



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 6
HCA/2022/165/XC

Lord Justice General
Lord Matthews
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

APPEAL AGAINST CONVICTION

by

CHRISTOPHER HUGHES

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Findlay KC, Young; Paterson Bell (for KM Law, Glasgow)
Respondent: Ewing KC (sol adv), AD; the Crown Agent

21 February 2023

Introduction

[1] On 30 March 2022 the appellant was convicted of two charges. The first was a contravention of section 28(1) of the Criminal Justice and Licensing (Scotland) Act 2010 (involvement in serious organised crime between 1 July 2013 and 7 January 2020). The serious crime group was allegedly run by two brothers JG and BG. Amongst other things

the offence encompassed the importation and supply of cocaine, possession of firearms and accessories, the use of false names and addresses to lease premises and acquire vehicles, money laundering and the selling of encrypted mobile phones through a company called MPC.

[2] The second charge was one of attempted murder and murder on 8 December 2016, aggravated by a connection with serious organised crime.

[3] The deceased Martin Kok was clearly murdered. He was shot outside a club in Amsterdam. It was a planned assassination and an attempt had been made to shoot him shortly beforehand. The appellant was with him at the relevant times and the issue was whether he was proved to have been a party to the crimes, which were caught on CCTV.

[4] The Crown case was largely circumstantial, but the evidence of an incriminee, Edward Doyle, was crucial. Doyle worked for the crime group but was also a police informant, or CHIS, having been approached by the police in July 2016. A formal agreement was signed in November 2016 and Doyle attested that he had received payments from the police amounting to £9,820 between 5 October 2016 and 11 December 2017. The trial judge directed the jury that if they did not find him credible and reliable then they had to acquit on both charges, although that may be debatable in relation to the first charge. He was cross-examined for several days with a view to demonstrating that he was untruthful.

[5] Leave to appeal was only granted on one ground, namely that the trial judge had failed adequately to direct the jury on the approach to prior statements made by Doyle.

The circumstances

[6] Doyle gave evidence about the activities of the organised crime group, which operated throughout Scotland and Europe. He was recruited by the group in November

2015 and his evidence was that soon afterwards he became aware that its real business was drugs and guns. He was sent to such places as Marbella, Dubai and Amsterdam, the visit to Dubai taking place in what the Crown described as opulent circumstances, including travel in a Rolls Royce and a visit to a party on a yacht attended by celebrities. It was obvious that he was mixing with high powered criminals. He gave evidence of the appellant's involvement in charge 1, the details of which are not necessary to rehearse. Doyle's evidence in that regard was corroborated by various adminicles of circumstantial evidence, including agreed financial evidence, evidence of association, surveillance evidence and the products of searches.

[7] The circumstances of the death of Martin Kok were not in dispute. He was shot 8 times while in his car in the car park of a club in the Netherlands on 8 December 2016. Earlier in the evening, the appellant and the deceased could be seen on CCTV in a hotel. A male who appeared to be a lookout, and another male entered the hotel bar where Kok and the appellant were seated. As they left the hotel a male, who was similar to the second male, pointed something at the head of Kok. This was interpreted as a failed attempt to murder him. Neither Kok nor the appellant appeared to react.

[8] Less than an hour later the appellant and Kok arrived at the club. A car, which was similar to one seen driving away from the hotel, drove into the club's grounds. Later that night, at about 23.23, the deceased left the club followed by the appellant, who paused as he walked through the doorway and bent down to pat a cat. Then the deceased walked towards his car and the appellant walked in the same direction, some distance behind him. The deceased opened the driver's door and entered the car, whereupon a gunman emerged from undergrowth and shot him. The appellant could then be seen in the grounds a short distance from the murder scene. He was alone, walking with one hand in his trouser pocket

and holding what appeared to be a mobile telephone in the other. He walked down the drive to its junction with a public road and left the area. He was then seen re-entering the drive from the road and walking a short distance back up the drive before once again exiting onto the public road.

