APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 6
HCA/2016/000590/XC

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST CONVICTION

by

PRADEEP BHOWMICK

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Ms Dow; Faculty Services Limited
Respondent: Farquharson, AD; Crown Agent

14 December 2017

Introduction

[1] At the hearing of this appeal on 14 December 2017, having heard brief submissions from counsel for the appellant and the advocate depute, we refused the appeal and indicated that we would give our reasons for doing so later. This we now do.

[2] On 21 September 2016, the appellant and his co-accused James Quinn were found guilty of an offence of being concerned in the supplying of a controlled drug, namely cocaine, contrary to the Misuse of Drugs Act 1971 Section 4(3)(b).

[3] The evidence at trial demonstrated that the appellant was employed as a freight forwarder with a company based in Paisley. Through the knowledge and expertise which he acquired in that capacity he played an important role in the drugs operation which was uncovered. The appellant was granted leave to appeal on a ground challenging the admissibility of evidence concerning the recovery of his mobile phone, from which evidence implicating him in the commission of the crime was obtained.

[4] The appellant died on 24 March 2017 and an order in terms of section 303A of the Criminal Procedure (Scotland) Act 1995 was applied for and pronounced authorising his brother and sister to continue the appeal in his place.

The evidence

[5] The background to the evidence concerning the recovery of the appellant's mobile telephone was as follows. On 12 September 2013, UK Borders Force officers intercepted a crate in the hands of a haulage firm at Hull docks. The crate contained eight computer base units, each of which contained an artificial cavity into which approximately 1kg of high purity cocaine had been placed. The crate was to be delivered to an address in the West of Scotland and contact was therefore made with officers of the Police Service of Scotland. Those officers took the crate to premises in Glasgow where the cocaine was removed and packages of sugar substituted. The crate and the computer units were then re-entered into the freight system with the co-operation of the haulage firm.

[6] A surveillance operation was mounted and on 16 September 2013 the co-accused Quinn, driving a hired van, collected the crate from the premises of a freight company in Paisley. On 18 September 2013, the same vehicle was observed parked outside Quinn's address at 17 Glenhead Crescent, Glasgow. He was heard to be hammering within the rear of the van and was seen to be taking large objects into the house. On 20 September he was observed in the early hours of the morning disposing of the crate in a secluded area in Bishopbriggs.

[7] In the afternoon of 22 September 2013, the appellant was observed to meet with Quinn in a park near to 131 Haywood Street, Glasgow, which was the address of Quinn's girlfriend. They were then observed returning to that address and observation was continued there. The hired van was parked outside the property and the appellant was observed looking into the rear of the vehicle with the door open.

[8] Around 19:45 hours Quinn attempted to drive the hired van away and he was detained by Detective Constable Hamilton and Detective Inspector Biggam. It was noticed that one of the computer base units was in the rear of the van. The detective inspector and other officers then entered the property at 131 Haywood Street through the front door which was not properly closed. The appellant was detained inside the property by the inspector exercising the powers given to him in terms of section 23 (2) of the Misuse of Drugs Act 1971. The property was then secured whilst a search warrant was obtained and, in due course, a search under the authority of the warrant recovered the remaining seven computer base units and the appellant's mobile telephone, which was lying on a radiator in the living room.

The objection

[9] During the course of the trial senior counsel for the appellant took objection to the evidence of his detention, upon the premise that the detaining officer did not have reasonable grounds to suspect that the appellant was in possession of a controlled drug and that his detention in terms of the statutory provision was therefore unlawful. He contended that as the detention was unlawful, the subsequent recovery of the appellant's mobile telephone, albeit during the course of the later search, was also unlawful, since it flowed directly from the unlawful detention of the appellant.

[10] The appellant had not raised this objection by preliminary issue prior to the preliminary hearing in the case, as required by section 79(1) of the Criminal Procedure (Scotland) Act 1995. Despite this, the trial judge permitted the objection to be raised and the evidence of the detaining officer was then heard in the absence of the jury.

[11] Having heard the evidence of Detective Inspector Biggam, and submissions from counsel for the appellant and the advocate depute, the trial judge concluded that the appellant had been unlawfully detained. She reached that conclusion upon the view that the Crown had failed to adduce sufficient evidence to enable her to make a finding as to what the information available to the Detective Inspector was "that made [him] think that the drugs had been taken into 131 Haywood Street". In this state of affairs she concluded that the Crown had not demonstrated that the Detective Inspector had reasonable grounds for suspecting that the appellant was in possession of a controlled drug.

