APPEAL COURT, HIGH COURT OF JUSTICIARY

[2006] HCJAC 84

Appeal No: XC90/05

OPINION OF THE COURT

delivered by THE LORD JUSTICE GENERAL

in

APPLICATION UNDER SECTION 107(8) OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

LUKE MUIR MITCHELL

Applicant;

against

HER MAJESTY'S ADVOCATE

Respondent:

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Lord Justice General

Lord Kingarth

Lord MacLean

Act: D. Findlay, Q.C., Farquharson; Beaumont & Co., Edinburgh

Alt: A. Mackay, A.D.; Crown Agent

14 November 2006

Introduction

[1] The applicant was, on 21 January 2005, convicted after trial in the High Court at Edinburgh of the murder on 30 June 2003 near Dalkeith, Midlothian of Jodi Jones. At the time of her death she was 14 years of age. The applicant at that time was a few weeks short of his 15th birthday; at the date of his conviction he was aged 16. On 11 January 2005 the trial judge sentenced him to be detained without limit of time, a punishment part of 20 years being specified.

[2] The applicant sought leave to appeal against his conviction and sentence. A Note of Appeal containing twelve grounds of appeal against conviction and one against sentence was lodged. A single judge, acting under section 107(1) of the Criminal Procedure (Scotland) Act 1995, granted leave to appeal against conviction and sentence but specified as arguable grounds of appeal against conviction only six of the grounds set forth in the Note, namely, grounds 3, 5, 6, 7, 9 and 10. Unrestricted leave to appeal against sentence was granted. The applicant subsequently made an application under section 107(8) of the Act for leave to found his appeal on certain grounds of appeal which had been specified as unarguable, namely,

grounds 1, 2, 4, 11 and 12. It was stated that ground 8 was not to be insisted in. Mr Findlay was heard orally in support of the application and the Advocate Depute in response.

Ground 1

[3] Ground 1 is concerned with the disposal by the trial judge at a preliminary hearing on 16 October 2004 of an application by the applicant that his trial should be heard outwith Edinburgh. The trial judge refused that application but granted leave to appeal against his decision. In the event no appeal was then taken. Mr Findlay told us that, given the youth of his client and the stress to which he was subject, a decision had been taken not to delay matters by appealing that decision at that time.

[4] The basis of the application made on 6 October was that for weeks prior to the trial there had been extensive media coverage surrounding the death of Jodi Jones. The applicant's name had been widely canvassed in the press as being connected with her death. There had been both national and local publicity. The national publicity was in newspapers having a national circulation and on television. The case had attracted special interest in and around the Edinburgh area. The alleged crime had been committed within a small community. Beyond the local area, there was more interest in the case in Edinburgh than anywhere else. This was because people from the local area travelled into Edinburgh to work. While it was not submitted to the trial judge that, by reason of the publicity, the applicant could not get a fair trial anywhere, it was submitted to him that for that reason he could not get a fair trial in the Edinburgh area.

[5] Having heard the Advocate Depute in reply and considered certain authorities cited to him, the trial judge took the view that the issue was one of jury management, including the excusal from jury service of any person who had a connection with the locality or the school which had been attended by both the applicant and Jodi Jones.

[6] In the event, the trial judge took certain measures to minimise the risk of prejudice to the applicant by reason of the trial being in the Edinburgh area. After a trial diet which ran for a few days but was then aborted (to which we shall return) the trial commenced on 18 November 2004 when the trial judge gave to the jury clear and robust instructions as to their duties as jurors, including telling them that it was inappropriate for anyone to serve as a juror who knew Jodi Jones or knew Luke Mitchell or any of the people whose names appeared in charge 2 (a charge of being concerned in the supplying of cannabis resin). He also told them that it would be inappropriate for anyone to serve as a juror who had connections with the area where Jodi Jones lived and where she was allegedly murdered, or connections with St David's Roman Catholic High School in Dalkeith where some of the persons he had mentioned were or had been pupils. Such connections would, for example, he said, be living in that area or having family members living in that area or family members who were, or in the last few years had been, pupils at St David's. During an adjournment which immediately followed the giving of that instruction, an empanelled juror intimated that he worked with a colleague who had children at the school and had been told something about the case by that colleague. The trial judge discharged that juror and another juror was balloted. At an earlier stage an unempanelled juror who had been balloted but lived in the Dalkeith area had been objected to by Mr Findlay on that account. The trial judge excused him, a further juror being balloted without objection. As finally composed the jury comprised ten jurors who lived in Edinburgh and one in each of Whitburn, Livingston, South Queensferry, Ratho and Penicuik. No objection was taken to any of these jurors on the ground of their respective addresses.

