



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2026] HCJAC 23
HCA/2025/000076/XC

Lord Justice Clerk
Lord Matthews
Lady Wise

STATEMENT OF REASONS

delivered by LORD MATTHEWS

in

an Appeal under Section 301A of the Criminal Procedure (Scotland) Act 1995

by

NATHAN FRENCH

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg, sol adv; Lee Doyle Solicitors, Glasgow
Respondent: Stalker AD; Crown Agent

2 May 2025

[1] This is an appeal against the refusal by the sheriff at Paisley to grant the prayer of a petition seeking commission and diligence for the recovery of certain financial documents.

We refused the appeal on 2 May 2025 and indicated that we would give our reasons in writing, which we now do.

[2] The appellant is indicted in the Sheriff Court on a charge of theft by housebreaking committed, allegedly, between 24 and 25 April 2023, the locus being a café in Paisley. As

originally framed, the indictment libelled the theft of a quantity of charity tins, a bag and £10,500 in cash. During the course of proceedings before the sheriff, the Crown were permitted to amend the indictment by deletion of the reference to £10,500 and the substitution of the phrase “a sum of money”.

[3] The appellant’s agent objected to this amendment but no appeal was taken against the sheriff’s decision to grant it.

[4] It should be noted that the defence statement lodged on behalf of the appellant indicates that he pleads not guilty and that he takes issue with all matters of fact. There are no special defences.

[5] The specification of documents sought recovery of all financial accounts for the financial years 1 April 2022 to 31 March 2023 and 1 April 2023 to 31 March 2024; including but not restricted to the annual accounts for the year ending March 2023, held by or on behalf of the café and showing or tending to show how much cash the business had accounted for between 1 January 2023 and 25 April 2023. In addition, it sought the monthly financial accounts from 1 January 2023 to 25 April 2023 held by or on behalf of the café showing or tending to show how much cash the business had accounted for between 1 January 2023 and 25 April 2023.

[6] The application also sought all till receipts and other documents of whatsoever nature, whether electronic or paper, held by or on behalf of the café showing or tending to show the sum of the cash transactions received by the café from 1 January 2023 and 25 April 2023 inclusive and all cash books and bank statements held by or behalf of the café showing or tending to show the amount of cash deposits banked by the business between 1 January 2023 and 25 April 2023 and the nature of and amount of donations to charitable organisations in the same period.

[7] It is said in the petition that the defence require access to these records in order to challenge the sum allegedly stolen on the indictment. It is also stated that the Crown are offering to prove that the accused stole the sum of £10,000 (*sic*). The petition goes on:

“This sum is disputed. This is of significance as should this matter reach the stage of sentencing, if convicted of stealing that sum, as opposed to a lesser sum, this will have a fundamental impact upon any sentence the sheriff decides to impose. Therefore, if there exists documentation which can assist with ascertaining the amount of money which is likely to have been held on the premises on the night in question, then it is important that this information is requested. Without any such documentation, there is only the complainer’s word to rely upon. This was not regarded as sufficient in the case of *Carson v McGlennan* 2000 SLT 810.”

It is said that the information is necessary to “properly prepare” the petitioner’s trial. There is a material risk that he may be substantially prejudiced in the proper preparation and presentation of his defence without it.

[8] Having heard parties, the sheriff did not find it immediately obvious why the defence should be seeking additional evidence which it considered necessary to prove the charge. In any event, he heard and decided the Crown motion to amend before considering the petition.

[9] It was submitted before him that in the absence of the documentation sought, the defence would be unable to challenge and contradict the oral evidence of the complainer. The impact on sentencing was also relied upon.

[10] The Crown submitted that the recovery of the documents would not serve any useful purpose. It was unknown what they would show or to what use they could be put. The application was speculative and should be refused.

[11] The sheriff refused to grant the prayer of the petition. The defence statement denied any connection with the alleged crime. There was no foundation for any belief that the documents contradicted the complainer’s claims as to the amount stolen. The appellant

could have no knowledge of the café's financial situation or what the documents might show. What was being sought was nothing more than a fishing diligence.

[12] Before us, it was submitted that the sheriff had fallen into error. The complainer had given a number of statements which seemed to be contradictory about the number of days' takings which were present at the time. There was some uncertainty about the amount.

[13] We ascertained from the Crown that there was CCTV footage showing a person committing the offence, that person being identified as the appellant. His DNA was on a circular saw. A police officer said that on arrival at the premises the alarm was sounding, the lights were on, a window was smashed and the fire exit had been forced open. The locus was in disarray and the back office ransacked. The complainer herself said that at about 23:00 hours the alarm company contacted her to say that the alarm was activated. She checked the CCTV on her phone and saw two males in the office rummaging about.

[14] Counsel told us that it was not in dispute that the premises were broken into. Nor did it seem to be in dispute that a sum of money had been taken but nonetheless the Crown had to prove that. It was important that the defence have access to the various documents to show what the true financial situation of the café was and when money had last been banked. This would allow, or might allow, a challenge to be made to the credibility and reliability of the complainer.

[15] Despite being pressed a number of times, counsel was unable to clarify what the purpose of any attack on the credibility and reliability of the complainer would be. It remains a mystery.

[16] As far as sentencing was concerned, the advocate depute undertook at the bar that the Crown would advise the sheriff that, even if for some reason the sum of £10,500 was mentioned in evidence, it should not be taken into account when considering any sentence.

[17] Counsel nonetheless insisted that if there was any reference to £10,500 in the evidence that would somehow be prejudicial to the appellant, although she did not specify what the prejudice was.

Analysis

[18] As far as the test was concerned, it was sufficient to remind ourselves of what was said by the Lord Justice General (Rodger) in *McLeod v HM Advocate* 1998 JC 67 at page 80, as follows:

“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.”

[19] There was ample evidence available from which the jury could hold that the premises were broken into and at least a sum of money taken. There was no basis upon which the appellant could properly challenge that. Even if the complainer were entirely wrong about the amount of money taken, the Crown did not require to prove any particular amount. The production of these documents would be of no assistance in determining how much money was in the premises. More importantly, and *a fortiori*, they would not assist in answering the questions of whether there was any money at all or whether a sum of money was stolen.

[20] The credibility and reliability of the complainer did not appear to us to be of any significance. No proper purpose would be served by granting the order sought. Given the

Crown's undertaking, there was no question of any effect on sentence, in the event of a verdict of guilty. In these circumstances, the application did not get off the ground. Even if there were some purpose to it which was beyond our powers of divination, the sheriff was quite correct in describing it as a fishing diligence.

[21] The appeal was entirely without merit. Hence its refusal.