HER MAJESTY'S ADVOCATE v. KEITH WILSON+DARRELL MCCROSSAN

APPEAL COURT, HIGH COURT OF JUSTICIARY

[2013] HCJAC 95

Lady Paton

Lord Brodie

Lady Cosgrove

Appeal Nos: XC180/13, XC182/13

OPINION OF THE COURT

delivered by LADY PATON

in

BILLS OF ADVOCATION

by

HER MAJESTY'S ADVOCATE

Complainer;

against

(FIRST) DARRYL McCROSSAN and

(SECOND) KEITH WILSON

Respondents:

Complainer: D Bain QC, AD; Crown Agent

First Respondent: McConnachie QC, M C MacKenzie; Beaumont & Co

Second respondent: Lamb QC, Jones; Belmonte & Co

9 August 2013

Pleas in bar of trial and legal aid regulations

[1] The respondents are alleged to have assaulted Sheldon Hunt on 20 May 2011 by punching, kicking, and stamping on him. Over a period, they received three separate indictments in respect of the alleged offence. There were court hearings, continuations, adjournments, and desertions pro loco. It is unnecessary for present purposes to give details of the procedural history, other than to record that developments in the victim's condition resulted in a second indictment adding "severe injury and permanent impairment" to the libel; further developments and disclosures made by the respondents resulted in a third indictment with the additional aggravation "to the danger of his life" and the addition of five co-accused; and two trial diets had to be adjourned due to the illness of an essential witness.

[2] On receipt of the third indictment, solicitors acting for the respondents wished to take pleas in bar of trial in terms of section 79 of the Criminal Procedure (Scotland) Act 1995, founding on the protracted procedural history. They lodged minutes raising that preliminary plea. However they ascertained that any preparatory work for the hearing of that plea would not be remunerated under the legal aid regulations. They accordingly lodged devolution minutes averring a breach of article 6 of the European Convention on Human Rights (the right to a fair trial, and in particular article 6(3)(c) which provides each respondent with the right

"to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require").

[3] On 11 March 2013 a debate on the devolution minutes took place before Sheriff K E C Mackie. On 14 March

2013 the sheriff issued a judgment in favour of the two respondents, and dismissed the indictment simpliciter insofar as directed against them, but not insofar as directed against the five co-accused.

[4] The Crown challenges that decision by bills of advocation.

The sheriff's ruling

[5] Paragraphs [13] to [18] of the sheriff's judgment dated 14 March 2013 are in the following terms:

"[13]. The circumstances of this case may be distinguished from those of Marshall. In that case the court was concerned with a situation where the fixed fee payable to the solicitors was disproportionately low relative to the work to be carried out. In this case there is no provision for any payment to the solicitors for the work which requires to be carried out in accordance with their obligations under the Code of Conduct to prepare for what may be a significant hearing for the accused. The accuseds' agents are expected to carry out the work without any remuneration. Whatever financial constraints there may be upon the prosecutor that appears to me to imply a clear inequality of arms. As Lord Hope said in Buchanan 'the essential question is whether the alleged inequality of arms is such as to deprive the accused of his right to a fair trial'.

[14]. It was accepted in Buchanan that unfairness may result where for example agents were not prepared to act without remuneration and withdrew from acting leaving the accused without representation or where pleas in bar of trial and any consequent appeal were to be discouraged by any lack of provision for remuneration. In this case neither agent indicated an imminent intention to withdraw from acting further although Mr McCrossan's agent appeared to indicate that his position may be dependent on the outcome of this Minute. Minutes raising pleas in bar of trial have been lodged.

[15]. Concern was expressed in Buchanan about the potential for injustice in an inflexible and rigid legal aid scheme. As Lord Clyde said 'risk may arise from the lack of flexibility in the present Regulations. No allowance is made for any unusual or exceptional circumstances. The requirements of fairness in judicial proceedings are rarely, if ever, met by blanket measures of universal application. Universal policies which make no allowance for exceptional cases will not readily meet the requirements of fairness and justice.' Lord Hobhouse of Woodborough said that an element of flexibility was necessary to give the Legal Aid Board the power to avoid breaches of Article 6 of the Convention. In Marshall Sheriff Morrison opined that 'if the 1999 Regulations were thought to be inflexible giving rise to incompatibility with Article 6 then so must be the ABWOR Regulations in which there is also no provision for the exceptional case'. Sheriff Morrison found support for his view in HM Advocate v CK 2011 SCCR 381 wherein it was said 'It is wholly reasonable in our judgement to have a system of fixed block fees covering certain areas of work provided exception 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'. In my opinion similar criticism may be made of the 1989 Regulations, which apply to this case, in that there is no power enabling the Scottish Legal Aid Board to make special provision for payment of fees where the circumstances of the case justify it, except in relation to the fee for meetings in prison. In terms of paragraph 1(5)(i) of the Notes on the operation of Schedule 1 the work described in paragraph 3 of part 2 of the Table of fees ie meetings in prison does not fall within any inclusive fee 'where the Board is satisfied that the case raised unusually complex issues of fact'. Given the opinions expressed in Buchanan albeit obiter and in subsequent cases it is remarkable that no steps have been taken to amend the legal aid scheme to provide for the complex and unusual case.

