OUTER HOUSE, COURT OF SESSION

[2021] CSOH 28

CA72/20

OPINION OF LORD TYRE

In the cause

DAVID HENRY GRIER

Pursuer

against

THE LORD ADVOCATE

Defender

Pursuer: Smith QC, MacLeod; Kennedys Scotland (for Fleming & Reid, Glasgow)
Defender: Moynihan QC, Hamilton; Scottish Government Legal Directorate

12 March 2021

Introduction

[1] The pursuer is one of a number of individuals who were charged with various offences, including conspiracy to defraud, in connection with the acquisition in 2011 by a company controlled by Mr Craig Whyte of a controlling shareholding in Rangers Football Club plc ("the Club"). At the material time the pursuer was employed as a consultant in business restructuring by MCR Business Consulting, London. He appeared on petition on 17 November 2014 and an indictment was served upon him on 16 September 2015. A second indictment containing additional charges was served prior to a preliminary hearing before Lord Bannatyne on 6 January 2016. A further, substantially amended, version of the

indictment was produced on 4 February 2016. In two opinions dated 22 February 2016 and 15 April 2016, Lord Bannatyne held that all of the charges against the pursuer were irrelevant in law. The Crown appealed against, *inter alia*, Lord Bannatyne's decision in relation to the charge of fraudulent conspiracy against the pursuer. On 13 May 2016, the High Court of Justiciary refused the Crown's appeal.

[2] In this commercial action, the pursuer sues for damages for wrongful and unlawful prosecution and, separately, malicious prosecution. (A separate action for damages has been raised by the pursuer against the Chief Constable.) Proof before answer in both actions is set to commence on 6 April 2021. Certain matters were, however, considered by parties to be appropriate for debate prior to the proof hearing. One of those was whether the defender had pled a relevant and sufficiently specific defence that the prosecution was objectively justified, ie whether as a matter of law there was reasonable and probable cause to initiate and continue the proceedings. A debate on that matter was conducted under reference to the terms of the various iterations of the indictment, and in an opinion dated 16 February 2021 ([2021] CSOH 18), I held that although the question whether the prosecution of the pursuer had been subjectively justified could not be determined without inquiry, there was no relevant defence that the prosecution had been objectively justified as so defined.

[3] Following the issuing of my opinion, the pursuer indicated that he wished also to contend that there had been no objective justification for placing the pursuer on petition, and so the action was set down for a second debate at which I heard the pursuer's argument that there was no relevant defence pled in relation to that contention.

Reasonable and probable cause

[4] Before addressing the issues forming the subject matter of the second debate, it is necessary for me to make certain observations, further to those made in my previous opinion, on what constitutes absence of reasonable and probable cause in the context of a public prosecution. In that opinion I noted (at paragraph 31) that I had not been referred to any Scottish authority on this matter. I proceeded to consider the question under reference to certain English and Canadian authorities, including in particular the decision of the Supreme Court of Canada in *Miazga* v *Kvello* [2009] 3 RCS 339. At paragraphs 43 and 44 I expressed my conclusions as follows:

> "[43] Where, as here, the charges were dismissed as irrelevant, it seems to me that it will normally be difficult to argue that reasonable and probable cause existed from an objective standpoint. A decision that a charge is irrelevant is a decision that even if the Crown were to prove all of the facts narrated in the indictment, the essentials of the criminal charge are not present. As a general rule, it can hardly be said, on an objective assessment, that there is reasonable and probable cause for initiating and continuing proceedings if a conviction cannot result because the circumstances averred do not, as a matter of law, amount to commission of the offence charged.
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> [44] There may be exceptional circumstances in which dismissal of a charge as irrelevant does not imply an absence of probable and reasonable cause. Senior counsel for the defenders suggested, under reference to Clerk and Lindsell, that this may be so where the charge gave rise to a complex or controversial point of law. I am doubtful whether even in that case it could be said, if the charge were held to be irrelevant, that on an objective assessment there was reasonable and probable cause: it seems to me that the finding of irrelevancy effectively amounts to a finding that there was not. A more extreme example might be where a prosecution proceeds upon an apparently settled and uncontroversial interpretation of the law in relation to the offence charged, but where that interpretation is challenged on appeal and subsequently overruled by a larger court convened to reconsider its correctness.
>
> [45] The present case does not, in my view, fall within such marginal territory…"

