



**IN APPEAL BY**

**NAT GORDON FRASER**

**against**

**HER MAJESTY'S ADVOCATE**

**SUMMARY**

**6 May 2008**

**Today at the Criminal Appeal Court in Edinburgh the appeal by Nat Gordon Fraser against his conviction for the murder of his wife Arlene was refused. The Lord Justice Clerk, Lord Gill, sitting with Lord Osborne and Lord Johnston delivered the following summaries of their decision in Court.**

**Lord Justice Clerk - Lord Gill**

"On the morning of 28 April 1998 the appellant's wife Arlene disappeared from her home and was never seen again. On 29 January 2003 the appellant was convicted of having murdered her and was sentenced to life imprisonment with a punishment part of 25 years.

At the time of the disappearance the appellant and the deceased were separated. The deceased was intending to divorce the appellant. She was living with the children at the former matrimonial home at 2 Smith Street, New Elgin. The deceased wore three rings and was in the habit of taking them off at night.

Immediately after the disappearance, there were a number of police searches of the house. Among the officers who took part were PC Neil Lynch and WPC Julie Clark. In their notebooks and in the statements that they gave soon after the searches; and in other records of the searches, there is no mention of the deceased's rings having been seen by police officers or scenes of crime officers. A video survey of the house made in the afternoon of 29 April shows no evidence of any of the deceased's rings anywhere in the house. After 30 April members of the deceased's family were living at the house. They searched the house extensively but none of them saw the deceased's rings.

There was evidence that around lunchtime on 7 May 1998 the appellant called at the house and went into the bathroom; and that just after he left, the deceased's three rings were found on a wooden dowel beneath a soap dish in the bathroom.

The advocate depute presented the Crown case to the jury on the basis that the appellant removed the rings from the body of the deceased and took them to the house on 7 May. That presentation implied that the deceased had been wearing the rings when she was killed. The advocate depute described the finding of the rings as "the cornerstone" of the Crown case. The trial judge directed the jury that if they did not accept that the appellant placed the rings in the bathroom on 7 May, they could not convict.

After the appeal was lodged, it came to light that when he was precognosced by the Crown in preparation for the trial, PC Lynch had said that on the night of 28-29 April he had seen jewellery, including rings, at the house and that he thought that, before the official search began, he had seen bracelets and rings in the bathroom at the side of the sink. It became apparent that this evidence had not been known to the advocate depute and had not been disclosed to the defence.

In the course of an internal inquiry, PC Lynch repeated his recollection of having seen jewellery in the bathroom on a shelf of some sort, including two or three rings. The question of the rings was raised with WPC Clark. She said that before the formal police searches began, she saw jewellery on a wooden pole or dowel underneath a glass ledge above the sink; that she saw at least two finger rings and a chain, and that one of the rings could have been a lady's wedding ring or eternity ring. She said that she had mentioned this when she was precognosced before the trial.

In 2006 a formal inquiry was conducted by the Area Procurator Fiscal for Glasgow and the Deputy Chief Constable of Strathclyde. That inquiry obtained a report, the Woods-Bowie Report, which concluded from an analysis of the video that while rings could not be seen, the possibility that there were rings on the dowel could not be ruled out.

The two grounds of appeal are (1) that the evidence of PC Lynch and WPC Clark, and of the conclusions of the Woods-Bowie Report, is new evidence and that, since it was not heard by the jury, the conviction was in the circumstances a miscarriage of justice; and (2) that the Crown's failure to disclose the evidence of PC Lynch to the defence before the trial had the same result.

The basis of the appeal was that neither PC Lynch nor WPC Clark was precognosced by the defence before the trial; but towards the end of the hearing, the appellant's present solicitors discovered, among the papers of his previous solicitors, precognitions of both witnesses, neither of which mentioned the rings.

On the first ground of appeal I conclude, for the reasons set out in my Opinion, that the evidence of the Woods-Bowie Report is inconclusive and is of no material significance. I also conclude that the proposed evidence of PC Lynch and WPC Clark is not new evidence; but that, even if it is, the verdict cannot be regarded as a miscarriage of justice.

The circumstantial evidence alone constituted a compelling case against the appellant. There was evidence that he had motives for the crime. There was evidence of his previous malice and ill-will towards the deceased. There was evidence of preparatory acts by him in setting up an alibi and in his involvement with Hector Dick on the previous night in the urgent purchase of a car with a boot when the witness Kevin Ritchie, who obtained the car, was given £50 by Dick to keep quiet.

There was incriminating evidence in the events and circumstances, and in the demeanour and the statements of the appellant, immediately after the disappearance.

In my opinion, the circumstantial evidence alone was not only sufficient in law to entitle the jury to convict, but was powerful in its effect.

But when Dick gave evidence for the Crown, the prosecution case was transformed. He gave evidence of premeditation; of the return of the car after the disappearance with inside it a coat similar to the deceased's and a bundle of clothing that he thought was the clothing of one of the children; and of several detailed confessions made to him by the appellant in which he described his part in the murder and in the destruction of the body.

I therefore conclude that it was not essential to a conviction that the jury should accept that the appellant left the rings in the bathroom on 7 May; but that, if they concluded that he did, his furtiveness in doing so was a further incriminating circumstance.

Therefore the trial judge's direction that the jury could not convict unless they held that the appellant placed the rings in the bathroom on 7 May was a misdirection; but it was limited in its scope. It related only to the events of 7 May. The question did not depend on whether the rings were in the house in the early hours of 29 April.

