



Hilary Term
[2010] UKSC 6
On appeal from: 2008 HCJAC 63

JUDGMENT

Allison (Appellant) v Her Majesty's Advocate (Respondent) (Scotland)

before

**Lord Hope, Deputy President
Lord Rodger
Lord Walker
Lord Brown
Lord Kerr**

JUDGMENT GIVEN ON

10 February 2010

Heard on 8, 9 and 10 December 2009

Appellant
Gordon Jackson QC
Claire Mitchell
(Instructed by Capital
Defence Lawyers)

Respondent
Alex Prentice QC
Gordon Balfour
(Instructed by Crown
Office and Procurator
Fiscal Service)

*2nd Respondent &
Intervener*
The Baron Davidson of
Glen Clova QC
Mark Lindsay
(Instructed by Office of
the Solicitor to the
Advocate General for
Scotland)

LORD RODGER

1. On 9 September 2004 the appellant, Steven Allison, was convicted after trial in the High Court at Glasgow of four contraventions of section 4(3)(b) of the Misuse of Drugs Act 1971. In effect, he was found guilty of being concerned in the supplying of cocaine and three other controlled drugs at his home in Cumbernauld, at an address in Falkirk and elsewhere in the United Kingdom, between 12 November and 3 December 2003. The trial judge, Lord Bracadale, sentenced him to 8 years imprisonment.

2. The appellant appealed against both his conviction and sentence. On 7 November 2008 the appeal court (Lord Osborne, Lady Paton and Lord Philip) refused his appeal against conviction, leaving his appeal against sentence to be heard on a date to be fixed.

3. Among his grounds of appeal against conviction was one which was first advanced in an additional Note of Appeal. It relates to the record of a police interview of a John Stronach. Mr Stronach had died before the trial and the Crown introduced the interview into evidence in accordance with the procedure in section 259(5) of the Criminal Procedure (Scotland) Act 1995.

4. Neither before nor during the trial did the Crown disclose to the defence that Mr Stronach had a number of previous convictions and outstanding charges. In particular, he had convictions for reset, theft by opening lockfast places, assault and robbery and assault and breach of the peace. He also had a number of outstanding charges, including two alleged contraventions of the Misuse of Drugs Act 1971, an alleged theft by housebreaking and several alleged contraventions of the Road Traffic Act 1988. One of the outstanding cases under the Misuse of Drugs Act related to events covered by the trial and was known to the appellant's legal advisers. The Crown disclosed the previous convictions and the other outstanding charges only while the appellant's appeal was pending before the appeal court. This prompted the appellant to lodge his additional ground of appeal: "The failure on the part of the Crown to disclose to the defence the existence of all the previous convictions and outstanding charges resulted in the defence being unable to prepare and properly conduct their defence and the result was that the appellant did not receive a fair trial, as guaranteed by article 6(1) of the European Convention on Human Rights."

5. Following the dismissal of his appeal by the appeal court, the appellant applied for leave to appeal to the Privy Council in relation to the additional ground

of appeal. On 6 March 2009 the appeal court (Lord Osborne, Lady Paton and Lord Mackay of Drumadoon) refused the application as incompetent, on the ground that no intimation of a devolution issue had been given to the Advocate General as required by para 5 of Schedule 6 to the Scotland Act 1998. The court went on to indicate that, if it had been open to them to grant or refuse leave, they would not have granted leave.

6. The appellant subsequently applied to the Privy Council for special leave to appeal. The Board granted special leave. Although the statement of facts and issues included an issue relating to the competency of the appeal court's decision to refuse leave, neither the advocate depute nor the Advocate General advanced any argument on the point at the hearing of the appeal. Undoubtedly, when the appeal court determined that the Lord Advocate was not under an obligation by virtue of article 6(1) of the European Convention to disclose the outstanding charges against Mr Stronach, they were in substance determining a devolution issue in terms of para 1(d) or (e) of Part I of Schedule 6 to the Scotland Act 1998 – irrespective of whether all the relevant procedural steps had been followed. It follows, as was held in *McDonald v HM Advocate* 2008 SLT 993, 1002, paras 48 and 49, that an appeal on that point lies to this Court under para 13(a) of Part II of that Schedule.