[7] The single judge expressed in the following terms his reasons for refusing to grant leave to appeal on ground 1:-

"The decision taken by the trial judge, prior to the trial, concerned a matter falling within his discretion. It appears from his report that he correctly directed himself as to the law and had regard to all material considerations. The ground of appeal recognises that the media coverage of the case extended nationally. The argument seems to be that coverage was liable to have a particular effect on a jury drawn from the population of the Edinburgh area, because of connections between the small community within which the crime

occurred and that wider population. The anticipated danger in other words, appears to be that the jurors might be prejudiced as a result of contact with persons belonging to the community within which the crime took place. It is apparent that the trial judge took steps to ensure that jurors having connections with the locality of the crime, and jurors who felt that there was any reason why they could not decide the case impartially on the evidence, should be excused. The directions which he gave to the jury are acknowledged to have been clear and robust. None of the members of the jury, as finally composed, came from the locality (see para.118). In these circumstances this ground of appeal is not arguable. That conclusion is not affected by what is said about the discharge of a juror during the first trial diet. It appears from the report of the trial judge (at para.115) that the juror was not discharged because of any failure on her part. Since she was unaware of her connection with the appellant, she could not have been prejudiced as a consequence of that connection".

[8] The final two sentences of that passage refer to an event which occurred during the aborted trial. On the fourth day of that trial investigations revealed that a girl who in effect regarded the applicant as her current boyfriend had had as a previous boyfriend the son of one of the jurors. On being questioned about this by the trial judge, the juror stated that she was aware that the girl had been her son's girlfriend and that the relationship had come to an end but appeared to be genuinely surprised that the girl now regarded the applicant as her boyfriend. After hearing counsel the trial judge discharged that juror. It is, however, quite clear that she was discharged on objective grounds, not because of any failure on her part to disclose a matter within her knowledge.

[9] One other event of possible significance occurred during the aborted trial. A report in a national newspaper had included the sentence:-

"The schoolgirl Jodi Jones smoked cannabis with her boyfriend hours before he killed her, a court heard yesterday".

The author of that piece appeared by order before the trial judge. An explanation for the admitted inaccuracy of that report - on the basis of the evidence at that stage led in the trial - having been given through counsel, the trial judge decided to take no further action. In the event no later published media items gave cause for concern as to the fairness of the trial.

[10] Before us Mr Findlay acknowledged that to found on the contention advanced in ground of appeal 1, he required to show cause why leave should be granted for him to do so. He accepted that it was clear from *Beggs* v *HM Advocate* 2006 S.C.C.R.25 that, while it was a necessary pre-condition to cause being shown that the grounds sought to be advanced were arguable, something more than that was required. Mr Findlay reiterated that prior to the trial there had been widespread publicity, much of it hostile to the applicant. While it was the normal practice for trials to take place in the general locality of the scene of the alleged crime, that was not inevitably so. In recent times a number of high profile trials had consciously been indicted for trial in places remote from the scene. The apparently brutal murder of a young girl and the suggested involvement in her death of a young man, both from the same area, gave rise to much interest and emotion in the community. Public interest and memory of relevant matters were likely to be less in places remoter from the scene than Edinburgh was. Although the trial judge had taken steps at the outset both of the trial which had been aborted and of the trial which carried on to a verdict to minimise the risks, these remained as illustrated by the circumstance that a juror in the aborted trial had had to be discharged because of an initially undisclosed connection with the applicant. The trial judge had, in refusing to order that the trial take place more remotely than in Edinburgh (say, in Glasgow or Dunfermline) erred in the exercise of his discretion. He had failed sufficiently to take into account the potential impact of the publicity, given the nature of the alleged crime and its location. He had wrongly assumed that because the publicity was in the national media it would be of equal interest nationally. He had granted leave to appeal. The reasons why the opportunity to appeal had not been taken up had already been explained. While it could not be demonstrated that the publicity had had an effect on the verdict, there were risks, shown to have been of substance, that the trial would be, and in the event had been, unfair.

