APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 37
HCA/2019/000575/XC

Lord Brodie
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD BRODIE

in

BILL OF ADVOCATION

for

ROSS PATRICK

Complainer

against

HER MAJESTY'S ADVOCATE

Respondent

Complainer: M Jackson QC, Harvey; John Pryde & Co
Respondent: Edwards QC AD; Crown Agent

17 January 2020

Introduction

[1] The complainer appeals by way of Bill of Advocation the decision by Lord Beckett on 3 October 2019 at the High Court in Glasgow to desert the indictment against the complainer *pro loco et tempore*, with a view to the Crown immediately serving a new indictment with a preliminary hearing for 4 November 2019. The decision to desert and the consequential

extensions of time limits were made at what was minuted as a continued hearing on examination of facts, as is provided for by section 55 of the Criminal Procedure (Scotland) Act 1995. In acting as he did, Lord Beckett relied on the terms of section 56(5) of the 1995 which provides:

> "(5) The court may, on the motion of the prosecutor and after hearing the accused, at any time desert the examination of facts *pro loco et tempore* as respects either the whole indictment or, as the case may be, complaint or any charge therein"

[2] On deserting the examination of the facts *pro loco et tempore* as respects the indictment, Lord Beckett remanded the complainer, who had previously been admitted to bail, in custody.

[3] The procedure which preceded the decision was as follows.

Procedural history

[4] The complainer was indicted to a preliminary hearing on 5 December 2018 on an indictment which included seven charges, two of which libelled rape. Following the discharge of that and three subsequent preliminary hearings, the complainer appeared at a preliminary hearing on 11 April 2019 when a minute raising a plea in bar of trial was lodged on behalf of the complainer averring that he was unfit for trial in terms of section 53F of the 1995 Act due to mental impairment. The preliminary hearing was accordingly continued to 10 June 2019 as an evidential hearing in respect of the preliminary plea. Evidence as to fitness for trial was led on behalf of the complainer and the respondent before Lord Boyd on 10 and 11 June 2019. On 14 June 2019 Lord Boyd heard submissions from the parties and, having done so, determined that he was satisfied, having regard to the medical reports tendered and evidence led, that the complainer was unfit to stand trial in terms of section 53F of the 1995 Act due to the nature and extent of his medical condition which

would prohibit his effective participation in a trial. Lord Boyd further ordered, in terms of section 54(1)(b) of the Act, that a diet be held under section 55 for an examination of facts. On 18 June 2019 the complainer was admitted to bail.

[5] The examination of facts was heard on 6 and 7 August 2019 before Lord Beckett. At the conclusion of the evidence the advocate depute moved and was granted authority to make certain amendments to the indictment and withdrew the libel in respect of charge (004). Lord Beckett acquitted the complainer of that charge in accordance with section 95 of the Act. Having considered the evidence and being satisfied beyond reasonable doubt, Lord Beckett found that the complainer had committed the offences libelled in the remaining charges and that there were no grounds for acquitting him. Lord Beckett continued the diet to 28 August 2019 for the appropriate disposal to be made.

[6] On 28 August 2019 the reports which had been called for were not available and the diet was further continued until 12 September 2019. On 12 September, a report dated 8 September 2019 from Dr Chandima Perera, a Consultant Psychiatrist in Learning Disability addressed the issue of disposal and recommended the making of a compulsion order with a further recommendation that the complainer:

> "…be referred to a Forensic Learning Disability Inpatient Psychiatrist from the Local Health Board to determine the level of inpatient security required to manage Mr Patrick safely."

A second report was produced from Dr Alina Kopric, Consultant Learning Difficulty Psychiatrist. Dr Kopric apparently had misunderstood the instruction and instead of offering a view on disposal, her report dealt with the issue of fitness to stand trial. Dr Kopric considered the condition of the complainer against the criteria contained in section 53F and concluded that he met the criteria for diagnosis of mild learning disability but did not demonstrate evidence of any other mental health illness. She concluded that

despite his mild learning disability, he demonstrated good understanding of trial proceedings and the role of those involved and that he was fit to stand trial. She made recommendations as to appropriate adjustments to assist him to participate effectively in a trial. She did not address the question of disposal under section 57(2). The advocate depute proposed a further continuation in which the Crown would investigate both disposal and fitness. In the light of the information before him Lord Beckett further continued the diet until 3 October 2019 in order that the necessary second psychiatric report addressing the issue of disposal might be instructed and prepared. Counsel for the complainer advised that he had become aware that the complainer had a history of involvement with a psychiatrist, Dr Marjorie Macfie, and that consideration would be given to obtaining a report from her. The advocate depute and counsel for the respondent indicated that they would liaise in order to ensure that an appropriate report on disposal was before the court on 3 October.

