

R.

Respondent

-v-

ALEX WILLIAM SMITH

Applicant

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**NOTE OF APPEAL HEARING**

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JM Intros  
HM junior  
Bundles  
AS and EH assisting (EH made witness statement in proceedings,  
helped with preparation of papers)

LJC Reviewed all papers, evidence bundle, helpful updated grounds and  
advice on appeal.

JM Instructed by Bar Pro Bono Unit

LJC Located EH statement

JM Grateful for permitting witnesses to be present

Number of procedural applications, intend to deal at end.

Begin with Ground Four. CPS disclosure failures. Strongest ground  
of appeal. Also ground for which there is the subsequent application  
for disclosure order. After grounds final settled updated amended  
lodged, there has been an app for disclosure order – served on 18  
Sep. Definitely acknowledged as received by CM in CAO.

We asked the app be dealt with at preliminary hearing, but response  
that app can be dealt with at this hearing.

LJC Have seen this. May be at back of updated

JM Served on them, declined to serve material.

LCJ How can you ask us to make order without showing NGN response.

JM Sorry – not served on NGN. There have been SARs for material, declined to provide it. Aware material exists because of parallel MTVIL. Made under CrPR 37. Apologise for any procedural failures.

Served in Sept. Only knew material in Jan.

LJC Late developments, unexplained. Something was around in Sept 2021

JM Became aware of existence of material via John Alford. Litigant in MTVIL litigation. Made civil claim, recently settled.

LJC If disclosure made in ongoing civil litigation, which you want to use here.

JM If going through that route (taking via John Alford) that is app to make. But we are seeking to go to source – NGN

Picken What go to?

JM Ground 4. Shows criminal activity of MM.

LJC AS position is that he was a fake who he was trying to expose at the time.

JM Pleaded G without proper disclosure. Seeking to expose. Police and

LJC Client not told about disclosure until January?

JM In Jan, JA claim settled, made clear what contents of that disclosure is.

Picken Part 31.22 refers to 'use of;.

LJC Not happy receiving subs on contents nwithout assurance that it won't compromise elsewhere

JM Various procedural matters to be dealt with as preliminary matters. May be that CACD feel substance of appeal cannot be dealt with today, and if minded to go off to another date.

LJC Adjourned multiple times since May 21 in order to put forward further evidence. No question of any further delay in this matter.

Picken Looking at 4<sup>th</sup> ground in bundle. Reference in §64 to underlying litigation.

LJC Fourth ground suggestion of non-disclosure by police or CPS . What is basis of submissions?

JM Failure to disclose is what was known re MM at the time. Material that would reinforce submissions on this ground and other grounds. In material sought, material re Shepherd and Norman case – at §66.

Case from 1994 where decision was taken by CPS to ONE based on concerns re MM as main prosecution witness. Therefore known in 1994, but in 1998 no disclosure was made about those concerns – inc pros being dropped. Understand material in NGN archives about that case.

LJC Support alleged non-disclosure by police re Sheppherd and Norman.

JM CPS disclosure failure has been compounded in appeal proceedings, because what instigated appeal – following Tulisa case – HHJ McCreath stopped conviction and vacated G plea. During course of Vior Dire, became clear re MM misleading court

LJC Why integral when G plea entered, when only issue is did your client know the coins were counterfeit. Why relevant?

JM What was relevant was there was entrapment which was concealed, substantial ground to make abuse of process argument at time – kept in dark about, so entered G plea. And significant disclosure failures, ...

Deprived of stay. And disclosure failures – would have challenged MM credibility.

Understanding is may have been drugged. Scores of MM victims say same thing.

Picken Ground One – Seems that Ground 4 is reliant on Ground 1. Re §45(c) – knew counterfeit

JM AS didn't have opportunity to argue.

Wall Deprived of opportunity to run abuse of process at time. Solely with whether material that ought to have been disclosed.

Can understand argument re entrapment/abuse of process. Cannot ....

JM [Directed to RN §9]

Understand that AS informed by defence advocate that he has no available defence. That is instructions.

LJC 25 years on. Not enough.

Instructions are that MM subject to journalistic privilege, did not have to reveal sources.

JM Rather than using true journalistic sources, actually paying PIs to use unlawful data collection techniques. What MTVIL is about, AS would have claim.

MM misleading police by presenting investigation on basis of true sources. Where there is in fact invoices for PIs being used. Not presented at time. No disclosure made at time because of MM criminal and deceptive techniques.

Come back to fact that AS is LIP with some vulnerability. Acting pro bono. Assisted by former pupil and non-lawyer (EH). No paralegal.

LJC Make allowance for those matters. Extraordinary application. Need to be extraordinary grounds.