[12] It is not in dispute that the disposal of the application that the trial take place more remotely than in Edinburgh involved an exercise of a discretion by the trial judge. The criteria against which an appeal court will interfere with the exercise of such discretion are well known and need not be repeated here. The trial judge granted leave to appeal against his decision. The proper inference from the granting of leave is that the trial judge, having heard full argument, took the view that there was a contention that could arguably be presented for review of his decision - or at least that it was in the interests of justice that the location of the trial be considered by a larger bench. The single judge who refused to give leave for this ground does not in his reasons advert to the circumstance that the trial judge granted leave to appeal; no reference to that circumstance is made in the written ground of appeal which the single judge was considering. However, we regard the trial judge's grant of leave as a significant factor and as being, in the circumstances of this case, cause why this court should consider of new the arguability of this ground of appeal.

[13] We have come with some hesitation to the view that this ground is arguable. As the ground is accordingly to be fully argued we do not consider it appropriate to set out at length our reasons for that decision. Suffice it to say that there is an argument that the trial judge failed adequately to take into account the circumstance that the publicity (the detail of which we have not seen but which we were led to believe was both widespread and hostile to the applicant) might have had an impact of particular strength not only in the immediate locality of the crime but in a somewhat wider area embracing the city of Edinburgh and other towns in the Lothians. Before this ground of appeal could succeed after trial, it would of course be necessary to demonstrate that the decision to proceed with the trial in Edinburgh led in the event, and notwithstanding the measures taken during the trial, to a miscarriage of justice. But that issue is better considered when at the appeal more detail is provided of, among other things, the nature, timing and extent of that publicity. In the whole circumstances we shall specify ground 1 as an arguable ground of appeal.

Ground 2

[14] The next ground of appeal which the single judge held not to be arguable concerns the trial judge's refusal at another preliminary hearing to separate the applicant's trial for murder from his trial on two other charges, namely, an alleged contravention of section 49(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 (having on various occasions a knife or knives) and an alleged contravention of section (4)(3)(b) of the Misuse of Drugs Act 1971 (being concerned on various occasions in the supplying of cannabis resin). Mr Findlay submitted that there was no evidential link between the applicant's possession of knives and the murder nor between the latter crime and his being involved in the supplying of cannabis resin. The only purpose of leading evidence in respect of these other charges was, he said, to cast the applicant in an unfavourable light. In the event the charge under section 49(1) had been withdrawn by the Advocate Depute who had also described the offence under section 4(3)(b) as "small beer". Where murder is charged it is the duty of the court to prevent any risk of prejudice which might arise to the accused if it is tried along with other charges which are not evidentially linked to the murder charge (*HM Advocate* v *McGuiness* 1937 J.C.37, per Lord Justice-Clerk Aitchison at page 39).

[15] The Advocate Depute submitted that it was only where a material risk of real prejudice to the accused could be demonstrated that a trial judge would normally be justified in granting a motion for separation of charges (*Reid* v *HM Advocate* 1984 S.L.T.391, per Lord Justice-General Emslie at page 392). The trial judge in this case had been well entitled to exercise his discretion by refusing the motion. There was a clear evidential connection between the murder charge (death having been caused by cutting of the throat by a sharp implement and the victim's body having been mutilated by such an implement) and the charge under section 49. The applicant had been in the habit of carrying a knife but none had been found immediately after the murder; some months later a similar knife had been purchased for him. As to the charge under section 4(3)(b), the applicant's supplying of cannabis resin was relevant to the whole context of his relationships with the victim and with other young people with whom they had associated, including an incriminee on the murder charge who was said also to have been a supplier of cannabis. When the applicant had been arrested, a substantial amount of cannabis resin had been found in his bedroom.