[7] On 3 October no report was produced from Dr Macfie. However, the respondent produced a supplementary report from Dr Perera, dated 26 September 2019, expressing the conclusion that the complainer was fit for trial. The respondent also produced a report from a Dr Rona Gow, Consultant Forensic Psychiatrist, dated 1 October 2019 concluding that the complainer was fit for trial.

[8] Against that background, on 3 October the advocate depute moved to desert the indictment in respect of the examination of facts *pro loco et tempore* under section 56(5) of the Act with a view to recommencing proceedings on a new indictment under section 56(6)(a) with a preliminary hearing fixed for 4 November 2019.

[9] The Crown's motion was opposed by counsel for the complainer. He submitted that if the Crown had wanted to adduce psychiatric evidence they ought to have done so at the hearing before Lord Boyd. The effect of the motion to desert being granted would be to

circumvent the finding made by Lord Boyd that the complainer was unfit for trial. It would be wrong to do so. The complainer had a learning disability and nothing about his condition had changed since it had been considered by Lord Boyd. Counsel accepted that if a person had a fluctuating psychiatric illness then it might be appropriate to proceed under section 56(6). He also accepted that it had been held in *Stewart* v *HM Advocate (No 2)* 1997 JC 217 that it was open to an accused, served with a second indictment in relation to a particular matter, to submit a plea of insanity in bar of trial at a preliminary diet notwithstanding the fact that the same plea had been unsuccessful in respect of the previous indictment. However, counsel submitted that in the present case it was simply unfair to the complainer to desert *pro loco et tempore*. He had already spent a considerable period on remand.

Lord Beckett's reasoning

[10] In his report to this court Lord Beckett explains that he accepted that the situation in the present case appeared to be different from that in *Stewart*. However, nothing in the court's reasoning in that case suggested to Lord Beckett that it would be wrong to desert under section 56 simply because the complainer had a mild learning disability rather than a potentially fluctuating psychiatric illness. Indeed it appeared from *Stewart* that alterations in the available clinical insights into an accused's fitness to stand trial might lead to a different decision being taken in relation to a second indictment than that which had been taken in respect of a first indictment, irrespective of the precise nature of an accused's disabilities.

[11] In Lord Beckett's opinion, it was to be kept in view that the court was simply being asked to desert *pro loco et tempore* and to permit a new indictment to be raised. He would not be making any decision as to the fitness of the complainer for trial on the new indictment.

That was an issue which the complainer would be entitled to raise at the preliminary hearing on 4 November 2019. It was significant that the court had before it three reports from psychiatrists, of whom at least two had a speciality in psychiatry associated with learning difficulties. Each of those clinicians had met with the complainer and reviewed his case and considered that he was fit to stand trial. The court did not have sufficient information to make a compulsion order, as counsel for the complainer recognised, albeit that the course that he would have favoured by this stage was for the court to make no order. Counsel had not asked Lord Beckett to continue for a further report to be obtained and counsel had not himself furnished any report.

[12] In Lord Beckett's opinion, the statute comprehended situations such as the one before him. Whilst the motion came at a late stage after the facts had been determined, it was nevertheless competent to desert *pro loco et tempore* at a stage when the court had not made an order under section 57(2) and had not determined to make no order under section 57(2)(e). The reason the motion was made by the Crown arose out of more information having become available, albeit by chance, in the course of consideration of the question of disposal. Lord Beckett had heard evidence at the examination of facts which suggested that at least in some respects the complainer functioned quite effectively. Three psychiatrists had expressed the view that the complainer was fit for trial. Lord Beckett did not have a basis to make any of the orders available under section 57; if he refused the motion to desert he would have been compelled to make no order. He considered that the interests of justice and the whole circumstances of the case favoured his deserting *pro loco et tempore* which he accordingly did.

The Bill of Advocation and the supporting note of argument

[13] In his Bill of Advocation the complainer avers, *inter alia*:

> "that the motion to desert the examination of facts had the effect of circumventing the Hon Lord Boyd's finding of 14 June 2019, namely that the complainer was not intellectually capable of participating in any trial process. The condition from which he suffers had not changed and had certainly not improved in the time following the finding of 14 June 2019. The Crown had elected not to lead any more evidence than they did. They had chosen to rely on the evidence of a consultant forensic psychologist. The Crown elected not to lead psychiatric evidence. Following the Hon Lord Boyd's finding, they elected not to appeal and proceeded to the examination of facts. The opinion of those psychiatrists relied upon by the Crown suggesting that he was indeed fit to stand trial could have been ventilated at the relevant proof."

When granting warrant for service of the Bill the administrative judge noted that a question might arise as to the competence of deserting an examination of facts after the relevant findings had been made.

