

Chapter 26: Appeals

26.1 General Principles

26.1.1 The Crown's disclosure duty, as required by Article 6, case law and now Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010, exists in perpetuity. (**See Chapter 2, in particular, paragraphs 2.1.1 – 2.1.3.**) Therefore it applies post-conviction and even after the final disposal of the case, which includes appeal proceedings.

26.1.2 While previously the court only considered the Crown's duty of disclosure in relation to trial proceedings, the principle enunciated there extends beyond that stage. (**See paragraphs 8 and 9 of the Summary of the Crown's Approach to Disclosure.**)

26.2 The Common Law Background

26.2.1 Prior to the Crown's disclosure obligations in respect of appellate proceedings being placed on a statutory footing within Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010, the Appeal Court had, on occasion, considered applications for recovery of documents at the appeal stage. The decision of the Court in **Hoekstra v HMA (No 1)** ((2000) SCCR 263) was subsequently set aside, on account of comments made by one of the judges regarding the European Convention, however the court's dicta (page 290) remains instructive and provides a useful background to what now forms the statutory framework :

“In general terms, this court should not order the Crown to disclose new material in the course of an appeal against conviction unless the court is satisfied that the material to be disclosed is likely to be of value for the purpose of evaluating the grounds of appeal and determining whether or not there has been a miscarriage of justice. The court may be prepared to consider ordering the production of new material which is shown to be of potential importance even if it is not material which is, on a strict reading, relevant to an existing ground of appeal, provided that, in that case, the material sought could provide the basis for a new or amended ground of appeal which the appellants should, at this late stage, be allowed to advance. In giving consideration to these issues in the present appeals the court must bear in mind that it is now almost three years since the convictions and that considerable indulgence has already been shown to the appellants in relation to the advancing of new grounds of appeal. The grounds of appeal now before this court are, as has been pointed out, not grounds for which leave was obtained under section 107 of the 1995 Act and they are entertained, though lodged very late, only by leave of the court. Furthermore, they have been added to, with the court's permission, at the appeal hearing itself.”

26.2.2 The court continued (page 294):

“Certain of the submissions made to us were to the effect that disclosure as sought should be ordered so that the appellants and their advisers could now scrutinise the whole investigatory antecedents (however remote) of the interception of the *Isolda* so that these might be investigated for any irregularities. No order for such a purpose would in our view be justified. To do so would be inconsistent

with the ratio of *McLeod v H.M. Advocate*, by which we are bound. We shall therefore refuse to order the Crown to disclose the material referred to in heads 1, 2 and 3 (and of head 6 insofar as related to them) of the 'Schedule to the Devolution Minute'."

26.2.3 The court returned to the issue in **Hoekstra v HMA (No 5)** ((2001) SCCR 121), the Lord Justice-General (Rodger) discussing **McLeod** and continuing (page 127):

"Both the Lord Justice-Clerk and Lord Hamilton expressed their agreement with the Lord Justice-General's reasoning. This shows that they saw no inconsistency between their description of the approach to be followed and the description given by him. Nor do we. For present purposes it is sufficient to say that, as the advocate-depute indeed accepted, where, say, an accused intends to seek to have evidence excluded on the ground that it was obtained illegally, that is a matter which relates to the accused's 'proposed defence' to the charge in question. It follows that the court may order the production of documents relating to that matter if they would be likely to be of material assistance to the proper preparation or presentation of that aspect of the accused's defence. Mutatis mutandis the same test would fall to be applied at the appeal stage. For these reasons we are satisfied that the test applied by the court in **McLeod** is not open to the criticism advanced by Dr Sjöcrona and in these circumstances we have not found it necessary to refer to the decisions of the European Court of Human Rights which he cited to us."

26.2.4 In **McDonald [AC]** the Appeal Court again considered specifically the obligations of disclosure arising in appeals. The appellants McDonald and Dixon had each lodged a petition for recovery of documents in the following terms:

"1. All material in the possession of or under the control of the Lord Advocate which ought to have been (and ought to be) disclosed in terms of his (*sic*) obligation under Article 6(1) when read with Section 57(2) of the Scotland Act 1998.