[16] In our view no cause has been shown for granting leave to argue this ground of appeal. We note that no application was made to the trial judge for leave to appeal against his decision at the preliminary hearing. That is consistent with a recognition that there was in this matter no arguable ground of appeal. It is plain that there is not. While we acknowledge that particular care must be shown in murder cases to avoid prejudice to an accused by indicting him also for crimes which are not said to be evidentially relevant to the murder and its surrounding circumstances (*HM Advocate* v *McGuiness*), the trial judge at the preliminary hearing was clearly entitled, on the material placed before him by the Crown, to be satisfied that there was reasonably claimed here to be such an evidential link. That claimed link was also founded on by the Crown at the trial. The single judge properly addressed and determined this issue.

Ground 4

[17] The third ground of appeal which the single judge held not to be arguable is to the effect that the trial judge misdirected the jury on the issue of circumstantial evidence. The present case is one in which the whole evidence against the accused was circumstantial in character. The trial judge, as Mr Findlay acknowledged, directed the jury on the basis of the approach to a case of that kind laid down in *Megrahi* v *HM Advocate* 2002 J.C.99; 2002 S.C.C.R.509 at paras.31-35. In the ground of appeal it is submitted that that approach "merits further consideration". While Mr. Findlay disavowed any intention to argue that the approach adopted in *Mackie* v *HM Advocate* 1994 S.C.C.R.277 and disapproved in *Fox* v *HM Advocate* 1998 S.C.C.R.115 should have been adopted, it was difficult to divine what alternative, if any, was being argued. In the end it appeared that the contention was that the trial judge, while giving the direction he had, should have given the jury a further direction on how they should approach their decision-making in a wholly circumstantial case. In our view there is no warrant in *Megrahi* or in the line of authority upon which it relies for any requirement to give a further direction of the kind suggested. At para.[34] of *Megrahi* there is cited a passage from *Fox* v *HM Advocate* in which Lord Justice General Rodger stated:-

"[I]t is of the very nature of circumstantial evidence that it may be open to more than one interpretation and that it is precisely the role of the jury to decide which interpretation to adopt ...".

While that observation was made in a case in which circumstantial evidence was used as corroboration for direct evidence, it was held in the same paragraph in *Megrahi* that it was equally applicable to a case in which the evidence was wholly circumstantial. That determination, having been made by a court of five judges, is binding upon us. We see no basis for remitting the case to a larger bench. A further direction of the kind adumbrated by Mr Findlay appears to us to require the court to enter upon the very issue of interpretation which it is the function of the jury to resolve. This ground is not, in our view, arguable nor has cause been shown for granting leave to argue it.

Ground 11

[18] The next ground of appeal which the single judge held not to be arguable concerns whether or not the jury should have been secluded overnight on 20-21 January 2005. The jury retired to consider their verdict at 11.26 on 20 January. The court was reconvened at 16.19 that day. The jury at that stage had made it known to the clerk that they were "nowhere near reaching a verdict". The trial judge, having given the jury further clear directions that they should not discuss the case with anyone else, permitted them to go home overnight. The court reconvened the following morning. The jury retired again at 10.05. On their return at 11.39 they delivered their verdicts of guilty on the two remaining charges.

[19] Mr Findlay acknowledged that this ground could not stand alone as an arguable ground of appeal. He submitted, however, that in a case such as this, where the applicant was a young person who had been subjected to unfair media treatment, the court should have been particularly astute to ensure that the jury, at the critical stage after they had retired to consider their verdict, were not subject, even inadvertently, to external influence. In another prosecution involving a young accused in which there had been much media interest, the jury had been secluded overnight at a hotel.