[9] On 9 December 2016 the appellant attended voluntarily at Amsterdam Police Office and was detained on suspicion of being complicit in murder. He was interviewed on 10 and 11 December and provided a detailed account of his actions. He said he had attended at the office because he thought the police were going to be looking for him and wanted to let them know what had happened. He claimed he had met with the deceased at the hotel and that it was a pre-arranged business meeting to discuss advertising. There was evidence that Kok ran a website which contained, amongst other things, material related to crime. After some time they left the hotel and travelled to the club. He stopped to share a joke with the doorman about a cat and then saw the masked man shooting into the car. He was frightened that he might have been next, walked out to the back of the club and kept walking, hoping to see the police. He climbed over a wall into a garden. He was in shock and wanted to reflect on what had happened. He texted a friend who came and picked him up but he did not want to give the friend's name. He claimed that he had smashed his phone and put it into a bin, having dropped it while he was walking. He did not know the street where he had disposed of the phone.

[10] Doyle's evidence was that he had been in contact with Kok between June and November of 2016 with a view to placing advertisements for MPC's encrypted telephones on his website. He had met Kok in Amsterdam on 11 November 2016. He was instructed by JG to arrange a meeting with Kok for 7 December 2016 in an Amsterdam hotel. He was told that the appellant would be attending but, while Kok attended, the appellant was delayed.

JG told Doyle to provide a number of excuses to Kok for the appellant's non-attendance but Kok became impatient and left. Doyle was in Glasgow at this time, in premises operated by the group. Some time later, after he had returned home, he received a text message from JG which read something like "bastard never happened". He was worried that Kok was to be killed, to the extent that he made contact with his police handlers but they calmed him down. The next morning JG seemed calmer and Doyle had thought that he had got hold of the wrong end of the stick. He was instructed to rearrange the meeting for that day and it was fixed for the Citizen M hotel in Amsterdam. He was in contact with the appellant by text during the course of that day. Later that day, 8 December 2016, while at home, he received a text from JG which said that Kok had been "done".

[11] Doyle claimed in evidence that, in the middle of 2017, the appellant asked him to look at a news website which was showing the CCTV footage from the hotel. Later Doyle was ordered by JG to leave Glasgow and he spent 12 days in the appellant's flat in Antwerp in November 2017. During that visit the appellant admitted his participation in the murder and attempted murder. The appellant told him that he had advised JG of Kok's attendance at the hotel and thereafter of the fact that he and Kok had left the hotel and travelled to the club. Doyle asked him if he had been aware of the attempt on Kok's life outside the hotel and he replied "yes if that c**t had not sneezed he would have put the bullet through my face or my head". The appellant thereafter described the pair travelling to the club where the appellant paid for Kok to spend time with a girl. He said that he was in communication with JG by encrypted telephone from the club and was told that someone was waiting for Kok. On advising JG that they were leaving the premises the appellant had been told to hold back, that Kok was to go to his car first so that the appellant was not caught in the crossfire. That was why he had stopped to pat a cat. After the murder he peered in the car

window while saying to himself “he’s deid”. He then walked away from the car to message JG. He told Doyle that he left by the gate of the car park and started walking up a road away from the building. At some point while on that road he heard and saw the lights of the police. He jumped into and hid in the hedges of a garden until they went past. He then got a message from JG with arrangements to be picked up and taken away. He was told to get rid of a couple of phones and present himself to a police station to report that he was there when Kok was killed. He also mentioned something about a change of clothing along the lines of him putting on a tracksuit.

[12] As it happens, when he was interviewed by the Dutch police the appellant was wearing a tracksuit and when he was asked by the police about the other clothes he had been wearing he said they had been left at a friend’s house but he did not want to disclose the friend’s address.

[13] Doyle was arrested by officers investigating the crime group on 5 January 2018. These officers did not know that he was a CHIS. He was interviewed as a suspect and charged with a contravention of section 28. He denied any involvement in criminality. At the trial he agreed with the suggestion put to him in cross-examination that he had told the police a pack of lies and said that he had done so on or at the instructions of JG. He appeared on petition on 8 January 2018. He was admitted to bail and taken to a place of safety. In April 2018 he entered into an assistance agreement whereby he undertook to disclose his own criminality and thereafter agreed to be further interviewed by the police officers. A number of so-called “debrief interviews” took place between 30 May 2018 and 18 September 2018 and extensive reference was made to these during cross-examination. On 14 November 2019 he was told that he would be cited as a witness.

