



APPEAL COURT, HIGH COURT OF JUSTICIARY

**[2026] HCJAC 45
HCA/2026/106/XC**

Lord Justice Clerk
Lord Matthews
Lord Clark

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

PAUL McCANN

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

**Appellant: Alonzi; Faculty Appeals Unit
Respondent: Cameron KC (sol adv); The Crown Agent**

15 October 2026

Introduction

[1] In this appeal against a conviction for attempted murder committed in prison on another prisoner, the appellant contends that a failure by the prosecution to disclose information contained in a victim statement until after the trial has caused a miscarriage of justice.

The charges and verdicts

[2] The jury found the appellant guilty of three charges and the appeal concerns only charge 3 stating:

“(003) on 5 March 2023 at HMP Perth... you PAUL MCCANN did assault Sean Dempsey... and did repeatedly strike him on the head and body with a bladed article to his severe injury, permanent disfigurement and to the danger of his life and did attempt to murder him.”

He lodged a special defence of self-defence and testified in support of it.

[3] The appellant was also convicted of two offences committed in HM Prison Low Moss, Bishopbriggs on 19 July 2022:

- (1) assault to severe injury and permanent disfigurement by striking another prisoner on the head and body with blades attached to pieces of wood; and
- (2) having an article with blades in a prison contrary to the Criminal Law (Consolidation) (Scotland) Act 1995 section 49C(1)(b).

The verdicts on charges 1 and 2 were unanimous and that on charge 3 was non-unanimous.

The circumstances of the offence and the evidence

[4] We need not narrate the evidence on charges 1 and 2 but note that the evidence on charge 1 was available to provide mutual corroboration on charge 3. Whilst it is not clear precisely how this aspect was presented to the jury, and the judge did not give directions on mutual corroboration, he did direct the jury that part of the Crown case on charge 3 involved “some reliance on the similarities between the incident in charge 1 and with that in charge 3.”

[5] The Crown case on charge 3 principally comprised CCTV footage, evidence from two prison officers and agreed facts and evidence about the complainer’s injuries. Whilst the complainer was listed as a witness on the indictment, neither the Crown nor the appellant called him to testify. The preamble to, and the latter part, of the events of charge 3

were captured on CCTV but not the few seconds of the fight starting inside the complainer's cell. We have viewed the footage and are satisfied that the trial judge is broadly correct in his description in his report.

[6] The footage commences at about 08:30 hours on 5 March 2023 showing a communal area with cell doors at either side. The appellant, wearing a blue T-shirt and shorts, walked towards the complainer's cell door and pushed it open with his right hand whilst his left hand was in his pocket, before returning to his own cell. The complainer, wearing only boxer shorts, then looked out and the appellant looked towards him before re-entering his own cell. The complainer went back into his cell.

[7] The appellant then walked, with his left hand in the pocket of his shorts, consistent with concealing a weapon, towards the complainer's cell and entered it very briefly. The camera did not capture events within, there being 3 seconds between the appellant entering and leaving the complainer's cell. The appellant then emerged followed by the complainer. They appeared to aim punches and kicks at each other in the communal area. It becomes apparent that the complainer was bleeding from the front of his neck and side of his face. The appellant appeared to have something in his right hand and then walked away from the complainer.

[8] Footage taken from the opposite end of the communal area shows two prisoners kicking a small article behind them in the direction of a communal bin after the end of the fight. One of them, wearing a green shirt, then appeared to kick the item under the bin. He was taking an interest in the appellant when he first approached the cell and the fight, positioning himself so that he and another prisoner could secrete what we would infer was the razor. The appellant appeared to interact with them, particularly the man in the green shirt. The inference we would draw, and the jury could draw, is that they were party to a premeditated attack with a weapon on the complainer.

[9] Shortly afterwards, the appellant approached the two prisoners and walked towards prison officers. The appellant's T-shirt was torn but he did not appear to be injured. The judge's impression of the recordings was that the appellant targeted the complainer and had the razor in his pocket on entering the complainer's cell, before attacking him whilst the complainer was in a state of undress. On our viewing of the recording we consider he is correct.

[10] Aaron Dunbar, Prison Officer, realised that something had happened when he saw the appellant's torn shirt and took the appellant to his cell. Mr Dunbar knew that the complainer had sustained injuries but, as is common among prisoners, the complainer was saying that nothing had happened. In due course, when speaking to Mr Dunbar, the appellant accepted responsibility for what had happened, which the officer accepted could have meant that he accepted causing the complainer's injuries.

