



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2026] HCJAC 9
HCA/2025/539/XC

Lord Justice General
Lord Matthews
Lord Armstrong

OPINION OF THE COURT

delivered by LORD PENTLAND, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION

by

KASSIM ASHLEY GREEN NICHOLAS

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg (Sol Adv); V Good & Co
Respondent: Keenan KC (Sol Adv); the Crown Agent

11 March 2026

Introduction

[1] This is an appeal against conviction by Kassim Ashley Green Nicholas under section 106(3)(a) of the Criminal Procedure (Scotland) Act 1995 on the ground that there has been a miscarriage of justice due to the existence and alleged significance of evidence which was not heard at the appellant's trial. Subsection (3A) of section 106 makes it clear that such

evidence may found an appeal only where there is a reasonable explanation of why it was not so heard.

[2] The appellant was convicted after trial in the High Court of two charges.

[3] The first was that, on 22 October 2022, at Morvenside and Murrayburn Drive, Edinburgh, while acting with others, he assaulted the now deceased Beren McLaughlin, caused him to fall to the ground, pursued him, stamped on his body and repeatedly punched and kicked him on the head and body, all to his severe injury.

[4] The second charge was that on the same date and at the same places, while acting with others, he attempted to murder David Denny by driving a motor vehicle at him and striking him on the body with it, all to his injury and the danger of his life.

[5] In due course the appellant was made the subject of a *cumulo* extended sentence of 12 years, with a custodial term of 9 years.

[6] The fresh evidence is said to be an affidavit from David Denny, the complainer on the second charge. He was listed in the indictment as a Crown witness but was not called to give evidence at the trial. It is important to note that at the preliminary hearing on 21 March 2024 senior counsel then instructed for the appellant advised the court that the defence was ready for trial and that no Crown witnesses were sought for the trial on behalf of the appellant.

[7] The case called for trial in the High Court at Edinburgh on 25 September 2024. A soul and conscience certificate signed by a consultant psychiatrist at the Royal Edinburgh Hospital had been provided to the Crown on 23 September 2024 and to the appellant's senior counsel on the same date. The certificate stated that Mr Denny was an in-patient in the hospital. He was said to be detained on a short-term detention certificate and to be

suffering from a psychotic episode. The certificate said that Mr Denny was not fit to attend court on 23 September 2024 and was unlikely to be fit for the next four weeks.

[8] There was no motion made on behalf of the appellant to adjourn the trial in light of the soul and conscience certificate.

[9] At a continued procedural hearing on 15 January 2026 this court ordered that there should be a hearing in respect of the reasonable explanation test. The appeal called before us for this purpose.

[10] Although the Note of Appeal implicitly challenged both convictions, Ms Ogg, who now appeared for the appellant, confirmed that the appeal concerned only the second charge.

Evidence at the trial

[11] It was agreed by joint minute that the appellant was the registered keeper of the vehicle referred to in charge 2, a BMW, on 22 October 2022.

[12] It was also agreed that the DNA of David Denny was found in blood on the footpath at Murrayburn Drive; on the bonnet, windscreen and roof of the BMW; and on the back seat of a SEAT Alhambra taxi from which Abdul Mukit, a taxi driver, made a 999 call in circumstances we will shortly mention.

[13] As we have explained, David Denny was not a witness but there was evidence from Mr Mukit.

[14] He said that a young man, who the jury could infer from the DNA evidence was Mr Denny, got into his taxi and asked him to drive away quickly. Mr Mukit told him to get out, and when the man did not Mr Mukit said that he was going to call the police. The man asked him not to do so. Mr Mukit was worried that people would be following the young

man and that his car would be damaged. He thought the man had been involved in a fight. He was bleeding from his head. Mr Mukit made a 999 call and the operator asked to be put on loudspeaker to be able to talk to the passenger. The passenger said "someone stabbed me but I'm all right". The operator asked him where he was bleeding from and he said "I don't know darling everywhere". According to Mr Mukit, the man was bleeding very badly. The man told the operator not to call an ambulance and said that he was all right. The man then ran away and was followed by two cars.

[15] In the early hours of 22 October 2022 PC Greig Smith was on duty and was asked to look out for a BMW 1 series. Other officers located it in Lanark Road. He went there and positioned his vehicle next to the driver's side.

[16] A man of medium build with dreadlocks (the appellant) was in the driver's seat. A woman was in the passenger seat. PC Smith cautioned the driver as he came out of the vehicle. The appellant said that he had "hit a deer in Penicuik".

[17] PC Smith observed that the vehicle had a smashed windscreen, there was grass underneath the car, there was blood on the bonnet above the registration plate and there was more on the roof.

