HER MAJESTY'S ADVOCATE v. C K

APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Clarke

Lord Hardie

Lord Bracadale

[2011] HCJAC 61

Appeal No: XB1276/11

OPINION OF THE COURT

delivered by LORD CLARKE

in

CROWN APPEAL AGAINST GRANT OF BAIL

in causa

HER MAJESTY'S ADVOCATE

Appellant;

against

C K

Respondent:

Appellant: Jackson, Q.C., Hughes; J Friel & Co, Solicitors;

Respondent: McSporran, A.D.,

6 May 2011

Introduction

[1] The respondent, C K, has been charged on an indictment with eight contraventions of the Misuse of Drugs Act 1971 including drug trafficking offences. Two other persons appear on the same indictment charged with a number of similar offences. The respondent has previous convictions, on indictment, for drug trafficking offences.

[2] On 21 April 2011 the respondent applied to the sheriff, at Dumbarton, Sheriff Dunlop, to be admitted to bail. Standing the fact that she is charged with drug trafficking offences and has been previously convicted for such offences on indictment, the provisions of section 23(D) of the Criminal Procedure (Scotland) Act 1995 fell to be considered and applied by the sheriff in relation to that application. The relevant provisions are as follows:

"(1) Where subsection (2) or (3) below applies, a person is to be granted bail in solemn proceedings only if there are exceptional circumstances justifying bail.

.....

(3) This subsection applies where the person -

(a) is accused in the proceedings of a drug trafficking offence;

and

(b) has a previous conviction on indictment for a drug trafficking offence".

The sheriff granted bail. In his report to this court he noted that the Crown had opposed bail under reference to the provisions of section 23(D) as just set out. The Crown had also submitted that there was a substantial risk that the appellant might, if granted bail, commit further offences. In his written reasons given at the time of his decision the sheriff said:

"Reasons for Decision. The preparation time covered by legal aid (as detailed below) is wholly inadequate in a case of this gravity. It seemed to me for the accused to get a fair trial she had to be at liberty when such unreasonable strictures do not apply".

The "exceptional circumstances" were that "The new legal aid regulations in respect of funding inquiries where the accused are in custody cover only 21/2 hours".

[3] The appellant appealed to the High Court against the sheriff's decision to grant bail. The appeal was set down for hearing by Lord Tyre on 28 April 2011. Having heard counsel for the parties, Lord Tyre continued the hearing to be conducted before a bench of three judges on Friday 6 May. He did so because he was advised that there were a number of bail appeals pending where the point raised in the present case was being taken and that the point was likely to arise in further applications for bail. His Lordship said he considered that the matter raised important issues of general importance and that it was desirable that the point raised should be argued fully before, and determined, by a bench of three judges. In pronouncing his interlocutor continuing the appeal to be heard by a bench of three judges, he directed that the sheriff, if so advised, should provide a further report to the court. The sheriff produced a further report dated 3 May 2011.

[4] Before this court Mr Andrew Smith, Q.C., appeared, at the outset of the hearing, and advised the court that he represented the Glasgow Bar Association. He did not, as such, seek to make submissions on behalf of that organisation, but indicated that its specialist knowledge of the legal aid regulations, which are at the heart of the issue in this case, might be conveyed by him to the court, if the court considered that desirable. In the event the court did not consider that such assistance was either required or appropriate and Mr Smith withdrew.

The legal aid regulations

[5] The Criminal Legal Aid (Scotland) (Fees) Amendment (No.2) Regulations 2010 set out, inter alia, new provisions for the payment of solicitors in respect of solemn legal aid work. While the scheme of payments remains predominantly of payment by means of "detailed fees" sometimes known as "time and line" payments, certain areas of work are covered by what are known as "block fees", being payments made for all work done which falls within a block of work described in Part 2 of the Table of Fees which forms part of the regulations. In proceedings where the accused person is remanded in custody, the solicitor is entitled to claim a "block fee" for arranging and attending all meetings, including consultation, in prison with the client after full committal for trial up to the conclusion of the case. For solemn proceedings in the Sheriff Court where the accused is charged with offences like those of which the respondent stands charged, the relevant block fee under that heading is £152. That is the minimum fee paid in relation to such work however extensive that work may be. The fees payable depend on the type of charge and the court in which the proceedings are to be heard. Accordingly, if the case against the respondent is ultimately prosecuted before the High Court, and this is a matter still to be determined, then the block fee in question will be £304. In addition in Schedule 1, paragraph 1(5) it is provided, inter alia, the

following items which do not fall within any block of work prescribed in Part 2 of the Table of Fees

"....