[11] Aaron Asher, Prison Officer, spoke to accompanying the appellant to the segregation unit. Another officer exclaimed to the appellant, "Christ Paul, you almost had his jugular" and Mr Asher heard the appellant respond: "That's what I was going for." The appellant was calm and composed at this time. No weapon was recovered.

[12] Agreed facts in a joint minute confirmed that the complainer sustained multiple wounds to his face, chest and upper arm. They included an 11.5 cm vertical cut from in front of his right ear towards the corner of his jaw; a 5.5 cm cut to his right cheek; a 1.5 cm cut to the outer aspect of his right eye socket; and a 5.5 cm cut to the right side of his neck. They were closed with stitches. The injuries could have been caused by a bladed article. Permanent scarring will result. Dr Michael Donald, a consultant in emergency medicine, explained that the cuts to the neck came close to the carotid artery and the jugular vein. If either had been cut, the complainer would have suffered a catastrophic haemorrhage requiring immediate treatment to prevent death.

[13] The appellant's evidence was that he was receiving hassle from certain prisoners and the complainer was deliberately banging on his cell wall at night to keep him awake. The appellant had gone to the complainer's cell that morning to speak about it but had no weapon with him. The appellant described himself as being "cheeky" to the complainer, who grabbed him whilst also grabbing a razor from a shelf above his sink. The complainer cut himself in doing so and dropped it. The appellant picked it up and the fight then continued outside the cell. The appellant said that he acted in self-defence. He did not say he had been going for the complainer's jugular.

The undisclosed material

[14] A victim statement was completed by the complainer as follows:

- In the section on the effect of injuries, he wrote:

"My injurys (*sic*) were effectivly (*sic*) self inflicted. The only victim in my opinion is Paul McCann"

- In the section on the emotional and psychological effect of the crime he wrote:

"The above paragraph seem's (*sic*) to be trying to put words into a melodrama-behave yerselves. I am a more confident person than before."

- Where invited to provide any further information about the impact of the crime which he feels is relevant he writes:

"No crime was committed in my opinion".

- In the section asking if he was the victim etc he wrote:

"Paul McCann is the victim here-not me".

- In response to a warning about the consequences of giving false information, he wrote:

"Tell someone who gives a fuck".

Note of Appeal

[15] The Crown received the victim statement from the complainer on 27 May 2025 but did not disclose it until after the appellant was convicted and sentenced on 20 February 2026. The Crown accepted that the information ought to have been disclosed sooner. It was likely materially to weaken or undermine the Crown case and/or materially strengthen the defence case. If the defence had the statement, they could have lodged it as a production and the complainer could have been called as a defence witness. He may then have supported the appellant's account, failing which he could have been cross-examined on the content of the victim statement. Accordingly, there has been a miscarriage of justice.

The judge's response

[16] In reporting on grounds of appeal, a trial judge is obliged by statute to offer an opinion on the case generally and on the grounds of appeal: Criminal Procedure (Scotland) Act 1995 section 113(1). This court expects trial judges to do so: *McPhelim v HM Advocate* 1996 JC 203, Lord Justice Clerk (Ross) at page 205. It facilitates this court in determining appeals appropriately: *Razzaq v HM Advocate* [2017] HCJAC 45, 2018 JC 21 [53]; *TH v HM Advocate* [2025] HCJAC 46, 2026 JC 58 [33].

[17] The trial judge complied, providing his opinion. He observed that the appellant could have precognosced (interviewed) the complainer and called him as a witness if his counsel judged it would help. The judge did not consider that the complainer's remarks in the victim statement either described himself as the aggressor or supported that the appellant acted in self-defence. He considered that the jury would have been sceptical about the content of the statement, particularly the response to the warning about giving false information. Any evidence from the complainer of assistance to the appellant would be inconsistent with his telling prison officers that nothing had happened.

Submissions

Appellant

[18] The appellant largely repeats the content of the Note of Appeal, adding that had the appellant called the complainer, his evidence was more likely to undermine the Crown case than support it and:

“The defence would have been in a stronger position to make an informed choice about calling the complainer as a defence witness. Furthermore, regardless of what the complainer may ultimately have said in evidence, the terms of the Victim Impact Statement would thereby have been adduced for the jury’s consideration. The significance of this should not be underestimated as this was the only source of independent evidence capable of supporting the appellant’s defence. Thus, the appellant was deprived of a significant source of evidence supporting his defence.”