7. Of course, the late Mr Stronach's name was never included in the list of Crown witnesses appended to the indictment for the appellant's trial – which may help to explain why the need to disclose his criminal antecedents was overlooked. But, when dismissing the appellant's appeal, the appeal court rightly accepted, under reference to *Holland v HM Advocate* 2005 1 SC (PC) 3, 24, para 72, that the failure by the Crown to disclose Mr Stronach's previous convictions had been incompatible with the appellant's article 6(1) Convention rights. Despite the further conclusion of the Privy Council in *Holland*, at pp 24-25, paras 73-74, that the Crown were also under an obligation to disclose material outstanding charges of which they were aware, the appeal court in the present case drew a distinction between Mr Stronach's previous convictions and "his outstanding cases at the time of the trial" – by which the court obviously meant the charges against him which had been outstanding at the time of his death. The court continued:

"We consider that, in this context, a distinction has to be made between previous convictions and outstanding cases. While, in appropriate circumstances, the existence of previous convictions may be of importance in connection with the preparation of a defence and to the challenge that may be mounted to the credibility of a witness, we do not consider that the same may be said of outstanding cases. Where an individual is charged with crime, he or she is presumed to be innocent until proved guilty. If a case is outstanding, necessarily no verdict has been reached in it. In these circumstances we have

insuperable difficulty in understanding how information relating to those matters could be properly deployed in the conduct of a defence.”

8. Previous generations of Scots lawyers and judges do not appear to have experienced the same “insuperable difficulty” as the appeal court.

9. It is, of course, trite that an individual charged with crime is presumed to be innocent until proved guilty. But that is not to say that he has to be treated in all respects as if he were an innocent person against whom no charge had been brought. Most obviously, in an appropriate case, he can be remanded in custody pending trial or granted bail subject to appropriate conditions. Similarly, depending on the offence and the terms of his contract of employment, he may be suspended from his employment. More generally, if you know that someone has been charged with, say, fraud, you will be less inclined to enter into a commercial transaction with him; if you know that someone has been charged with sexual abuse, you will think twice before entrusting your children to her care; if you know that someone has been charged with theft, you will be less inclined to trust anything which he tells you, unless it can be confirmed from other sources.

10. The Privy Council’s decision in *Holland*, that the Crown should disclose outstanding charges of Crown witnesses of which they were aware, simply reflected the common sense position that - just as in everyday life - judges or jurors who have to assess the credibility of a witness may properly take into account not only the fact that the witness has been convicted of various offences, but also the fact that he has been charged with others. To judge from the passage quoted in para 7 above, the appeal court seem to have thought that this was an unprincipled and incoherent innovation. It is noteworthy that they did not refer to any authority. In reality, the approach of the Privy Council, in so far as it proceeds on the basis that outstanding charges may have a bearing on a witness’s credibility, merely reflects what appears to have been recognised as the proper practice in Scottish courts for more than 170 years.

11. At one time, in Scots law anyone convicted of serious crimes became technically infamous (*infamis*) and was thereafter unable to give evidence at any trial. By the early nineteenth century this rule was proving self-defeating for the authorities: all too often it was a gift to the defence since it prevented the only material witnesses to crimes from giving evidence. So the rule was first relaxed and then eventually abolished. The only explicit authority relating to a witness with outstanding charges comes from that era. At a High Court trial at Dumfries, when leading a Crown witness, William Higgins, the advocate depute began by establishing that he was due to be tried at the same circuit on a charge of theft by housebreaking, aggravated by his having been previously convicted of theft and

being a thief by habit and repute. See *John Hannah and Hugh Higgins*, 17 September 1836, Bell's Notes, p 256, in the Supplement to Hume's *Commentaries on the Law of Scotland respecting Crimes* (1844 edition), vol 2. Since the court ruled on the admissibility of the advocate depute's line of questioning, the defence must have objected that the Crown were, in effect, leading a witness who, if convicted of the crime in question at his trial later in the sitting, would then be unable to testify. The court rejected the argument and allowed the question. As the author of the Notes, Sheriff Bell, comments, "The court, however, in allowing the question, must have thought it relevant to affect the credit of the witness."

