



16 December 2015

PRESS SUMMARY

Macklin (Appellant) v Her Majesty's Advocate (Respondent) (Scotland) [2015] UKSC 77
On appeal from [2013] HCJAC 80

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Sumption, Lord Reed, Lord Hughes, Lord Toulson, Lord Gill

BACKGROUND TO THE APPEAL

In 2003 the appellant, Mr Macklin, was convicted of possession of a handgun in contravention of section 17 of the Firearms Act 1968, and a further charge of assaulting two police officers by repeatedly pointing the handgun at them. The issue in dispute at his trial was whether he was the person who had been pursued by the officers and who had pointed the gun at them. He was identified at trial by both officers. One of them had recognised the appellant at the time of the incident, and the other had identified him from a selection of photographs shortly afterwards. Their evidence was challenged in cross-examination. The judge warned the jury about the risk that visual identification evidence might be unreliable, but gave no specific directions concerning the risks associated with the identification of an accused person in court. Some years later the Crown disclosed material which had not been disclosed at the trial, including statements given to the police by witnesses. One witness gave a description inconsistent with the appellant's appearance. Two witnesses failed to identify the appellant when shown his photograph. It was also disclosed that the police had found fingerprints belonging to someone else in the car, and that that person had a criminal record.

In 2012 the appellant was granted leave to appeal against his conviction, on the basis of (i) the Crown's failure to disclose material evidence; (ii) the Crown's leading and relying on dock identifications by the police officers, without having disclosed material evidence and without the officers having participated in an identification parade; and (iii) a contention that the judge had misdirected the jury in failing to warn them of the dangers of dock identification evidence. The appellant argued that, with respect to the first two matters, the Lord Advocate had acted in a manner incompatible with article 6(1) of the European Convention on Human Rights. The appellant's appeal was refused by the High Court of Justiciary. He was subsequently granted permission to appeal to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses Mr Macklin's appeal. Lord Reed gives the leading judgment. Lord Gill gives a concurring judgment. The other justices agree with both judgments.

REASONS FOR THE JUDGMENT

Lord Reed explains that the jurisdiction of the Supreme Court under section 288AA of the Criminal Procedure (Scotland) Act 1995 is not to sit as a criminal appeal court exercising a general power of review, but to determine compatibility issues, which are questions as to whether a public authority has acted unlawfully under section 6(1) of the Human Rights Act 1998 or has acted incompatibly with EU law, or whether a provision of an Act of the Scottish Parliament is incompatible with Convention rights or EU law [5-7]. As a consequence of section 34 of the Scotland Act 2012, which introduced compatibility issues into the 1995 Act by inserting a new section 288ZA, and the Scotland Act 2012

(Transitional and Consequential Provisions) Order 2013, the first two grounds raised by the appellant were converted from being devolution issues to compatibility issues. However the third ground, which concerns the directions given by the trial judge, did not give rise to a devolution issue which could be converted into a compatibility issue [10].

The question of whether a failure of disclosure has resulted in a breach of article 6(1) ECHR has to be considered in the light of the proceedings as a whole, including the decisions of appellate courts. This involves consideration firstly of whether the prosecution failed to disclose all material evidence, in circumstances in which such a failure would result in a violation of article 6(1), and secondly whether the defect in the trial procedure was remedied by the procedure before the appellate court [13]. As held in *McInnes v HM Advocate* [2010] UKSC 7, on the question of whether withheld material should have been disclosed, the test is whether the material might have materially weakened the Crown's case or materially strengthened the defence's case. Where this is satisfied, the test concerning the consequences of the non-disclosure 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 [14].

The Crown conceded before the High Court of Justiciary that the statement of the witness who had given a description inconsistent with the appellant's appearance, and the statements given by the witnesses who failed to identify the appellant when shown his photograph, should have been disclosed. The High Court applied the first test in *McInnes* to the remaining withheld evidence and explained its reasons for concluding that the material did not require to be disclosed. In relation to the material which should have been disclosed, the High Court then applied the second test in *McInnes* and explained its reasons for concluding that there was no real possibility that the jury would have arrived at a different verdict [15-16]. The High Court also considered whether the Crown's leading of the identification evidence from the police officers had resulted in the Lord Advocate's acting incompatibly with article 6(1) and concluded that it had not [17].

The fact that under current Crown practice, the withheld material would have been disclosed does not lead to the conclusion that the non-disclosure breaches article 6(1); it is the first of the *McInnes* tests which must be applied [18]. In determining a compatibility issue, applying Lord Hope's dicta in *McInnes*, the Supreme Court can decide whether the High Court has adopted the correct test, but not whether it then applied that test correctly to the facts [20]. It was conceded that the Supreme Court might have jurisdiction to intervene if the High Court merely purported to apply the *McInnes* test but did not actually apply it. But this does not permit examination of whether the test was correctly applied to the facts. This principle gives effect to the finality accorded to the High Court's decisions. It should not be undermined by permitting dressed-up challenges to the application of the correct test [22]. In the present case it is clear from the reasoning of the High Court that it identified the correct test and also applied it to the circumstances of the case. Comparison with *Holland v HM Advocate* [2005] UKPC D 1 does not assist, as the Judicial Committee of the Privy Council was performing a different exercise and its decision reflected the particular circumstances of that appeal [23]. Mr Macklin's appeal should therefore be dismissed [24].

Lord Gill gives a concurring judgment, finding that the High Court identified and applied the correct test, and that its conclusions on the significance of the non-disclosure in relation to the verdict do not fall within this Court's jurisdiction [25-49].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.uk/decided-cases/index.html