[19] At the hearing, counsel explained that the trial had been conducted on the basis of self-defence and submitted that it was plain from the CCTV footage that the appellant had inflicted the injuries after he and the complainer had left the cell and were exchanging blows in the communal area. The natural reading of what the complainer had written was that he was acknowledging that his actions had caused the appellant to act in self-defence. This was materially exculpatory and had this been known to the appellant, and he had called the complainer as a witness, and the witness had repeated this, then there must be a real possibility of a different verdict.

[20] The Crown was wrong to suggest that the proper test of whether an established failure of the duty of disclosure led to an unfair trial was that set out by Lord Hope in *McInnes v HM Advocate* [2010] UKSC 7, 2010 SC (UKSC) 28 at [20]. His Lordship had contradicted himself at [24], where he set out the correct test. Lord Rodger was to similar effect at [30] and Lord Brown at [35]. The proper question was whether there was a real possibility that the jury might have come to a different verdict, not a real possibility that they

would have. In the circumstances of this case, the test was met and there has been a miscarriage of justice.

Respondent

[21] The Crown accepted that the statement about effective self-infliction of injuries was potentially exculpatory even if its veracity may be doubted. Accordingly, it ought to have been disclosed under the Criminal Justice and Licensing (Scotland) Act 2010, section 121(3), but there has been no miscarriage of justice. There had been two internal clerical errors in dealing with the statement when it came into the Crown's possession. Steps had been taken with a view to avoiding repetition of such failures.

[22] The test to be applied was the second stage of the test in *McInnes* at [20], namely whether with the additional information there was a real possibility that the jury would have reached a different verdict.

[23] The complainer had not provided a statement to the police but was listed on the indictment and the defence could have interviewed him. They could have adduced him as a witness, which the Crown would have facilitated. In any event, it was not clear whether his statement that his injuries were essentially self-inflicted supported self-defence.

[24] The information must be considered against a strong Crown case. In particular: the recording and what it showed; the appellant saying in the hearing of Mr Asher that he was going for the complainer's jugular; the admitted injuries including to the complainer's neck; the appellant stating to both Mr Asher and Mr Dunbar that he was responsible for the attack; and Mr Dunbar's evidence that the appellant was calm and compliant after the incident. A jury would not have been impressed by the appellant's response on the victim statement form to the warning about giving false information. That and the evidence from Mr Asher that after violent incidents prisoners very commonly say that nothing happened, would cast

considerable doubt on the credibility of any information from the complainer that might be exculpatory of the appellant.

[25] At the hearing, the Advocate Depute suggested that the Crown considered that the meaning of the statement seemed to be that the complainer had inflicted all of the injuries on himself. On that basis it was exculpatory in a broad sense, even if it was contradicted by the evidence in the trial, not least that of the appellant whose evidence involved an acceptance that he inflicted the serious injuries but sought to exonerate himself by claiming self-defence.

Analysis and decision

[26] The Crown accept, and we proceed on the concession, that the statement was disclosable under the 2010 Act section 121(3) which categorises information that the Crown must disclose:

- (a) the information would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused,
- (b) the information would materially strengthen the accused's case, or
- (c) the information is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused.

[27] As for the consequences of the admitted non-disclosure, we are not persuaded that there was any material difference in what Lord Hope wrote in his judgment in *McInnes* at [20], where he set out the second test in a non-disclosure appeal, and [24] where he applied it. Nor do we consider that either Lord Rodger or Lord Brown proposed a different test, but matters have moved on.

[28] In *Fraser v HM Advocate* [2011] UKSC 24, 2011 SC (UKSC) 113 Lords Hope, Rodger and Brown presided (with Lords Kerr and Dyson) in another appeal based on non-disclosure. Lord Hope explained, at [14], that the second test, for the effect of non-disclosure on the trial, was set out in *McInnes* at [20], [24] and [30], adding that:

“...At this stage the significance and consequences of the violation must be assessed. The question is whether, given that there was a failure to disclose and having regard to what actually happened at the trial, the trial was nevertheless fair. It was in order to indicate more precisely what ‘fair’ means in this context that the court went on to give this further guidance. The test that is to be applied to determine this issue is whether, taking all the circumstances of the trial into account, there is a real possibility that the jury would have arrived at a different verdict if the withheld material had been disclosed to the defence...”