[16]. The circumstances in this case are, as averred in the Minute raising the plea in bar of trial, that the procedural history has been protracted. A number of indictments have been served upon the accused. At present two indictments are proceeding arising from the same incident. In this case there are four other accused and almost four times as many productions as in the other indictment. It is averred that no disclosure has been made in respect of this case other than that made in respect of the other indictment. A diet of trial is imminent in each case.

[17]. It would be unfortunate if a history of proceedings such as is averred were to be considered anything other than unusual. The absence in the Regulations of any provision for the complex or unusual gives rise to an incompatibility with Article 6. If the accuseds' agents are unable through lack of remuneration properly to prepare in accordance with their obligations in the Code of Conduct for the conduct of a hearing on the pleas in bar of trial then in my opinion there will be an inevitable prejudice to the accused. As was said in Artico v Italy the right to

legal assistance requires to be effective. The accuseds' right in terms of Article (6)(3)(c) to defend himself through legal assistance is breached if that legal assistance is not effective. That assistance cannot be effective if the accuseds' agents are unable properly to prepare their defence.

[18]. In my opinion the continued prosecution by the Lord Advocate in these circumstances contravenes the accuseds' convention rights. Accordingly the indictment so far as directed against these accused should be dismissed."

The Crown bills of advocation
[6] The bills of advocation, read short, contend:

1. It was premature for the sheriff to find that continuing the prosecution would inevitably breach the respondents' rights under the Convention. No actual or inevitable prejudice had been demonstrated (statement 10).

2. It could not be said that the respondents' right to a fair trial was contravened by the continued prosecution, or that that "act" was ultra vires of the Lord Advocate (statement 11).

3. The legal aid regulations provided an element of flexibility by a system of block fees and detailed fees (statement 12).

4. That element of flexibility catered for the "complex and unusual case", contrary to the sheriff's conclusion (statement 13).

5. The respondents thus had criminal legal aid and proper and effective legal assistance.

6. As the respective agents had represented the respondents for several months, they were familiar with the procedural history.

The sheriff's report to this court
[7] The sheriff's report draws attention to recent changes made to the legal aid regulations, as follows:

"A written judgement was issued by me on 14th March 2013.

I would observe that since Sheriff Morrison's decision in PF Edinburgh v Marshall to which I was referred and the refusal of the Bill of Advocation lodged thereafter Regulations have been made by Scottish Ministers which have the effect of introducing an element of discretion to the operation of the fixed fees complained of in that case. The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2013 come into operation on 26th April 2013."

The legal aid regulations
[8] The relevant legal aid regulations include the following:

Solemn criminal proceedings

· The Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (SI 1989/1491): regulation 4 Fees allowance to solicitors: general provisions; and Schedule 1 Notes on the operation of Schedule 1 paragraph 1, and Table of Fees Part 1 detailed fees, Part 2 inclusive fees for solemn first instance proceedings.

Summary criminal proceedings

· The Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 (SI 1999/491): regulation 4 Fixed payments allowable to solicitors; and regulation 4A Exceptional cases.

· The Criminal Legal Aid (Scotland) (Fees) Amendment (No 2) Regulations 2010 (SI 2010/212): regulation 4.

ABWOR (assistance by way of representation)

· The Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 (SSI 2003/179).

· The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2013 (SI 2013/92), which came

into operation on 26 April 2013: regulation 2.

[9] Reference was also made to a legal aid publication dated February 2011 entitled "Solemn fees - Criminal Legal Aid (Scotland) (Fees) Amendment (No 2) Regulations 2010 - Frequently Asked Questions"

[10] The Advocate depute and counsel for the respondents agreed that:

· The regulations contain tables of fixed fees for designated types of work.

