APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 8
HCA/2017/396/XC

Lord Justice General
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

AN APPLICATION TO AMEND A NOTE OF APPEAL AGAINST CONVICTION

by

GARY MICHAEL TRAVERS

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Green; Faculty Services Ltd
Respondent: McSporran QC (sol adv) AD; the Crown Agent

10 January 2018

[1] This is an application to amend a Note of Appeal to introduce a ground of appeal against a decision made by the sheriff (Small), at what was a (sixth) First Diet at Hamilton on 8 March 2017, to refuse to allow a challenge to a statement of uncontroversial evidence (SOUE) under section 258 of the Criminal Procedure (Scotland) Act 1995 to be "re-introduced" shortly before a trial diet. The trial took place on 11 April 2017. The appellant

was convicted of a breach of sections 84 and 91 of the Sexual Offences Act 2003 in that, between 12 and 15 August 2016, being a person subject to the notification requirements of the Act, he had failed to comply with these requirements by not advising of his release from prison and his change of address within 3 days. He was sentenced to 2 years imprisonment. A hearing of the appeal has been fixed for 31 January 2018.

[2] A sexual offences prevention order (SOPO) had been granted at Airdrie Sheriff Court, in the absence of the appellant, on 10 December 2009. On 13 March 2013, a sheriff at Hamilton, in a different trial, had sustained a no case to answer submission in respect of a charge, which was similar to the present one, because it had not been proved that the SOPO had been properly served. Very shortly thereafter, the sheriff clerk at Hamilton handed the relevant SOPO documents to the appellant in the cells, acting under section 102(3) of the 2003 Act, which provides that intimation may be made by the clerk, by causing a copy to be given to the person concerned. More than 3 years later, on 12 August 2016, the appellant was released from prison and reminded of the notification requirements. Having allegedly failed to comply with them, he was indicted, on the current charge, on 26 October 2016.

[3] On 9 November 2016, the respondent served a SOUE on the appellant, to the effect that he was subject to the requirements of the 2003 Act and that the 2009 SOPO had been properly intimated to him. That was initially challenged by the appellant. At a First Diet on 11 November, the appellant also lodged a preliminary issue minute (1995 Act, s 79(2)(b)(ii)) challenging the special capacity, that he was subject to the requirements as libelled (1995 Act, s 255). A compatibility issue to the effect that the SOPO was contrary to several articles of the European Convention was also lodged. At a continued First Diet on 18 November, it was intimated that the appellant no longer challenged the SOUE. The appellant had been represented by a solicitor at that diet.

[4] There followed three more First Diets, at which various references were made to "devolution minutes"; although, since there were no such minutes, these were thought to be references to the minutes challenging the special capacity and raising the compatibility issue. On 17 February 2017, at a fifth First Diet, it was recorded that the two "devolution minutes" were not to be insisted upon. There was, however, a motion to "re-introduce" the challenge to the SOUE, which was continued to a sixth First Diet on 8 March. On that date, the sheriff refused to allow a new challenge to the SOUE, having regard to the fact that it, and the challenge to the special capacity, had previously been withdrawn. It appears from the minutes that the sheriff did not consider that the re-introduction of a challenge was competent but, since the matter has not been appealed until now, there is no report from the sheriff setting out his full reasoning.

[5] On 15 March 2017 a new minute challenging the special capacity was lodged along with a motion to allow it to be received late. It was said that the earlier withdrawal of the challenge had been made in error and contrary to the appellant's instructions. A new compatibility minute was lodged too, along the lines of that previously withdrawn. On 22 March, the sheriff (Bicket) refused the applications to receive the minutes late, giving as his reasons; (i) the earlier withdrawal of the challenge to the SOUE and the refusal to instate it; (ii) similar considerations in relation to the compatibility minute; and (iii) the weakness of the merits of the challenge. Attempts to appeal that decision, and to petition the *nobile officium*, were unsuccessful.

[6] On 3 April 2017, yet another compatibility issue minute was tendered late and refused by the sheriff (Waldron).

[7] The grounds of appeal, as currently lodged, maintain that the original minute challenging the special capacity, lodged at the First Diet on 11 November 2016, had

remained live thereafter, notwithstanding the intimation on 17 February 2017 that the two "devolution" minutes, understood to refer to the only two minutes in process (the challenge to the special capacity and the compatibility issue) were not insisted upon. This contention appears to run contrary to the stance taken on 15 March 2017, when the appellant had attempted to lodge a new minute challenging the special capacity and had explained that the earlier withdrawal of the challenge had been in error and contrary to instructions. It was maintained that the refusal to allow a late new challenge was an error.

[8] The current application seeks to appeal, for the first time, the decision of 8 March 2017, to refuse to allow a new challenge to the SOUE. It has presumably only recently been recognised, under some prompting from the court at a Procedural Hearing, that a successful challenge to the special capacity would have no practical effect in circumstances where an unchallenged SOUE remained extant.

[9] Section 258 of the 1995 Act provides that a SOUE may be served 14 days before the First Diet. The other party is allowed time to challenge that but, if he does not, then the facts stated in the SOUE are deemed to be conclusively proved. If there is a challenge, then the other party can apply to the court to disregard it on the basis that it is unjustified. If a challenge has been withdrawn, that option is no longer required. That is the position here, where the respondent's application to disregard was not heard because the challenge, as minuted, had been withdrawn.

[10] Section 258 also provides, however, that, if there are special circumstances, then the court can direct that the presumption that the facts have been conclusively proved shall not apply. An application to this effect can be made after the commencement of the trial but before the start of the prosecutor's address (see s 258(6) and (7)). No such application was made in this case. Had such an application been granted, then supplementary provisions

permitting the leading of evidence about the facts thereby disputed anew would have come into play.

[11] There is no report from the sheriff who made the decision now complained of. One would be needed if this ground were to form part of the Note of Appeal. In determining whether it should, regard must be had to the time at which this application to amend has been made; that is to say shortly before the appeal hearing, in circumstances in which leave to appeal was granted on the existing ground on 3 November 2017, having been refused at first sift on 10 October. Consideration must also be given to the strength of the merits of the proposed ground. In that regard, the sheriff appears to have been correct in holding that the application to re-challenge was incompetent standing the statutory remedy available at trial. The challenge to the statement having been withdrawn, the facts were deemed conclusively proved in the absence of an application made to disregard the presumption. There is no scope for the introduction of a second challenge at first instance where the statute stipulates the appropriate course of action. The withdrawal of the challenge was a deliberate act and not a procedural irregularity under section 300A(5) of the 1995 Act.

[12] In all these circumstances, the application to amend the Note of Appeal is refused.