APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 52
HCA/2019/613/XC

Lord Justice General
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL UNDER SECTION 130 OF THE
CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

by

JOHN JOSEPH McCARTHY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Bovey QC; Paterson Bell (for Callahan McKeown & Co, Paisley)
Respondent: Gillespie AD; the Crown Agent

13 February 2020

Introduction

[1] This is an appeal against a first instance decision of the High Court on whether section 121 of the Criminal Justice and Licensing (Scotland) Act 2010 ("Prosecutor's duty to disclose information") applies in circumstances in which both the Crown and the police had stated to the appellant's legal representatives that the information did not exist. The

practical purpose of making such a ruling remained unclear, but the appeal raises wider issues about the operation of the statutory disclosure regime. There is a related concern about the time which has elapsed, whilst the appellant has remained in custody, pending his obtaining different sets of legal representation.

The Criminal Justice and Licensing (Scotland) Act 2010

[2] The 2010 Act introduced a detailed, elaborate and onerous statutory scheme for the disclosure of "information" by the Crown to the defence following the recommendations of Lord Coulsfield's *Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland* (2007). The scheme supersedes the "common law rules about disclosure of information" (s 166(1)).

[3] Section 116 of the 2010 Act (Meaning of "information") provides that:

> "(1) ... 'information' ... means material of any kind given to or obtained by the prosecutor in connection with the proceedings".

[4] Section 117 requires, *inter alios,* the police to provide the Crown with "details of all the information which may be relevant to the case" of which they are aware and has been obtained during their investigation. The duty arises as soon as practical after the accused's first appearance in solemn proceedings and (s 118) continues until the conclusion of these proceedings.

[5] Section 121 (Prosecutor's duty to disclose information) states:

> "...
> (2) As soon as practicable after the appearance … 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."

Subsection (3) encompasses any information which is likely to form part of the evidence in the Crown case or either weakens that case or strengthens the accused's case. The duty on the prosecutor is also a continuing one (s 123). However, since the Crown will not necessarily know what the accused's case is, the scheme introduced into the Criminal Procedure (Scotland) Act 1995, against the Coulsfield recommendations, an obligation (s 70A) on the accused to lodge a statement of his case 14 days prior to the first diet or preliminary hearing. In the event of a change in the defence in the period up to 7 days before the trial, a further defence statement must be lodged (s 70A(4)). If there is another change, further statements may be lodged prior to the trial diet and possibly even during that diet (ss 70A(5)-(7)). The statements ought to set out the nature of the defence and, under reference to that defence, identify any information which the accused requires the Crown to disclose (s 70A (9)(e)).

[6] Section 124 of the 2010 Act (Defence statements: solemn proceedings) continues:

> "…
> (2) As soon as practicable after the prosecutor receives a copy of the defence statement, 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 any information to which section 121(3) applies."

Section 128 (Application by accused for ruling on disclosure) states:

> "(1) This section applies where the accused –
> (a) has lodged a defence statement …
> (b) considers that the prosecutor has failed, in responding to the statement, to disclose to the accused an item of information to which section 121(3) applies (the 'information in question').
> (2) The accused may apply to the court for a ruling on whether section 121(3) applies to the information in question.
> …
> (7) On determining the application, the court must –
> (a) make a ruling on whether section 121(3) applies to the information ...".

Section 130 (Appeals against rulings under section 128) states:

> "(1) The prosecutor or the accused may, within the period of 7 days beginning with the day on which a ruling is made under section 128, appeal to the High Court against the ruling."

Procedure

[7] The appellant was indicted to a preliminary hearing on 28 September 2018 on charges of being concerned in the supplying of diamorphine and cocaine between December 2014 and June 2018 at an address in Glasgow, contrary to section 4(3)(b) of the Misuse of Drugs Act 1971. The case has had a tortured procedural history since then.

[8] On 26 September 2018, a defence statement was lodged in bland and unconstructive terms. This stated that the nature of the appellant's defence was that he was not guilty. He took issue with all matters of fact relied upon to found an inference of guilt and intended to rely on all matters of fact tending to undermine any inferences of guilt or supporting the defence position. It was stated specifically that there was no point of law which the appellant wished to raise. There was no information that he wanted the prosecutor to disclose. There was a reference to a special defence of coercion, without further elaboration. This special defence was a matter of "ongoing enquiry". The appellant was nevertheless ready for trial. Since that was also the Crown's position, a trial diet was appointed for the week commencing on 10 January 2019.

