

## **Criminal Case study**

### **Sent to applicants in advance of the interview**

#### **List of Cases**

*Bickerstaff v HMA* 1926 JC 65

*HMA v Swift* 1984 SCCR 21

*Campbell v Ritchie* 1999 SCCR 914

*Allan v HM Advocate* 2005 SCCR 61

*Early v HMA* 2007 JC 50

*Lachlan and O'Neill v HM Advocate* [2012] HCJAC 137

### **The following information was provided to applicants when they arrived at their interview.**

You are due to preside over a trial in the High Court. A copy of the indictment against the seven accused involved is attached as Appendix A. It contains seven charges that are currently due to proceed to trial next week. An estimated duration of the trial is 12 weeks. The charges involve being concerned in the supply of a Class A drug (Cocaine) and various related Proceeds of Crime Act and fraud matters. Only the first four accused are the subject of the Misuse of Drugs Act charge (charge 1). All seven accused are on bail.

You are about to conduct a continued preliminary hearing, the purpose of which is to hear from the Advocate Depute about his state of readiness for the first day of the trial. Four weeks ago at an earlier continued preliminary hearing the Crown moved to adjourn the trial on the basis that a detailed 300 page forensic accounting report had been lodged by the defence and there would be insufficient time for the Crown expert to consider that before commencement of the trial. The motion was opposed by counsel on behalf of all seven accused. Balancing the various interests as best as you could, you decided that the Crown should be given an additional 3 weeks to work on the matters raised in the defence report. Accordingly, rather than commence the trial on week 1 of the allocated 12 weeks, you decided that the start of the trial should be delayed so that it would commence at the

beginning of week 3 of that 12 week allocation. You then fixed a continued preliminary hearing to take place a week before the commencement of the trial, so that any outstanding matters could be dealt with prior to the trial diet.

Your clerk has come into chambers to inform you of a dramatic development. The Advocate Depute has told him that the necessary work had now been commenced by the forensic accountant instructed by the Crown following receipt of the defence report. However, the Advocate Depute will not be renewing or making a fresh motion to postpone the start of the trial in relation to those matters. Instead, he is going to seek to extend the 11 and 12 month time bar to 2 April and 2 May, both 2017, with a view to Crown deserting the current indictment and re-indicting to include fresh charges against the first accused. It is implicit in the Crown's motion that the 12 week trial diet due to commence next week would then simply fall. All seven accused will be opposing the Crown's application.

You will require to make a decision today on this contentious matter.

You convene the court and hear submissions for the Crown and for the accused – these are set out below.

Please make a decision on the Crown's application and give reasons for your decision.

## **Submissions for the Crown**

The Advocate Depute advises that the Crown received new information 5 weeks ago that the first accused may have committed other offences. So far as the Crown is concerned that new offending is related to the charges in the current indictment. The first accused appeared on petition in respect of those charges 3 weeks ago. In essence, the new charges allege attempted murder, wilful or reckless destruction or damage to property, statutory breach of the peace and attempting to pervert the course of justice. The complainer in the charges is a John Muir. According to the Crown information the first accused committed acts of violence and threats against Mr Muir in an attempt to induce him to give evidence supportive of the defence at this trial. John Muir is not a witness on the current indictment, nor is he on any defence list.

The Advocate Depute seeks to pre-empt submissions that might be made for the first accused by explaining that there are counter-allegations by the first accused against John Muir as a result of which Mr Muir is also on petition in respect of which the first accused is the complainer of alleged violent acts by Mr Muir. However, the Advocate Depute maintains that the new evidence available to the Crown about the first accused is highly relevant to the existing charges on the indictment and would “transform the case”. He submits that it is clear that the first and second accused (who are married and in business together) will present a “legitimate business defence” to the Proceeds of Crime Act charges. The position of John Muir is that he and his wife were involved in a proposed business venture with the first and second accused about 2 to 3 years ago. There was a breakdown in the relationship between the two couples. The Crown alleges that the first accused then asked John Muir to come to court as a witness at this trial and say that he had given certain

monies to the first and second accused at a different time and for a different reason than the proposed business relationship. On Muir refusing to do so, he was, according to the Crown, threatened by the first accused and others leading to the very serious charges in the petition.