2. Failing principals, drafts, copies or duplicates of the above whether in paper or digital form."

26.2.5 The court held, in line with its previous decision in **Hoekstra v HMA (No 5)**:

"**McLeod**, subject only to the specific refinements laid down in **Sinclair** and in **Holland**, remains the guiding authority in Scots law on the test for the extent of the Crown's duty of disclosure."

26.2.6 Significantly, the Judicial Committee of the Privy Council considered the current approach adopted by the Crown in relation to disclosure in appeals cases and confirmed that the Crown had correctly identified its obligation (paragraph 73), namely that:

"If when preparing for an appeal or at any other stage, the Crown became aware of any material which had not been disclosed and which ought to have been, the Crown would be obliged to provide it to the appellant who can then use it, if appropriate, to support an existing ground of appeal or to formulate a fresh ground of appeal. But that is

very different from an obligation on the Crown actually to reinvestigate the entire position on disclosure in all solemn cases which are under appeal”.

26.2.7 Lord Rodger went on to confirm (paragraph 74) that:

“While the Crown need only prepare to meet the existing grounds of appeal, the duty of disclosure in terms of article 6(1) was not confined to material relevant to those grounds of appeal. It would extend to material which should have been disclosed at an earlier stage or which had become disclosable in the light of developments in the appeal or which was disclosable but had only come to the attention of the Crown since the trial. An obligation in these terms is already enshrined in the Crown Office *Disclosure Manual* paragraph 26.1.3”.

26.3 The Statutory Framework

26.3.1 The Crown’s statutory duty to disclose information after the conclusion of proceedings at first instance is now laid down in section 133 of the Criminal Justice and Licensing (Scotland) Act 2010. Subsection 5 of section 133 provides details of the type of proceedings to which this duty is applied.

26.3.2 As soon as practicable after the relevant act the prosecutor must review all information of which the prosecutor is aware that relates to the grounds of appeal in the appellate proceedings and disclose to the appellant any information which is:

- a. information that the prosecutor was required to disclose in terms of the materiality test laid down in s121(2)(b) or 123(2)(b) of the Criminal Justice and Licensing (Scotland) Act 2010 but did not disclose,
- b. information which, during the earlier proceedings, the prosecutor considered would not materially weaken or undermine the evidence likely to be led by the prosecutor, or materially strengthen the accused’s case but which the prosecutor now considers would do one or both of these things, or
- c. information of which the prosecutor has become aware since the disposal of the earlier proceedings that, had the prosecutor been aware of during those proceedings, the prosecutor would have been required to disclose in terms of the materiality test laid down in section 121(2)(b) or 123(2)(b)

It should be noted that there is no need to disclose again anything which has already been disclosed in the course of the earlier proceedings (Criminal Justice and Licensing (Scotland) Act 2010 section 133(4)).

26.3.3 The Crown must disclose any such material information to the defence in advance of, and during the appeal proceedings, as part of its continuing obligation to ensure that there has been a fair trial. If the procedure as a whole has secured a fair trial, there will not have been a breach of Article 6. This statement of principle was set out in the speech of Lord Hope of Craighead in **McDonald [PC]**, where he said (paragraph 37):

“I would only be willing to accept that it would be incompatible with the appellant’s rights under article 6(1) for the Lord Advocate to seek to support the conviction if the appellant was able to demonstrate that

there was a reasonable possibility of unfairness as a result of the non-disclosure”.

26.3.4 It should be noted, however, that as set down in Section 2.5 of this Manual and as expressed by Lord Rodger in **McDonald [PC]** (paragraph 77), a failure to disclose a statement may, in itself, not result in an unfair trial if, for example, the witness did not depart from their statement when giving evidence (**Kelly v HMA** (2006 SCCR 9)). The court must consider the effect of any failure to disclose in the context of the circumstances as a whole.