(i) The work described in paragraph 3 of Part 2 of the Table of Fees, where the Board is satisfied that the case raised unusually complex issues of fact".

In a memorandum to solicitors operating under the Criminal Legal Aid system, dated 14 April 2011, the Scottish Legal Aid Board explained that:

"In circumstances where the solicitor considers 'that the case raised unusually complex issues of fact'...an application can be made to us which allows the solicitor to be funded outwith the block fee regime and charge for attendances on a detailed basis. It was our recommendation that discretion be allowed for prison visits in complex cases. The solicitor may make such an application at any point up until 4 months from the conclusion of proceedings. This allows solicitors to take an informed view, at the accounting stage, as to whether or not the block fee payable adequately remunerates the solicitor".

Moreover the Scottish Legal Aid Board in the said memorandum has provided that:

"Recognising that the discretion to be exercised in connection with the prison block is at the conclusion of the proceedings, on the lodging of the solicitor's account, we stated that we were prepared to issue what is described as a 'letter of comfort' to solicitors in circumstances where it becomes quite apparent, on the information available to us, that the number of necessary prison attendances is likely to fall outwith the range which the fee can reasonably be expected to recover. Even if we are not initially satisfied, there is nothing to stop a solicitor reverting to us at a later stage when it becomes more apparent that the case is going to become one appropriate for the lodging of a detailed (albeit a fee which would itself be subject to assessment and possible abatement). We have to be satisfied on submission of the final account that 'the case raised unusually complex issues of fact', and so it would be pointless to issue a letter of comfort during the course of the proceedings without sufficient information at that stage to indicate that it would be likely to accept a detailed account".

It should be observed, at this stage, that the block fee regarding consultation with an accused person does not apply where that accused person is not remanded in custody.

[6] The solicitor instructed, on behalf of the respondent, in the present case apparently reached the view at the earliest stage after being instructed in the case that, having regard to the nature of the charges involved, he would be unable to obtain proper and full instruction without consultations taking place with the respondent in prison to an extent that would be unremunerative from his point of view under the block fee of £152. On 15 April 2011, the solicitor in question wrote to the Scottish Legal Aid Board requesting that "a waiver" in the block fee provision should be granted in the case having regard to various considerations which he set out in that letter. It should be noted that the hourly rate reflected in the block fee is £60.80. On the other hand the hourly rate for meeting with a client, charged on indictment who is on bail is £50.68, (see Table of Fees Part 1, note 6(a), Col.2). On 18 April 2011 the Scottish Legal Aid Board replied:

"on the basis of information available I regret to inform you that your application has been refused. If you are able to provide further details in line with the statutory test to allow the Board to consider whether the 'case raised unusually complex issues of fact' we would be happy to reconsider matters".

The parties' submissions

[7] Before this court the Advocate depute, for the respondent, argued that the sheriff had erred in his approach to

matters in a number of ways. He had erred both in fact and in law as to the effect of the relevant legal aid regulations. He was wrong, in particular, to assume, apparently, that the fee payable in the present case would be capped at £152 however much work of the kind covered by the block fee was carried out, even when it could be established that that amount of work was required because of the complex nature of the case. The Legal Aid Board had disclosed that 60 applications had been made for letters of comfort in advance of the completion of the case for a release from the block fee and 10 applications for an uplift from the block fee had been made at the time of the submission of final account by the solicitor for all the work done. Of these applications, by way of letters of comfort or requests for final uplifts, 33 had been granted, 26 had been refused and 15 were pending the obtaining of further information.

[8] The sheriff was, moreover, wrong in saying, as he did, that the effect of the regulations was that the respondent was at risk of not obtaining a fair trial. It was clearly premature and illegitimate, at this early stage of matters, for the sheriff to reach any such conclusion. In addition any perceived or anticipated effect of the regulation, in the present case, could not be regarded as amounting to "exceptional circumstances" for the purposes of section 23D. The regulations fell to be applied to all cases falling within their terms. The same argument, if it were sound, could be advanced on behalf of accused persons in the similar situation to the respondent, as a basis for her being released on bail, simply upon the assertion of those instructed on his behalf that the case was of such a complex character that the block fee in question would be insufficient to cover the work required to be done in that context. The court was also referred to the decision of the Judicial Committee of the Privy Council in the case of Buchanan v McLean 2001 SCCR 475. There was, in that case, a recognition by Lord Hope at para.21 of his judgment, of the advantages of a fixed fee regime operating in the legal aid system but also that a disadvantage of such a regime is "that the solicitor may not be fully remunerated for his work and his prescribed outlays in all the cases which he undertakes". Notwithstanding that disadvantage his Lordship went on to remark:

"But he (the solicitor) is expected to take the rough with the smooth or, as the advocate depute put it, the good with the bad. It can be assumed that from his point of view what matters is his overall return over a given period". See also Lord Hope at para.43 of his judgment.