The Advocate Depute submits that the court will require to consider whether it is appropriate for the proposed new charges to appear alongside the existing charges. The usual test for separation of charges would be whether it was fair to the accused to have this combination of charges before the jury at the same trial – *Bickersstaff v HMA* 1926 JC 65. The Advocate Depute submits that any motion to separate charges could only be granted by the court if there was a real risk of prejudice to the accused if the charges were heard together. The test is high and not easily satisfied.

Again in anticipation of counsel for the first accused's submissions the Advocate Depute explains that he had been told that the first accused would waive any *induciae* on a fresh indictment and allow the new charges to be added so that they could proceed at the forthcoming trial diet. He indicates however that the Crown is not in a position to accept that offer because further investigation of the new allegations is required including the obtaining of telephone records which, it was said, will take at least 8 weeks to obtain. There are, however, some police intelligence reports in relation to the content of those records.

The Advocate Depute submits that the earliest day by which the Crown could serve a new indictment would be 3 months from today's date. Accordingly the extension of the time bar periods until April and May 2017 respectively was sought. He is not able to assist the court as to when any new trial diet might be fixed on the fresh indictment. The Advocate Depute accepts that of course the Crown must show cause to extend the time bar and refers to the test to be applied as set out in *HMA v Swift* 1984 SCCR 21. In summary the first question is whether the reason put forward for the extension was one for which the

Crown was responsible and here it could be said that the situation was unavoidable situation because of the date of disclosure of the fresh allegations. The second question for the court is then whether the additional time sought is short compared with the period that has already passed. He submits that is the case here, given that the Crown will be in a position to re-indict within three months. He refers to the gravity of the charges against the seven accused in this case. The value of the Misuse of Drugs Act charge is in the region of £2 million and the value of the Proceeds of Crime Act charges is at a similar level. The new charges are of a serious nature and relevant to the matter before the court. He refers to a number of cases including *Campbell v Ritchie* 1999 SCCR 914; *Allan v HM Advocate* 2005 SCCR 613 ; *Early v HMA* 2007 JC 50 and *Lachlan and O'Neill v HM Advocate* [2012] HCJAC 137. In this case the new charges are serious and have a sufficient nexus with the charges on the current indictment that they should be tried together.

The Advocate Depute also makes various submissions about the public interest in prosecuting crimes of this nature and gravity altogether. It is appropriate that each accused be tried on the same indictment as the evidence in relation to each accused is inter-linked. There are four accused involved in charge 1 which is linked to the subsequent financial charges. If the charges are not all heard together there would be considerable expense to the public purse because evidence might have to be heard more than once. For example the Crown will be calling an “assisting offender”, who is a protected witness with a new identity whose evidence will take at least the first week of the trial. The Advocate Depute submits that the pressure and stress that each of the accused will be suffering awaiting trial this was not a substantial matter and that the prejudice to the public interest if the Crown was not allowed to re-indict would be greater. There are financial constraints imposed on some of the accused in the related Court of Session proceedings but there have already been

one or two applications for variation made and granted in that process to mitigate some of the restraints.

## **Submission for the Defence**

All seven accused oppose the Crown's application.

Senior counsel for the first accused, Mr J QC, addresses some of the points made about the fresh allegations. In summary, the first accused's position is that there is an ongoing feud between the two families but that is entirely unrelated to the issues that arise at this trial.

Both Mr Muir and the first accused are subject to investigation in relation to those separate matters. Further, there has never been any question of John Muir being cited or called as a witness for the first accused. The position of the first accused is that the only charge arguably relevant to the current indictment, namely charge 5 on the petition, which alleges perverting the course of justice, is a fabrication. Mr J QC records that he considered matters and took instructions as soon as the contents of the petition were made known to him. He made an offer to the Crown at some point during the course of last week that if the Crown wished to incorporate these fresh charges, he would be in a position to meet them at the current trial. He had two separate types of offer to make. First he says he is prepared to waive the *induciae* and asks the Advocate Depute to proceed by serving a fresh indictment. So far as further investigations by the Crown are concerned he undertakes to lodge any telephone records recovered and disclosed to him on behalf of the first accused once they are available even if that was after the commencement of the trial. Secondly, he has suggested to the Crown that, as an alternative, a docquet could be added to the current indictment together with section 67 notices in relation to any additional witnesses and that he would have no objection to that.