[5] It has now been drawn to my attention that there is relevant Scottish authority on the point. In *Craig* v *Peebles* (1876) 3R 441, the pursuer was the holder of a public house licence for premises which were partially destroyed by fire. Despite this, he continued to trade,

having obtained leave to do so from the Excise department. He was prosecuted for selling spirits without a licence, on the basis that the premises were dangerous and uninhabitable. Having been convicted by the justices of the peace, the pursuer brought a bill of suspension to the High Court of Justiciary (see (1875) 2R (J) 30), who quashed the conviction, holding that the complaint was irrelevant. He then raised a civil action against the procurator fiscal for damages for malicious prosecution. It was held that although relevant averments of malice had been made, there was in the circumstances no relevant averment of absence of reasonable and probable cause for the prosecution. It is a feature of the case that some of the judges who delivered opinions in the damages action had also been members of the court which decided the criminal proceedings.

[6] At first instance, the Lord Ordinary (Young), observed (pages 443-444):

> "After the judgment of the Court of Justiciary, it must of course be assumed that [the Justices] decided it erroneously; but having taken part in the judgment of the Court of Justiciary and concurred in it, I must say for myself that I did not and do not regard the judgment of the Justices as of a character to warrant any strong expressions of disapprobation or surprise. I think the judges all felt that it was a novel and important question, and we certainly heard a full argument before deciding it. The expression 'probable cause' is not a happy one to use with respect to an opinion or judgment on a question of law, but using it here to signify that the view of the law which the fiscal maintained and the Justices upheld was not irrational, and was such as reasonable men in their position (or indeed in any position) might excusably entertain and act upon, I cannot hesitate to say that there was probable cause for it. It was certainly unusual, if not unprecedented, to sell spirits within the bare and roofless walls of a burnt-down house, and I cannot say it was unreasonable to take the opinion of the Justices on the question, whether the certificate continued available, notwithstanding of the change on the character of the premises for which it had been granted."

[7] The judges of the Inner House agreed without pronouncing any statements of general principle. The Lord Justice-Clerk (Moncrieff) noted (page 445-446):

> "…In the circumstances set forth by the present pursuer it is clearly impossible for him to prove want of probable cause. The question whether there was probable cause for presenting the complaint was one partly of law, upon the construction of the licensing statutes, and partly of inference from facts, on which persons, whether

> skilled or not, might reasonably differ. I was one of the judges who decided the case in the Court of Justiciary, and I was far from thinking the question one free from doubt…"

To similar effect, Lord Gifford stated (page 448):

> "Now, I agree with your Lordships that, in point of law, the public prosecutor must be held to have had probable cause for raising and insisting in the complaint. The very fact that the inferior court and the court of review took different views affords of itself the strongest presumption that the law was doubtful, and that therefore the prosecutor did not proceed without probable cause. His cause was so probable that he actually succeeded in it before the court of the first instance, and although the court of review, the Court of Justiciary, held that he was wrong in law and quashed the conviction, this does not in the least shew that he had no probable cause to institute the prosecution."

[8] I should also mention the case of *Lightbody* v *Gordon* (1882) 9R 934, in which the defender had reported to the police his suspicion that the pursuer was the person who had cashed a forged cheque at a bank. The pursuer was tried and the charge found not proven. The pursuer then raised an action against the defender for damages for slander. The jury having delivered a verdict in his favour, the court held on a motion for a new trial that there was no evidence of either malice or want of probable cause, and set aside the verdict. In relation to the meaning of malice and want of probable cause in the context of slander, Lord President Inglis observed at page 938:

> "The meaning of these terms has often been explained in the judgments of this Court, and it is needless for me to enter into a lengthened detail on such a matter. But I may say, in a single word, that in order to make out malice in the sense of such an issue as that now before us, it is necessary for the pursuer to prove that in making the statements or giving the information respecting the commission of the crime, the defender acted, not in discharge of his public duty, but from an illegitimate motive; and not only so, the pursuer must also prove that the statements were made or the information given without any reasonable grounds of belief,—in other words, without probable cause."