At [26] Lord Hope reiterated that the test for an unfair trial, “there is a real possibility that the jury would have arrived at a different verdict”, was to be found in *McInnes* at [20] and he applied it in *Fraser* at [38]. Lord Rodger, Lord Kerr and Lord Dyson agreed with Lord Hope’s judgment.

[29] Lord Brown adopted the same test at [46]:

“...the test of such unfairness is that now authoritatively laid down by this court in *McInnes* — in short whether, taking into account all the circumstances of the trial, there is a real possibility that the jury would have arrived at a different verdict had the undisclosed material in fact been disclosed to the defence (see particularly *McInnes*, paras 24, 30, 35).”

[30] Any possible doubt is dispelled by Lord Reed giving the judgment of a Supreme Court bench of seven judges in *Macklin v HM Advocate* [2015] UKSC 77, 2016 SC (UKSC) 47 where he confirmed, at [14], that for the consequences of non-disclosure of disclosable material:

“...The test here is whether, taking all the circumstances of the trial into account, there is a real possibility that the jury would have arrived at a different verdict.”

[31] We note that no use could have been made of the information in the victim statement in the trial as it was conducted. Despite the complainer being listed on the indictment, neither the Crown nor defence adduced him. He gave no evidence in the trial. Accordingly, he could not have adopted the content of his statement and it could not have been put to him in cross-examination or admitted as hearsay if the complainer was permitted not to answer in order to avoid self-incrimination (1995 Act s 259(2)(d)) or refused to take the oath/affirmation or to answer questions (s 259(2)(e)).

[32] If we assume that possession of the statement at trial would have prompted the appellant to adduce the complainer as a witness, we do not know what he would have said. He did not cooperate with the appellant's attempts to interview him for the appeal.

[33] If we proceed on an assumption that the complainer would have said either that he had caused all of his injuries himself (as the Crown suggest is the natural meaning of his written statements) or, as the appellant maintains, that the complainer was confirming that his conduct caused the appellant to act in self-defence, a jury would be expected to evaluate his evidence against the other evidence, not least the CCTV footage. There is no sign of injury on the appellant, and the complainer was plainly bleeding from injuries on his face and neck. The footage disclosed what we consider to be clear indications of other prisoners taking steps to secrete the blade used by the appellant to injure the complainer, whatever its origin. The appellant's proximity to them suggests that they did not do so spontaneously. Like the trial judge, we cannot avoid the conclusion that the appellant took the item to the complainer's cell with him. There was no recorded injury to the complainer's hands, as might be expected from the appellant's description of events in the cell.

[34] Anything exculpatory that the complainer might have said would have been contradicted by his telling prison officers that nothing had happened when the jury could see for themselves that the complainer left his cell, engaged in a fight in the communal area with the appellant, the complainer was bleeding and they carried on exchanging blows. They would have seen prisoners making gestures suggestive of secreting the razor, after the appellant passed close by. Exculpatory evidence from the appellant would also have been contradicted by his acceptance of responsibility to prison officers and his overheard confirmation that he had been going for the complainer's jugular. The jury would no doubt have paid heed to the evidence of prison officers that prisoners frequently maintain on investigation of occurrences of violence that nothing happened. The judge was correct to

recognise that the final response by the complainer in the victim statement form would damage the credibility of any exculpatory evidence he gave.

[35] Applying the *McInnes* test, and considering all of the circumstances of the trial, we find that there is no real possibility that the defence having possession of the victim statement, or its content, in advance of the trial would have caused the jury to reach a different verdict. The appeal is accordingly refused.

[36] We note that the only defence advanced in the trial was self-defence. If counsel for the appellant is correct that the injuries were inflicted in the communal area as at least most of them plainly were, when the appellant had possession of the razor and the complainer was unarmed, self-defence could not have succeeded. First, the appellant could reasonably have got away from the complainer and, secondly, to aim blows repeatedly with a razor to the complainer's face and neck could only be a cruelly excessive retaliation towards an unarmed man. Even if all events had transpired within the complainer's cell in circumstances where escape could not reasonably be made, the appellant's cruelly excessive response would still exclude a defence of self-defence.