12. The potential relevance of outstanding charges to the credibility of a witness appears to have been settled in the nineteenth century. See, for instance, Dickson's *Treatise on the Law of Evidence in Scotland* (revised edition, 1887) vol 2, para 1619. Most significantly, Macdonald's *Criminal Law of Scotland* (3rd edition, 1894), p 462, says: "Nor may [a witness] refuse to say whether he has been convicted of or stands indicted for a crime." This passage appears in virtually the same words in the fifth and final edition (1948), pp 297-298. The passage could never have stood unchallenged in successive editions of the traditional vademecum of Scottish criminal practitioners and judges if it had not reflected practice in the courts. Not surprisingly, therefore, neither the advocate depute nor the Advocate General supported the approach of the appeal court in the present case.

13. In *Holland v HM Advocate* 2005 1 SC (PC) 3 the appellant was convicted of a charge of assault and robbery at a house in Rutherglen. The Crown failed to disclose that there were outstanding charges against the complainers, relating to drug dealing at the house in question. The Privy Council held, at p 25, para 75, that information about these charges would have helped to complete the picture both of the complainers and of their milieu. In other words, it would have had the potential to weaken the Crown case and so it should have been disclosed. In his written submissions in the present appeal, the advocate depute gave examples of other situations where an outstanding charge against a Crown witness might materially weaken the Crown case or strengthen the defence case: if the witness denied he had ever been in trouble with the police, an outstanding charge could legitimately be put to him; similarly an outstanding charge might provide a potential motive for the witness giving untrue information in an attempt to curry favour with the authorities.

14. It is unnecessary to prolong the discussion since the Crown did not deny that the outstanding charges against Mr Stronach might have weakened the Crown case by casting doubt on his character or credibility. It follows that, in accordance with *Holland v HM Advocate* 2005 1 SC (PC) 3 and *HM Advocate v Murtagh* 2009 SLT 1060, the failure of the Crown to disclose the outstanding charges to the

defence was indeed incompatible with the appellant's article 6(1) Convention rights.

15. At the hearing of the appeal, all this really went without saying and the only live issue was the actual significance, in the whole circumstances of the case, of the Crown's failure to disclose the charges. The appeal court did not consider that matter, but they did, of course, consider the effect of the Crown's failure to disclose his previous convictions. Having considered the circumstances, the appeal court were not "persuaded that the failure of the Crown to disclose the previous convictions of Stronach to the appellant's advisers resulted in an unfair trial and hence a miscarriage of justice." They accordingly rejected the appellant's appeal, so far as based on the Crown's failure to disclose Mr Stronach's previous convictions.

16. Standing that decision, at the hearing before this Court, Mr Jackson QC, who appeared for the appellant, had to argue that the failure to disclose Mr Stronach's outstanding charges made a significant difference. In other words, the Court should conclude that there would have been a real possibility of a different outcome if the jury had been made aware, not only of Mr Stronach's previous convictions, but of the outstanding charges against him: in that event, the jury might reasonably have come to a different view as to whether the appellant was concerned in the supplying of the various drugs during the relevant period.

17. The case against the appellant was circumstantial. It comprised, for the most part, evidence of observations by police officers who had conducted a surveillance operation over several weeks. The evidence relating to Mr Stronach's statement concerned events of 24 November 2003.