[18] During cross-examination, counsel commented that the jury would not believe that the appellant had hit a deer, standing the blood analysis.

[19] There were photographs taken by the police of the white BMW showing the blood on the bonnet, the shattered (but intact) and bloodied windscreen, a piece of clothing embedded in the cracked windscreen, the blood on the front grille and bumper, the blood on the front and back of the roof, the blood on the back of the car, and the parts of the front bumper which were damaged and where there was grass and mud stuck to it.

The Appeal

[20] In the affidavit, which is dated 5 August 2025, Mr Denny says that he has recently been in the Royal Edinburgh Hospital as he was not well with his mental health for a number of months. He explains that he is now better and has been released home. No information is provided as to when he was admitted to hospital, for how long he was in hospital or when he was discharged.

[21] The affidavit continues by stating that Mr Denny just found out that the appellant had been found guilty of a serious assault on him and is in prison for a long time. Mr Denny wanted to contact the appellant's solicitor about this as it was Mr Denny's position that the appellant did not assault him and he was not contacted to be a witness at the trial by the procurator fiscal. Mr Denny remembered the night. He had been stabbed by someone else, whom he does not identify. As Mr Denny was running away, he was hit by a car as he ran out in front of it. He was covered in blood from his stab injury and the driver of the car got out to try and help him. The driver did not assault Mr Denny or hit him deliberately with his car. The appellant was the driver of the car.

Appellant's submissions

[22] There was a reasonable explanation for the evidence in Mr Denny's affidavit not being produced at the trial.

[23] Ms Ogg submitted that the information now supplied by Mr Denny was not known prior to the trial and did not become available until he contacted the appellant's solicitor. He had not given a statement to the police. It would have been inappropriate for the appellant's counsel to insist on Mr Denny attending at the trial in view of what was said in

the soul and conscience certificate. This was because it was not known whether Mr Denny would incriminate the appellant and because of his mental condition.

[24] Ms Ogg tendered an email from senior counsel who had conducted the trial. He explained that neither he nor the Crown had expected Mr Denny to attend to give evidence at the trial. It had never crossed counsel's mind to devote time to any attempt to precognosce him. Counsel's instructions from the appellant did not lead him to consider that Mr Denny's attendance as a witness would have been beneficial to the defence.

[25] Ms Ogg explained that the essence of the defence at the time of the trial was that the quality of the evidence available to the Crown was inadequate to establish that the appellant was the driver of the BMW.

Crown submissions

[26] The appellant was aware of the existence of and whereabouts of Mr Denny at the time of the trial. It would have been open to the defence to attempt to precognosce him or to ask the Crown to cite him to attend at the trial. If necessary, he could have been precognosced on oath. In light of the soul and conscience certificate a motion to adjourn the trial could have been made.

[27] If the contents of the affidavit were correct, the nature of Mr Denny's evidence would inevitably have been known to the appellant. If the appellant had got out of his car to assist Mr Denny this would obviously have been within the appellant's knowledge. Therefore, he would have been aware of the significance of the evidence from Mr Denny prior to the trial. That being the case, the appellant could not be said to have exhausted all means of inquiry to obtain the evidence. It had been open to the appellant to make attempts to trace Mr Denny and to obtain a precognition from him at any time between the commencement of

proceedings until the trial or upon learning that the witness was in the Royal Edinburgh Hospital to seek to adjourn the trial until such time as he was fit to testify. A tactical decision had been taken not to seek to adjourn the trial in circumstances where the potential significance of the evidence must have been known to the appellant.

[28] No explanation had been provided as to any efforts made by the appellant or his agents to trace or precognosce Mr Denny between 24 October 2022, when the appellant first appeared from custody, until 23 September 2024 when the soul and conscience certificate was received.

Decision

[29] The question for the court is whether the appellant has shown that there is a reasonable explanation for the evidence on which he now seeks to rely not having been heard at the trial. The issue is a fact-sensitive one turning on the court's assessment of the circumstances of the case and the decisions taken in relation to presentation of the appellant's defence. It is for the appellant to demonstrate that there is a reasonable explanation for the evidence not having been led at the trial (*Campbell (T) v HM Advocate* 1998 JC 130 at p 146F). As the Lord Justice Clerk (Cullen) said (*ibid* at p 146G-H) an explanation cannot be a "reasonable explanation" if it is not adequate to account for the fact that the witness's evidence was not heard.

[30] In our opinion, there is no such reasonable explanation in the circumstances of the present case.