[14] The Crown relied on Doyle's evidence, on the CCTV footage and what was said to be the appellant's awkward account given to the police. The Crown argued that the jury were entitled to regard his account as incredible and part of a course of conduct designed to prevent the police obtaining evidence of his participation in the matter. His account that he walked off hoping to see the police and thereafter hid in a garden made no sense. He told the police that he had damaged his phone in the period after the murder and then disposed of it while on his way to the police station the next day. He would not give the police any details of those he claimed to have been in contact with after the murder nor did he provide the clothing he had worn. The jury would be entitled to conclude that he had left the scene and delayed contacting the police. The story about damaging his phone and throwing it away had been concocted to avoid the police examining the phone. This was significant because if the jury accepted Doyle's account of the admission it was that telephone which the appellant had used to contact JG.

[15] The footage was consistent with the admission Doyle had claimed the appellant made. Patting the cat was consistent with hanging back to avoid being caught in the cross-fire. The footage was also consistent with the admission that he had left the scene and contacted JG to arrange to be picked up. The evidence that he contacted the police the next day was consistent with his admission that he had been told to do so. The admission that he had donned a tracksuit was consistent with the evidence of the Dutch police.

[16] The incrimination of Doyle was implausible. He had not been in a position to pass any information to JG about the whereabouts of Kok whereas the appellant was in prime position.

The defence “position”

[17] The appellant did not give evidence. Doyle was subject to rigorous cross-examination over a number of days in an effort to demonstrate that he was a liar and a senior figure in the organised crime group; that it was he who had organised the murder; and that the appellant was nothing more than a patsy. The jury obviously rejected these suggestions.

The judge’s directions

[18] At the beginning of the trial the judge, as is the current practice, provided the jury with certain written directions. Amongst these were the following:

“witnesses may be asked about earlier statements made by them to other people. Now, there are three main reasons for this: to jog the memory of the witness, who may then be able to give evidence from their recollection; to enable the witness to adopt an earlier statement which then becomes evidence; or to undermine the witness’s credibility or reliability. Now, if any earlier statement of a witness arises in the evidence, I will tell you again more about that at a later stage, if necessary.”

The judge did not return to this topic in the course of her charge and that is the focus of the appeal. She did, however, give the usual directions about the jury’s task in assessing the credibility and reliability of the evidence and summarised the challenge to Doyle in cross and in the course of the defence speech.

Submissions for the appellant

[19] Counsel reminded us of the circumstances surrounding Doyle’s recruitment as an informant. Thereafter he took us to a number of passages in the interviews which he said necessitated clear instruction to the jury. In each of these interviews Doyle was under caution and entitled to legal assistance. He had read and signed each transcript and it had been made clear to him that he must fully admit any crime which had been committed by

him. The status of these interviews was such that the need to have a direction on any inconsistencies between them and his evidence was elevated.

[20] In particular, reliance was made on the following.

[21] Doyle said that at the time of his initial contact with the police in 2016, when he was recruited, he told them the truth. He also said that during his debrief sessions he told the truth. However, when he was arrested on 5 January 2018 he accepted that he told a great many lies in the interview that day.

[22] The starting point of cross-examination was to establish that he had lied on occasions when he claimed to have told the truth.

[23] In relation to the January 2018 interview, he maintained that he had been told what to say by the brothers and to stick to the line that he and they were merely the sellers of encrypted phones. By that time there was no doubt that he knew the nature of the business in which he was involved. In January 2018 he was aware that he was the subject of audio surveillance and by November 2019 he knew he would not be prosecuted.

[24] He said in evidence that his job interview with the group took place in Saughton where JG was serving a sentence for what he believed to be a "misdemeanour". However, he had told the police that, according to an associate, JG was in prison for fighting, that a knife was involved and that he had jammed a finger into someone's eye. This was inconsistent with claiming it was a misdemeanour.

[25] In the debrief of 3 September 2018 he described in detail the trip to Dubai and the people he had met, one of whom was referred to as a member of the mafia. He painted a picture to the police of a gathering where he mingled with individuals who were clearly involved in the underworld. This was inconsistent with his evidence that he was not involved in criminality.

[26] In an email sent to his then employer, dated 20 November 2015, it was clear that he knew what he was getting into. He claimed that he turned against the brothers because of threats made against him and sought to make out that money was not a motivation.

Production 2647 was an authorisation for an enhanced role as a CHIS and included a comment that his motivation was financial and self preservation.

[27] In evidence he tried to make out that he earned less than £30,000 annually from the group but he told the police that he always made over £50,000.