18. DS Duncan Smith was not otherwise involved in the relevant events. He gave evidence that, at about 12.45 pm on 24 November, when checking an address, he saw a blue Peugeot, registration number M810 UEW, parked at the appellant's home at 58 Whitelees Road, Cumbernauld. At 9.32 pm Mr Stronach was seen driving the Peugeot to a service station at Kilmarnock where he met up with a Ford Orion. The two cars drove in convoy to Logan, near Cumnock. There, in the car park of the Logagate Arms, the driver of the Orion spoke to Mr Stronach who did not leave his car. Mr Stronach then drove up to Glasgow and on to the M8 where he was stopped by two police officers. A Farm Foods bag, found in the glove compartment of the Peugeot, contained cocaine worth at least £30,000.

19. The police interviewed Mr Stronach on tape in the early hours of 25 November. This is the interview which is the subject of the additional ground of

appeal. The tape recording of the entire interview was played to the jury during the evidence of DC McFadden. In the course of the interview Mr Stronach said that he had been sent by a man called “Stevie” from Abronhill to sell the car. The appellant’s first name is Steven and his home was in the Abronhill district of Cumbernauld. The description of “Stevie” given by Mr Stronach fitted the appellant. On 27 November the appellant left his home and drove to the house of Mr Stronach’s girlfriend in Denny. He then took Mr Stronach’s passport to Airdrie Sheriff Court where it was used in connexion with his application for bail. A receipt for the passport from the court dated 27 November was recovered from the appellant’s home.

20. Defence counsel took DC McFadden through the transcript of the interview in detail and was able to show that Mr Stronach had told many lies. When he came to address the jury, the advocate depute accepted that he had clearly lied about his movements and about his involvement in drugs. But the advocate depute suggested to the jury that it would be easier to accept those parts of the interview which were supported by other acceptable evidence. In particular, he pointed to the evidence of DS Smith, who was not otherwise involved in the investigation, that the Peugeot which Mr Stronach was driving when stopped by the police had been parked outside the appellant’s house earlier the same day. The advocate depute also referred to the evidence about the appellant collecting Mr Stronach’s passport from his girlfriend’s house and taking it to Airdrie Sheriff Court in connexion with his application for bail on the drugs charges arising out of the recovery of the cocaine from the Peugeot. The advocate depute argued that it would be a spectacular coincidence if this did not indicate that the appellant knew of Mr Stronach’s involvement with drugs.

21. In his supplementary report to the appeal court, Lord Bracadale, summarised the position in this way:

“Taking into account the analysis of the interview of Mr Stronach carried out by [defence counsel] and the concessions made as to his credibility by the advocate depute, the jury would have been most likely to conclude that Mr Stronach did indeed tell many lies in the course of the interview. They would, however, have been entitled to be selective in their view of the evidence of Mr Stronach.”

Lord Bracadale then referred to Mr Stronach’s previous convictions and added:

“In the circumstances outlined above it is difficult to see how the canvassing of the previous convictions of Mr Stronach before the jury would have bolstered the already largely successful attack on his

credibility. It is also difficult to see why knowledge of the previous convictions would have discouraged the jury from being selective in the approach to the contents of the interview of Mr Stronach.”

22. Against that background, the appeal court were not persuaded that the failure of the Crown to disclose Mr Stronach’s previous convictions resulted in an unfair trial and hence a miscarriage of justice. For exactly the same reasons, I am not persuaded that, if defence counsel had been able to deploy Mr Stronach’s outstanding charges as well as his previous convictions, this would have made any material difference. More especially, it would not have affected the fact that the jury, who must have been well aware of the defects in Mr Stronach’s statements, could still, with equal plausibility, have accepted those elements, and only those elements, in Mr Stronach’s account which were corroborated by other acceptable evidence.

23. I am accordingly satisfied that there is no real possibility that the jury would have come to a different verdict on the four charges against the appellant if they had been made aware, not only of Mr Stronach’s previous convictions, but of the outstanding charges against him as well. There has therefore been no miscarriage of justice. I would accordingly dismiss Mr Allison’s appeal and remit the case to the appeal court to proceed as accords.