· Regulations for both summary criminal legal aid and ABWOR (assistance by way of representation) contain a provision for exceptional circumstances enabling the Scottish Legal Aid Board in its discretion to authorise payment for work not falling within the tabled allowances. The "exceptional" provision was inserted (i) in the summary regulations when those regulations were being challenged in the Supreme Court as being non-compliant with the Convention (Buchanan v McLean 2001 SCCR 475); and (ii) in the ABWOR regulations following upon a decision of Sheriff N M P Morrison QC to dismiss a complaint in McGowan v Marshall 2012 SLT (Sh Ct) 109; 2013 SCCR 271 (sub nom McLeod v Marshall).

· No such "exceptional" provision is to be found in the solemn criminal legal aid regulations, with the result that in solemn proceedings, solicitors' work must qualify in terms of a category or an item of work specified in the regulations' text and/or tables.

[11] The Advocate depute and counsel for the respondents also agreed that, on a proper construction of the regulations:

1. Solicitors rendering professional services in terms of the summary criminal regulations or ABWOR could, if necessary, seek to recover remuneration under the "exceptional " provision, which the Scottish Legal Aid Board (if satisfied in its discretion) could pay; but -

2. Solicitors rendering professional services in terms of the solemn criminal regulations had to restrict any claim for remuneration to the categories or items of work specified in the regulations' text and/or tables;

3. The solemn criminal regulations allowed a block fee of £152 for all preparation undertaken during the case: but that block fee was only recoverable if a trial took place. If, for any reason, the solicitor's client did not undergo a trial (for example, because of a successful plea in bar of trial), then the solicitor could not recover the block preparation fee no matter what work had been carried out;

4. If the respondents' solicitors spent time, effort and materials researching the law and the procedural history of the case with a view to presenting an argument on a plea in bar of trial, they would be unable to recover remuneration for that preparation over and above the block fee of £152.

Submissions for the Crown

[12] The advocate depute invited the court to recall the interlocutor of the sheriff dated 14 March 2013 dismissing the indictment so far as directed against the two respondents. The solemn criminal legal aid regulations relied on the "swings and roundabouts" principle. The combination of the block fee and an ability to charge time and line for certain designated "detailed fees" provided adequate remuneration and flexibility. The question for the appeal court was whether the effect of the regulations was to create a real risk that the respondents would be denied a fair trial because they would be deprived of the effective legal assistance which they were entitled to be given free under article 6(3)(c) of the Convention (Buchanan v McLean 2001 SCCR 475). The Crown contended that the sheriff's decision was erroneous for the following reasons. (i) It was premature for the sheriff to find that the respondents' rights to effective legal assistance would inevitably be breached. It was not clear that their solicitors could not properly prepare for a hearing on a plea in bar of trial. No estimate of expenses had been tendered. No indication had been given that the agents would withdraw from acting. There was no suggestion that professional standards would be reduced. On the information available to the court at this stage, there had been no deprivation of the right to a fair trial. (ii) It had not been shown that there was (or would be) any inequality of arms. The respondents' complaint was a narrow one, namely that there was no separate item permitting remuneration for preparation for a hearing of a plea in bar of trial. (iii) The lack of a discrete fee for that preparation did not mean that there was no payment for the work. The block fee and detailed fees provided sufficient and flexible remuneration. The sheriff had accordingly erred in the interlocutor of 14 March 2013, and the court was invited to

pass the bills.

Submissions for the first respondent

[13] Senior counsel for the first respondent submitted that the sheriff had come to the correct decision. The sheriff was right to conclude that a continued prosecution would contravene the respondent's Convention rights. There was, and would be, no effective representation in relation to the case because of the inflexibility in the regulations. The regulations made it clear that there would be no fee for preparation for a hearing of a plea in bar of trial. If the solicitor took a preliminary plea in bar of trial, and was successful with the result that the indictment so far as directed against his client was dismissed, no element of the block preparation fee of £152 was payable. That £152 fee was payable only if the case proceeded to trial.

[14] It was important to consider what the court expected from a solicitor at the first diet. In solemn proceedings, the accused faced trial by jury with a possible maximum sentence of 5 years. With reference to section 71 of the Criminal Procedure (Scotland) Act 1995, it could be seen that the court expected the solicitor (a) to have ascertained whether it was likely that the case would proceed to trial; (b) to advise on the state of preparation of the accused; (c) to state whether any evidence was capable of agreement (section 127); (d) to have ascertained whether there were any vulnerable witnesses and to produce, for example, child witness notices; (e) to have ascertained which of the Crown witnesses were required for the trial; (f) to have considered the accused's bail conditions; (g) to have considered any preliminary plea or preliminary issues.