[9] In his submission to the court Mr Jackson, Q.C., for the respondent, informed the court that the solicitor instructed on behalf of the respondent had formed the view that, because of the nature of the offences charged and the other circumstances in relation thereto, there was no possibility that he could "properly prepare" the case in terms of the hours of consultation provided for by the prescribed fixed fee. The sheriff, who, it was said, was a very experienced sheriff, particularly in criminal matters, was aware of the number of offences involved, the nature of these offences, the number of co-accused and that there were allegations by the respondent of police entrapment. On the basis of that information, the sheriff had agreed with the solicitor that his assessment of matters, namely that the consultations that required to be carried out in prison, if the respondent remained on remand, would not be covered by the prescribed fee which was insufficient for the preparation of the respondent's defence. He, therefore, concluded that if the respondent remained in prison she would be unable to receive a fair trial. Senior counsel for the respondent reformulated that last proposition to the effect that there was a "possibility" of the respondent not getting a fair trial. The solicitor representing the respondent had now said that if he was to be restricted to the block fee he would withdraw from acting for the respondent. The sheriff, in the foregoing circumstances, correctly applied the test, of exceptional circumstances, for the purposes of section 23(D). Reference was made to the construction of the word "exceptional" given by Lord Bingham CJ in R v Kelly [2001] 1 QB 198 at page 208C-D. It could not be said that the decision which the sheriff arrived at in this case was not one he was entitled to reach.

[10] The court was able to give its decision at the conclusion of the hearing. That decision was that the

respondent's appeal should be allowed. Brief reasons for the decision were given at the time but the court informed parties that it would provide fuller reasons in due course which we now do.

Decision

[11] It is to be noted that the sheriff, in effect, proceeded to determine the issue of whether or not the respondent could obtain a fair trial at the earliest stage in the proceedings in this case and not at a hearing designed specifically to discuss that question, but to discuss whether or not there were circumstances justifying bail being granted to the respondent, notwithstanding the provisions of section 23D of the 1995 Act. We have already observed that in his contemporaneous note of 21 April 2011 the sheriff provided as his reason for his decision that the "preparation time covered by legal aid (as detailed below) is wholly inadequate in a case of this gravity. It seemed to me for the accused to get a fair trial she had to be at liberty when such unreasonable strictures do not apply". The sense of that statement is that unless the respondent was liberated she could not obtain a fair trial. In his report to this court dated 3 May 2011, the sheriff's reasoning for his decision was modified. There he stated at the foot of the first page "In these circumstances I came to the view that there was a real risk that continued detention would deprive the accused of her right to a fair trial" (emphasis added). The test is then apparently reformulated by the sheriff at page 2 of his report where he states:

"It seems to me that any possibility, other than a very remote one, that a person will, by virtue of some legal aid restriction, be deprived of his or her right to a fair trial must easily qualify special circumstances within the meaning of the Act. The only means by which the accused can obtain a fair trial is not to restrict her solicitor to consulting with her as submitted". (emphasis added)

[12] The judicial assessment of whether or not an accused person can obtain, or has obtained, a fair trial for the purposes of Article 6 of the European Convention on Human Rights is normally a decision which can only be reached by having regard to all the relevant factors which fall to be taken into account. In Buchanan supra the issue was whether the provisions of previous criminal legal aid fixed payments regulations, enacted in 1998, were so restrictive that accused persons could not obtain a fair trial. A plea in bar of trial was taken on that footing. As Lord Clyde at para.51 said:

"It is to be noticed at the outset that the question of the fairness of the proceedings should be judged in the light of the entirety of the proceedings (Imbrioscia v Switzerland, paragraph 38 (p456)). But here, as in other cases which have come before us raising devolution issues, we are asked to consider the issue in advance of the trial. A question of prematurity then arises. There are of course practical advantages in seeking a determination of the issue at an early stage and so avoiding the holding of a trial which may later be held to have been unlawful. But when the issue is raised for determination at the early stage, the test has to be whether the act of the prosecutor in continuing with the prosecution will inevitably have the consequence of a breach of Article 6. Even if that question is answered in the negative at that stage, it does not follow that a breach may not occur later".