[20] In our view there is no substance in Mr Findlay's contention. Before the jury were released for the night the trial judge gave to them a clear direction that they should not discuss the case with anyone else. This reinforced directions in similar terms which he had given to them at earlier stages. There is no reason to suppose that they, or any of them, would have failed to comply with that direction. The jury's promptly reached collective decision the following morning is wholly consistent with personal reflection, uncontaminated by external influence, having individually taken place overnight leading to a more focused deliberation the following morning. This ground of appeal is plainly not in itself arguable; nor is it rendered arguable by being taken in conjunction with any other ground or grounds of appeal. No cause has been shown for granting leave to argue it.

Ground 12

[21] The final ground of appeal which the single judge held not to be arguable concerns certain information about a possible connection between a defence witness and one of the jurors. The witness, who was an employee of the firm of solicitors acting for the applicant, gave in the course of the trial uncontroversial evidence about times taken to walk along a route from the applicant's home to certain points of significance and to run back part of the way. According to the grounds of appeal the witness subsequently informed her employers that

"she would be known to [the juror] and that there was reason to believe that [the juror] would be hostile to both her and her sister. It is believed that [the juror] may believe that [the witness's] sister caused her to lose her employment in recent times. It is submitted that [the juror] ought to have brought this matter to the attention of the court as she was well aware she was obliged to".

[22] Mr Findlay hardly submitted that this was an arguable ground of appeal. In effect he simply drew the circumstances to the court's attention against the possibility that it might regard them as suitable, in the course of the appeal, for the carrying out of further inquiry.

[23] In our view there is no basis for any such inquiry nor consequentially for allowing this ground to go forward. The witness gave uncontroversial evidence: she was not cross examined by the Advocate Depute. The substance of what she spoke to had already been the subject of testimony by other witnesses. The jury, prior to this witness giving evidence, had made an accompanied site visit to the locus and can have found nothing surprising in her evidence. There is no reason to suppose that the juror recognised the witness nor, even if she did, that that recognition impinged to any extent upon her approach to the evidence at the trial. This ground of appeal is in itself unarguable and is not rendered arguable by being taken in conjunction with any other ground of appeal. No cause has been shown for granting leave to argue it.

The grounds in conjunction

[24] We have already held that, in respect of grounds 11 and 12, they are not rendered arguable by being taken with any other ground or grounds of appeal. Mr Findlay submitted that, in relation to the whole grounds of appeal which the single judge had held to be unarguable, it was necessary to see them in the context of the many complex issues which this "unique" trial gave rise to. Grounds 1 and 2 were inter-related, he said, with ground 4; in the context, for example, of hostile publicity and extraneous charges, the jury might more easily draw an inference adverse to an accused in a wholly circumstantial case. There was also an inter-relationship with ground 6 (which had been granted leave); there also evidence had been led (about the finding of several bottles of urine in the applicant's bedroom) whose only purpose was to seek to convince the jury that the applicant was an "oddball" character. Similarly ground 5 (which had been allowed) was another aspect of the unfairness of the trial - witnesses who had identified the applicant in court had never been asked to attend an identification parade; prior to giving evidence they had seen in the media photographs of the applicant.

[25] We do not doubt that it is necessary to have regard to the inter-relationship of grounds of appeal and to the possibility that grounds of appeal, if viewed individually, may appear unarguable but, if viewed cumulatively or in conjunction with arguable grounds, may be rendered arguable. Ground of appeal 1, in respect of which we have already held that cause has been shown for it to be argued at a full hearing, may gain added strength or give added strength to other grounds when they are read in conjunction. We have already held that grounds 11 and 12 do not, either alone or in conjunction with any other ground to which we were referred, constitute arguable grounds. The same is true of grounds 2 and 4. The latter is a pure question of law. The former is likewise a question of law, namely, whether the trial judge erred in the exercise of its discretion by not separating the charges. Neither could be rendered arguable by being considered in conjunction with other grounds.

Decision

[26] In the whole circumstances we grant this application to the extent of specifying ground of appeal 1 as a ground upon which the applicant may found in his appeal. *Quoad ultra* we refuse the application.