[9] Shortly before the trial diet, the appellant lodged a preliminary issue minute. This concerned whether a search warrant had covered the *locus* where the drugs had allegedly been found. The PH judge refused to allow this to be received late. An incompetent Bill of Advocation, and then an equally incompetent Petition to the Nobile Officium, followed to challenge the PH judge's decision. When the trial diet was called on 15 January 2019, senior

counsel for the appellant advised the court that, "Due to differing views on the conduct of the defence", he and his agents were withdrawing from acting. The trial was adjourned until the week commencing 18 March 2019, with a continued PH set for 5 March.

[10] The new PH was continued until 11 March when a special defence of coercion was allowed to be received late. This read that:

> "any involvement with controlled drugs which the accused ... may have had in the matters set out in the indictment was against his will and solely as a result of threats of violence made against him by an adult Caucasian male person known ... only by the name of 'Lee', whose further personal details and whereabouts are presently unknown, which threats of violence overbore his will and placed him in fear of his life and amounted to coercion."

The appellant moved the court to adjourn the trial diet again to allow a period of investigation in relation to the identity and whereabouts of Lee. This was granted. A new trial diet was fixed for the week commencing 10 July 2009.

[11] On 16 July 2019, when the trial diet called, the new senior counsel for the appellant advised that there had been "a breakdown in trust with the accused, and that unfortunately he, and his agents, were unable to continue to represent the accused". On this basis another trial diet was fixed for the week commencing 4 November 2019 with a continued PH on 19 August. In due course, that PH was continued to the trial diet.

The new Defence Statement and Application for a ruling

[12] On 8 October 2019, the appellant's agents sent a "supplementary defence statement" to the Justiciary Office. This stated that, although the nature of the appellant's defence was one of coercion, he had also been "the victim of entrapment by a state agent". He wished to raise a plea in bar of trial or a preliminary issue objecting to the admissibility of evidence. The statement continued in relation to disclosure as follows:

> "The accused wishes the prosecutor to request/obtain from the police and disclose the following information –
>
> (1) The true identity and address ... of the man known ... as 'Lee' and confirmation whether ... he is an undercover police officer or police informant or covert human intelligence source or agent provocateur working for the police.
>
> (2) Any and all police records of the involvement of 'Lee', and Kirsty McKay and 'Caroline' ... with the accused in the events giving rise to the instant charges ...
>
> (3) In the event that the disclosure requested above does not exist or does not confirm that 'Lee', Kirsty McKay or 'Caroline' had any involvement with the accused and/or the police in connection with the instant charges, the prosecutor is requested to disclose any and all records ... that led to the grant of the search warrant for the *locus* on 16 May 2018 and the execution of that warrant on 4 June 2018; and the nature and source of that objection".

[13] The statement sought information on whether either Ms McKay or Caroline were police informants or covert human intelligence sources. It sought information about an alleged attendance by the Scottish Ambulance Service and the police at a service station in Elderslie when they allegedly had certain dealings with Lee. Information about an alleged attendance of the police at a flat in Glasgow, some time between January and June 2018 when the police allegedly spoke to Lee, was also requested. Finally, recordings of telephone calls between the appellant and Ms McKay and Caroline, whilst he was on remand in HM Prison, Barlinnie, were sought.

[14] Behind the requests for disclosure in the defence statement was a narrative in which the appellant maintains that he came to know Lee through Ms McKay in the context of Lee's drug dealing. It is said that, on 2 June 2018, the appellant visited Ms McKay's flat. Lee was there and threatened to kill the appellant, if he did not assist in the storing of drugs and making them up into street deals. The appellant was afraid that this threat would be carried out and, for that reason, took drugs, bags and scales from Lee and stored them in his flat (ie the *locus*). On 3 June he was called round to Ms McKay's flat and threatened as before,

unless he stored cash for Lee. On 4 June he went round to Ms McKay's flat again and took samples of the drugs, which he had made up into bags. When the appellant returned home, the search warrant was executed and drugs, cash and related paraphernalia were recovered. In addition, and perhaps in contrast, to the defence of coercion, the appellant maintains that he had been targeted by the police and entrapped by their agent, namely Lee, into becoming involved in the offences.