It must be a rare case, indeed, in our opinion, where a judge is able to reach a conclusion, at a hearing regarding bail, that he has before him all the information necessary to reach a properly considered judgment that unless the accused person who for good reasons should otherwise remain in custody is liberated, he or she will inevitably fail to have a fair trial. In the present case the existence of such an inevitability did not begin to be made out to the sheriff. Any judgment he made on the matter was in the circumstances clearly premature. The block fee in question is not something from which there can be no departure where it can be shown that the case is of a complex character, see Schedule 1, para.1(5)(i). Again, as has been seen, the scope for exceptions to the block fee in complex cases is highlighted in the explanatory memorandum issued by the Scottish Legal Aid Board dated 14 April 2011. It should be noted that the regulations with which we are concerned, by virtue of the foregoing

aspects, do not suffer from the problem of the regulations before the Privy Council in the case of Buchanan, which troubled members of the Board of the Privy Council. The perceived problem with those regulations was that there was apparently no room for exceptions being made to the fixed fees in question. As well as the express provisions just referred to in the regulations regarding complex cases, as has been seen the Scottish Legal Aid Board operates a system of "letters of comfort". In relation to the present case they have not closed the door to such a letter of comfort being issued if further information is presented to them which persuades them that this would be appropriate. It is wholly reasonable, in our judgement, to have a system of fixed block fees covering certain areas of work, provided exceptions can be made therefrom so that additions may be made to the fee where the complexity of the case is made out and justifies this. There is nothing in the material before us to lead us to suppose that if solicitors, acting on behalf of the respondent, placed before the Scottish Legal Aid Board material which satisfied the Board that an uplift to the block fee is justified, such an uplift will not be made. It is perfectly appropriate that this should not simply be a self-certifying matter, that is, that it is not sufficient simply for the solicitor to assert that the case is a complex one and justifies such an uplift. It is perfectly reasonable that he should be expected to make his case out to the Board and ultimately the matter is for them to decide. In that situation it simply cannot be stated, at this stage, that:

(a) the respondent's case cannot be adequately prepared by the solicitor and

(b) that because of the relevant regulations an unfair trial is inevitable.

To contend that a solicitor, or certain solicitors, will not choose to act for accused persons in the position of the respondent because they are not prepared to wait to satisfy the Legal Aid Board that the work carried out by them is sufficient as to justify an uplift to the block fee, is not to say that a respondent will not obtain a fair trial. The court would remind those who choose to be eligible to provide criminal legal services of the duties imposed by relevant codes of conduct enacted under the Legal Aid Scheme, the codes of conduct pronounced by the Law Society of Scotland and the assumptions that arise therefrom, as referred to, and discussed by, Lord Hope at paras.18-20 in the Buchanan case. We would simply repeat what Lord Hope said at para.21:

"It would be wrong to proceed upon the assumption that the solicitor will consciously reduce the standards just because, in a given case, the overall return which he is likely to receive for his fees and outlays is less than he would regard as profitable" (compare also para.38).

[13] Solicitors participating in the Criminal Legal Aid Scheme should also bear in mind the words of Lord Hope at para.43 in Buchanan:

"Their interest is to look at the spread of the money which they derive from criminal legal assistance in all its forms over a given period".

[14] Behind the application made on behalf of the respondent, in the present case, for bail, may lie a feeling of genuine grievance, on behalf of solicitors operating under the Legal Aid Scheme, as to the level at which the block fee has been fixed. If there be any such grievance then such a grievance is not appropriately advanced by the vehicle of applying for bail in circumstances, as obtained in the present case, where there was a clear public interest in having the respondent detained in custody.

[15] For all the foregoing reasons we have come to the clear conclusion that the sheriff, on the basis of the information before him, was in no position to reach any concluded view on whether there was a real risk of the respondent not being able to have a fair trial, far less that it was an inevitability that the respondent could not obtain a fair trial unless liberated. It may well have been that the sheriff was unaware of the decision in the case of Buchanan. Had it been before him it is, in our judgement, difficult to see how he could have arrived at the decision

he did.

[16] We should conclude by noting that senior counsel for the respondent initially sought to lodge a devolution minute but, on a reconsideration of matters, agreed that it was in inept terms. It was accordingly withdrawn.