[9] Neither of these cases appears to have attracted judicial comment. As I have noted, although they are Inner House decisions, the only statement of principle in relation to the meaning of reasonable and probable cause in the context of prosecution was provided by

Lord Young at first instance in *Craig* v *Peebles*. The observations are nevertheless of assistance in identifying the test to be applied to the circumstances of the present case. Senior counsel for the pursuer submitted in the course of the second debate that the view expressed in my judgment above was supported by the opinions expressed in *Craig* v *Peebles*. It seems to me, however, that application of those opinions would indicate that the circumstances in which dismissal of a charge as irrelevant will not imply an absence of reasonable and probable cause are not quite as exceptional as I suggested at paragraph 44 of my earlier opinion. They would appear in particular to support the defender's proposition that dismissal of a charge giving rise to a complex or controversial point of law would not necessarily amount to absence of probable cause: that appears to have been exactly how the court saw the matter in *Craig* v *Peebles*. For the avoidance of doubt, however, I am not to be taken as saying that if the observations in *Craig* v *Peebles* had been drawn to my attention at the first debate, my decision on the facts of the present case would have been different.

The charges in the petition

Charge 1

[10] The charges in the petition were not exactly the same as those that appeared in any of the iterations of the indictment. Charge 1 in the petition was a charge of fraud, as opposed to conspiracy to commit fraud. The pursuer was alleged to have participated in the fraud in two respects, set out in paragraphs (iv) and (vi) of charge 1 as follows:

> "(iv) on 24 April 2011, you DAVID HENRY GRIER and CRAIG THOMAS WHYTE did attend a meeting with the Independent Committee of the board of directors of the Club at which you did pretend that you CRAIG THOMAS WHYTE did have sufficient funds of your own to acquire the controlling shareholding in the Club and to meet the ongoing working capital requirements of the Club and you did thereby induce them to consent to the sale of said controlling shareholding in the Club to Craig Thomas Whyte

…

> (vi) you DAVID HENRY GRIER, PAUL JOHN CLARK and DAVID JOHN WHITEHOUSE did prepare a letter addressed to your client, Craig Whyte dated 7 April 2011, providing advice on matters related to the acquisition of the controlling shareholding in the knowledge that said letter would be produced by Craig Whyte to Ticketus and used to induce Ticketus to release the aftermentioned £18,161,500 to a Collyer Bristow account controlled by Gary Martyn Withey"

Paragraph (iv) has come to be referred to as the Independent Committee charge, and paragraph (vi) as the Letter of Comfort charge, although as already noted both formed part of a single charge of fraud against a number of individuals, including the pursuer.

[11] On behalf of the pursuer, it was submitted that the court should reach the same decision in relation to the petition as was reached in relation to the indictments. Applying the observations in *Craig* v *Peebles* made no difference because the present case was not in difficult or complex territory. It was accepted that a different threshold was applicable at the stage of full committal on petition. That difference related, however, to sufficiency of evidence: at petition stage there was no requirement for corroborated evidence. There was, however, a requirement of a *prima facie* case. The charge against the pursuer had not been dismissed by Lord Bannatyne and on appeal because of lack of sufficiency; it had been dismissed because there was no relevant criminal charge. That had equally been the case at petition stage. Nothing turned on the *nomen juris* of the charge. If the necessary causal link was absent in the charge in the indictment, it was obviously also absent in the charge in the petition.

[12] On behalf of the defender it was submitted that differing considerations applied to paragraphs (iv) and (vi), even though they were parts of a single charge. As regards paragraph (iv) (the Independent Committee charge), which had also appeared in the indictments, the question was whether at the petition stage there was evidence affording a

prima facie case (*Lin* v *HM Advocate* 2014 SLT 173, Lord Justice-General Carloway at paragraph 21, under reference to *Lauchlan* v *HM Advocate* 2010 SCCR 347, Lord Carloway at paragraph 24). The summary of evidence annexed to the petition explained what was seen at that time as the practical result of the representations alleged to have been made by, *inter alia*, the pursuer to the Independent Committee. Paragraph (iv) of charge 1 narrated, incorrectly, that the consent of the Independent Committee was a necessary step for the transaction to proceed. That was a mistake, but at the time it was regarded as providing the link between the pursuer's role and the practical result, ie that the transaction was pursued to completion. Applying the test in *Lin* and *Lauchlan*, there was therefore at that time a *prima facie* case for paragraph (iv). As regards paragraph (vi), which did not find its way into the indictments, the decisions of Lord Bannatyne and of the court afforded no guidance because there was no judicial determination of the relevancy of this part of the charge. At the time of the pursuer's full committal on petition, it had been understood that the provision of a letter of comfort to Ticketus had been essential to the unlocking of Ticketus funds, and had enabled the transfer of those funds to Mr Whyte's solicitors' client account. That too proved to be incorrect: the funds had been transferred before an email containing assurances to Ticketus was sent. But the pursuer's participation in the preparation of the letter, thought at the time to have been a pre-requisite, provided the *prima facie* case for paragraph (vi). In these circumstances, it was submitted, it was relevantly averred by the defender that there had been objective reasonable and probable cause for the pursuer's full committal on petition.