JM Horizon case. Endorsing and reaffirming authorities cited. G plea not bar, especially where material non-disclosure. Deprived at time of properly arguing case, properly seeking stay. Handicapped by passage of time. Respondent hasn't kept papers, no material.

If there has been a procedural failure with disclosure app – sorry for that. Done best. One way of dealing with it would be to consider procedural applications today, correct disclosure application and argue substantive appeal on future date.

Adjournments – May listing, taken out because of MTVIL re further material. Listed in December, I was in murder trial, put off to January. Overran and finished yesterday. Any defects in prep – when acting pro bono – would ask for indulgence. Although extraordinary to have delays, no urgency – already 25 years down the road. Indulgence asked for.

LJC Others prejudiced.

Ground 4 – maintain fresh ground by ref to non-disclosure of material. Add to Ground 4 with application for NGN documents in order to support overarching theme under Ground 1 re stay application.

Ground 2 – dishonest not revealed

Ground 3 – original ground re coins

JM Disclosure failure. Say further aggravation of disclosure failure – when disclosure pack prepared, note (which is basis of late appeal) is itself significantly deficient because only made reference to Tulisa

case and that trial collapsing. What are docs and evidence demonstrated – is that CPS aware (or should have been aware) of raft of other cases that collapsed due to MM conduct.

LJC Trials that collapsed all prospective?

JM Yes. Most people subject to stinging – were convicted at trial then appealed at time (exhausted remedies at that time, now with CCRC). AS in unusual position of having pleaded G.

Other cases – Beckham, Red Mercury, lots of drugs cases.

CPS not disclosed that information.

Showing docs in John Alford case.

Picken One thing when shown. Another where party has access to docs.

JM That is why seeking order. SAR relying on intended publication bar to SAR.

Picken Para 1(a) of order.

JM Not familiar with procedural requirements for CACD.

Respondent copied in to application.

JM Asking court today to consider whether this order can be given, in an adapted form, with directions for NGN to be put on notice if suitable.

Ask court to consider various procedural applications — grant leave for grounds to be amended (AS prepared ground himself initially). And out of time, and renewed application out of time, and appeal to be made out of time – given disclosure made by CPS 15 years later.

Ask court to grant leave for this appeal. So that AS will have benefit of some funding for appeal to proceed with leave. And ask that the hearing of substantive appeal be adjourned to subsequent date, when CPS can attend. May be if we are adjourned for leave, may respond properly and give proper attention to their disclosure obligations. And reconsider stance whether they oppose appeal – not really engage properly with all material produced. With amended response notices, copied and pasted what provided previously. Not engaged with material previous. All material should be known to CPS – not too late to make proper disclosure or reconsider their position.

Examples of things CPS have not engaged with. EH in w/s has exhibited report in Canopus – police investigation arising from FloRin

Gashi case (Beckham kidnapping). 8 separate cases where judicial criticisms.

LJC All this material which shows that this is MM's mo.

JM Ref to Canopus report in bundle.

Cause of concern that could reach this stage, when disclosure in 2015 doesn't address this. And RNs don't address this. And judicial criticism of MM which CPS should have disclosed. CPS accept need to make disclosure of what known about MM, but it is inadequate.

LJC Robust and clear. Thank you.

Judgment 12:05

Renewed app for leave to appeal against conviction, upon G plea to 2 counts of delivering counterfeit of protected coin contrary to... app sentenced to 2 concurrent terms of 6 months. Occurred as long ago as 1999, when app 23, now 46. Delay is immediately apparent. Extension of time of 2 years and 11 months to renew his app for extension of time of 16 years 5 months, following refusal of SJ in May 2016.

Reasons for delay: negative advice, lack of understanding, difficulties in funding and finding counsel. Matter referred to CCRC which declined to refer in 2018. Delays mean w/s, exhibits and transcripts not available. SJ referred to delay as extraordinary – refused leave on this ground alone. But also considered substantive merits.

App seeks to introduce new grounds, accompanied by leave s23 of CAA to introduce new evidence.

Was listed on 6 May 2021, app applied to vacate hearing to lodge further information. Several extensions of time – to obtain information. Lodged extensive documentation. Volume of material is vast. What is 'app evidence bundle' is over 2000 pages.

Despite this, reasons for decisions are brief. Doesn't mask careful considerations in reaching conclusions. That is so, even though some of it could not conceivably be admissible on appeal. Large swathes of pleadings and w/s inc unsigned, in context of hacking litigation. Excerpts from books etc.

Facts:

According to grounds of appeal [reads]

Grounds:

JM and HM appear pro bono. Seek to raise 3 fresh grounds since SJ refusal and revise fourth. JM emphasises handicap facing applicant as LiP, and G plea is not bar to appeal, insofar as there has been procedural failures subject to debate during course of hearing – should grant adjournment, leave to appeal, with view to allowing app to cure defec. Submitted justified given delays already.

