APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 8
HCA/2022/000274/XC

Lord Justice Clerk
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

NATALIE McGARRY or MEIKLE

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Jackson KC, A MacLeod; John Pryde & Co (for Campbell McCartney, Glasgow)
Respondent: Prentice KC (sol adv) AD; C McKenna, (sol adv); the Crown Agent

23 February 2023

Introduction

[1] On 12 May 2022 the appellant was convicted after trial of two charges of embezzlement and on 30 June 2022 was sentenced to imprisonment for 2 years. Charge 1 involved embezzlement of £19,974 from an organisation called Women for Independence,

over a period from 26 April 2013 to 30 November 2015. Charge 2 spanned 9 April 2014 to 10 August 2015 and embezzlement of £4,661.02 from the Glasgow City branch of the SNP.

[2] Broadly speaking the appellant was responsible for the funds of the organisations referred to in the charges and repeatedly avoided attempts to have her produce accounts. Investigations ultimately led to the discovery of the defalcations. She disputed that there had been any dishonesty, stating that she had merely reimbursed herself legitimately for outlays for work properly carried out. She no longer had her computers which would have vindicated her. The jury must have rejected this, and been satisfied that she had the necessary criminal intent.

[3] Only one ground of appeal against conviction arises, relating to publicity before and during the trial, which is said to have been so prejudicial as to prevent a fair trial.

[4] As originally formulated this ground of appeal focused on assertions that the Crown had a duty, in which they failed, to take active steps to have the material removed. The case and argument, however, focused on a decision by the sheriff refusing to desert the trial *pro loco et tempore*. No such argument had been foreshadowed in the ground of appeal, which led to an application to amend the ground of appeal. Given that the issue of desertion had been raised in the application to the second sift, and that the court had already called for a supplementary report from the sheriff, this motion was granted. This was therefore the focus of the appeal, in which it was not suggested that any duty lay on the Crown.

Background

[5] The appellant is a former MP, and there is no doubt that there was a lively press interest in this case. In the original proceedings she tendered pleas of guilty, was refused permission by the Sheriff to withdraw these pleas, and was duly sentenced. A successful

appeal allowed the pleas to be withdrawn, and granted permission for a fresh prosecution. Following the original proceedings, in 2019, there was widespread reporting in the mainstream media of the tendering and attempted withdrawal of the pleas, and the sentencing. The vast majority of these reports are ordinary and factual reports of the criminal proceedings, without commentary or observation. They appear to constitute fair and accurate reporting. The complaint in this case does not concern these reports: rather the focus is on social media posts, particularly in the days leading up to, and during, the trial. There were numerous such posts, although it is difficult from the way in which the material has been presented to the court to identify how many actual threads were involved, and it is fair to say that most of these focused on the withdrawal of the plea, puzzlement at how this might have occurred and why a new trial was taking place, and many carried the implication that the appellant must be guilty of the offences with which she was charged. In some cases the posts carried links to media reports from 2019.

[6] The court minutes show that the defence raised the issue of publicity at various stages - culminating in the motion made on day four of the trial, 8 April 2022, for desertion *pro loco et tempore*, which was opposed by the Crown and refused by the sheriff. The defence requested the Crown contact the individuals responsible for the relevant posts, explaining that there was an ongoing trial and that their actions could amount to contempt of court. The Crown refused to do so, and the sheriff refused a motion to ordain the Crown to take action; he did however ask the PFD to draw the matter to the attention of his superiors, for any action they might consider relevant. In the course of the trial three messages (which did not refer specifically to the appellant's case) were posted on the COPFS Twitter account citing the provisions of the Contempt of Court Act 1981, the punishment for contempt and stating that published information must not include commentary or analysis of evidence,

witnesses or accused. In addition the sheriff stated in open court that those posting on social media concerning the trial risked being in contempt of court, and asked the mainstream media to report his comments, which they duly did.

[7] On 4 May the sheriff indicated that he intended to adopt the steps referred to by Lord Bracadale in the case of *HMA* v *Thomas Sheridan and Another* (unreported) 18 November 2011. He duly did so.