26.3.5 In **Botmeh and Alami v United Kingdom** the European Court of Human Rights held:

“44. Given the extent of the disclosure to the applicants of the withheld material by the Court of Appeal, the fact that the court was able to consider the impact of the new material on the safety of the applicants' conviction in the light of detailed argument from their defence counsel and the fact that the undisclosed material was found by the court to add nothing of significance to what had already been disclosed at trial, the Court considers thatthe failure to place the undisclosed material before the trial judge was in the particular circumstances of the case remedied by the subsequent procedure before the Court of Appeal.”

26.4 The Extent of the Disclosure Obligations in Appellate Proceedings

26.4.1 Even where the Crown has complied with its duties of disclosure by reviewing all information, of which the prosecutor is aware, that relates to the grounds of appeal in the appellate proceedings and disclosing the relevant information to the defence as soon as practicable, (under the Criminal Justice and Licensing (Scotland) Act 2010 section 134(2)) the prosecutor must from time to time review all such information relating to the grounds of appeal and disclose to the defence any information which is -

- a. information that the prosecutor was required to disclose in terms of the materiality test laid down in s121(2)(b) or 123(2)(b) of the Criminal Justice and Licensing (Scotland) Act 2010 but did not disclose,
- b. information which, during the earlier proceedings, the prosecutor considered would not materially weaken or undermine the evidence likely to be led by the prosecutor, or materially strengthen the accused's case but which the prosecutor now considers would do one or both of these things, or
- c. information of which the prosecutor has become aware since the disposal of the earlier proceedings that, had the prosecutor been aware of during those proceedings, the prosecutor would have been required to disclose in terms of the materiality test laid down in section 121(2)(b) or 123(2)(b)

It should be noted that there is no need to disclose again anything which has already been disclosed whether in the course of the earlier proceedings or earlier in the appeal process (Criminal Justice and Licensing (Scotland) Act 2010 section 134(4)).

26.4.2 This continuing duty of disclosure begins with the prosecutor's compliance to disclose under section 133 of the Criminal Justice and Licensing (Scotland) Act 2010 as set out at 26.1.3 above and until the relevant conclusion of the case. Depending on the nature of the appellate proceedings concerned, 'relevant conclusion' can mean:

- (i) the lodging of a notice of abandonment,
- (ii) the disposal of the appeal, or
- (iii) the setting aside of the conviction or sentence or, as the case may be, conviction and sentence

26.5 Limits of Crown Duty

26.5.1 The Crown will **not** at the stage of appeal proceedings,

- (i) review the entire case material;
- (ii) re-investigate the case; or
- (iii) review the history of disclosure.

This approach was expressly endorsed by the Judicial Committee of the Privy Council in **McDonald** and is confirmed within sections 133 to 140 of the Criminal Justice and Licensing (Scotland) Act 2010.

26.6 Applications for Further Disclosure in Appellate Proceedings

26.6.1 At any time between the granting of leave to appeal and the beginning of the hearing of the appellate proceedings, or if allowed by the Court on cause shown, between the granting of leave to appeal and the 'relevant conclusion' of proceedings the appellant may lodge a further disclosure request (Criminal Justice and Licensing (Scotland) Act 2010 section 135). Depending on the nature of the appellate proceedings concerned, 'relevant conclusion' can mean:

- (i) the lodging of a notice of abandonment,
- (ii) the disposal of the appeal, or
- (iii) the setting aside of the conviction or sentence or, as the case may be, conviction and sentence

26.6.2 A request for further disclosure must be in writing and set out:-

- (i) by reference to the grounds of appeal, the nature of the information that the appellant wishes the prosecutor to disclose, and
- (ii) the reasons why the applicant considers that disclosure of any such information is necessary

26.6.3 Following receipt of a request for further disclosure the prosecutor must, as soon as practicable, review any information of which the prosecutor is aware that relates to the request and then disclose to the appellant any of that information which is:

- a. information that the prosecutor was required to disclose in terms of the materiality test laid down in s121(2)(b) or 123(2)(b) of the Criminal Justice and Licensing (Scotland) Act 2010 but did not disclose,
- b. information which, during the earlier proceedings, the prosecutor considered would not materially weaken or undermine the evidence

- likely to be led by the prosecutor, or materially strengthen the accused's case but which the prosecutor now considers would do one or both of these things, or
- c. information of which the prosecutor has become aware since the disposal of the earlier proceedings that, had the prosecutor been aware of during those proceedings, the prosecutor would have been required to disclose in terms of the materiality test laid down in section 121(2)(b) or 123(2)(b)

It should be noted that there is no need to disclose again anything which has already been disclosed (Criminal Justice and Licensing (Scotland) Act section 135(4)).