[12] Despite having arrived at the conclusion that the appellant's detention was unlawful, the trial judge accepted that there were grounds for considering that the property at 131 Haywood Street was a crime scene, that the situation was an urgent one and that the police were entitled to preserve the scene, including the mobile telephone lying on the radiator in

the living room. She accordingly admitted the evidence of the recovery of items during the subsequent search under the authority of the warrant.

The appeal

[13] On an application made to it in terms of section 107(4) of the Criminal Procedure (Scotland) Act 1995, (the "second sift") the High Court granted the appellant leave to appeal. In doing so the court made the following comment: "The court wishes to be addressed also on the correctness of the trial judge's decision on the validity of the appellant's detention".

[14] The written submissions lodged on behalf of both the appellant and the Crown raised a number of issues concerning the proper approach to an assessment by the court of whether there existed "reasonable grounds to suspect", such as would permit a constable to exercise the power of detention provided for by section 23(2) of the Misuse of Drugs Act. They also raised issues as to the circumstances in which police officers would be entitled to secure a crime scene. The written submissions for the Crown stated that the trial judge was wrong to have allowed the objection to be raised in the course of the trial and made certain observations on the importance of timeous objections being made.

[15] Since the ground of appeal sought to challenge the way in which the judge had, in part, disposed of the objection taken, a question arose as to what the effect of the appellant's argument would be if the trial judge ought never to have entertained it in the first place. When this was raised with her by the court, counsel for the appellant candidly acknowledged that a miscarriage of justice could not be said to have occurred, even if the judge erred in repelling the objection taken, if in fact she had no power to hear the objection.

[16] It therefore appeared to us that the first question to be answered was whether the trial judge was entitled to entertain the objection which was raised and which, in part, she sustained.

[17] Section 79(2)(b)(iv) of the 1995 Act defines an objection by a party to the admissibility of any evidence as a preliminary issue. Subsection (1), as read along with section 72(3), provides that, except by leave of the court on cause shown, no preliminary issue shall be raised by any party unless his intention to do so has been stated in a notice intimated not less than 7 clear days before the preliminary hearing. The cause shown provision enables preliminary issues to be raised at the preliminary hearing, even if the requirement for notice has not been complied with.

[18] However, the matter is quite different after the preliminary hearing has been heard. Section 79A (so far as relevant) provides as follows:

> "(1) This section applies where a party seeks to raise an objection to the admissibility of any evidence after-
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> (a) in proceedings in the High Court, the preliminary hearing;
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> …
>
> (4) Where the party seeks to raise the objection after the commencement of the trial, the court shall not, under section 79(1) of this Act, grant leave for the objection to be raised unless it considers that it could not reasonably have been raised before that time."

[19] Counsel for the appellant confirmed that no attempt had been made at trial to satisfy the judge that the point taken in the evidence of Detective Inspector Biggam could not have been the subject of timeous intimation. There were no submissions which she could make at this stage in support of such a suggestion. She was not able to identify any authority which would permit the trial judge to dis-apply the terms of the statutory provisions.

[20] The advocate depute submitted that the trial judge had acted in conflict with the statutory provisions in permitting the objection to be heard. It followed that even if the court agreed with the criticisms identified in the Note of Appeal, it could not be said that a miscarriage of justice had occurred.

Discussion

[21] In her report to this court, the trial judge explained that she was aware of the terms of section 79A of the 1995 Act. She explained that objection was initially taken during the evidence of a Detective Constable Collier. At that time counsel for the appellant sought to persuade her that the point could not reasonably have been taken at an earlier stage. However, the objection was withdrawn as further evidence might illuminate the basis for the appellant's detention. When the objection was renewed in the course of the evidence of Detective Inspector Biggam, the trial judge informs us that counsel's emphasis came to be upon the duty of the court to provide a fair trial, rather than on the contention that the point could not reasonably have been taken at an earlier stage.

[22] The trial judge explains that she considered the cases of *Wade and Coates* v *HM Advocate* [2014] HCJAC 88 and *Murphy v HM Advocate* 2013 JC 60. Although she acknowledged that in those cases the court emphasised the importance of the provision found in section 79A(4), she expressed the view that the underlying grounds for the objections taken in those cases were poor ones. She concluded that it may have been readily apparent to the judge at first instance in each of those cases that he was not prejudicing the fair trial of an individual by declining to entertain the objection. She explained that before dealing with the objection in the present case she did not have that level of clarity about the

consequences of declining to deal with the objection for the fair trial of the appellant. She therefore decided to entertain the objection on its merits.

