SHERIFF APPEAL COURT

[2018] SAC (Crim) 8
SAC/2018-000107/AP

Sheriff Principal M M Stephen QC
Sheriff Principal C D Turnbull
Sheriff N A Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in appeal by

BILL OF SUSPENSION

by

JAMES MULLEN

Complainer;

against

PROCURATOR FISCAL, INVERNESS

Respondent:

Complainer: Hay, Advocate, Bruce McCormack, Solicitors
Respondent: McSporran QC, AD; Crown Agent

6 June 2018

[1] The complainer was charged at the instance of the respondent with driving a van in King Street, Nairn on 15 March 2017 when using a hand held interactive communication

device, namely a mobile phone as a sat nav, contrary to the Road Vehicles (Construction and Use) Regulations 1986, Reg 110(1)(b) and the Road Traffic Act 1988 section 41D(b).

[2] The complainer was tried and convicted of the charge at Inverness Justice of the Peace court on 5 December 2017. The Justice imposed a fine of £300 and six penalty points.

[3] The complainer appeals his conviction by Bill of Suspension in which he raises a number of matters relating to the Justice's conduct which, it is alleged, prevented him receiving a fair trial. At the appeal hearing the only ground advanced on behalf of the complainer was that the Justice lacked impartiality. The offence was proved on the evidence of two police officers who were on duty at the locus. One officer made an entry in his pocket book at the time and the other some days later. Both recorded the complainer's name accurately as James Mullen. However, in a subsequent disclosure statement the complainer's first name is given incorrectly as 'Steven' and that error is replicated in the statement of each officer. The defence agent cross examined the officers about this anomaly with the purpose of establishing that the officers had colluded with each other to present false evidence to the court. It was suggested that the second police officer (Sergeant Murray) had not observed the complainer with a hand-held device but had simply copied his colleague's notebook, indicative of collusion. The complainer's position as presented to us was to the effect that the Justice of the Peace brought the defence agent's cross examination of Sergeant Murray to a premature end with the comment that she found the police officers to be credible and reliable. In so doing, it was argued, she disclosed bias. The comment indicated that the Justice had already made up her mind as to credibility and reliability at that stage and before the complainer gave evidence. In these circumstances the complainer could no longer receive a fair trial.

[4] Counsel for the complainer addressed us on the test for bias and referred to three authorities *Bradford* v *McLeod* [1986] SLT 244; *Chaudhry* v *PF Hamilton* [2017] SAC (Crim) 5 and *Hogg* v *Normand* [1992] SLT 736. We were reminded of the Lord Justice Clerk's *dicta* in *Bradford* emphasising the importance of justice not only being done but being seen to be done. The fair minded and informed observer in these circumstances would conclude that there was a real possibility that the tribunal was biased. It was not necessary for the complainer to show actual unfairness:- "If the circumstances complained of are such as to create in the mind of a reasonable man a suspicion that justice is not impartial a conviction cannot stand" (*Hogg* v *Normand supra* at page 737). The Bill should be passed and the complainer's conviction, together with the sentence which followed, quashed.

[5] The advocate depute acknowledged that it is for this court to determine the question whether the Justice was biased or lacked impartiality. Nevertheless, the respondent did not intend opposing the Bill. It was the recollection of the respondent's depute in court on 5 December 2017 that the Justice stated that she found Sergeant Murray credible as regards his explanation for the error in his disclosure statement and his evidence that he had not simply copied his colleague's statement. It was also the depute's recollection that the legal advisor had interjected with words to the effect that 'credibility would, of course, not be determined until all the evidence had been heard'.

[6] The principle on which this appeal proceeds is that Article 6 of the ECHR requires the courts to show both objective and subjective impartiality which has for long been recognised as an essential feature of the right to a fair trial under Scots Law. The issue we have to decide is whether the remarks made by the Justice of the Peace at the close of the defence agent's cross-examination of Sergeant Murray can be said to give rise to the appearance of a lack of impartiality standing the accused's right to a fair trial by an impartial

tribunal. The test set out in *Bradford* v *McLeod* (*supra*) and referred to in *Hogg* v *Norman* has now been refined in *Porter* v *Magill* [2001] UKHL 67. The test set out in *Porter* v *Magill* was applied by the Supreme Court in a Scottish criminal appeal *O'Neill & Another* v *HMA* [2013] UKSC 36. The test is "*whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*".

[7] As we are concerned with the Justice's conduct of the trial and her remarks it is proper that we look at the context in which the remarks were made at the trial. The Justice has prepared a report on the conduct of the trial and the grounds of appeal. The Justice's recollection of what she said when bringing the cross-examination of Sergeant Murray to a close may be seen in paragraph 11 of her report which is in the following terms:

> "11. In the course of proceedings I did observe that I thought the explanations given by the witnesses regarding anomalies between the notebooks and statements to be plausible but I had not formed, and did not express, a concluded view as to their credibility and reliability in general."

The complainer takes issue with what the Justice records in this paragraph. Counsel for the complainer indicated that the complainer and his agent were clear that the Justice indicated that the police officers were credible and reliable and that the defence should move on. Otherwise, the complainer did not challenge either the Justice's narration of the evidence led at trial or her report of the conduct of the trial. The advocate depute accepted what the Justice says in her report about the conduct of the trial and confirmed that the respondent's depute had never seen a trial conducted by the defence in such a manner before, that being a reference to the Justice's remarks at the conclusion of her report (para 14) to which we will return. Accordingly, as it is necessary to understand what the fair minded and informed observer would know about the trial ("the facts") before determining what conclusion he or

she might reach we must consider the nature of the evidence and the conduct of the trial as reported on by the Justice.

