APPEAL COURT, HIGH COURT OF JUSTICIARY

[2011] HCJAC 60

Appeal No: XC90/05

OPINION OF THE COURT

delivered by THE LORD JUSTICE GENERAL

in

APPLICATION

by

LUKE MUIR MITCHELL

Applicant;

for

Leave to appeal to the United Kingdom Supreme Court

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Lord Justice General

Lord Eassie

Lord Osborne

Appellant: M.E. Scott, Q.C., Mitchell;

Respondent: Wade, A.D.; Crown Agent`

7 June 2011

[1] On 21 January 2005 the applicant was convicted after trial of the murder of Jodi Jones on 30 June 2003. He sought and obtained leave to appeal against both conviction and sentence. On 21 September 2006 he lodged a devolution minute contending that his right to a fair trial in terms of Article 6(1) of the European Convention on Human Rights had been contravened. Particular reference was made to ground of appeal 10 (late witnesses adduced by the Crown). On 7 December 2007 he lodged a proposed additional ground of appeal against conviction (No.1A of the appeal process). Later that month he intimated to the court that he was no longer insisting upon the devolution minute. The court granted leave for the minute to be withdrawn.

[2] In February 2008 the court heard argument in relation to the appeal against conviction, including argument on a further ground of appeal which the appellant was allowed to lodge in the course of the hearing. The grounds then argued - over some fourteen court days - included ground 5 (a ground that the identification of the appellant by three witnesses, at places and at times consistent with him having been the murderer, was unfair and had resulted in a miscarriage of justice) and ground 7 (a ground that the circumstances in which the appellant had been interviewed by police officers were unfair - such that certain passages from the transcript of that interview should have been excluded from the jury's consideration; complaint was also made of the manner in which the Crown had, on a selective basis, chosen to lead before the jury evidence of the interview). No contention was advanced at that hearing that the leading by the prosecutor of any of the evidence referred to in these grounds was *ultra vires* on a Convention or any other

ground. No devolution minute in relation to any of these grounds was ever lodged. The court was not at any stage invited to quash the conviction on any basis related to the *vires* of the prosecutor.

[3] In its judgment, issued on 16 May 2008, the court dealt comprehensively with all of the grounds of appeal argued before it. It discussed ground 5 at para [126] of its opinion, referring back to its discussion (at paras [106] to [125]) of related grounds of appeal - grounds 3 and 3A - on sufficiency of evidence. It held that no miscarriage of justice had arisen in relation to the identification evidence and that ground 5 should be rejected. At paras [148] to [157] it discussed ground of appeal 7. It held that it could find nothing to suggest that the replies of the appellant of which evidence was given were obtained by unfair means. It was not persuaded that the answers at interview led in evidence were inadmissible and saw no reason why the trial judge's decision on admissibility (which turned significantly on his impression of the evidence relating to the interview, including the appellant's robust response to police questioning) should be interfered with. It also held that it was not persuaded that the admission of the particular passages which were led in evidence could be said to have led, given their content, to a miscarriage of justice. It accordingly rejected ground of appeal 7.

[4] The court considered and rejected the other existing grounds of appeal for which leave to appeal had been granted. Counsel for the appellant having referred in the course of the hearing to proposed additional ground 1A but having indicated that enquiries in relation to it were not yet complete, the court on 22 February 2008 continued to a date to be fixed consideration of any motion to allow such a ground to be argued, directing that any further proposed evidence in support of it should be lodged within four weeks. On 16 May 2008 the court, having been advised by counsel for the appellant that the proposed additional ground of appeal was not now to be insisted on, refused the appeal against conviction and decerned.

[5] The appellant's appeal against sentence was heard in April 2010. On 2 February 2011 the court, by a majority, refused that appeal and decerned.

[6] Meantime on 27 January 2011 the appellant had lodged with the Justiciary Office a document entitled "Application For Leave To Lodge Additional Ground Of Appeal In Terms Of Section 110(4) of the Criminal Procedure (Scotland) Act 1995". The subsequent history of that application and the court's disposal of it are narrated in the court's opinion dated 15 April 2011, to which reference is made for its terms. In short, the court determined that the application was, on a sound interpretation of the 1995 Act, incompetent (it being out of time) and required to be refused.

[7] Before us it was not wholly clear against which interlocutor or interlocutors the appellant sought leave to appeal to the United Kingdom Supreme Court. However, we proceed on the basis that it is sought to bring under review both the interlocutor of 16 May 2008 and the interlocutor of 15 April 2011. Miss Scott acknowledged that, in relation to the complaint against the identification evidence and the complaint about the police interview, no devolution issue had been raised until this application for leave to appeal to the Supreme Court was intimated. This court has accordingly at no stage had the opportunity of considering any devolution issue which might be thought to arise in relation to these complaints. They were argued and determined on a purely "domestic" basis, namely, whether the reliance on the sources of evidence in question was at common law unfair. They were considered in detail on that basis and found to be without merit. As regards the second complaint (in relation to the police interview) the court held among other things that, in any event, the admission of the relevant evidence did not lead to a miscarriage of justice. A final interlocutor disposing of these complaints was pronounced more than three years ago. Having regard to the principle of finality, the court is not persuaded that it would be appropriate now to grant leave to appeal against its decision. It also takes into account that in protracted proceedings before it, conducted on the appellant's behalf by very experienced counsel, no relative Convention issue was ever raised. The Supreme Court would not, and could not, have access to the views of this court on any such issue.

[8] As to the interlocutor of 15 April 2011, that proceeded solely on the court's interpretation of the relevant procedural legislation. Although the ground of appeal proposed to be introduced involved a devolution issue, the decision which the court had to make did not turn upon the nature of the proposed ground. It turned

solely on the interpretation of domestic procedural legislation. No argument based on the Convention was advanced. The court's decision would have been the same whatever the nature of the proposed ground. The court, in our view, did not determine any devolution issue in that regard. That being so, there can be no justiciable issue for the Supreme Court and leave to appeal to it must be refused. In any event, having regard to the principles of finality and other considerations referred to in paragraph [7] above, we are of the view that it would not have been appropriate to grant leave in this respect either.