[28] It was clear that he was involved in setting up the meetings after which Kok was to be killed and he tried to play down his knowledge of that. In an interview on 30 May 2018, in which he said he told the truth, he claimed that there was a message from JG saying “bastard it didn’t happen, bastard they never got him.” He telephoned his handlers in a panic because he thought he had just set someone up to be killed. Therefore it was clear that he knew on the night of 7 December that there was a plan to kill Kok. With that knowledge it was Doyle who arranged the meeting the following night which led to the murder. This was clear evidence of Doyle trying to play down his role. There should have been clear guidance to the jury as to how to approach the potential significance of his allegedly truthful account to the police.

[29] Production 2548 was a transcript of the continuation of the interview. It contained a slightly different version of the message from JG. Although Doyle tried to suggest that he thought he was arranging a business meeting, on the same page of the interview he had to concede he realised it was not a legitimate meeting.

[30] In production 2547, an interview of 30 May 2018, there was a comment at page 9 that the appellant messaged Doyle to say that they were about to “head”. He said in evidence that that meant head to the club but because of the timings and the CCTV footage it could

only mean away from the club. The truthful account to the police showed that Doyle was at the heart of the plan and the jury should have been directed as to how to approach this. If they accepted that he was lying in his evidence and had told the truth to the police they could conclude he was trying to cover up his own role and that would reinforce the view that the appellant was a dupe.

[31] Mr Findlay accepted that he did not attempt to set up those interviews as the truth.

[32] In three different interviews, productions 2547, 2548, and 2565, Doyle gave different versions of what the appellant told the police as to his movements immediately after the shooting. In evidence he said that the appellant told him that he walked out of the car park, went up the road and hid in bushes until JG arranged for him to be picked up. In production 2547 there was no reference to a hedge. In production 2548 he claimed he was told by the appellant that he walked out of the gate of the club then walked back in. He walked along the road and kept walking. Doyle then said that he was aware of the CCTV and its possible conflict with what he had said. When asked how the appellant was picked up, he said that he had handed himself in to the police the next day and the appellant never told him that someone picked him up. In production 2565 he described the appellant walking along a long rural road. Police cars came along so he jumped over the hedge into a woman's garden and hid until the police went away. He started walking again until JG arranged for someone to pick him up.

[33] In production 2175, part of the interview under caution on 5 January 2018, he was caught out in a lie about the nature of a website operated by Kok and then correcting himself.

[34] Doyle admitted in evidence that he was aware that the cartels had a policy of killing informants, describing an incident where they attacked and killed not only an informant but the police officers guarding him.

[35] In an interview dated 31 August 2018 he described an incident early in his career with the group where it was clear that a shopkeeper had been threatened with reprisals if he did not sell the group's phones. All of these adminicles showed that he knew what was going on and that he was a criminal.

[36] Counsel accepted that there was a line of authority which was to the effect that it was not necessary to direct the jury about prior inconsistent statements, although that depended on the circumstances. The complex nature of this case and Doyle's status when speaking to the police meant that such a direction was necessary. The failure to give it had resulted in a miscarriage of justice.

Submissions for the Crown

[37] It was not in dispute that Doyle was a senior member of the group. The core of the Crown case was that the appellant admitted wrong-doing to him. He had been cross-examined at length and the criticisms had been reiterated in counsel's comprehensive address to the jury. The occasions where it was said that he had lied, the money he had received from the police, his alleged role in the murder of Mr Kok, the suggestion that the appellant was a dupe and that Doyle himself was responsible were all put to him quite plainly. The jury could have been in no doubt that his credibility and reliability were under attack. It was not necessary for the judge to give directions on matters which were obvious.

[38] As far as the individual attacks on Doyle's evidence were concerned, the fact that he had said JG's conduct was a misdemeanour was not inconsistent with his previous description of that conduct. It was merely his characterisation of it.

[39] While he said in evidence that he was aware from an early stage that the group was involved with drugs and firearms and denied that he himself was a criminal, that was again simply his own characterisation of his conduct and no issue of prior inconsistency arose. His evidence was entirely consistent as to his activities. The fact that his view of his actions was probably inconsistent with what the jury knew of his conduct was not a matter which required further direction. Neither did the email to his then employer, from which it could be inferred that he knew the kind of business he was getting into, amount to a prior inconsistency.