[8] The evidence in the trial comprised the crown witnesses, being the two police officers, and the complainer who gave evidence in his own defence. It appears that the trial began soon after midday and the first police officer gave evidence before the lunch adjournment. He was examined in chief and cross-examined. In cross-examination the defence agent put the defence case to the officer namely that the complainer had been looking at a sat nav 'Tom Tom' device mounted on a bracket and not a mobile phone. When the witness did not accept the defence case it appears that cross-examination developed into alternative propositions that the witness was either mistaken or lying. The Justice observes in her report that the defence solicitor's demeanour became more bellicose as his cross-examination went on. The second crown witness, Sergeant Murray, gave evidence in chief after the lunch adjournment and was cross-examined firstly as to what he had seen the complainer do whilst driving on 15 March 2017. The witness rejected the possibility that the complainer was using a 'Tom Tom' sat nav device rather than a mobile phone. Cross-examination continued for three quarters of an hour. It was repeatedly put to the officer that he had colluded with his colleague to fabricate evidence against the complainer and had given false evidence to the court. The witness refuted these suggestions, explaining that the anomaly relating to the complainer's name was an innocent mistake arising from a typographical error in producing the disclosure statement. This passage of cross-examination is the critical context to the remarks attributed to the Justice and it is therefore of some importance that we set out that part of the Justice's report which led to the conclusion of cross-examination (para 10) and this is as follows:

> "Mr McGeechan proceeded to put the same position repeatedly to the witness in a progressively more aggressive manner accusing him of lying and collusion. The witness repeatedly denied those accusations. After allowing Mr McGeechan considerable latitude in putting his position to the witness I thought that he was simply badgering the witness in an unacceptably aggressive manner and I directed him to move on to any other aspect of the witness's evidence upon which he wished to cross-examine. The witness was excused at 15.30".

It appears to be around this stage in the trial that the Justice made the remarks now complained of. The complainer then gave evidence in his defence to the effect that the device which the police officers noticed was a 'Tom Tom' sat nav not a mobile phone. The sat nav had fallen into the foot well and he had picked it up. The officers were mistaken. At the conclusion of the evidence and submissions the Justice found the crown witnesses credible and reliable. She did not accept the complainer's account that he had the 'Tom Tom' device in his hand whilst driving the van. The Justice gives reasons for rejecting the complainer's evidence namely that he had given his evidence in a trite and flippant manner; and he gave a description of the road layout which the Justice could not recognise or understand. These are two of the reasons which the Justice gives for rejecting the complainer's evidence.

[9] Further colour on the conduct of the trial is given by the Justice at the conclusion of her report. She reports:

> "14. I found this trial extremely difficult to deal with due to Mr McGeechan's persistently aggressive, disruptive and disrespectful behaviour. I found myself having to intervene frequently and when I did I was met with

> insolence. I refute Mr McGeechan's assertion that the complainer did not receive a fair trial. I allowed him wide latitude to present his defence as he wished but I have a duty also to allow the crown to present their case fairly and to maintain orderly conduct in court."

This is, accordingly, the context or prism through which our fair minded observer will be informed as to both the conduct of the trial and the facts.

[10] We do not consider it is necessary to resolve the apparent conflict about what the Justice said at the conclusion of cross-examination of Sergeant Murray. Although it is contended by the complainer that the Justice mentioned the words 'credible and reliable' it appears that the recollection, and it is only recollection not record, of the respondent's depute is that the Justice mentioned credible (with no mention of reliable). It appears to us that plausible and credible in their ordinary sense, are synonyms or near synonyms. Credible, of course, has a technical and an ordinary meaning. The technical or legal meaning in the context of a criminal trial refers to the judge's important function in assessing and evaluating the oral evidence of witnesses to determine issues of primary fact. However, in their ordinary sense, plausible and credible mean that the individual is capable of being believed although plausible may carry with it the suggestion of a mere appearance of being acceptable or trustworthy.

[11] By the stage the remarks are made, whatever they may be, the fair minded observer would know that the defence had been conducted in a confrontational and unpleasant manner. What the Justice describes is repetitive, aggressive and ultimately futile and unproductive questioning. Cross-examination moved on from putting the defence case to cross-examination as to the credit or honesty of the witness on matters which were strictly not germane to the issue of the mobile phone, in an effort to show that the police officers

had acted dishonestly. The proposition was that if the police officers had been dishonest in one matter, namely the preparation of their statements, they were therefore likely to be lying about the critical issue of the mobile phone which the court had to determine. *Falsus in uno, falsus in omnibus.* We consider that the Justice's use of the expression plausible or credible is explicable in the context of what preceded it, namely, the prolonged and unproductive cross-examination of a police officer who was repeatedly accused of lying. In mentioning the explanation given for the error in the complainer's name the Justice does no more than indicate that the police officer's explanation for the entry in the disclosure statements is potentially exculpatory. In our view, it does not indicate that the Justice was expressing a view about the Crown evidence overall but was simply attempting to bring to an end a lengthy, unjustified and apparently abusive line of questioning. In these circumstances, we are not persuaded that the Justice, who is not a professional judge, by her words would lead the fair minded and informed observer to conclude that there was actual bias or the real possibility of bias. Accordingly, we decline to pass the bill.