26.7 Applications for Court Rulings on Disclosure in Appellate Proceedings

26.7.1 If the appellant considers that, in responding to such a request for further disclosure, the prosecutor has failed to disclose an item of information which falls within the criteria set out at 26.6.3 above, then the appellant may apply for a Court Ruling on the matter (Criminal Justice and Licensing (Scotland) Act 2010 section 139(2)). The application will be assigned to the judges who are to hear the appellant's appeal, unless it would be impracticable to do so.

26.7.2 An application for a Court Ruling must be made in writing to the Court before which the appeal is to be brought (Form 56.3 as per Act of Adjournal (Criminal Procedure Rules Amendment) (Miscellaneous) 2011), and must set out:-

- (i) the charge or charges to which the application relates
- (ii) a description of the information in question, and
- (iii) the grounds upon which the appellant considers that the information in question is disclosable

26.7.3 Upon receipt of such an application the Court must appoint a hearing to consider and determine the application (Criminal Justice and Licensing (Scotland) Act 2010 section 139(4)).

26.7.4 If an application does not comply with the criteria set out at 26.7.2. above or otherwise disclose any reasonable grounds for considering that the information in question is disclosable, the Court may dispose of the application without appointing any hearing,

26.7.5 Having given both the prosecutor and the appellant the opportunity to be heard, the Court must make a ruling on whether the information in question, or any part of it, is disclosable, and specify the charge or charges to which this fresh ruling relates.

26.8 Applications to Review a Court Ruling on Disclosure in Appellate Proceedings

26.8.1 Following determination by the Court that information is not disclosable, if the appellant:

- (i) becomes aware of secondary information which was not available to the Court at the time of making the ruling; and

(ii) considers that if the Court had been aware of this secondary information it would have made a ruling that the information in question was disclosable

the appellant may apply to the Court which made the ruling for a review, so long as the secondary information comes to the appellant's attention in the period between the ruling being made and the relevant conclusion of the proceedings (Criminal Justice and Licensing (Scotland) Act 2010 section 140(2)). Depending on the nature of the appellate proceedings concerned, 'relevant conclusion' can mean:

- (i) the lodging of a notice of abandonment,
- (ii) the disposal of the appeal, or
- (iii) the setting aside of the conviction or sentence or, as the case may be, conviction and sentence

26.8.2 The application should be assigned to the judges who dealt with the application for the ruling which is to be reviewed, unless it is impracticable to do so.

26.8.3 The application for a review must be made in writing (Form 56.4 as per Act of Adjournal (Criminal Procedure Rules Amendment) (Miscellaneous) 2011) and must set out:-

- the charge or charges to which the application relates
- a description of the information in question and the secondary information; and
- the grounds upon which the appellant claims the information in question is disclosable

26.8.4 Having given both the prosecutor and the appellant the opportunity to be heard, the Court must determine the application by either affirming the original ruling or recalling that ruling and making a fresh ruling that the information in question, or any part of it, is disclosable, and specify the charge or charges to which this fresh ruling relates.

26.9 Disclosure Requests where no Appeal Proceedings

26.9.1 If, following conviction, the prosecutor becomes aware of information which was not disclosed which falls within the materiality test laid down in s121(2)(b) or 123(2)(b) of the Criminal Justice and Licensing (Scotland) Act 2010, namely information which –

- * **would materially weaken or undermine the evidence that is likely to be led by the prosecutor;**
- * **would materially strengthen the defence case; or**
- * **is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused**

and it is not a case in which the conviction has been up-held on appeal, then as soon as practicable after becoming aware of the information the prosecutor must disclose it to the convicted person (Criminal Justice and Licensing (Scotland) act 2010 section 137).