However, in consequence of the misdirection we can conclude with certainty that the jury found that the appellant put the rings in the house on 7 May. That being so, the question is whether in the light of the proposed new evidence the verdict was a miscarriage of justice. In my view, it was not. I shall assume that on the evening of 28 April and the early hours of 29 April the rings were in the house. That is quite possible. The deceased took her rings off every night. It appears that she was disturbed while doing housework on the morning of her disappearance. She may well have been killed before she had time to put her rings on again. The appellant had the opportunity to remove the rings from the house on 29 April after the assumed sightings by PC Lynch and WPC Clark and before the making of the video. The house at that time was not a crime scene. The house was unoccupied. The appellant had a key. Dick said that the appellant made the significant admission that he had been to the house on the night of 28/29 April and had tidied it up to clear away any evidence. The proposed evidence is therefore not inconsistent with the key finding that the appellant put the rings back in the house on 7 May.

In any event, even at its highest the evidence of PC Lynch and WPC Clark has no material significance in comparison with the evidence of the family members and of the whole circumstantial background to the case.

Lastly, the trial judge's misdirection, in my opinion, raised the Crown's hurdle higher than it should have been. In that sense the misdirection was favourable to the defence.

I conclude therefore that the first ground of appeal is not made out.

I shall deal with the second ground of appeal on the assumption that there was non-disclosure of the evidence of PC Lynch. On that assumption, section 106 of the Criminal Procedure (Scotland) Act 1995 requires us to consider whether the nondisclosure resulted in a miscarriage of justice. That involves an assessment of the importance and significance of the undisclosed evidence to the crucial issues at the trial. In effect therefore the non-disclosure ground at this stage becomes a new

evidence appeal. For the reasons that I have given in relation to ground 1, I consider that this second ground of appeal falls to be rejected.

I propose to your Lordships that we should refuse the appeal against conviction and continue the appeal for consideration of the sentence”.

## Lord Osborne

“I begin by agreeing with the Lord Justice Clerk that the appeal against conviction should be determined in the manner proposed by him, for the reasons that he gives. However, in view of the importance of certain of the issues raised in the appeal, I express my own opinion on those matters.

I deal first with the approach to be taken to evidence not heard at the trial where it is contended that a miscarriage of justice has occurred on account of such evidence, in terms of section 106(1) of the Criminal Procedure (Scotland) Act 1995. I affirm the correctness of the treatment of that matter in *Cameron v H.M. Advocate* 1987 S.C.C.R. 608, and elaborated in *Kidd v H.M. Advocate* 2000 S.C.C.R. 513 and *Al Megrahi v H.M. Advocate* 2002 S.C.C.R. 509. The approach set out there entails that the assessment of the significance of the additional evidence must be conducted in the context of the whole evidence laid before the trial court. In that connection, it is not necessary or appropriate to consider whether the additional evidence founded upon would in fact have been led on behalf of the appellant at the trial.

I go on to consider the issue of the assumptions that have to be made in the evaluation of the significance of additional evidence. I conclude that the assessment of the significance of the additional evidence must be performed in the light of the whole of the evidence before the court at the trial, but not the tactics which happen to have been adopted at the original trial in the different evidential situation.

I also consider the relevance, if any, of certain *dicta* in *Holland v H.M. Advocate* 2005 S.C.C.R. 417 to this appeal. In that connection, I examine the nature of the jurisdiction of the Privy Council in devolution issues under paragraph 13 of Schedule 6 and section 98 of the Scotland Act 1998, and that of this court under section 106 of the 1995 Act. That involves consideration of the relationship between an unfair trial, in terms of Article 6(1) of the European Convention on Human Rights and a miscarriage of justice under section 106(3) of the 1995 Act. I conclude that it is potentially confusing and unhelpful, in criminal appeals under section 106(3)(a) of the 1995 Act to rely on *dicta* pronounced in appeals under paragraph 13 of Schedule 6 to the 1998 Act. In the same connection, I comment on *Gair v H.M. Advocate* 2006 S.C.C.R. 419.

Further, I examine the status of precognitions in relation to the issue of disclosure. I affirm the absolute privilege attaching to Crown precognitions under reference to *Downie v H.M. Advocate* 1952 S.C.C.R. 446, and *H.M. Advocate v MacSween* 2007 S.C.C.R. 310.

I then turn to deal with the question of “reasonable explanation” in relation to evidence not heard at the trial under section 106(3A) of the 1995 Act, particularly the evidence of P.C. Lynch and W.P.C. Clark. In the light of all the circumstances in this case, I conclude that no reasonable explanation exists as to why the evidence they can now give was not heard at the original proceedings.

Upon the assumption that a reasonable explanation does exist, I consider the significance of the evidence of these witnesses. I conclude that the force of the Crown case would actually have been enhanced by this additional evidence, had it been available. Thus the fact that the appellant's conviction was reached in the absence of that evidence, in my opinion, could not be seen as a miscarriage of justice".

## Lord Johnston

"I respectfully agree with the opinion of your Lordship in the Chair.

I specifically endorse the views that this is not a fresh evidence case properly understood, but rather revealing an overwhelming case of guilt on a circumstantial basis for the reasons already mentioned by your Lordship.

This issue of the jewellery was unfortunate to say the least and I consider that the trial judge misdirected the jury in that respect. However, I do not consider that any miscarriage of justice arises from that misdirection since it was on any view favourable of the defence narrowing the Crown case beyond what was necessary.

In these circumstances the issue of the jewellery is nothing to the point when it comes to the assessment of the guilt of the appellant upon the whole evidence which is as I have indicated I consider to be overwhelming.

For these substantial reasons and in agreement with your Lordship I therefore concur that the appeal should be refused".

### 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.***

The full opinion will be available on the Scottish Courts website at this location:

[http://www.scotcourts.gov.uk/opinions/fraser\\_.html](http://www.scotcourts.gov.uk/opinions/fraser_.html)

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