

SCOTTISH CRIMINAL CASES REVIEW COMMISSION

SUPPLEMENTARY STATEMENT OF REASONS

1. This supplementary statement of reasons sets out the views of the Scottish Criminal Cases Review Commission ('the Commission') on the further submissions made by Mr Stephen Richard Bateson ('the applicant') following the Commission's interim decision to refuse to refer his case to the High Court.
2. For the reasons set out here and in its interim statement of reasons issued on 6 October 2006, the Commission does not believe that a miscarriage of justice may have occurred in the applicant's case. Accordingly, the Commission has finally decided not to refer his application. The applicant is not prevented from applying to the Commission again in future regarding his conviction and sentence although, unless any new matters are brought to the attention of the Commission, any such application is unlikely to result in his case being referred to the High Court.
3. The further submissions made in the applicant's case, and the Commission's views on these, follow.

Deletions to the charge of which the applicant was convicted

4. The applicant submits that he was not aware that there had been any deletions or amendments to the charge of which he was convicted. He has enquired about when the changes were made and whether his solicitor would have been made aware of them.
5. The minutes from the applicant's trial indicate that the charge of which he was convicted was the subject of the deletions and amendments referred to in paragraph 4 of the interim statement of reasons. The minutes do not indicate when exactly these amendments were made. However, as they are contained in the official court minutes, it is clear that they must have been made in open court. As such, both the applicant and his solicitor ought to have been made aware of the terms of the amended charge. The Commission does not consider that there is anything in this matter which would suggest that a miscarriage of justice may have taken place in the applicant's case.

Discrepancies in the summary of evidence by the Commission

6. The applicant submits that the summary of evidence of his case provided by the Commission is inaccurate. The applicant refers to two alleged discrepancies in the Commission's summary of the evidence presented in his case.
7. The first discrepancy highlighted by the applicant relates to paragraph 7 of the interim statement of reasons. The applicant indicates that the witness Carnegie acknowledged the other two witnesses as he passed them, and not as they passed him. Taking the applicant's case at its highest, and assuming that this is a fact an error in its summary of the evidence at his trial, the Commission does not consider that this is material to his submissions or to his conviction.
8. The second discrepancy relates to paragraphs 9 and 34 of the interim statement of reasons, where the Commission describes the comment which the applicant made to the

police upon being questioned about the incident. The applicant claims that the quote attributed to him by police officers was not accurate, but was paraphrased. He gives no indication of what he claims was actually said by him. The Commission has referred to the statements of the police officer who spoke to the applicant regarding the incident. In this statement the officer notes the applicant's reply as being in the same terms quoted in paragraphs 9 and 34 of the interim statement of reasons. Moreover, in the submissions which the applicant has made, and the evidence which he presented at his trial, he has made it clear that he does not dispute being the driver of the vehicle in question on the day of the offence.

9. Having considered the applicant's submissions in relation to the evidence presented at his trial, the Commission does not consider them to suggest that there may have been a miscarriage of justice in his case.

Failure to disclose the police statements of the Crown witnesses and additional evidence regarding the presence of a van at the locus

10. The applicant submits that the failure of the Crown to disclose the police statements of the witnesses in his case denied him a fair trial. He submits that without these statements he remained unaware of the allegation that there had been a van at the locus of the incident. The applicant questions the conclusions which the Commission has reached in relation to his matter in paragraphs 18 to 28 of the interim statement of reasons.

11. The applicant has also submitted a copy of a police incident log which he claims supports his assertion that there was no van present at the locus referred to by the Crown witnesses. He obtained this log from the police after his conviction.

12. The Commission has considered the submissions put forward by the applicant in relation to this matter. It has also taken into account the police incident log in which a report of a broken down van is made, which the applicant submitted with a letter dated 15 November 2006. In particular, it has taken into account the applicant's claims that the log describes the van being present around 40 minutes after the incident described by the Crown witnesses, and that the grid co-ordinates which it contains suggest that the van had broken down on the westbound carriageway of the carriageway around 1 ½ kilometres south-west of the eastbound carriageway spoken to by the witnesses for the Crown. The exact location of the van is not confirmed in the log, but the Commission has proceeded on the basis of the applicant's interpretation of the grid co-ordinates, in order to consider his submissions at their highest.

13. In assessing these submissions, the Commission has again considered the cases of *Holland v HMA* 2005 SCCR 417 and *Sinclair v HMA* 2005 SCCR 446, referred to in paragraph 19 of the interim statement of reasons, as well as the case of *Kelly v HMA* 2006 SCCR 9 referred to in paragraph 20 of the interim statement of reasons. It has reviewed its conclusions in relation to this matter in light of the additional information now put forward by the applicant. The applicant's submissions suggest that the Commission was wrong to conclude that, in terms of the test put forward in the case of *Kelly*, the information in the Crown witness statements would not have been of material assistance to the proper preparation or presentation of the his defence. He suggests that, had he known about the van, enquiries could have been carried out to obtain additional evidence in this regard. The report which he has submitted is cited as being such additional independent evidence which would have had a bearing on his case.