[13] I am concerned at this stage only with the question whether the defender has stated a relevant defence to the pursuer's case that there was no objective reasonable and probable cause for the petitioner's full committal on petition. (I did not understand senior counsel for

the petitioner to disagree that the question of subjective reasonable and probable cause was one for proof before answer.) Despite the attention that was devoted during the second debate, and in my observations above, to *Craig* v *Peebles*, I find it of limited assistance in addressing this particular issue. As was common ground, the test for probable cause is different at petition stage. The relevancy of the Letter of Comfort charge in paragraph (vi) was never the subject of judicial decision and, as the defender submitted under reference to *Coudrat* v *HMRC* [2005] STC 1006, it should not be assumed from the fact that the Crown decided not to include it in the indictment that it was irrelevant. In my view the defence of *prima facie* case based upon the Crown's incorrect understanding at the time of the petition that the pursuer had participated in the sending of a letter which had been essential to the transaction proceeding is relevant for inquiry. As regards the Independent Committee charge in paragraph (iv), the defender's averment that reliance was placed at petition stage on the erroneous view that the consent of the committee was required appears to me to provide a potential distinction from the charge in the indictment that was held by the court to be irrelevant because of the absence of a causal link. In my view, the relevance of the defence to the pursuer's case in relation to both paragraphs in charge 1 will be better decided after inquiry, and I decline the invitation to hold at this stage that there is no relevant defence that there was objective reasonable and probable cause for the inclusion of the pursuer in charge 1 of the petition.

Charge 5

[14] Charge 5 in the petition was a charge of attempting to pervert the course of justice and was in the following terms:

> "(005) On various occasions between 23 October 2012 and 7 November 2012, both dates inclusive, at the premises of Duff and Phelps [address], you DAVID HENRY GRIER did state to Jackie O'Neill, Detective Constable, and James Robertson, Detective Sergeant, respectively then conducting a criminal investigation into the acquisition and management of Glasgow Rangers Football Club PLC by Craig Thomas Whyte, that you had not known that said Craig Thomas Whyte had funded said acquisition of the Club through contracting with Ticketus LLP and Ticketus LLP 2 to sell 3 years' of said Club's season tickets and this you did in the knowledge that you had been aware of said contractual arrangements and this you did with intent to pervert the course of justice and you did attempt to pervert the course of justice"

This charge did not appear in any of the iterations of the indictment.

[15] On behalf of the pursuer, it was submitted that the defender's pleadings disclosed no objective reasonable and probable cause for this charge. In the first place, it was parasitic upon charge 1: if charge 1 contained no relevant charge then there could have been no course of justice to pervert. Secondly, charge 5 misstated the essential elements of a charge of attempting to pervert the course of justice. In *HM Advocate* v *Turner* [2020] HCJ 12, Lord Turnbull held that the crime could not be committed by an accused merely by stating his defence, regardless of whether that statement was false. There had to be conduct in the nature of a positive effort to disrupt or frustrate a criminal enquiry.

[16] On behalf of the defender, it was observed that the relevancy of charge 5 had not been the subject of a judicial determination. It was not the case that a charge of attempting to pervert the course of justice necessarily fell with a principal charge: see eg *Hanley* v *HM Advocate* 2018 JC 169. As was obvious, Lord Turnbull's decision in *Turner* post-dated the circumstances of the present case. There were a number of earlier authorities which indicated that stating a false defence (such as alibi or incrimination) to the police did constitute the crime of attempting to pervert the course of justice. If necessary it would be contended that *Turner* had been wrongly decided.

[17] In my opinion it cannot be decided at this stage that there was no objective reasonable and probable cause for charge 5. It did not necessarily stand or fall with charge 1. Its relevance was not put to the test in the criminal proceedings against the pursuer and so *Craig* v *Peebles* is not directly in point. Lord Turnbull's decision in *Turner* post-dated the circumstances of this case. Arguments about the scope of the crime of attempting to pervert the course of justice, including any argument about the correctness of the decision in *Turner*, will be more appropriately heard as part of the inquiry into the facts.

Disposal

[18] For these reasons, I make no further order at this time. Questions of expenses are reserved.