SCCRC Scottish Criminal Cases Review Commission

Position Paper

Fresh evidence

Introduction

1. The Criminal Appeal (Scotland) Act 1926 introduced a power for the High Court of Justiciary to allow an appeal on the basis of new evidence which was not heard at the original trial. An appeal on this ground would succeed only where the court was satisfied that had the jury heard the additional evidence they would have been bound to acquit and that a verdict in the absence of the additional evidence amounted to a miscarriage of justice[1]. This power was rarely used by the court and following the Sutherland Committee report[2], sections 106(3) (for solemn procedure) and 175(5) (for summary procedure) of the Criminal Procedure (Scotland) Act 1995 were amended to allow appeals on the basis of the existence and significance of evidence which was not heard at the original proceedings. This removed the requirement for "additional" evidence and allowed for appeals on the basis of "changed" evidence. The amended 1995 Act also allowed the court to consider evidence which had existed at the time of the trial where there was a reasonable explanation as to why it was not heard at the original proceedings. Prior to this the appellant had to satisfy the court that the additional evidence could not reasonably have been made available at the trial.
2. Fresh evidence is a common ground of review in applications to the Commission. It is also a common ground of referral to the High Court. In the Commission's first fifteen years, fresh evidence was the main ground of referral in 36% of all conviction reviews sent to the High Court[3]. One such case was *Campbell v HMA*[4], the so-called "Ice Cream Wars" case. One of the grounds on which the Commission referred the case to the High Court was the existence of fresh evidence from a Professor of Cognitive Psychology that it was highly improbable that a number of

[1] *Gallacher v HMA* 1951 JC 38, at page 48
[2] *Criminal Appeals and Alleged Miscarriages of justice,* Cmnd 3245
[3] 2013-2014 Annual Report at page 13
[4] *Campbell v HMA* 2004 SCCR 220

police officers were able to recall verbatim incriminating remarks which were alleged to have been made.

The Commission's Position

3. Section 106(3)(a) of the 1995 Act[5] allows for appeals against conviction and sentence based on the existence and significance of evidence which was not heard at the original proceedings. Section 106(3C) of the 1995 allows for appeals based on the existence and significance of evidence from a person, or from a statement of a person, who gave evidence at the original proceedings, which is different from, or additional to, the evidence given at the original proceedings. Additional considerations arising out of an application under this section of the 1995 Act are considered below.

4. When considering an application based on the existence and significance of evidence which was not heard at the original proceedings[6], the Commission must firstly be satisfied that the evidence is, indeed, additional and that it was not heard at the original proceedings. The Commission must also consider whether the proposed fresh evidence is, in fact, admissible in court[7]. The Commission must then consider whether, in terms of section 106(3A) of the 1995 Act, there is a reasonable explanation as to why the evidence was not heard at the original proceedings.

5. The term "reasonable explanation" is to be considered objectively[8]. What amounts to a "reasonable explanation" will depend on the facts and circumstances of each case. Tactical decisions taken not to lead certain evidence would only be considered as a reasonable explanation in exceptional circumstances[9].

6. In considering whether a reasonable explanation exists, the fact that an applicant was unaware of the existence of a witness, or was not aware that a witness was willing or able to give evidence, is not in itself a reasonable explanation[10]. If, however, it can be shown that an applicant had no good reason to have known that a witness existed, or that a witness could give the additional evidence, then that may be considered as a reasonable explanation.

[5] All references to the 1995 Act in this section refer to appeals under solemn procedure. Similar provisions in relation to summary procedure can be found at section 175(5) of the 1995 Act.
[6] For cases where the additional evidence is as a result of non-disclosure by the Crown, please see the Commission's position paper on non-disclosure.
[7] *Young v HMA* 2013 HCJAC 145
[8] *Campbell v HMA* 1998 SCCR 214
[9] *Campbell v HMA*
[10] *Cameron v HMA (No 2)* 2008 SCCR 748

7. Assuming that a reasonable explanation exists, the Commission considers that the following test, as stated in *Al Megrahi v HMA*[11], is to be applied:

"*(2) In an appeal based on the existence and significance of evidence not heard at the trial, the court will quash the conviction if it is satisfied that the original jury, had it heard the new evidence, would have been bound to acquit.*

(3) Where the court cannot be satisfied that the jury would have been bound to acquit, it may nevertheless be satisfied that a miscarriage of justice has occurred.