[23] It is apparent that the trial judge consciously made a decision not to comply with the terms of section 79A(4) of the 1995 Act. She did so, it would seem, upon the basis that the section might fall to be applied or dis-applied according to the strength of the underlying point sought to be made. She appears to have come to the view that compliance with the statutory provision might jeopardise an accused person's right to a fair trial if the objection disclosed the presence of evidence which would, or might, have been ruled inadmissible if taken timeously.

[24] No support for the conclusions arrived at by the trial judge was identified. In the case of *Wade and Coates*, to which the trial judge referred, the appeal was taken in part to challenge the trial judge's refusal to entertain an objection to the admissibility of evidence first taken during the trial. Part of the argument advanced was that the judge ought to have read down section 79A(4) of the 1995 Act, in terms of section 3 of the Human Rights Act 1988, as allowing him to consider the objection. It was said that the overriding duty of the court was to ensure that the appellant had a fair trial. These arguments did not prevail.

[25] In giving his opinion the Lord Justice General (Gill), with whom the other judges agreed, referred to the importance of the High Court of Justiciary Practice Note No 1 of 2005 which gave practical effect to the procedural reforms of the Criminal Procedure (Amendment) (Scotland) Act 2004, by which section 79A was introduced. He drew attention to the obligation imposed on the parties to discuss their state of preparation before the preliminary hearing, he pointed out that in doing so the parties must each consider in detail the evidence that they may require to lead if the case goes to trial, and he said this:

> "In particular, the parties must consider whether any preliminary plea, preliminary issue or other of matter that may be disposed of before the trial should be raised and whether all appropriate notices in that regard have been lodged timeously."

[26] The advantages of disposing of an objection to the admissibility of evidence before the trial are obvious. As noted in paragraph 2.4 of the Crown's written submissions in the present case, they include the opportunity to prepare in the context of an evidential hearing, and not a trial where the presentation of evidence for the benefit of a jury is the focus. The statutory framework also provides for an appeal from a decision on an objection, with leave of the court of first instance, which has the benefit of enabling an important point to be authoritatively adjudicated upon in advance and thus avoiding what may turn out to be a lengthy and unnecessary use of the time of a trial court. In any event, whether the advantages identified are thought to be compelling or not, prior objection to the admissibility of evidence is what Parliament has legislated for.

[27] In deciding to hear the objection in the present case because of a concern as to a possible impact on the accused's right to a fair trial, the trial judge looked at the restriction on the right to raise an objection in isolation. This was not a correct approach. Any consideration of a fair trial issue would have to take account of the proceedings as a whole. The process of disclosure, now governed by statute, enables the accused and his advisers to have a full understanding of the case to be led against him from an early stage, and long prior to service of the indictment. It includes a procedure permitting the accused person to seek an order for disclosure. The requirement to raise an objection by way of preliminary issue in advance of the preliminary hearing has to be seen in the context of the whole structure for pre-trial preparation, which includes the relevant statutory provisions, the availability of legal aid from petition stage and, in cases intended for prosecution in the High Court, early sanction of the employment of counsel, the Practice Note and judicial case

management. There is nothing exceptional or onerous in a requirement to consider the disclosed material and its implications in advance of the preliminary hearing. Having done so, the accused and his advisers have ample opportunity to state any objections which they may wish to have heard. Even if timeous notice of an objection is not given, section 72(6)(c) of the 1995 Act requires the judge at the preliminary hearing to ascertain whether there is any objection to the admissibility of evidence which any party wishes to raise despite not having given requisite notice. The judge is then required to consider whether he should grant leave under section 79(1) for any such objection to be raised. At this stage the test is simply on cause shown. As noted above, even an objection raised at trial can be heard, subject to the court being satisfied that the party could not reasonably have raised it prior to that time. All of these measures, and the others aspects of the system identified, when taken along with the domestic law on the admissibility of evidence, contribute to the provision of a fair trial. It is inappropriate to examine any single factor in isolation.

[28] In the present case the trial judge acted contrary to the legal requirements imposed upon her. She had no information which would have enabled her to conclude that the objection could not reasonably have been raised earlier. She was not invited so to conclude and she did not do so. There is no other dispensing provision attached to the mandatory requirement provided for by section 79A(4). In these circumstances the statutory provision required the judge to refuse leave to raise the objection and she ought not to have entertained it.

Disposal

[29] Having come to this view it is apparent, and conceded, that a miscarriage of justice cannot be said to have occurred in the present case. The trial judge afforded an advantage to

the appellant which she was not empowered to give. Any complaint about the way in which she then disposed of the point argued before her is of no assistance to the appellant. For these reasons the appeal is refused.