14. In considering this aspect of the applicant's case, the Commission has found it helpful refer to the previous authorities of the High Court which discussed the test which should be employed in assessing additional evidence. In the case of *Kidd v HMA* 2000 SCCR 513, the High Court referred to the previous cases of *Church v HAM* 1996 SCCR 29 and *Cameron v HMA* 1987 SCCR 608, and outlined the approach to be taken in any appeal based on fresh evidence. It held that the governing question in any such appeal is whether the fact that the evidence was not heard at the original trial represents a miscarriage of justice, and that it is not a question of whether the evidence is significant, but whether it is of such significance as to lead to the conclusion that a verdict returned in ignorance of it must be regarded as a miscarriage of justice. In doing so, it made clear that the significance of evidence includes considerations as to its relevance, materiality and importance, and its quality in point of credibility and reliability, the overall impression which is created being the important consideration. While it is sufficient that the evidence is capable of being regarded by a reasonable jury (or trial judge) as both credible and reliable, its cogency is of critical importance. In the case of *Al Megrabi v HMA* 2002 SCCR 509 the test was further outlined by the High Court, when it stated *inter alia*:

- "(2) In an appeal based on the existence and significance of additional evidence not heard at the trial, the court will quash the conviction if it is satisfied that the original jury, if it had 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. "*

15. Having regard to these decisions, and to the grounds on which the Commission may refer a case to the High Court in terms of section 194C of the 1995 Act, the Commission has considered whether the evidence which the applicant has now uncovered would have been likely to have had a material bearing on, or a material part to play in, the determination by the sheriff of a critical issue at the applicant's trial. It has come to the conclusion that it would not. The information provided by the applicant suggests that there was a van broken down 40 minutes after, and some distance from, the incident which was described by the witnesses for the Crown. It is not clear to the Commission why this would suggest that the witnesses were lying in describing the incident which they spoke to in evidence. The

information does not clearly undermine the witnesses' reliability, as it does not provide proof that they lied about what they saw earlier in the day. Nor would it have been likely to have had a material bearing on their reliability, as it was not in dispute that the witnesses were travelling eastbound, and it is therefore unlikely that any suggestion that they may have made a mistake about what they saw on the basis of this report would have been successful. There is no way of confirming if the van referred to in the log was the same vehicle to which the witness's referred in their evidence. Moreover, the Commission does not consider that this information would have had a material bearing on the sheriff's consideration of the standard of the applicant's driving, as spoken to by the witnesses in their evidence.

16. The Commission has also considered whether the points which the applicant has raised might constitute a claim of defective representation. It has considered whether his solicitor failed to investigate properly the existence of the report referred to by the applicant, to the detriment of the presentation of his defence, and whether this might have deprived him of a fair trial (as per *Anderson v HMA*, 1996 JC 29; *AJE v HMA*, 2002 SCCR 341; and *Grant v HMA*, [2006] HCJAC 421). In doing so, it has also had regard to the High Court's decision in *McIntosh v HMA* 1997 SCCR 397, where it held (at page 396D-E) that where inadequate preparation is put in issue, the argument can take the appellant nowhere unless he can show, *inter alia*, how the lack of that information prejudiced the defence. As the Commission does not consider that the report would have had a material bearing on the applicant's defence, it does not consider that there may have been defective representation in his case.

17. For the reasons outlined, the Commission does not consider that there may have been a miscarriage of justice in the applicant's case.

Damage to the witness Carnegie's vehicle

18. The applicant has again referred to the fact that the witness Carnegie's statement referred to damage to his vehicle. He again highlights the fact that nothing was made of this during his trial. He submits that all collisions between metal and concrete objects may be expected to cause damage. He further submits that the kerb at the locus was designed to prevent collision by letting wheels ride over it.

19. The Commission has taken into account the further submissions put forward by the applicant in relation to this matter. However, it does not consider that they add in any significant way to the submissions he made prior to the interim statement of reasons being issued in his case. As indicated in paragraph 26 of the interim statement of reasons, the damage to the witness Carnegie's car was minimal, involving only slight damage to his tyre. The Commission does not consider this to have been a material matter in the applicant's case. It does not consider that the issues which the applicant has highlighted raise any real questions about the credibility or reliability of the Crown witnesses. It does not consider that the further submissions put forward in this regard suggest that there may have been a miscarriage of justice in the applicant's case.

Unreasonable verdict

20. The applicant refers to paragraph 27 of the interim statement of reasons. He submits that while a discrepancy in the Crown case was before the sheriff for his consideration, it is not clear that the sheriff noticed this discrepancy.