[15] The Crown stated to the appellant's legal representatives that Lee was not an undercover police officer. A letter from a detective chief inspector of Police Scotland to the appellant's then agents, dated 9 January 2019, had already said that:

> "... at no time preceding [the appellant's] arrest was any covert police officer deployed to engage with [the appellant] or any other covert tactic deployed. Similarly I can also confirm that no officer supplied drugs to any female from Renfrewshire."

[16] On 29 October 2019, the appellant lodged an application for a ruling on whether section 121(3) of the 2010 Act applied to the information requested. This came before the court on 1 November 2019. At the hearing, the Crown explained that no covert tactics had been employed. Enquiries had been made by interrogating the police incident recording system, but this had not assisted in identifying Lee. The police did not know who Lee was. They had no record of a police incident involving ambulance services being called to a self-service station in Elderslie. Four calls had been made by the appellant from prison, but the recordings had been overridden and were no longer available. The Crown did not know anything further about Ms McKay or Caroline. The advocate depute submitted that there was nothing further that the Crown could do. The information sought did not exist and could therefore not be given to the defence. It was not information as defined by section 121(3) of the 2010 Act.

[17] The judge found that the information sought was not covered by the section, as it would neither materially weaken nor undermine evidence likely to be led by the prosecutor. It was not information that would materially strengthen the appellant's case, nor did it form part of the evidence to be led by the prosecutor. Section 121(3) had no application. The application was therefore refused. Meantime, yet another new trial diet has been set for the week commencing 23 March 2020. By that time the appellant will have been in custody for about 21 months.

Submissions

[18] The ground of appeal is that the judge erred in failing to make a ruling on whether section 121(3) applied to the information in the application and in failing to hold that it did. The information would enable the appellant to identify, trace and cite Lee in support of his defence of coercion and would confirm whether he was an undercover police officer, police informant or covert human intelligence source. It would support his contention that he was entrapped. It would provide evidence of the roles of Ms McKay and Caroline in entrapping the appellant.

[19] The judge erred in holding that section 128 permitted her to consider whether the Crown possessed the information, what steps it had taken to obtain it and whether it had met its disclosure obligations. None were relevant. Section 128 had two purposes. The first was to secure a ruling, when there was a disagreement on the relevance of information. The second was to inform the authorities of their duty to disclose the information. The appellant was not seeking to recover material from the police, since the police could not produce material which they did not have. The judge failed to have regard to the effect which a judicial declaration may have on the Crown and the police in obliging them to investigate,

reveal and disclose the information sought fully and diligently. She had given undue weight to the Crown's assertion that it had complied with the disclosure obligation. The defence had now been able to contact Ms Mackay and had obtained new information. The Crown were under a continuing obligation in what was a fluid situation (*McDonald* v *HM Advocate* 2010 SC (PC) 1 at paras [50-59]). If the court did not rule that the information was relevant, the Crown would be given the impression that they need not continue to look for it (cf *McClymont* v *HM Advocate* [2020] HCJAC 1, 7 December 2018 at paras [22], [34] and [46].

[20] Section 121(3) was not to be read as limited by section 116(1), since that would mean that the Crown could be aware of information, but have no duty to disclose it as they did not have possession of it. There was a duty of enquiry on the Crown. The failure by the Crown gave rise to a compatibility issue in that the trial would not be fair or in accordance with the law.

[21] The Advocate Depute replied that, on receipt of the revised defence statement, the Crown had made enquiries of the police. The information was that no covert tactics or covert officers had been involvemcd. No surveillance had been used. The Crown had no details of Lee, Ms McKay or Caroline. The search warrant had been obtained on the basis of intelligence received. The judge's decision was correct. It was consistent with *Hill* v *Procurator Fiscal, Lerwick*, unreported, 23 November 2016, in respect of information which did not exist. It was impossible to disclose it.