[40] The authorisation for his enhanced role, while it contradicted his account that his motivation was not financial, did not contain any inconsistent statement by him. It was a document generated by the police. While it was accepted that there was an inconsistency between his evidence about his earnings from the group and his prior police statement, this was clearly before the jury

[41] The statements made by him to the police about the text he received from JG were broadly consistent with his evidence. He had received a text which gave him such concern that he contacted his handler. While there were some inconsistencies in the exact wording of the message, they were of no significance. The point was that he thought there might have been a threat to Kok's life, which was what he said in evidence and what he had said to the police.

[42] As far as the message from the appellant that they were about to "head" was concerned, he was asked in cross if the appellant had told him when he was leaving the club

with the deceased and he said he did not believe so. It was suggested to him that the message showed that they were leaving the club. The interpretation he placed on it in evidence was that they were leaving the hotel. On one view there was arguably an inconsistency between his evidence and the police statement but on another view there was not. In evidence he accepted getting the message but interpreted it in a particular way. In any event this was all before the jury. There were some inconsistencies between his prior statements and his evidence about the appellant's account of what he did after he left the club but these were matters of mere detail. The jury would have understood without the need for a specific direction that Doyle's credibility was being attacked on the basis that he had not been consistent about these details. In any event there was no dispute about the appellant's movements after the murder. He could be seen on CCTV walking away, looking at his telephone. He told the police that he had left and hid in a hedge and that he was picked up later by a friend. Any inconsistencies were of no consequence.

[43] The judge's charge had to be read as a whole and in the context of the evidence and the parties' approach to it. The jury must be presumed to have a functioning collective intelligence. Furthermore, the extent to which the judge should touch on matters of fact was one for her in her discretion.

[44] There was no dispute as to the law. Whether a direction was required would depend on the facts and circumstances of the case; *Moynihan v HM Advocate* 2017 JC 71 and *Niblock v HM Advocate* 2010 SCCR 337. This was a relatively straightforward case. The fact that Doyle was an informant and spoke to the police in that capacity did not put his prior statements into any special category.

Analysis

[45] In many respects the submissions for the appellant seemed to desiderate a direction not so much on prior statements but about the general character of the incriminee Doyle. Such a direction would have been akin to a *cum nota* warning which the courts were accustomed to giving before the case of *Docherty v HM Advocate* 1987 JC 81. It was not, however, the function of the trial judge to give the jury any special directions as to how they should approach Doyle's, evidence, that matter having been placed fairly and squarely before them in the speeches by the Crown and defence. The jury were given standard directions about credibility and reliability and there was no need for the judge to give further guidance on these matters. The defence challenges to Doyle's credibility and reliability were plainly and comprehensively set out in counsel's address to the jury, as were what was said to be inconsistencies between his prior statements and his evidence.

[46] *Moynihan* makes it clear that the existence of any obligation to direct the jury on prior statements will depend on the facts and circumstances of the case. The mere fact that there has been reference to a prior statement or statements at some point during the trial does not mean that a direction is inevitably necessary.

[47] It is likely that such a direction will require to be given where the witness has adopted a statement as part of his evidence and that part is material to proof of the charge. A direction may also be required where the adopted statement is material to proof of the defence.

[48] In this case, however, neither the advocate depute nor senior counsel for the appellant relied at trial on Doyle's adoption of any particular parts of his police interviews. To that extent, the observations in *Niblock*, which were repeated in *Moynihan*, have no part to play in this appeal.

[49] There is no merit in the suggestion that statements of a police informant, even one who is somehow contracted to tell the truth, are in a different category from other statements when it comes to assessing whether they are consistent or inconsistent with evidence. It does not matter whether such statements are given on oath, during the course of formal interviews or in the course of conversation. The same rules apply.

[50] The nature of the attack on Doyle was plain. The jury did not require to be given any directions beyond those they received about their function in assessing credibility and reliability. There is nothing exceptional in this case which takes it out of the generality as described in *Moynihan*.

[51] In any event, we agree with the advocate depute's characterisation of the statements relied on by the appellant. Insofar as they can be regarded as inconsistent it is in respect only of matters of mere detail. While his evidence in some respects could be said to have underplayed his status as a criminal, there is no prior inconsistency in what he said his activities actually were. A direction about prior inconsistency in dealing with those features of his evidence would have been confusing and misplaced. In any event, the jury were well able to make their judgment on that for themselves without any additional assistance from the bench.

[52] There being no substance to the only ground which has been given leave to appeal, it follows that this appeal must be refused.