21. The Commission considers that there is no basis for claiming that the sheriff was not aware of the terms of the evidence which was presented by the defence and the Crown at the applicant's trial. In order to refer the applicant's case, the Commission would have to identify a valid ground of appeal. The only ground which the present submission might suggest is one of unreasonable verdict, in that the sheriff convicted the applicant despite the existence of the discrepancy which the applicant has identified. For the reasons indicated in paragraphs 36 to 45 of the interim statement of reasons, the Commission does not consider that there may have been a miscarriage of justice in the applicant's case on the basis of such an unreasonable verdict being returned.

Incorrect Forum

22. The applicant again submits that the circumstances of his case were too complex to have been dealt with by way of summary trial.

23. The Commission dealt with this matter in paragraph 28 of the interim statement of reasons, and does not consider that there is anything in the additional submissions put forward by the applicant which suggests that the conclusion which it previously reached was incorrect. Cases similar to that of the applicant are dealt with on a daily basis in summary courts in Scotland, and there is no legal basis for suggesting that his trial ought to have proceeded by way of an indictment. The additional submissions in relation to this matter do not suggest that there may have been a miscarriage of justice in the applicant's case.

Independence of Crown witnesses

24. The applicant has again submitted that there was insufficient evidence of the independence of the witnesses who gave evidence against him at his trial. He cites examples of what he considers to be "improbable" evidence given at his trial to support his claim that the witnesses may not have been independent, such as the fact that the witness Carnegie was able to memorise a vehicle registration number, despite being in a shocked and confused state of mind. He claims that his attempts to investigate the independence of the Crown witnesses have met with resistance from the police.

25. The Commission notes that the applicant has made attempts to obtain information from associates of the Crown witnesses in order to assess their independence, as he believes that this line of investigation ought to have been pursued by the police prior to his trial. The Commission does not consider this to be a valid line of investigation. The matters on which the applicant relies in relation to this ground of review do not support his claims of collusion between the Crown witnesses, and the Commission considers that the applicant's arguments in relation to their independence are unfounded. The Commission considers that the submissions put forward by the applicant involve speculation, and do not suggest that a miscarriage of justice may have taken place in his case.

Dock identification

26. The applicant maintains that the fact that he was identified in the dock at his trial was unfair, particularly given the reluctance with which the witness MacGregor identified him. He claims that the reason for this reluctance was the fact that this witness had never seen him previously. He submits that the Commission has not understood the nature of his submission on this issue.

27. The Commission does not consider that the applicant's further submissions in relation to this matter add in any material way to those put forward previously. As indicated in paragraphs 31 to 35 of the interim statement of reasons, the Commission does not consider that the identity of the applicant as the driver of the vehicle in question was ever in dispute at the trial, the applicant himself having accepted that he was the driver. Rather, the real issue was the nature of his driving. The Commission notes that applicant's claim that the witness MacGregor did not see the incident, but this submission does not correspond to the Crown case which the trial sheriff accepted. Having considered the circumstances of the applicant's case, in light of the decision of the Privy Council in the case of *Holland*, referred to in the interim statement of reasons, the Commission does not consider that the submissions put forward suggest that there may have been a miscarriage of justice in the applicant's case.

Inference drawn regarding the applicant being tired

28. The applicant submits that there is nothing to support the Commission's conclusion that the sheriff was entitled to infer that someone who had driven 275 miles without a break may have been tired. He points out that the law permits commercial drivers to drive for 4 ½ hours between rest periods.

29. The Commission notes the applicant's submissions in this regard. It notes the applicant's reliance on the rest periods permitted by law to commercial drivers. However, it does not consider that the existence of such legal provisions suggest that it was unreasonable for the sheriff to infer that the applicant would have been tired at the time of the incident. Other advice to road users is less supportive of the applicant's submissions. For example, the Highway Code provides that a minimum break of at least 15 minutes after every two hours of driving is recommended to drivers. Neither of these provisions is determinative of the issue. What is important is whether the inference which the sheriff drew was reasonable, given the evidence which had been led in the applicant's trial. The Commission remains of the view that it was reasonable. Moreover, as indicated at paragraph 44 of the interim statement of reasons, the trial sheriff has made it clear that it was not this inference, but rather the evidence concerning the standard of the applicant's driving, which was decisive in his conviction. For these reasons, the Commission does not consider that the additional submissions put forward suggest that there may have been a miscarriage of justice in the applicant's case.

Conclusion

30. For the reasons set out above, and in its interim statement of reasons, the Commission does not believe that a miscarriage of justice may have occurred in the applicant's case. As indicated, the applicant is not prevented from applying to the Commission again in future regarding his conviction and sentence, although, unless any new matters are brought to the attention of the Commission, any such application is unlikely to result in his case being referred to the High Court.