[15] Thus the court anticipated that the solicitor would have turned his mind to (i) preliminary pleas; (ii) preliminary issues; and (iii) questions relating to the admissibility of evidence, but in circumstances where there was no provision for the solicitor being paid to carry out this work. Courts were rightly concerned to secure compliance with expected time-tables, and in terms of section 79A could refuse to consider objections to evidence raised out of time. So solicitors were encouraged to deal with all of the above matters at the first diet. Yet the regulations did not provide for payment.

[16] The "swings and roundabouts" principle might be apt in the summary context. A simple case of a statutory breach of the peace with two eye-witnesses would not cause the solicitor to complain that the fixed fee was inadequate. By contrast, he might also have a complex summary trial, the work for which would exceed the amount generated by the block fee and any specific additional items of work permitted by the regulations. In one case, he might be overpaid; in the other case, underpaid; and the overall result would be fair. But that approach did not work in solemn proceedings. In those proceedings, the solicitor was not paid unless he actually did the work: for example, if he met with the client, or took a precognition from a witness. Thus it was not a question of receiving £500 for £300 worth of work: in a solemn case, the solicitor actually had to do the work in order to qualify for payment. So the "detailed fees" did not in fact provide the flexibility suggested by the advocate depute. The detailed fees did not cater for the exceptional or the non-routine item.

[17] In summary procedure, legal aid regulations had (as a result of Buchanan v McLean 2001 SCCR 475) made provision for exceptional or non-standard items of work. By contrast, in solemn procedure, legal aid regulations made no provision for recognising the exceptional or the unusual.

[18] It was accepted that the test to be applied in the present case was set out in paragraph [31] of Buchanan v McLean cit sup, and also in the dicta of Lord Clyde and Lord Hobhouse. All that had been said there about the potential for injustice was relevant in the present case. The respondent's right to a fair trial was put at risk by the regulations, which arguably discouraged the taking of a plea in bar of trial. Because the regulations did not provide a defence solicitor with a fee for preparing for a hearing in relation to such a plea, there was no equality of arms. A solicitor could explain to the accused that there was no funding for such preparation, and therefore that the accused could argue the point himself: but an accused would be unlikely to be able to master and present the necessary arguments. In McGowan v Marshall cit sup, the sheriff in paragraph [23] followed the test set out in Buchanan v McLean cit sup, recorded as

"whether there is or will be actual or inevitable prejudice to the accused such that continuation of the proceedings by the prosecutor will result in the accused not being able to have a fair hearing because he cannot defend himself through legal assistance".

[19] Senior counsel accepted that if regulation 6 of part 2 of schedule 1 to The Criminal Legal Aid (Scotland)

(Fees) Regulations 1989 included in the list of work items the three following items, namely (i) preliminary pleas in bar of trial, (ii) preliminary issues, and (iii) objections to the admissibility of evidence, then there would be no risk that the respondents would be denied a fair trial as a result of being deprived of the effective legal assistance to which they were entitled.

Submissions for the second respondent

[20] Mr Lamb QC for the second respondent adopted the submissions made on behalf of the first respondent.

Discussion

[21] As Lord Hope of Craighead explained in Buchanan v McLean 2001 SCCR 475 in the context of legal aid in summary criminal proceedings:

"[31] The question which lies at the heart of the case therefore is whether the effect of the 1999 Regulations is to create a real risk that the appellants will be denied a fair trial because they will be deprived of the effective legal assistance which they are entitled to be given free under Article 6(3)(c) of the Convention ... The critical question is whether the appellants have shown that the effect of the 1999 Regulations on the performance of their duties by their solicitors is such that the proceedings as a whole will be unfair ...

[38] I am not persuaded that it has been shown that the fixed fee regime will give rise to any actual or inevitable prejudice at the appellants' trial. As I have already said, it would be wrong to assume that the solicitors who have been instructed in this case will reduce their standards of preparation simply because they consider that they will not receive adequate remuneration for their work when they are paid the fixed fee. The assumption must be, in the absence of any contrary evidence, that they will conduct the defence according to the standards which are expected of their profession as they are required to do by the codes. The fact that the solicitors have not indicated that they propose to withdraw from the case is also an important indication that, on the information which is available at this stage, the appellants are not being deprived of their right to a fair trial by the 1999 Regulations ...