As a separate matter Mr J QC argues that there is a lack of synchronism between the timescale of the charges on the fresh petition and those in the indictment. The petition charges relate to a period that commences in January 2014, with the last date in charge 2 of

the petition being 27 August 2015. The allegations in the current indictment end in February 2012.

So far as prejudice is concerned Mr J argues that the issue of prejudice could not arise unless and until there were charges on an indictment that were the subject of an argument about separating or not. It was premature to consider any question of separation of charges. If the Crown did seek to add the charges to the indictment then it could be appropriately dealt with by way of a minute which would in turn be dealt with at the beginning of the trial diet. Mr J notes that the Crown had opposed bail in relation to the new petition charges both at first instance and at appeal which indicates they must have been in a position to progress matters fairly quickly. Further submissions are made in relation to the very considerable preparations that have been put in place for the anticipated trial diet. Several senior counsel are involved and have committed to the 12 weeks of the trial. The worst possible scenario would be that the Crown is given time to add the charges, the trial is adjourned and the Crown re-indicts but, ultimately, the court determines that the charges should be separated from the charges currently due to go to trial. That would involve adjournment of a very lengthy trial and a significant delay for no good reason.

Senior counsel Mr W QC appears for the second accused and opposes the Crown's application. He submits that no good reason had been given why the Crown could not add these new charges to the indictment or in a docquet at this stage. On the narration given by the Crown there were only 4 or 5 witnesses relevant to the fresh allegations. The only reason for a delay was the phone records which counsel for the first accused had indicated he would undertake to lodge. On Mr W's assessment, it would be something like 10 weeks into the trial before the Crown would have to lead evidence on these fresh charges. While it could not be argued that there was any prejudice to the Crown, there was significant



prejudice to the accused if the Crown's application was granted. The second accused currently has no passport, is unable to deal with property matters, has young children and has to sign on at the police office every second day. The proceedings have been hanging over all of the accused for a considerable period of time. While it is perhaps not a determinative factor, it should be recognised that several experienced senior counsel have committed to this trial and, if it is accepted that they should remain involved, this would be for a fresh trial diet which would commence as late as Autumn 2017.

Mr Y QC for the third accused also opposes the application. He points out that the petition is simply an indication of charges that might be brought. In any event the allegations within it fall wholly outwith the period of the indictment and are wholly collateral to the current issues before the court. He also submits that the Advocate Depute's reference to the public interest was misconceived. In *HMA v Swift* the Appeal Court had made the point that the right conferred on an accused in relation to commencement of the trial within a period of 12 months of the first appearance of the accused on petition is a very important one and the general rule could only be departed from if sufficient reason was shown to justify an extension of the period and the court was prepared to exercise its discretion in favour of the Crown. Further, the view expressed in that case that it is important that an extension sought is as short as possible and that little prejudice will be suffered by an accused if it is granted cannot be relevant to the consideration of whether sufficient reason has been shown for the extension; albeit that they may come into play at the discretionary stage. Further, the court held that it is not a sufficient reason for an extension that the charges are serious. In essence there is yet no guarantee that there is to be an indictment on these fresh charges. They are entirely separate from the main allegations.

There was no prejudice to the public interest in simply allowing the Crown to proceed separately on these charges if it chooses to do so.

Mr F for the fourth accused adopts the arguments presented on behalf of the first three accused. He advises that the fourth accused is a lady in late middle age who has had the considerable stress of waiting for this trial while caring for her 90 year old mother.

Miss M QC for the fifth accused associates herself particularly with the submissions of Mr Y QC and Mr F. The fifth accused is married to the fourth accused and is 62 years old. His pension has been frozen in terms of the relevant restraint order and he does not receive any state benefits.

