test. The statutory exception requires the “condition or predisposition” to be one which is objectively diagnosable in medical, notably psychiatric, terms. The exception cannot be applied in the absence of medical evidence to that effect – (*CJM* paragraph [46]). In *DM v HM Advocate* [2015] HCJAC 4 in upholding the decision of the sheriff to refuse an application by an accused for the recovery of a psychiatric report relating to the complainer the court stated at paragraph [5]:

“For material in a psychiatric report to be relevant in this case, it would either have to support the proposition, which is nowhere stated, that the appellant's mental state is such that she is unable to distinguish between right or wrong, or that she is suffering from some specific condition which causes her to lie or to be unreliable”.

[31] In the present case those who act for the accused appear not to possess any medical advice vouching the contention that the description of the complainer's mental health, as provided either by the accused or by the complainer herself in her statement to the police, was consistent with any known medical condition which would manifest itself in a lack of reliability or truthfulness. There are no averments in the petition suggesting that she suffers from any particular condition, beyond the possibility that she may have a "personality disorder". There are no averments to vouch the proposition that any particular personality disorder is known to cause those who suffer from it to lie or be unreliable. The first instance judge was presented with no medical opinion and appears to have been invited to proceed upon the proposition that mental illness of any nature equated to a propensity to lie or fantasise.

[32] In our opinion, the averments in the petition for commission and diligence provide no basis upon which an order of the sort requested could have been granted. As noted above, paragraph [9] of the report from the first instance judge contains the following observation:

"Whilst it cannot at this stage be known whether any problems from which she did suffer will demonstrate a propensity to lie, confabulate or fantasise, the information before me provided a substantial basis justifying this application and it could not be said to be a fishing expedition."

[33] We disagree. In our opinion the circumstances as explained by the first instance judge constitute a description of a fishing diligence. We therefore granted the prayer of the petition to the *nobile officium* and recalled the interlocutor of 7 September 2018 in so far as it granted commission and diligence in favour of the accused.