[31] The appellant was aware long before the trial of the fact that Mr Denny was a potential witness. He was listed as such on the indictment. The view was taken by the defence that there was nothing to be gained by attempting to trace him or to seek to lead

him in evidence. This was a strategic or tactical decision which can only have been made on the basis of the appellant's instructions.

[32] At the preliminary hearing on 21 March 2024, it was stated by senior counsel then appearing on behalf of the appellant (who later conducted the trial) that the defence did not require the evidence of any of the Crown witnesses. That disclaimer applied to Mr Denny. Presumably this decision was made on the basis of instructions given by the appellant. It is difficult to understand how the view could have been taken that the evidence of Mr Denny was not required by the defence if there is any substance in the contents of his affidavit. His account of events would have exculpated the appellant, who would have been aware of all that Mr Denny claims to have happened.

[33] However that may be, we consider that it would have been reasonable for the appellant to have at least attempted to trace Mr Denny or to have asked the Crown to do so. Neither step was taken. It would also have been open to the appellant to have sought an adjournment of the trial in light of the soul and conscience certificate. Again, this was not done. It is reasonable to assume that this decision, a strategic or tactical one, was taken on the view that the absence of the complainer on charge 2 (Mr Denny) would be of assistance to the appellant in the presentation of his defence, which was essentially that the Crown could not prove that he was the driver of the BMW. In other words, there was a tactical decision made to put the Crown to its proof.

[34] In *Cameron v HM Advocate* [2008] HCJAC 39; 2008 SCCR 748 the Lord Justice General (Hamilton) in giving the opinion of the court observed (at p 754B-C), under reference to *Campbell (T)*, that an accused person, if he is to rely subsequently on a ground of appeal based on section 106(3)(a), cannot passively ignore lines of inquiry which he knows, or has reason for knowing, are of material significance for his defence.

[35] In *Mills v HM Advocate* 1999 JC 216 the Lord Justice General (Rodger) explained at page 221E-H that if the defence decide for tactical reasons not to lead the evidence of an incriminee at trial, it would be difficult, if not impossible, to admit his evidence at the stage of an appeal:

“[The] limit on an accused's room for manoeuvre at the appeal stage is not arbitrary but is, rather, a concomitant of the wide discretion enjoyed by an accused and his advisers as to how his defence should be deployed at his trial. An accused person who is served with an indictment receives a list of the witnesses against him. He and his advisers have the opportunity to investigate the case, to precognosce potential witnesses for the Crown and for the defence and then to decide in general how his case can best be presented and in particular what witnesses are to be led. Inevitably these decisions may be complex and may involve an assessment of the potential benefits and potential disadvantages of one course or another. The pros and cons may have to be constantly reassessed in the light of the evidence as the trial proceeds. But, for better or for worse, these decisions shape the trial and the evidence which the jury hear and on which they decide the case. The verdict is intended, wherever possible, to be final. That is in the interests both of the public and of the accused. It follows that an accused person and his advisers cannot decide, for strategic or tactical reasons, not to lead a particular witness and then, when the accused is convicted, ask this court to order a new trial so that he can adopt a different strategy or different tactics in the hope of achieving an acquittal at the new trial....”

[36] As this court observed more recently in *Marshall v HMA* [2025] HCJAC 20 [59]; 2025 SCCR 235 this passage has been cited with approval on several occasions in a variety of contexts, for example in *Burzala v HM Advocate* [2007] HCJAC 67 [28]; 2008 SLT 61.

[37] In *Marshall* the court held that where a tactical decision had been taken not to seek an adjournment of a trial to investigate what evidence there might be to support an incrimination, the reasonable explanation test was not satisfied.

[38] In the present case the view was taken that it was to the appellant's advantage to proceed with the trial in the absence of evidence from Mr Denny. That was in line with the strategy adopted on behalf of the appellant from an early stage in the proceedings, no doubt

informed by the appellant's position that he denied being the driver of the BMW at the material time.

[39] Essentially what the appellant now wishes to do is to advance a line of defence which would be fundamentally different from the one he adopted throughout the proceedings. He does not seek merely to bolster his previous defence, but to reconstruct the defence altogether. We consider that to allow the new evidence to be introduced for this purpose would be entirely contrary to the interests of justice. It would in effect permit the appellant to avoid the consequences of strategic and tactical decisions responsibly taken on advice from his previous senior counsel and solicitors and based on his instructions. Such a course would undermine the principle of finality to an unacceptable degree.

[40] Where an appellant seeks to have fresh evidence admitted, he must at least demonstrate that he has exhausted all reasonable inquiries into the existence, availability and content of such evidence. The appellant has signally failed to do this.

[41] We are satisfied that no reasonable explanation for the evidence of Mr Denny not having been heard at the trial has been made out. The appeal is refused.