First ground of appeal, supported by fourth ground (JM suggests strongest) is to effect that app was deprived through non-disclosure by P of a good application to stay proceedings against him as abuse of process. In particular, case of entrapment by MM as part of investigation. Said to be newspapers 'fake sheik;. Had it been made known to applicant at time, would have had grounds to apply for stay. Entrapped app to commit offences – pressured, induced and threatened to procure. He and associate provided details of individuals to procure, covert servailance, edited prior to providing to police. Evidence re MM docs to show misled police.

Supported by fourth ground – faiulure to comply with duty to disclose. Material in P hands undermine credibility. Said only recently came to apps attention, contacted by new witnesses, incontact of other litigation involving NGN. Ref made to app not adducing material due to legal restrictions. App fior disclosure. Draft order. JM suggests can be made under CrPR 39.7(3). App told was advanced in Sep 2021. Not entirely clear the etent to which NGN put on app at that time. But clear no solid basis that newspaper is properly on notice of app itself or nature and jurisdictional basis.

Second ground is related – that MM conviction in 2016 for pervert in respect of similar investigations, question reliability of evidence. MO unlawful evidence, no disclosure, edited evidence. MM manipulated or intimidated to provide coins. Covert recordings said to have been edited.

Final ground – fresh evidence from Royal Mint calls intop question basis for pros and conviction. Email indicatiung that there was no record of any authentication exercise being carried out. Unclear whether P confimed authenticity of coins.

Re fourth ground of appeal – which said seems to be bolster first ground – said non-disclosure by P of a case R v Shepherd and Norman. Case collapsed, as have many others, in light of MM dishonest activities.

## Discussion

Clear that in addition to extension of time, app relies on app to vary and adduce fresh evidence. Relates to trial of signed Tulisa, evidence to Leveson Inquiry, and MTVIL and Beckham.

Lack of delay and explanation. Merits would have to be very overwhelming indeed. No adequate detail re 1999-2014. Significant gaps of total inactivity between Aug 2018-Apr 2019. Prejudice very significant. CPS retains no papers. Police no papers. Pros counsel no recollection of case.

Variation principles in R v James [2018] para 38. Hurdle high.

Admission of fresh evidence: overarching test is whether interests of justice require it to be admitted – inc factors requiring particular considerations.

In principle such evidence may be admitted if conviction, even if based on G, is unsafe. Fact app fully advised entered G pleas. Ordinarily, once unambiguous G plea – because nothing unsafe on Ds voluntary confession.

## Exceptions to rule legal obstacle

Context is: two issues that were live re ingredients of offence – narrow – limited to knowledge re counterfeit, and whether in fact. As indicated, the app in our view is all about suggestion that app deprived of meaningful app to stay based on abuse arising from entrapment on part of MM.

But was app's case stated by him personally, that it was him who set out to entrap MM, knew MM was undercover journalist – engineered situation to expose. Suggestion that he was entrapment, and somehow threatened is at total odds with this case.

Relevant principles re state entrapment is Loosley. Principles apply

to journalists but not with same force. When considering entrapment by private citizen – starting point to ask whether police officer entrapment would lead to stay. Highly fact specific. No single principle.

Problem facing this count – is no particulars of any of the alleged pressure, inducement or threat/ Suggestion that MM spiked is purely speculative. No basis to establish. No argument to say entrapped. Therefore not arguable that applicants convictions are relevant unsafe accordingly.

Foyrth ground – two aspects of material re material in hands of MPS. No identification of if/when/how material provided to GMP or CPS at any material time. Schedules of unused no longer in existance. P cannot say whether aware of material or not. Continuing theme behind app – that dishonesty would have been relevant to or given rise to material app to stay, doesn't make sense.

SJ said not of issue – rather whether applicant knew he was handing over counterfeit coins. He knew himself, not affected by MM dishonesty. Disposes of Ground 2.

App for order of disclosure against third party. Would not counterance of considering in absence of NGN being put on notice. Prospect of further delay wuld not counterance.

Leaves third ground. That cannot arguably give rise to concern re safety of app conviction. P prejudiced in responding – since evidence no longer available. Wholy unarguable to seek to advance factual position in 1998 when cannot be tested. Mostly equivicol, when no record any longer.

Demonstrates total artificiality of position before us. App case that he purchased coins for £400,e entirely consistent with G pleas – accepting knowledge.

Newspaper report of mitigation. Position didn't expect rto enter circulation. Maintained by him for purpose of appeal. Self prepared grounds say as much, and on website. Surprising if legal professionals involved in case had not noticed.

App pleaded G with personal direct knowledge of ingredients of case.

Refuse apps to extend, vary, adduce, and dismiss renewed apps.

*Note taken by:*

**HAMISH MCCALLUM**