Submissions

[8] For the appellant it was submitted that when her former appeal was successful, and authority to bring a fresh prosecution was granted, the reporting of that decision was embargoed in an effort to limit further pre-trial publicity. The effect was rather that the circumstances of the former plea and sentence remained in the public domain, whereas the explanation that the circumstances of the tendering of the pleas had constituted a miscarriage of justice was not. The real problem lay with the content and timing of the social media posts, so close to, and even during, the trial, which increased the risk of prejudice. The prejudice lay in the implication that the appellant was guilty, and had somehow been manipulating the system to obtain a retrial. It was submitted that it is for the court to ensure, so far as possible, that the accused receives a fair trial. Given the nature of the material, with implications of guilt seemingly supported by reference to accurate reporting of the earlier proceedings, the Sheriff erred in refusing to desert the case *pro loco et tempore.* Granting the motion would have separated the timing of the trial from the relevant posts, although it was acknowledged that there was every prospect of such posts being repeated at a later date.

[9] The Crown submission was that while some of the publications are prejudicial (largely to a minor extent), there were sufficient safeguards, of the kind detailed in *Stuurman* v *HM Advocate* 1980 JC 111 and *Montgomery* v *HM Advocate* 2000 SCCR 1044, to ensure the fairness of the appellant's trial. All of the mainstream media publications dated back to more than two years before the trial. The focussing effect on the jury of listening to the evidence was important, especially in a trial which lasted over a month. The sheriff's directions, given both prior to and during the hearing of the evidence and in the course of his charge, were a further safeguard.

Analysis and decision

[10] As we have indicated, the majority of the social media posts note that the appellant previously pled guilty and ask how in these circumstances there can be a retrial. The general tenor of many of them is that she must be guilty of the charges. The question is whether these posts presented a degree of prejudice to the fairness of the trial, in respect of the independence of the tribunal, so grave that no direction of the trial judge, however careful, could reasonably be expected to remove it. We are satisfied that this is not such a case. It is accepted that the safeguard of the "fade factor" which may arise in relation to past publications does not apply in this case given the timing of the social media posts. However there were other strong safeguards which enabled a fair trial to take place.

[11] It is well established that in cases of this kind it must be assumed that the jury will take the responsibility of their oath seriously and will follow the directions of the trial judge. In *Fraser* v *HMA* 2014 JC 115 the court (Lord Carloway, LJC) stated (para 56):

> "Jurors are adults. They have a collective intelligence. Of course, a rogue juror may decide to disregard the admonitions of the trial judge. If that is shown to have occurred, there may be an arguable ground of appeal. However, it is not to be assumed that this will occur. It may be that some aspects of a judge's charge can be

> difficult to follow. The direction telling the jurors not to conduct an internet search on the facts of the case or the accused is not in that category. The court has no reason to suppose that it will not be understood and followed. … In the absence of material which would tend to demonstrate the contrary, the court must proceed on the basis that the directions were followed."

[12] See also the following:

> "the entire system of trial by jury is based upon the assumption that the jury will follow the instructions which they receive from the trial judge and that they will return a true verdict in accordance with the evidence." (*Montgomery* v *HM Advocate* 2000 SCCR 1044, per Lord Hope, p1170)

> "It is essential to underline … that it is reasonable to assume that a jury will follow the directions given by the judge in the absence of any evidence suggesting the contrary" (*Ali* v *United Kingdom* [2016] EMLR 5, para 89)

[13] In this case, in his opening remarks to the jury the sheriff gave detailed directions that they must not make inquiries on the internet or electronically, and must put out of their minds anything they may have read in the past about the accused or circumstances relating to the charges. His directions on these matters stretched over four and a half pages. He repeatedly told the jury (at least 5 times) that they required to reach their verdict on the evidence led in court and without regard to any other source. Throughout the course of the trial he returned to this issue, regularly reminding the jury of their obligations in this respect, and of the need to take account only of evidence laid before them in court during the course of the trial. In his charge he returned to the issue, and not only reminded the jury of what he had already told them, but repeated the directions in detail, at length and in depth. These were thorough and careful directions, making the position abundantly clear, and there is no basis for thinking that the jury did not follow them. In fact, the reverse is true given that the jury returned a discriminating verdict with deletions and by a majority.