Mr S QC for the sixth accused also opposes the application. He points out that the motion to extend the time limits is moved only as a result of petition charges which the Crown says it is not in a position presently to prosecute. It is clear, he says, from the submissions of other counsel, that the Crown has been given options and has failed to say why those are not being taken up. The Crown is not ready to proceed with a fresh indictment at this stage. It should take the opportunity to add a docquet to this indictment and lead such evidence as it sees fit. The length of time the proceedings have been outstanding has had a debilitating effect on the sixth accused. She was first detained in relation to these matters in 2012. The issue of prejudice to the accused cannot be ignored.

Mr Z QC for the seventh accused adopts the submissions made by others and opposes the application.

## **Response by the Crown**

In a brief response for the Crown the Advocate Depute reiterates that the Crown is not in a position to put any charges on the indictment at this stage because of further investigations it requires to carry out particularly in relation to phone records. The Crown is anxious not to lead evidence in a “half-hearted way” and is concerned that if the offer of appending a docquet to the current indictment was taken up credibility and reliability of the evidence on the new charges would be a matter for the jury at this trial and that could prejudice future proceedings.

## Appendix A Indictment

HIGH COURT OF JUSTICIARY AT GLASGOW  
Preliminary Hearing: 5 December 2016

RL, born 6 January 1959, whose domicile of citation has been specified as [REDACTED]; II or L, born 1 February 1973, whose domicile of citation has been specified as [REDACTED]; NQA, born 1 October 1976, whose domicile of citation has been specified as [REDACTED], MN, born 7 July 1959, whose domicile of citation has been specified as [REDACTED]; KX, born 26 January 1973, whose domicile of citation has been specified [REDACTED]; OV, born 10 May 1981, whose domicile of citation has been specified as [REDACTED]; and FA, born 19 August 1970, whose domicile of citation has been specified as [REDACTED]

you are indicted at the instance of Her Majesty's Advocate and the charges against you are that

(1) between 1 January 2006 and 6 February 2012, both dates inclusive, at [REDACTED] you RL, II or L and NQA while acting with you FA between 1 February 2009 and 30 June 2010 both dates inclusive at said [REDACTED] and elsewhere, were all concerned in the supplying of a controlled drug namely Cocaine, a Class A drug, specified in Part I of Schedule 2 to the Misuse of Drugs Act 1971 to another or others in contravention of Section 4 (1) of the aftermentioned Act: CONTRARY to the Misuse of Drugs Act 1971, Section 4(3)(b);

(2) between 1 January 2006 and 6 February 2009 both dates inclusive at [REDACTED] you RL and II or L did conceal, disguise, convert and transfer criminal property within the meaning of the aftermentioned Act namely sums of money amounting to £777,754 and 300,558 Euros the exact amount of money being to the Prosecutor unknown in that you did while acting together and with others:-

(a) receive transfers of £315,720 of criminal property between 1 February 2006 and 29 November 2009 in respect of the repeated sale and purchase of motor vehicles by you and by the said Smith Street Cars;

(b) spend £94,000 of criminal property buying and selling boats at said [REDACTED] and receive from them £30,500 of criminal property in respect of the sale of a boat, all in 2006;

(c) purchase the property at [REDACTED] in May 2006 for 508,740 Euros, obtain a mortgage for 507,000 Euros and use 401,740 Euros of criminal property to pay the balance of the purchase price and a further 22,918.54 Euros of criminal property to pay the monthly mortgage of 1788 Euros between 11 May 2007 and 4 May 2008;

(d) purchase the property at [REDACTED], having fraudulently obtained a mortgage for £200,000 from the [REDACTED] as detailed in charge (006) and use £2340.13 of criminal property per month to pay the monthly mortgage payment;

(e) purchase and instruct said MN to purchase on your behalf between 1 April 2008 and 30 November 2008, four diamond rings from [REDACTED] for £26,000, £5,800 and £1,900;

(f) purchase a Rolex watch with diamond dial for £15,379.57, a diamond ring for £7,000 and a white gold Rolex watch for £12,000 from said [REDACTED], between 1 April 2008 and 01 December 2008;

(g) charter a helicopter using £5,560.50 of criminal property to convey you to your wedding at [REDACTED] in April 2009;

