APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 19
HCA/2023/153/XC

Lord Justice General
Lord Pentland
Lady Wise

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the

APPLICATION TO AMEND A
NOTE OF APPEAL

by

HIS MAJESTY'S ADVOCATE

Appellant

against

JM

Respondent

Appellant: L Ewing KC AD; the Crown Agent
Respondent: Renucci KC; Paterson Bell

12 May 2023

[1] Section 4 of the Victims and Witnesses (Scotland) Act 2014 required the appellant to make rules governing a process for reviewing decisions of the Crown not to prosecute a person. These were published in July 2015 as the *Lord Advocate's Rules: Review of a Decision not to Prosecute*.

[2] On 7 December 2020, the respondent appeared on petition at Glasgow Sheriff Court charged with six allegations of assault on his wife in the years 1991, 1994, 2006, 2011 and 2018. In the Crown narrative of what followed, there is what appears to be an attempt to distinguish between Crown Office and Procurator Fiscal Service staff at different levels of administrative authority. Whether that attempt is a legitimate one may be for the court to consider in due course. What is stated here presumes that a communication to or from the COPFS, from or to whatever office or department, is one from or to the Crown.

[3] On 21 December 2021, the respondent's agents emailed the Crown Office asking for an update on the status of the case. Meantime, on 16 December, a decision had been made (it is not said by whom) that there would be no further action in respect of the charges because there was insufficient evidence. On 23 December, the Crown replied to agents by email that: "There are to be no further proceedings in this case". Two days earlier, on 21 December, a letter had been sent to the agents. This also said that a decision had been taken that there would be no further action against the respondent, but it added a caveat that this was "at this time" and the Crown reserved the right to prosecute "at a future date". Such a cautious approach is in line with internal COPFS policy guidelines. The letter was received by the agents on or after 27 December.

[4] The decision not to prosecute was subsequently reviewed by the Crown Office and reversed. On 1 April 2022, an indictment libelling the assaults was served upon the respondent. The plea in bar of trial, based on renunciation of the right to prosecute, was lodged as early as 6 May 2022. Thereafter, a series of First Diets, at which not much seems to have occurred, followed: 10 June, 4 July, 22 August, 3 October, 10 October, 21 November, 23 January 2023 and 13 February. Eventually, the case called on 27 March. The appellant argued before the sheriff that the member of staff who had sent the email did not have

authority to make a decision not to prosecute. However, the sheriff held that the email had well-understood consequences (*HM Advocate* v *Cooney* 2022 JC 108, approving *Thom* v *HM Advocate* 1976 JC 48). The Crown had unequivocally renounced the right to prosecute the respondent.

[5] On 3 April 2023, the appellant lodged a Note of Appeal, signed by Crown Counsel. The ground of appeal is simply that the sheriff erred in holding that the email of 23 December had amounted to a clear and unequivocal renunciation of the right to prosecute, having regard to all the relevant circumstances. The Note states that the email had been sent

> "by an administrative member of staff who did not have authority to act on behalf of the Lord Advocate to make a decision that no further action was to be taken in a case".

[6] A hearing on the appeal has been set for 24 May 2023.

[7] On 3 May, the appellant lodged an application to amend the Note of Appeal by adding a new ground. This is that

> "The application of the rule regarding renunciation of the right to prosecute… would result in a breach of the complainer's rights in terms of Articles 3 and 8 of the European Convention…. The state's positive obligations inherent in articles 3 and 8 include not only a duty to enact laws which criminalise and punish crimes such as rape and domestic abuse but a duty to ensure that they are applied in practice through effective investigation and prosecution (*O'Keeffe* v *Ireland* (2014) 59 EHRR 15; *MC* v *Bulgaria* (2005) 40 EHRR 20; *Commissioner of Police for the Metropolis* v *DSD* [[2019] AC 196]).

[8] In the Crown's written submissions in the substantive appeal, there is an emphasis on the obligation upon the state to have in place laws that will effectively investigate, prosecute and punish those guilty of domestic abuse. A breach of the relevant Articles may be established where there are either systematic or operational defects; the latter only where

there have been serious, egregious and significant failures, going beyond simple errors or isolated omissions. In recent times the European Court of Human Rights has stressed the need to protect victims of domestic abuse (*Volodina* v *Russia* (No 2), 14 December 2921, no 40419/19; *JI* v *Croatia*, 30 January 2023, no 35898/16; *MS* v *Italy*, 7 July 2022, no 32715/19). The submission came to be that, rather than any renunciation of the right to prosecute being the sole cause of any Convention breach, it would be the court that had breached the complainer's rights by not in some way overturning the Crown's renunciation and allowing the charges to proceed to trial. The law in relation to renunciation should not be applied in this case.

[9] Under reference to *Singh* v *HM Advocate* 2013 SCCR 337 at para [6], it was submitted that the reason for the late ground was that matters had been "further considered". The interaction, between the rules on renunciation and Convention rights, was relevant to the court's determination of the appeal and was an issue of general importance. On the merits, the indictment libelled domestic violence, constituting a contravention of Articles 3 and 8. There would be a failure to discharge these obligations if the prosecution were not allowed to continue. A system in which an administrative error had the effect of preventing further prosecution was not one which provided practical and effective protection of the relevant rights.

[10] The court emphasised in *Singh* v *HM Advocate* that it did not permit amendment as a matter of routine, but required cause to be shown. This involves a consideration not only of the reason why an additional ground is proffered late, but also the merits of that ground. The court requires to be satisfied that the new ground has sufficient strength to merit invoking the amendment procedure. The grounds must contain "clear and substantial merit". This application fails on both heads.

[11] First, no sufficient reason has been advanced as to why this application to amend the grounds has been made. Merely to say that the case has been reconsidered falls short of a sufficient justification for an amendment, in the absence of clear and substantial merit. The appellant did not argue the matter of Convention rights before the sheriff. There was ample time to consider the matter, given the proliferation of apparently pointless First Diets. This court therefore has no first instance view on the merits of the ground. Were it to allow the ground to proceed, it would be determining it as a court of first instance; a procedure which is not normally satisfactory.

[12] Secondly, the new ground appears to be, in effect, no more than a recapitulation of the grounds which were recently rejected in *HM Advocate* v *Cooney*. In that case, it was determined that the appellant was entitled to make a decision renouncing an intention to prosecute. Such a decision is the equivalent of a desertion simpliciter once proceedings on indictment have commenced. There is no suggestion that there is some form of systematic error in the way in which decisions to renounce or to continue prosecutions operate as a generality. What occurred appears to have been an isolated instance in which the procedures in the Crown Office may have failed (see *Commissioner of Police for the Metropolis* v *DSD*, Lord Kerr at para 29).

[13] There is no apparent breach of Articles 3 or 8. If there is such a breach, it is one for which the Crown are potentially liable. The court does not itself create a breach by upholding the current Convention compliant law in which there is an acceptable system in which the Crown retain an ability to discontinue prosecutions in appropriate circumstances, such as a lack of evidence. If a breach were to be established, the complainer has other remedies both in the civil and criminal courts.

[14] Leave to introduce this matter is therefore refused.