[46] The rigidity of the present scheme is demonstrated by the fact that, despite the obvious hardship which the solicitors face in this case, no allowance can apparently be made under it for the work undertaken in connection with the pleas in bar which were advanced in the sheriff court or the appeal to the High Court of Justiciary. The point which they wished to raise on the appellants' behalf was responsibly taken on a matter of general public interest: see McLeod v Glendinning, in which no solicitor could be found who was willing to act under the scheme. Section 144(5) provides for a plea in bar of trial to be lodged, with leave, notwithstanding the fact that it was not stated at the first diet at which the accused pled not guilty. The accused's right to a fair trial would be put at risk if the lack of provision in the fixed payment regime for work done in connection with a plea in bar and any consequent appeal to the High Court of Justiciary were to have the effect of discouraging the taking of such pleas at that stage. It would also be put at risk if the lack of provision in the scheme to enable the board to remunerate work of an exceptional nature, such as the precognition of witnesses abroad where this was plainly necessary, were to result in incomplete preparation for the trial. The fact that no such risk has been demonstrated in this case should not be taken as an indication that the 1999 Regulations are beyond criticism on Convention grounds ..."

[22] In our opinion, the legal aid regulations applicable in the present case (solemn criminal procedure) lack the flexibility which is necessary for compliance with the Convention. We have reached that view inter alia for the following reasons:

· A solicitor is not entitled to recover the block preparation fee of £152 (no matter how much time and effort he had expended in preparation) if the proceedings against his client terminated without a trial. That is arguably a disincentive for a solicitor taking any preliminary issue which might excuse his client from the trial.

· A solicitor is not entitled to any remuneration for preparation for a plea in bar of trial. That is arguably a disincentive for the solicitor taking such a plea (even although there might be a good basis for the plea), a fortiori when coupled with the fact that the block preparation fee of £152 would not be recoverable if the plea in bar were to be successful and the client did not have to face trial.

· An element of inequality of arms is introduced by the above points: the Crown prosecution might be expected to take and thoroughly prepare all necessary points, whereas a solicitor dependent upon the legal aid regulations with certain rigidities and restrictions (such as those mentioned above) might not.

[23] It is unnecessary in our view to examine the regulations further. The above points are in our view significant and suggest that the regulations are not wholly compliant with the Convention. We consider that the type of challenge raised in the present case is likely to be repeated in future cases, particularly as efforts have been made to introduce the necessary flexibility to the legal aid regulations relating to summary criminal proceedings and to ABWOR: see paragraph [10] above. It seems to us that solemn criminal proceedings, involving as they do more serious alleged offences, trial by jury, and a maximum sentence (if convicted) of 5 years, require at least as much flexibility as summary criminal proceedings and ABWOR.

[24] Nevertheless, as in Buchanan v McLeod, the only question for this court is whether the effect of the regulations in the present case is to create a real risk that the respondents will be denied a fair trial because they will be deprived of the effective legal assistance to which they are entitled to be given free under article 6(3)(c) of the Convention. As it was put in McGowan v Marshall:

"whether there is or will be actual or inevitable prejudice to the accused such that continuation of the proceedings by the prosecutor will result in the accused not being able to have a fair hearing because he cannot defend himself through legal assistance."

[25] In this particular case, we have not been persuaded that the test has been met. On the information before us, the respondents have had experienced, competent, and effective legal representation at every stage. Their solicitors have not (so far) incurred significant irrecoverable fees or expenditure. Their standards of professional practice have not, so far as we are aware, been affected. Nor have the solicitors intimated their imminent withdrawal from acting without the possibility of a replacement being found. In the result therefore, the test set out in Buchanan and McGowan has not in our view been met. However we would endorse and adopt the observation of Lord Hope in paragraph [46], namely:

"... The fact that no such risk has been demonstrated in this case should not be taken as an indication that the [relevant] regulations are beyond criticism on Convention grounds"

[26] We also observe that it would be an unfortunate and short-sighted policy to maintain the present rigidity in the legal aid regulations relating to solemn criminal proceedings when, by contrast, care has been taken in summary criminal proceedings and ABWOR to introduce a necessary element of flexibility in the relevant legal aid regulations. It seems likely that challenges such as the present will be repeated in other cases, at considerable cost to the public purse, possibly bringing to a premature end proceedings which ought properly to be taken to their final conclusion.

Decision

[27] For the reasons given above, we shall pass the bills of advocation, recall the sheriff's interlocutor of 14 March 2013, and remit to the sheriff to proceed as accords.