26.9.2 It should be noted that there is no requirement to review at this stage that information of which the prosecutor was already aware, or indeed to disclose again any information which has already been disclosed (Criminal Justice and Licensing (Scotland) Act section 137(4) and (5)).

26.9.3 If the person institutes appellate proceedings in relation to the conviction the prosecutor need not comply with this obligation during the period between the granting of leave to appeal and the 'relevant conclusion' of proceedings. Depending on the nature of the appellate proceedings concerned, 'relevant conclusion' can mean:

- (i) the lodging of a notice of abandonment,
- (ii) the disposal of the appeal, or
- (iii) the setting aside of the conviction or sentence or, as the case may be, conviction and sentence

The duties outlined above from 26.1.3 would become applicable instead.

26.10 Disclosure Duties upon Crown Appeal against Acquittal

26.10.1 If the prosecutor lodges an appeal against the acquittal of a person and subsequently becomes aware of information which relates to the appeal and is:-

- a. information that the prosecutor was required to disclose in terms of the materiality test laid down in s121(2)(b) or 123(2)(b) of the Criminal Justice and Licensing (Scotland) Act 2010 but did not disclose,
- b. information which, during the earlier proceedings, the prosecutor considered would not materially weaken or undermine the evidence likely to be led by the prosecutor, or materially strengthen the accused's case but which the prosecutor now considers would do one or both of these things, or
- c. information of which the prosecutor has become aware since the disposal of the earlier proceedings that, had the prosecutor been aware of during those proceedings, the prosecutor would have been required to disclose in terms of the materiality test laid down in section 121(2)(b) or 123(2)(b)

then such information must be disclosed to the person as soon as practicable (Criminal Justice and Licensing (Scotland) Act 2010 section 138).

26.10.2 It should be noted that there is no requirement to review at this stage that information of which the prosecutor was already aware, or indeed to disclose again any information which has already been disclosed.

26.11 Disclosure Duties when Conviction upheld on Appeal

26.11.1 The Crown's disclosure obligation exists in perpetuity and therefore even where on appeal the High Court upholds a conviction the Crown must continue to comply with its disclosure duties in respect of any information it becomes aware of which is -

- a. information that the prosecutor was required to disclose in terms of the materiality test laid down in s121(2)(b) or 123(2)(b) of the Criminal Justice and Licensing (Scotland) Act 2010 but did not disclose,
- b. information which, during the earlier proceedings, the prosecutor considered would not materially weaken or undermine the evidence likely to be led by the prosecutor, or materially strengthen the accused's case but which the prosecutor now considers would do one or both of these things, or

- c. information of which the prosecutor has become aware since the disposal of the earlier proceedings that, had the prosecutor been aware of during those proceedings, the prosecutor would have been required to disclose in terms of the materiality test laid down in section 121(2)(b) or 123(2)(b)

26.11.2 Any such information of which the prosecutor becomes aware must be disclosed to the person as soon as practicable.

26.11.3 It should be noted that there is no requirement to review at this stage that information of which the prosecutor was already aware, or indeed to disclose again any information which has already been disclosed.

26.12 Disclosure Requests from the Scottish Criminal Cases Review Commission (SCCRC)

26.12.1 With effect from 1 April 1999, SCCRC assumed the responsibility previously carried out by the Secretary of State in relation to the consideration of cases of alleged miscarriage of justice and the referral of appropriate cases to the High Court. In terms of Section 194F(6) of the Criminal Procedure (Scotland) Act 1995 as amended, the SCCRC is empowered to request the Lord Advocate to undertake such enquiries or obtain such statement, opinions and reports as SCCRC consider appropriate for assisting them in the exercise of their functions.

26.12.2 The High Court has held that SCCRC has a statutory duty to carry out a full and independent examination and that SCCRC are entitled to any material if it has a basis for believing that the documents and materials might assist them in the exercise of their functions (**SCCRC Petitioners** Unreported 30th August 2000).