(4) Since setting aside the verdict of a jury is no light matter, before the court can hold that there has been a miscarriage of justice it will require to be satisfied that the additional evidence is not merely relevant but also of such significance that it will be reasonable to conclude that the verdict of the jury, reached in ignorance of its existence, must be regarded as a miscarriage of justice.

(5) The decision on the issue of the significance of the additional evidence is for the appeal court, which will require to be satisfied that it is important and of such a kind and quality that it was likely that a reasonable jury properly directed would have found it of material assistance in its consideration of a critical issue at the trial.

(6) The appeal court will therefore require to be persuaded that the additional evidence is (a) capable of being regarded as credible and reliable by a reasonable jury, and (b) likely to have had a material bearing on, or a material part to play in, the determination by such a jury of a critical issue at the trial."

8. If the Commission is satisfied that the additional evidence is capable of being regarded as credible and reliable by a reasonable jury, it will then go on to consider whether the additional evidence is likely to have had a material bearing on, or a material part to play in, the determination by such a jury of a critical issue at trial. This must be assessed in the context of the trial as a whole[12]. The Commission must consider that the absence of the fresh evidence may have resulted in a miscarriage of justice[13]

[11] 2002 SCCR 509, at page 585
[12] *Al Megrahi v HMA*
[13] *Fraser v HMA* 2008 SCCR 407

Section 106(3C)

9. As outlined at paragraph 2 above, section 106(3C) of the 1995 Act allows for appeals based on the existence of additional evidence from a person, or from the statement of a person, who gave evidence at the original proceedings and which is different from the evidence given at the original proceedings.

10. In considering evidence under these provisions, the Commission must be satisfied that there is a reasonable explanation as to why the evidence was not led at the original proceedings. This explanation must be supported by independent evidence. Section 106(3D) of the 1995 Act defines this "independent evidence" as evidence which was not heard at the original proceedings; which comes from a source independent of the person from whom the additional evidence emanates; and which is accepted as being credible and reliable. The Commission notes that appeals under this section of the 1995 Act are rarely successful. The decision in *McCreight v HMA*[14], however, provides an example of a case where the court accepted such evidence.

Sentence

11. When considering an application for a review of sentence on the basis of fresh evidence, the Commission must consider whether there is a reasonable explanation as to why the fresh evidence was not heard at the original proceedings; whether the evidence is credible and reliable; and whether the fresh evidence is cogent and important evidence of a kind and quality which would have been of material to the court at the original proceedings[15].

Specific considerations

12. Where an applicant is legally represented, the Commission would expect an application on the grounds of fresh evidence from a witness to contain a precognition, statement or affidavit from that witness. The Commission may reject cases at Stage 1 where no such supporting documentation has been produced.

[14] *McCreight v HMA* 2009 SCCR 743
[15] *Reid v HMA* 2012 HCJAC 18

13. In *B v HMA*[16], the court held that it would expect in relation to the establishment of a "reasonable explanation" some form of evidential foundation "in the form of an affidavit or a statement from either the appellant or his former agents that the [evidence] was not known to the appellant or his legal advisers." Where this is an issue, the Commission should take statements from the appellant, his legal team or, preferably, both.
14. Where the Commission has accepted a case for review, it may also choose to obtain its own signed statement or affidavit from a witness. Where the witness is not willing to cooperate with the Commission, the Commission may seek to exercise its statutory powers under s194H of the 1995 Act.
15. Where an applicant is seeking a review of conviction on the basis of "fresh evidence" in relation to a charge to which he or she has previously pled guilty, the Commission must consider whether the applicant is entitled to withdraw the plea[17]. For the additional considerations which apply in these cases, please see the Commission's position paper on the withdrawal of pleas of guilty.

Date of Approval: 8 July 2016

Date of Review: July 2017

[16] 2014 SCCR 376 at paragraph 19
[17] *Kalyanjee v HMA* 2014 SCCR 397