SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 57
P914/20

Lord Justice Clerk
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Reclaiming Motion

by

PAUL VINCENT KELLY

Petitioner and Reclaimer

for

JUDICIAL REVIEW OF A DECISION OF THE SCOTTISH CRIMINAL CASES REVIEW COMMISSION

Petitioner and Reclaimer: Dewar QC; Paterson Bell (for McKennas, Solicitors, Glenrothes)
Respondents: Pirie; Scottish Criminal Cases Review Commission

19 October 2021

Introduction

[1] In July 2016 at the High Court in Glasgow, the reclaimer was convicted of six charges of historic sexual assault and one of assault. He asked the respondents ('the SCCRC') to refer his case to the High Court for an appeal on the basis of defective representation. It

declined to do so. The Lord Ordinary refused the reclaimer's petition for judicial review. This is an appeal against his decision.

Background

[2] The reclaimer had originally been indicted on a total of 63 charges. The complainers were all boys within his care at St Ninian's, a residential school in Fife. Several other former members of staff at the school appeared on the same indictment. The reclaimer gave evidence denying the charges. Defence witnesses were also led. One, GMcQ, who had been a pupil at St Ninian's at the material time, said that it was a common occurrence for boys to sleep in the reclaimer's room. GMcQ himself had encountered no problems, and specifically neither sexual nor physical abuse, at the school or from the reclaimer. He had invited the reclaimer and a co-accused to his wedding. Another defence witness, AC, a former pupil of the reclaimer when he taught at a day school in England, gave evidence of the reclaimer's good character. The one co-accused remaining on the indictment at the conclusion of the trial also gave evidence and called one of the acquitted co-accused in his defence.

[3] The reclaimer sought to appeal his conviction on various grounds including fresh evidence and disclosure issues relating to two witnesses, RD and SJ, whose evidence had not been led at trial. That evidence was said to be capable of exonerating the reclaimer. The sift judges found that the fresh evidence test was not met and that the ground of appeal was not arguable.

[4] The reclaimer made an application to the SCCRC requesting that it review his conviction on the basis of defective representation. The primary focus was on the failure to lead the evidence of RD and SJ. Complainer JR had given evidence that a group of fellow pupils, including GMcQ and RD, had been involved in sexually abusing him in the presence

of, and with the encouragement of, the reclaimer. In his police statement RD denied that any such abuse had taken place or that the reclaimer had abused pupils. It was submitted that RD's evidence would have adversely affected the jury's assessment of JR's credibility, and supported the reclaimer's defence. So far as SJ was concerned, he remembered being taught by the reclaimer, and sleeping on the floor in his room in circumstances which were not sinister. He spoke well of his time at the school. A number of other witnesses who could also have assisted the defence, by giving evidence of the reclaimer's good character and of their having no awareness of any abuse taking place, should also have been called.

[5] The SCCRC decided that the statutory grounds for making a reference (Criminal Procedure (Scotland) Act 1995, section 194C) were not satisfied. It was not persuaded that any of the matters raised by the reclaimer met the criteria for defective representation set out in *Anderson* v *HMA* 1996 JC 29; *E* v *HMA* 2002 SCCR 341; *Jeffrey* v *HMA* 2002 SCCR 822; *SD* v *HMA* [2014] HCJAC 17; *Grant* v *HMA* 2006 SCCR 365; *McBrearty* v *HMA* 2004 JC 122; *McEwan* v *HMA* 2010 SCL 557; *McIntosh* v *HMA (No 2)* 1997 SCCR 389; *Urquhart* v *HMA* 2009 SCCR 339; *Hughes* v *Dyer* 2010 JC 203; and *Woodside* v *HMA* 2009 SCCR 350. The Lord Ordinary agreed and refused the petition.

Decision and analysis

[6] The task of deciding whether there has been a miscarriage of justice requiring a reference to the High Court is one for the SCCRC (1995 Act, section 194C(1)(a) and (b); *Raza* v *SCCRC* 2007 SCCR 403 at para 8). Such decisions are open to challenge by judicial review only on conventional grounds of illegality (*Sheridan* v *SCCRC* 2019 SLT 586 (para [72])). No doubt in recognition of this, the reclaimer's written submissions asserted that the SCCRC had improperly exercised its discretion in that: (a) its decision was based upon a material

error of law in relation to the test for defective representation; (b) it failed to take account of relevant and material considerations; (c) there was no proper factual basis underpinning the determination; and (d) the decision was one that no reasonable decision maker exercising the discretionary power conferred upon the SCCRC could have reached. It was asserted that the Lord Ordinary had in turn erred in failing to recognise these errors in law.