CONTRARY to the Proceeds of Crime Act 2002, Section 327(1)(a)(b)(c) and (d);

(3) between 6 February 2006 and 6 February 2010, both dates inclusive at [REDACTED] you RL and II or L did conceal, disguise, convert and transfer criminal property within the meaning of the aftermentioned Act namely sums of money amounting to £192,510 and 233,427 Euros in that you did:-

(a) deposit £155,450 of criminal property into a Bank of Scotland bank account number [REDACTED];

(b) deposit £14,960 of criminal property into the Royal Bank of Scotland bank account number [REDACTED];

(c) deposit £15,320 of criminal property into the Halifax bank account number [REDACTED];

(d) deposit £6,180 of criminal property into the Halifax bank account number [REDACTED];

(e) deposit £3,600 of criminal property into the Airdrie Savings Bank account number [REDACTED];

(f) deposit 145,927 Euros of criminal property into Banco Popular bank account number [REDACTED];

(g) deposit 29,500 Euros of criminal property into Banco Popular bank account number [REDACTED];

(h) deposit 56,000 Euros of criminal property into Banco Popular bank account number [REDACTED];

(i) deposit 65,000 Euros of criminal property into Banco de Sabadell account number [REDACTED]; and

(j) deposit 28,000 Euros of criminal property into Caixa D'Estavalis de Catalunya account number [REDACTED];

CONTRARY to the Proceeds of Crime Act 2002, Section 327(1)(a)(b)(c) and (d);

(4) between 23 March 2006 and 23 March 2012, both dates inclusive at the Bank of Scotland 64-66 George Street you RL, II or L and MN did conceal, disguise, convert and transfer criminal property within the meaning of the aftermentioned Act namely £150,113 of money in that you did (a) deposit £74,775 of criminal property into Bank of Scotland account number [REDACTED]; and (b) deposit £75,338 of criminal property into a Bank of Ireland Post Office Financial Services account number [REDACTED]: CONTRARY to the Proceeds of Crime Act 2002, Section 327(1)(a)(b)(c) and (d);

(5) between 26 March 2006 and 12 January 2010, both dates inclusive at [REDACTED] you RL, II or L, MN and KX did conceal, disguise, convert and transfer criminal property within the meaning of the aftermentioned Act namely £166,560 of money in that you did (a) deposit £166,500 of criminal property into a Virgin One bank account number [REDACTED]; (b) deposit £10,060 of criminal property into a Bank of Ireland Post Office Financial Services account number [REDACTED]; and (c) deposit £30,000 of criminal property into Barclays Bank Plc account number [REDACTED]: CONTRARY to the Proceeds of Crime Act 2002, Section 327(1)(a)(b)(c) and (d);

(6) between 7 August 2007 and 15 December 2009, both dates inclusive, at [REDACTED] II or L did cause ER and LH both representatives of said [REDACTED] to prepare and submit to the said [REDACTED] an application for a mortgage which stated that you II or L were a self employed developer earning £95,002 per annum, the truth being as you well that the said employment and earnings information were false, and in furtherance of said pretence adopt a menacing attitude towards HR, Accountant c/o Police Service of Scotland, Paisley, threaten him and his family with violence and cause him to prepare on your behalf as proof of employment and earnings a letter dated 9 December 2007 which falsely stated *inter alia* that you II or L traded as a sole trader in the property market and that net profits were in the region of £83,912 from receipts and invoices received and that there would be no difficulty in affording a monthly mortgage of £2000 per month, and you did thereby as a result of the false pretences made by you and on your behalf, induce representatives of the said Birmingham Midshires to approve and pay to you a mortgage of £283,600 to purchase the property at [REDACTED] and you did thus obtain £283,600 by fraud;

(7) between 1 February 2009 and 30 September 2009, both dates inclusive at [REDACTED] RL and II or L did conceal, disguise and convert criminal property within the meaning of the aftermentioned Act namely £323,589 of money in that you did use £212,296 of criminal property as part of the finance required to set up and establish a Private Limited Company, namely [REDACTED] Limited registered number [REDACTED] and the [REDACTED]: CONTRARY to the Proceeds of Crime Act 2002, Section 327(1)(a)(b) and (c);