TAXATION

H.M.A. v [redacted] GM

HELD AT GLASGOW 25th APRIL 1996

This taxation arose out of a dispute between the Scottish Legal Aid Board ("The Board") and Messrs Hughes Dowdall, Solicitors, Glasgow (The Agents) in relation to the fees claimed by the Solicitors for the work in connection with the above case in which they represented [redacted] Two detailed accounts amounting to £50,155.90 and £140,480.25 and running to 18 pages and 152 pages respectively have been submitted to the Board. I am informed that all matters within the accounts have been agreed with the exception of charges for the perusal of Crown Productions which appear on page 8 of the first Account and page 22 of the second Account. These amount to £37,980.00 and £2,850.60 respectively and are the only charges for perusal of the Crown Productions within the two Accounts. The first charge is for the perusal of some 65,550 sheets of Productions and is based on a time charge of 900 hours. The second charge is for the perusal of 2,702 sheets and is based on a charge of 15 minutes for each 10 sheets perused.

Mr Alex Quinn on behalf of the Agents advised me that when the Accounts had been sumbitted to the Board originally the charge for the perusal of the 65,550 sheeets had been calculated using the approach used for the 2,702 sheets, i.e. 15 minutes for each 10 sheets perused. This approach produced a fee of £69,155.25 and had proved completely unacceptable to the Board. I was also informed by Mr Quinn that this approach had been used by the person drafting the Account after discussion with a Team Leader of the Criminal Legal Aid Board who had advised that for every 10/20 sheets perused the Board's practice would be to allow 15 minutes. What was not discussed at that time was the sheetage involved in the productions of this particular case which is quite exceptional. The Board insisted that the Account be re-framed stating the actual time taken in regard to perusal of the documentation. Unfortunately any preliminary file notes made by the Agents at the time of perusal are no longer available through loss, disposal or destruction. The Agents have submitted to me a draft Affidavit by Garry Alan the then Nominated Solicitor. At the time Mr Allan was a partner in Hughes Dowdall. Mr Allan retired from the partnership in September 1993 to enter the Faculty of Advocates. Mr Allan advised me that he would have been prepared to come before me on the first

2,089 SHEETS - CURRENT CASE

Account which included the original perusal charge of £69,155.25 which equates to some 1,638.75 hours. In the draft Affidavit Mr Allan estimates the time personally spent by him perusing these productions between May 1992 and March 1993 at 900 hours (approximately 50 seconds per sheet). In addition he estimates time spent by another partner and two employees of Hughes Dowdall at 400 hours. Mr Allan informed me that he worked on this case a minimum of 3 hours per day, not always during business hours, and indeed worked on it at week-ends and was seldom away from the office before 7 o'clock each week-day.

[redacted] on behalf of the Board stated that [redacted] had visited the premises of the Agents in August 1993 in order to see for themselves the voluminous documentation involved. At that time they expressed concern that no file notes were available to substantiate the perusal fee being sought which I understand at that time was the original figure of £69,155.25. The Board are not suggesting that Mr Allan received the productions and did not look at them. However, in the absence of notes, they have no way of knowing how long was spent perusing the productions and if that time was reasonable? Was it fair remuneration for work actually and reasonably done? It is to be remembered that the productions were varied and included files, invoices, computer print-outs and Contracts. [redacted] again stressed the absence of any file notes stop the Board from carrying out its function to accept or otherwise the time charges. Mr Haggerty invited me in the absence of any other information available to consider how long others took to peruse the same productions. Counsel Alan Turnbull and Rita Rae 100 hours and 130 hours respectively. Messrs Doonan McCaig Agents for Mr McKay, the Co-accused 321 hours. I have previously taxed the fees of Alan Turnbull and Doonan McCaig where these productions were also perused. **I do not consider Mr Turnbull's time to be relevant as he was Counsel in the case and clearly would not spend as much time perusing productions as an Agent.** In the matter of Doonan McCaig's fees relative to perusals. Again, file notes were not available although the perusal charges were spread throughout the Accounts as and when time was spent. In my report I addressed the charge made by the Agent and converted this to sheetage. The charge equated to 15 seconds per

sheet. That charge I could not find excessive nor unreasonable. I did however go on to ask "Who is to say if a greater or lesser time could have been spent on this aspect?"

Mr Allan whilst acknowledging Mr Haggerty's views re Doonan McCaig's charges submitted that this consideration be only part of my task. He also submitted that he knows what was necessary in the preparation of his own case in view of the charges faced by Mr MacDonald.