[7] In fact, as the argument was presented, it proceeded on a much narrower basis. It was acknowledged that the SCCRC had applied the correct test (and thus that the Lord Ordinary had been correct to make that finding). The dispute was with its application of the test to the facts. Nor was it maintained that the SCCRC failed to take account of material considerations or that there was no factual basis for the decision it reached. The submission was rather that the SCCRC did not attach sufficient weight to certain factors in the evidence, and that its assessment of that evidence led it to a decision that no reasonable body could have reached.

[8] The arguments focused on issues relating to witnesses RD and SJ. This was said to have been an "all or nothing" case looked at from the reclaimer's perspective, having regard to the very serious consequences which would follow on conviction of any of the charges. There was said to be no compelling reason not to call each of those witnesses. Whatever small risk was involved in leading either of them, it was said to be a risk that was crying out to be taken. Counsel submitted that the SCCRC erred in failing to recognise this. It should have concluded that the decisions in question were beyond the scope of strategic or tactical decisions which might reasonably be taken by the defence team.

[9] We disagree. The SCCRC took account of the comments by senior counsel. She said that, had RD been called as a witness for the Crown, she would have taken the opportunity to question him about JR. However, from a tactical view point she was less inclined to call

him as a defence witness, given that his statement was not unequivocal and there was a risk that part of his evidence might support the Crown case. She had called GMcQ, and his evidence had been supportive of the defence. She was very wary of calling further witnesses in case parts of their evidence might be harmful to the defence case. Her impression was that the complainer JR had not been a good witness. In those circumstances she decided that it was better not to risk calling either RD or SJ. In so far as other witnesses gave evidence of the reclaimer's good character or of not having seen any abuse, their evidence would not add materially to the evidence already before the jury. The SCCRC, having considered the matter at large and in context, concluded that these were decisions within a range of options reasonably open to counsel.

[10] The trial judge, in his appeal report, considered that calling RD or SJ would not have advanced the defence case, and that calling RD could have been dangerous. This reflected the view of senior counsel as to the risks inherent in calling the latter.

[11] In our opinion it is plain that the decisions which senior counsel took about which defence witnesses to call necessitated the exercise of her professional judgement. A defective representation ground could succeed only if it could be said that such decisions were so flagrantly wrong that they would not have been taken by any reasonably competent counsel.

[12] So far as witnesses other than RD and SJ are concerned, calling numerous witnesses to speak to the same issue, particularly where it is simply an assertion that they were not aware of a particular matter, would be an inefficient and potentially hazardous way to run a defence.

[13] It is worth noting the setting in which decisions of the kind in question must be taken by the SCCRC. The task of defending someone on serious charges in the High Court is

demanding, difficult and stressful. In any trial the dynamics will change from day to day. Counsel will try to assess how witnesses may have presented themselves to the jury, what the weaknesses and strengths of the Crown case are, and these will also change with the ebb and flow of the case. Judgements have to be made based on professional experience and impression. The nuances of a trial may mean that evidence can cut both ways: it may appear to be favourable in one light, but there may be another way of looking at it which is more troubling to the defence. These subtleties all feed into the decisions taken in the heat of battle. On such matters there is room for professional disagreement. Different counsel might legitimately favour different approaches, without either of them failing in their task of properly representing an accused person. Decisions taken during the trial must be viewed in the context of the situation at the time they were taken, and not with the benefit of hindsight. It is for these reasons that the test for defective representation is a high one. The fact that different strategic or tactical decisions could have been taken at trial does not amount to defective representation resulting in an accused being deprived of a fair trial, unless of course, the decision is one which no competent counsel could reasonably have taken. The fact that a defence could have been improved with the benefit of hindsight and further investigation does not render a failure to take such steps a miscarriage of justice (*Ditta* v *HM Advocate*, 2002 SCCR 891 at [17].)

[14] The SCCRC recognised all of this in considering the application made to it. We agree with the Lord Ordinary that it was entitled to reject the application. It applied the correct test, had an evidential basis for its conclusion, took account of all relevant material and gave full and cogent reasons. The grounds for judicial review amount to no more than a disagreement with the judgements which defence counsel made and a disagreement with the SCCRC's assessment of those judgements. No error of law has been demonstrated,

either on the part of the SCCRC or the Lord Ordinary. The reclaiming motion will therefore be refused.