LORD HOPE

24. I agree with Lord Rodger that the appeal must be dismissed, and I would make the same order as he proposes.

25. The point of principle which this case raises is whether a failure to disclose outstanding charges against a Crown witness is incompatible with the accused’s article 6(1) Convention rights. Had it not been for the passage in the opinion of the appeal court which Lord Rodger has quoted in para 7 of his judgment, I would not have thought that there was now any room for dispute on the point. In *McDonald v HM Advocate* [2008] UKPC 46, 2008 SLT 993, para 51 Lord Rodger said that the decisions of the Board in *Holland v HM Advocate* [2005] UKPC D 1, 2005 SC (PC) 3 and *Sinclair v HM Advocate* [2005] UKPC D 2, 2005 SC (PC) 28 had answered this question. Included within the general description of disclosable material are two classes of material, namely police statements of any witnesses on the Crown list and the previous convictions and outstanding charges relating to those witnesses.

26. The rule of law on which that classification is based is that of fairness. In *McLeod v HM Advocate (No 2)* 1998 JC 67, Lord Justice General Rodger said that our system of criminal procedure proceeds on the basis that the Crown have a duty at any time to disclose to the defence information which would tend to exculpate the accused. In *Sinclair v HM Advocate*, para 33 I said that the prosecution is under a duty to disclose to the defence all material evidence in its possession for or against the accused, and that for this purpose any evidence which would tend to undermine the prosecution case or to assist the case for the defence is to be taken as material.

27. Sometimes the proposition is worded differently. In *HM Advocate v McDonald* [2008] UKPC 46, 2008 SLT 993, para 50 Lord Rodger said:

“Put shortly, the Crown must disclose any statement of other material of which it is aware and which either materially weakens the Crown case or materially strengthens the defence case (disclosable material)”

Lord Bingham of Cornhill used the same formula when describing the “golden rule” in *R v H and others* [2004] UKHL 3, [2004] 2 AC 134, para 14 when he said:

“Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence.”

In *HM Advocate v Murtagh* [2009] UKPC 36, 2009 SLT 1060, para 11, I said, under reference to *McLeod*, *Holland*, *Sinclair* and *McDonald*, that it was well settled that the Crown must disclose any statements or other material of which it is aware which either materially weakens the Crown case or materially strengthens the case for the defence: see also Lord Rodger, para 48.

28. These formulations should however be regarded as expressing what has been described as the golden rule in shorthand. After all, they are describing a decision about disclosure which must normally be taken before the trial. It is a decision which will be based on an assumption as to what may happen in the future. So the question the Crown must ask itself is what the possible effect would be likely to be if the material were to be disclosed. As I said in *R v Brown (Winston)* [1998] AC 367, 374, it would be contrary to the principle of fairness for the prosecution to withhold from the defendant material which *might* undermine their case against him or which *might* assist his defence. Lord Collins, referring to

what I said in that case, also used the word “might” in *Murtagh*, para 75. That is the way Lord Rodger has expressed the position that the Crown has adopted in this case in para 14, above, and I respectfully agree with it.

29. As for the point that troubled the appeal court, it is true that a distinction can be drawn between previous convictions and outstanding charges. But that does not mean that it can be assumed that information about outstanding charges of Crown witnesses can never affect their credibility. It is enough, for the disclosure rule to apply to them as a class, that they *might* do so. Of course the person concerned is presumed to be innocent until proved guilty. But if he is asked the question whether he has ever been in trouble with the police, he must answer it. A false or evasive answer might well be thought by a jury to undermine his credibility. Other circumstances may be envisaged where the fact that charges have been brought against the witness may have that effect. The application of the rule to outstanding charges, as the Crown accepts, is really just based on common sense and every day experience. No-one should now be in any doubt that the disclosure rule applies to them, or as to the reasons why this is so.

LORD WALKER

30. I am in full agreement with the judgment of Lord Rodger. For the reasons that he gives I would dismiss this appeal.

LORD BROWN

31. I agree with the judgment of Lord Rodger and, for the reasons that he gives, I too would dismiss this appeal.

LORD KERR

32. I agree with the judgment of Lord Rodger and, for the reasons that he gives, I too would dismiss this appeal.