Handling of requests

26.12.3 SCCRC will intimate their interest in a case to the Crown and this will be filtered through the Crown Office Appeals Unit. On receipt of this intimation Appeals Unit will contact the Procurator Fiscal Office where the case originated and arrange for all case papers and productions held by them to be retrieved and secured to prevent routine disposal or destruction. Thereafter a request for disclosure may be made by SCCRC. This will also be received through Crown Office Appeals Unit, who will arrange for Procurators Fiscal to convey all related papers to the Appeals Unit for consideration of appropriate disclosure.

Extent of Disclosure

26.12.4 Unredacted copies of witness statements and witness precognitions along with unredacted documentary productions should be disclosed along with any factual information and results of enquiries, opinions and reports instructed by SCCRC. In appropriate cases the Crown will arrange for SCCRC to have access to productions for examination or analysis by persons instructed by them.

26.12.5 Care should be taken to ensure that disclosure of an address of a witness or any other information contained within witness statements or precognitions is not likely to place a witness in danger.

26.12.6 There should be NO disclosure of comment or opinion of members of COPFS staff contained within the papers.

26.12.7 On occasion it may be appropriate to consider disclosure of the History of the Accused and/or the Narrative contained within the precognition. If this is being considered then the matter must be considered by the Crown Agent or Director of Serious Casework and instructions obtained as to whether it would be appropriate to so disclose.

26.12.8 Consideration may have to be given to the disclosure of internal COPFS correspondence. This is particularly appropriate where there is correspondence between COPFS and third parties in relation to the accused, or internal memorandums. Prior to the disclosure of such correspondence, approval must be obtained from the Crown Agent or Director of Serious Casework.

Restriction on use of disclosed information

26.12.9 When information is disclosed to SCCRC, a covering letter should be included outlining that the information is being provided on the understanding that it will not be disclosed to any third party without prior discussion with the Crown. In the event of any referral to the High Court, SCCRC have undertaken to contact the Crown in advance of any hearing in order to identify any information that requires to be redacted from the documents provided.

26.13 Response to Disclosure Requests

26.13.1 The Crown is entitled, before responding to a request from the defence for disclosure on appeal, to have a reasoned explanation justifying disclosure. The extent of such explanation will depend on circumstances. The Crown is also entitled to ask the defence to:

- (i) confirm that they did not have the information at the trial stage;
- (ii) identify what information was disclosed at the trial stage;
- (iii) advance a specific justification for the request.

26.13.2 In the absence of such justification, the request, unless there are exceptional circumstances, will normally be refused.

26.13.3 The Crown need not disclose again anything that has already been disclosed to the accused in relation to the same matter (whether because the same matter has been the subject of an earlier petition, indictment, or complaint or otherwise) (Criminal Justice and Licensing (Scotland) Act 2010 section 127).

26.14 Significance of Disclosure

26.14.1 Disclosure at appeal stage of information which was not disclosed at trial stage does not involve any concession by the Crown:

- (i) that the non-disclosure has prejudiced a fair trial;
- (ii) that the information disclosed or the non-disclosure would justify a new ground of appeal;
- (iii) that the court should allow a new ground of appeal to be received; or

(iv) that there has been a miscarriage of justice.

26.15 Reconciliation of Disclosed Information

26.15.1 At the stage of submitting a report in any appeal (other than an appeal against sentence), or if otherwise requested by the Crown Office Appeals unit, the Procurator Fiscal should, so far as possible, provide an inventory of information already supplied to the appellant.

26.16 Records of Disclosed Information

26.16.1 Where disclosure of additional information is made in the course of an appeal, an inventory will be prepared of all items disclosed.

26.16.2 A Disclosure Log will be maintained in all solemn conviction appeals, and a note kept in that of any information (by reference to the inventory if appropriate), to whom it was passed, and the date. This will form a cumulative summary of what is in the inventories. Copies of each inventory will be kept filed with the Disclosure Log.

26.16.3 Completion of Disclosure Logs and inventories is the responsibility of the staff in the Crown Office Appeals Unit dealing with the case.