



PRESS SUMMARY

25 May 2011

Fraser (Appellant) v Her Majesty's Advocate (Respondent) [2011] UKSC 24

On appeal from the High Court of Justiciary [2009] HCJAC 27

JUSTICES: Lord Hope (Deputy President), Lord Rodger, Lord Brown, Lord Kerr, Lord Dyson

BACKGROUND TO THE APPEAL

The immediate issue in this case is whether the trial at which the Appellant was convicted of murder was fair. The point of law of broader significance is whether it is compatible with Article 6 of the European Convention on Human Rights for an appeal against a criminal conviction on the ground of the Crown's non-disclosure of evidence to the defence to be determined by applying the test laid down by the High Court of Justiciary in *Cameron v HMA* 1991 JC 252 for "fresh evidence" appeals.

Arlene Fraser disappeared from her home in New Elgin on 28 April 1998. Her body has never been found. The Appellant stood trial for her murder in January 2003. He was convicted and sentenced to life imprisonment. The Crown's case was that the Appellant had arranged for his wife to be killed. Part of the evidence against him was that his wife's rings had been discovered in the bathroom of her house on 7 May 1998 after he had visited the house. There was unchallenged evidence that they had not been in the bathroom when the deceased had disappeared. At the trial, the Crown placed considerable emphasis on the return of the rings. In his speech to the jury, the prosecutor (the Advocate Depute) described the return of the rings as the cornerstone of the case against the Appellant. He suggested to the jury that the Appellant had removed the rings from the dead body and placed them in the bathroom to make it look as though his wife had decided to walk away from her life. The trial judge directed the jury that, if they were not prepared to hold that it was the Appellant who placed the rings in the bathroom on 7 May, it was not open to them to convict him.

After conviction, it came to light that the Crown had had evidence before the trial suggesting that the rings were in the house on the night of 28/29 April after all. In preparing for the trial, a statement had been taken from PC Lynch on 3 July 2002 in which he had said that he had visited the house that night, before the official police search, and had seen rings in the bathroom. He said that he had been accompanied by WPC Clark. After this information came to light, the Crown carried out further inquiries. Statements were taken in 2006 from PC Lynch and WPC Clark. Both said that they had seen jewellery (including rings) in the bathroom on the night of Arlene Fraser's disappearance. The rings were not visible in a video which had been taken during the official search, but subsequent analysis of that video could not rule out the possibility that rings had been present.

The Appellant relied upon this information in his appeal against conviction. He argued that it was new evidence which showed that his conviction was a miscarriage of justice. He also sought to raise a "devolution issue", arguing that the Crown's failure to disclose the information obtained from PC Lynch on 3 July 2002 had infringed his right to a fair trial under Article 6 ECHR. The Appeal Court refused to allow him to advance the "devolution issue": among other reasons, it held that the points were already covered by the "fresh evidence" grounds of appeal.

The Appeal Court refused the Appellant's appeal. It treated the grounds of appeal relating to the Crown's non-disclosure in the same way as those relating to new evidence and held that the new evidence was not such as to make the conviction a miscarriage of justice. The Supreme Court granted the Appellant leave to appeal to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows the appeal. It remits the case to a differently constituted Appeal Court to consider whether to grant authority for a new prosecution and then, having considered that point, to quash the conviction. Lord Hope gives the main judgment, with which Lords Rodger, Kerr and Dyson agree. Lord Brown gives a separate judgment indicating his reservations about allowing the appeal, but does not dissent.

REASONS FOR THE JUDGMENT

The Supreme Court recognises that it has no jurisdiction to consider the test which applies in Scots law to fresh evidence appeals which do not involve a devolution issue. This case, however, involves an issue of non-disclosure, which raises the question whether the trial complied with Article 6 ECHR and which is a devolution issue. By refusing the Appellant's devolution minute, the Appeal Court did "determine" a devolution issue and the Supreme Court has jurisdiction to hear an appeal against that determination: [11], [12], [17].

The test which is to be applied to determine whether non-disclosure of information by the Crown had resulted in an unfair trial, contrary to Article 6 ECHR, is now set down in the Supreme Court's decision in *McInnes v HM Advocate* ([2010] UKSC 7). It can be analysed as comprising "threshold" and "consequences" components. If the material *might* have materially weakened the Crown case or *might* have materially strengthened the case for the defence, it ought to have been disclosed by the Crown. When assessing the consequences of non-disclosure, *McInnes* provides that the trial was unfair and the verdict a miscarriage of justice if there is a *real possibility* that the jury would have arrived at a different verdict if the withheld material had been disclosed to the defence: [12] - [14].

Because it dealt with all of the grounds of appeal as a fresh evidence appeal, the Appeal Court applied the test set down in *Cameron v HMA* 1991 JC 252. In order to determine whether that approach complies with what *McInnes* requires in a non-disclosure case, the *Cameron* test and the Appeal Court's application of it must be compared against the *McInnes* test: [15] – [16]. The *Cameron* test is materially different from the *McInnes* test: [25], [29]. If fresh evidence is admissible on appeal, the "threshold" element of the *Cameron* test asks whether the evidence would have had a material bearing upon the jury's determination of a *critical* issue at trial. That is more stringent than the threshold test in *McInnes* ([25]), which was clearly satisfied in this case: had the evidence of PC Lynch and WPC Clark been led at the trial the prosecution would not have committed itself to the theory of the case which it presented and the conduct of the trial by both parties would have been quite different: [32].

In relation to the consequences of the evidence not featuring at the trial, the *Cameron* test asks whether there has been a "miscarriage of justice", which it does not define: [26] – [27]. In this case, the Appeal Court considered that question on the assumption that, had the undisclosed material been available at the trial, it would have been conducted differently. As a first stage of its analysis, it left out of account the Advocate Depute's speech to the jury and the judge's direction and considered the evidence led at the trial. It considered that the jury had been entitled to convict on the basis of that evidence and concluded that the new evidence was not of such significance as to require the verdict to be set aside: [36]. That approach cannot be reconciled with the *McInnes* test, which requires an appeal court to concentrate on the case as presented at trial, rather than as it might have been presented. An appeal court is not to deal with the case as if it were a new jury trying the case for the first time. There was a real possibility, in light of the undisclosed evidence, that the jury at this trial would have arrived at a different verdict: if the evidence of PC Lynch and WPC Clark were accepted, the Crown's theory of the case would have been untenable: [37] – [39].

Lord Brown agreed that the Appeal Court applied the wrong test. He would have been inclined to remit the whole matter to that court for reconsideration, leaving it to that court to apply the *McInnes* test. In view of the majority's decision, he did not carry his doubts to the point of dissent: [51] – [52]

NOTE

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

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