[14] Allied to the fact that jurors can be taken to follow the instructions given to them, particularly on an issue which is so straightforward, is a further factor of relevance in the

difference between mainstream publications or news agencies and social media. Unlike the former the latter operate without editorial control, frequently in an irresponsible manner and usually unaccountable to others, unless in extreme cases they may be traced and prosecuted for contempt. They do not represent what is commonly understood by the word "journalism" (see *Murray* v *HMA* [2022] HCJAC 14, paras 77-78). They are not designed, and frequently do not even purport to be, fair and accurate reports of proceedings. They are in many respects the modern day equivalent of gossip and tittle-tattle at the bus stop or the pub. As adults with a collective intelligence and common sense, jurors know and understand this. This strengthens the validity of the safeguard to be found in the directions given in high profile cases: jurors can be trusted to understand the importance of this, and the importance of keeping an eye out for other jurors having acted in a rogue manner. In short, they are to be treated as sensible adults.

[15] Another important safeguard is the very trial process. In *Sinclair* reference was made to the process and immediacy of the trial itself in front of the jury, and the discipline of the jury listening to the evidence adduced in court. This was emphasised by Lord Bracadale in *Sheridan,* when he noted (para 10) that:

> "the focusing effect of listening to evidence over a prolonged period …. will be a powerful safeguard. The focusing effect of listening to evidence is not a polite fiction. It is within the daily experience of judges and counsel that juries do become engrossed in the evidence and return verdicts which reflect the evidence. It seems to me that listening to the evidence and hearing it being tested in cross examination in the immediacy of the court environment will be likely to focus the minds of jurors on what they are hearing in court. That is more likely, in my view, to dispel notions that they may have picked up from reading prejudicial material, rather than to reinforce preconceived views. In addition, the jury will have regard to the evidence as a whole, which is a significant consideration".

[16] In this case the trial lasted a month; the jury heard evidence from 29 Crown witnesses, the appellant and 3 defence witnesses, and had placed before them hundreds of documentary productions. The focussing effect of all this would have been significant.

[17] It is impossible to say that the sheriff was not entitled to refuse the motion or that an unfair trial resulted. The appeal against conviction is refused.

Sentence

[18] The appeal was also against the sentence of two years imprisonment, but limited to two issues: a failure to give credit for a period of 6 days spent on remand; and secondly that the sheriff took account of evidence that the appellant had falsely claimed that she was about to be evicted and borrowed money from colleagues to pay for her rent as an aggravation to the charges. These allegations were not accepted by the appellant and did not form part of the subject matter of the charge.

[19] An attempt was made to argue a point which was raised in the Note of Appeal but upon which leave had not been given, namely that the appellant should not have been sentenced to longer than the headline sentence selected by the sheriff who had originally dealt with the case. This was not pursued when the court pointed out the effect of the sift decision, but after the court made *avizandum* a short note was submitted under reference to *Ferguson* v *HMA* 2010 SCCR 399. We are not entirely persuaded that the situation is analogous: in *Ferguson* there was conviction after trial on two occasions. Here there were pleas of guilty and an agreed narrative followed by a full trial lasting over a month. It seems likely that the sheriff in the trial will obtain a much deeper understanding of the degree and nature of the criminality involved than may be apparent on an agreed plea.

[20] In any event, the arguable grounds having been specified in restricted fashion by the first sift judge it is simply not competent (there being no order under section 107(8)) to "found any aspect of his appeal on any ground of appeal contained in the note of appeal but not so specified".

[21] Turning to the issues in respect of which leave has been granted, the sheriff explains that the failure to recognise the period on remand was an oversight. More pertinent perhaps is the other point, which, with respect to him, the sheriff does not really explain. It is clear that in his sentencing statement he said

> "The jury have convicted you of crimes of dishonesty. Over the relevant period the jury have accepted that you had lied to others, deceived colleagues you were working with and embezzled funds from organisations who entrusted you with their finances. In particular you had obtained money from colleagues and people who looked up to you when you falsely claimed to them that you are (*sic*) about to be evicted from property you had been renting."

Such evidence as there was of dishonesty of the kind specified in the last sentence formed no part of the charges laid and proven against the appellant. In stressing that aspect of the case as he did, it seems that the sheriff took this into account in reaching the sentence which he selected, leading him to impose a sentence which may properly be described as excessive. Having regard to this and the error in relation to remand we shall quash the sentence of 2 years and impose a sentence of 20 months imprisonment.