It is extremely unfortunate that no file notes are available and the Agents would be well advised to ensure file notes are kept with all business files and in cases involving the Scottish Legal Aid Board only destroyed after their fees have been settled. I consider the absence of such notes leaves me with no alternative but to base the Agents fees on the sheetage. It is my opinion that where such a volume of productions is perused the Agent should base his charge on the greater number of sheets perused in the 15 minute time charge, i.e. 20 sheets as opposed to 10 sheets. It is also my opnion that consideration requires to be given to the repetitive nature of certain productions, e.g. Invoices. For this reason I propose to abate the ovall charge by 10%. The perusal charge in these two Accounts should be reduced from £37,980.00 and £2,850.60 to £31,143.60 and £1,287.10 respectively. (Account 1 - 65,550 Sheets - 820 hours less 10% - 738 hours. Account 2 - 2,702 Sheets - 34 hours less 10% - 30.6 hours rounded to 30.5 hours).

In accordance with my normal practice I have apportioned the Audit Fee so as to find the Board liable for the fee on the Accounts as taxed. I have accordingly taxed the charges for perusals in these Accounts at £33,958.20 (Thirty three thousand nine hundred and fifty eight pounds and twenty pence) inclusive of Audit Fee of £1,527.50.

T McCAFFERTY
Auditor of Court
Sheriffdom of Glasgow and Strathkelvin
21 October 1996

Note of Appeal Against Conviction — *1st December 1995*

JAMES McAULAY ANDERSON — *Appellant*

against

HER MAJESTY'S ADVOCATE — *Respondent*

Appeal—Defective representation of accused at trial—Whether capable of forming ground of appeal—Criminal Procedure (Scotland) Act 1975 (c.21), s.228(2)—Criminal Justice (Scotland) Act 1980 (c.62), Sched.2, para.1—European Convention on Human Rights 1953, art.6.3(c)

Appeal—Defective representation of accused at trial—Accused with record of dishonesty on charge of assault whose defence was alibi claiming solicitor advocate not following instructions to cross-examine complainer on latter's record for violence—Whether miscarriage of justice—Criminal Procedure (Scotland) Act 1975 (c.21), s.228(2)—Criminal Justice (Scotland) Act 1980 (c.62), Sched.2, para.1—European Convention on Human Rights 1953, art.6.3(c)

Section 228(2) of the Criminal Procedure (Scotland) Act 1975, as substituted by para.1 of Sched.2 to the Criminal Justice (Scotland) Act 1980, provides that any person convicted on indictment may appeal to the High Court against his conviction and may bring under review any alleged miscarriage of justice in the proceedings in which he was convicted.

Article 6.3(a)–(c) of the European Convention on Human Rights 1953 provides that everyone charged with a criminal offence is entitled to defend himself in person or through legal assistance of his own choosing.

The appellant was charged with assault and lodged a special defence of alibi. He was convicted and appealed to the High Court on the ground that his solicitor advocate had ignored his instructions to challenge the character of one of the complainers as being a man of violence, claiming that he had served a sentence with the complainer at a certain time which did not fit with the record of the complainer's previous convictions, which showed only two minor previous convictions for violence fifteen years earlier. He also had two previous convictions for minor offences of dishonesty some ten years earlier. The appellant himself had a bad record of dishonesty.

Held, by a Bench of five judges (1) that the purpose of the system of representation by counsel or solicitor is to enable the defence to be presented to the court and that, if the system breaks down to such an extent that the defence is not presented, it would be a denial of justice for the appeal court not to intervene in order to set aside the conviction and allow a new trial (p.126A);

(2) that counsel who represents an accused must first obtain instructions from him about his intended defence and may not conduct a defence for a client who pleads not guilty which is contrary to the instructions he has received as to the basic nature of it, that his duty is to act on the instructions which he has been given, and that how he acts on those instructions is a matter for him, as he is

of appeal must be defined narrowly, and that the conduct must be such as to have resulted in a miscarriage of justice before s.228(2) of the 1975 Act will apply (p.131F);

(4) that the conduct of the defence counsel or solicitor can only be said to have resulted in a miscarriage of justice where it was such that the accused's defence was not presented to the court because he was deprived of the opportunity to present it, or because his counsel or solicitor acted contrary to his instructions, or because of other conduct which had the effect that, because his defence was not presented to the court, a fair trial was denied to him (pp.131F–132A);

(5) that where questions of fact arise as to the nature of the defence or the effect on it of the conduct of the appellant's counsel or solicitor, the appeal court may require to hear evidence in the exercise of its powers under s.252(b) of the 1975 Act or to remit to a fit person to enquire and report in regard to these matters, but that, before the court will exercise these powers, it must first be satisfied that the complaint is of a kind which would be likely to satisfy the test described (p.132A–B);

(6) that in all cases where a complaint is made against counsel or the solicitor who represented an appellant at his trial in respect of which leave to appeal has been granted, the Clerk of Justiciary will advise counsel or the solicitor of this fact, and will provide him with a copy of the ground of appeal so that he may respond to the allegation if he has not already done so (p.132D);

(7) that a decision as to whether or not to attack the character of a Crown witness is one for the advocate to take, not the accused, and is a matter on which the advocate is entitled to, and must, exercise his own professional judgment (p.134C); and

(8) that the solicitor advocate in this case was fully justified in his decision not to attack the complainer's character, that, even if the complainer was a man of violence, this would be irrelevant to the appellant's defence of alibi, and that, in any event, any challenge to the complainer's character would have been ineffective, given his record, and that it would have been unhelpful to the appellant's case for his own record to be put to him in cross-examination (pp.133E–134C); and appeal refused.