Decision

[22] As with many of the provisions of the Criminal Procedure (Scotland) Act 1995, the disclosure scheme pre-supposes that an accused will abide by its terms, in so far as they set a

procedural framework within which a fair trial will occur. The scheme is intended to secure such a trial by making clear what the Crown require to disclose to the defence representatives (see *McClymont* v *HM Advocate* [2020] HCJAC 1, 7 December 2018, Lord Turnbull, delivering the opinion of the court, at para [22]). For the system to operate as intended, defence representatives must lodge the requisite statement within the time scale provided; that is, in a High Court prosecution, at least 14 days before the preliminary hearing. If that is not done, there is at least a prospect that the Crown will not have disclosed material which is ultimately regarded as falling within the definition of relevant "information" in terms of section 121(3) of the 2010 Act. Where no statement is lodged timeously, or if it takes the form of the type which was lodged in this case, it should not be assumed that the court will regard a later statement as validly lodged in terms of section 70A(4)(b) or (5). Such a statement is only competent if it stems from a material change of circumstances. It ought accordingly to narrate what that change of circumstances has been, in order to enable the court to take a view on competence. No such change was advanced in this case and the judge at first instance would have been entitled to reject the new statement as invalid. No doubt, in the interests of justice, which may often be the test, she did not do so. The court will accordingly proceed on the basis of its competency. Nevertheless, it is worth repeating that, if an accused wishes the Crown to make proper disclosure in terms of what is intended to be a balanced statutory scheme, he should comply with the obligations upon him as set out in the scheme. A *pro forma* response, such as that employed here, does not do so where, as subsequently revealed, the accused, for example, accepts that the drugs, cash and associated paraphernalia were in his flat when the search warrant was executed.

[23] The purpose of the provision which permits an accused to ask for a ruling on whether section 121(3) applies to the "information in question" is designed to operate in circumstances in which the Crown is in possession of information and there is a dispute about whether it falls within the parameters of section 121(3); eg whether it materially weakens the Crown case or strengthens that of the accused. It permits the court to rule on a matter in dispute. It is not to be used as a vehicle for airing uncontested glimpses of the obvious. The court is available for the determination of issues of live practical significance; not those of academic or hypothetical interest (see *Macnaughton* v *Macnaughton's Trs* 1953 SC 387, LJC (Thomson) at 392).

[24] It can hardly be disputed that information that the drugs held by the appellant had been supplied by a police officer, or a person acting under the direction of the police, would fall to be disclosed under section 121(3). Equally, if the Crown were in possession of information, which might enable the appellant to locate the person, by the name of Lee, who is said to have coerced the appellant into supplying the drugs, that too would be disclosable as relevant to the special defence. The Crown did not attempt to resist the application on the basis that they were not, and would not continue to be, under an obligation to disclose this type of information, if it existed. The opposition was that it did not. The appellant has proffered no basis, apart from his own musings, for supposing that it does exist. A ruling that the Crown must disclose information, when there is no reason to suppose that such information exists, is an academic exercise which serves no purpose. The court agrees with the judge at first instance that the application for a ruling that such information was disclosable should be refused. The appeal accordingly fails.

[25] It is important to distinguish disclosure from recovery. If the appellant seeks to recover records covering the police's involvement with Lee, Ms McKay or Caroline, or

Ambulance Service records, then an application to that effect may, subject to the conventional rules (*McLeod* v *HM Advocate (No. 2)* 1998 JC 67, LP (Rodger) at 80), be made for a commission and diligence. In all of this, it is useful to recall the *dicta* in *McDonald* v *HM Advocate* 2010 SC (PC) 1 (Lord Rodger at para [60]) that, whereas the Crown have an obligation to disclose relevant information, their core duty is to prepare and prosecute the case; not to encroach onto the territory of the defence representatives.

[26] Finally, this appeal should not be determined without comment on the extraordinary length which this prosecution has taken whilst the appellant has been in custody. This appears to be primarily attributable to the appellant's own actings in having rejected the advice of at least two legal teams, both of which included experienced and skilled senior counsel. Priority must be given in the court calendar to ensure that this case proceeds promptly at the next calling of the trial diet.