Observed (1) that the position of the solicitor advocate acting on behalf of his own client is indistinguishable from that of the solicitor advocate acting on behalf of the client of another solicitor in regard to the principle of independence as it affects the performance of his duty as an advocate (p.122F);

(2) that the solicitor when acting as his client's advocate is placed on the same footing as counsel in regard to the independence which he is entitled to exercise in the conduct of the case in court on his client's behalf (p.123C);

(3) that the right to a fair trial should not be viewed as involving a right to a retrial simply because things might have been done differently by the accused's counsel or his solicitor, and that there can be no miscarriage of justice if the advocate conducts the case within his instructions according to his own professional judgment as to what is proper for him to do in his client's best interests (p.123E);

(4) that, when addressing a jury, an advocate should base his submissions on the evidence and should not invite the jury to speculate on matters of fact for which no foundation has been laid in evidence (p.133D); and

(5) that the provisions of the European Convention on Human Rights are not part of our domestic law, but that the principles described in art.6.3(a)–(c) have for a long time been established as part of the law of this country (p.121F).

Opinion reserved as to whether, in construing any provision in domestic

HMA v Arthur Thompson when the Auditor quoted

In this particular case and for this particular accused, the Board refers the auditor to Storer -v- Wright (1981) when Lord Denning stated "on a legal aid taxation, it is the duty of the taxing officer to bear in mind public interest ... A legal aid taxation is inquisitional. The taxing master is the inquisitor."

The Board are concerned that the work done by counsel falls outwith the terms of the legislation, i.e. work actually, reasonably and necessarily done with due regard to economy. The preparation undertaken goes far beyond what could ever be regarded as required by the case or warranted by the legal aid certificate and that the over-provision of such services should not be borne by the Legal Aid Fund.

In HMA -v- [redacted] the auditor stated "it cannot be sustained as a charge against the Legal Aid Fund that it has never been proper to regard as an ever consenting client prepared to apply unlimited funds. The duty owed to the common fund by counsel and solicitors is not an overriding duty but its interests must constantly be regarded as underlying the service to the client." The strong impression the auditor formed from the whole picture of the case presented to him that leading counsel did not exercise adequate control over the preparation of the representation of the accused. It is for leading counsel to direct the other members of the team to their particular areas of concern and finally to bring together their various contributions.

In this case the Board cannot accept that it was managed by defence counsel with the expertise reasonably to be expected or that sufficient care was taken by leading counsel to devolve appropriate areas of responsibility on to other members of the defence team.

1. Three experienced members of the team perused all the paperwork. Perusal is deemed to be not only the reading and digesting but also the noting of a document. Yet counsel clearly state that the Board are aware that counsel do not have file notes.

The fact is that the Board have been provided with file notes in other cases from other counsel to assist in the assessment process. Mr Allan, Advocate is also aware of the Board's requirement and in this regard I would refer you to HMA -v- [redacted] in which Mr Allan was the nominated solicitor in the case and had, unfortunately, misplaced his preliminary notes on the productions. The auditor makes reference that agents would be well advised to ensure file notes are kept with all business files and in cases involving the Scottish Legal Aid Board only destroyed after their fees have been settled. In addition, reference is made that counsel in the case would clearly not spend as much time perusing productions as an agent. It is interesting to note that the productions were approximately 70,000 sheets whereas in this case, the total sheetage copied for counsel was ~~2,002~~. 2089

The solicitors in this case are claiming 49½ hours for perusals, whereas counsel is claiming 95½ hours and 66 hours for pre-trial preparation to include mostly perusals.

Q: Why was more preparation undertaken than by any of the co-accused's counsel (i.e. no separate preparation or 82 hours, 43 hours or 35 hours)?

Q: What useful purpose was served by perusing documents without taking appropriate notes at the time, especially as the trial did not start until the end of January, yet the perusal work commences on 3 November 1997?

Q: Why was the experienced solicitor in this case not requested to provide appropriate summaries of witnesses evidence and details of the nature of the productions in order to assist leading junior in identifying areas appropriate for his consideration and that of junior? This was done by a co-accused solicitor for his senior.