[14] Prior to the hearing before this court the complainer lodged a written note of argument supplementing what appears in the Bill and adopting and developing the suggestion which had been made by the administrative judge. The argument set out in the note can be summarised as follows.

[15] There had been a three-day hearing before Lord Boyd after which he had found the complainer to be unfit for trial. This was a finding that Lord Boyd had been fully entitled to make on the evidence that he had heard. The Crown had not appealed that finding although it had been open for it to do so. The complainer's condition of impaired cognitive functioning is not one that will change. The effect of Lord Beckett's decision was to circumvent Lord Boyd's finding, not because of any change of circumstances but simply because of different experts considering the issue and coming to a different conclusion. This cannot have been contemplated by the relevant provisions of the statute as an appropriate course to take. The statute provides for distinct stages in the procedure. The examination of

facts is not a means by which the earlier determination of fitness for trial may be set aside when there has been no change of circumstances. It is not in the interests of justice to treat a finding of unfitness to stand trial as provisional or contingent. To do so would be contrary to the principle of finality. The power to desert *pro loco et tempore* is discretionary. Lord Beckett exercised his discretion erroneously.

[16] Moreover, the administrative judge had been correct to express concern; desertion at an examination of facts after the court has made a finding in terms of section 55(2) is incompetent. An examination of facts is the equivalent of a trial. Once a finding is made, the "trial phase" has finished. The court has moved to a different stage in the proceedings: the disposal of the case in terms of section 57. Consideration of the terms of sections 55(1) and 57(1)(b) demonstrated that the statute envisaged that the examination of facts is concluded once the evidence is led and the court has made findings on them. It followed that any purported desertion *pro loco et tempore* which takes place after the court has made a finding is incompetent. The express statutory power conferred by section 56(5) supersedes any common law power that might otherwise exist. This is consistent with the rules that would apply in a trial: a prosecutor may not make a motion for desertion *pro loco et tempore* after the Crown has closed its case (see *Parracho* v *HM Advocate* 2011 SLT 600, also Renton & Brown *Criminal Procedure* paras 9-08 to 9.12.1 and 18-21 to 18.23). In his report Lord Beckett had referred to section 55(7) but the powers within that subsection are caveated by reference to section 55(6) to the rules, procedures and power applicable in respect of a trial; and by the ordinary meaning of section 55(1) and section 57(1)(b).

[17] It was plain from the reports received by Lord Beckett that no hospital or other order could competently be made. Accordingly he should have made no further order.

Oral submissions

[18] Mr Matt Jackson QC appeared for the complainer. He adopted his written note of argument but in the course of developing his submissions they became more focused. He came to concede that it had been competent for Lord Beckett to desert the examination of facts *pro loco et tempore* on the prosecutor's motion, in terms of section 56(5) of the 1995 Act. However he submitted that Lord Beckett's exercise of the discretion conferred by section 56(5), with the consequence that the Lord Advocate could raise a new indictment as provided by section 56(6), had been irrational in that there had been no change of circumstances since Lord Boyd's finding that the complainer was unfit to stand trial. Desertion *pro loco et tempore* is an established and useful procedural disposal but it is a course to be followed only in exceptional circumstances (see *Parracho* v *HM Advocate supra* at para [9]). It was desirable that the court should achieve finality (see *McAnea* v *HM Advocate* 2000 JC 641 at paras [14] and [15]).

[19] The motion of the advocate depute, on behalf of the respondent, was to refuse the Bill. She took the court through a brief chronology of the case under reference to the relevant provisions of the 1995 Act. Lord Beckett had made a finding, in terms of section 55(2), that he was satisfied beyond reasonable doubt that the complainer had done the acts constituting the offences which were before the court and that, on the balance of probabilities there were no grounds for acquitting the complainer. That did not conclude the examination of facts. In terms of section 55(7)(a) an examination of facts commences when the indictment is called and concludes when the court does one of the three things set out at section 55(7)(b): (i) acquits the person before it; (ii) makes an order under section 57(2); or (iii) decides not to make an order. Lord Beckett had not done any of these things when he deserted the examination of facts, which section 56(5) gave him power to do

"at any time" On that desertion the Lord Advocate was empowered to raise a new indictment by virtue of section 56(6). There was no question of the complainer having tholed his assize. As section 56(7) makes clear, even where, following a finding in terms of 55(2), an order is made in terms section 57(2), a further indictment may be served, in which case any order made under section 57(2) will cease to have effect. Thus, as Mr Jackson had conceded, what Lord Beckett had done was competent. It was also entirely reasonable in all the circumstances.

Decision

[20] Mr Jackson was correct to concede that Lord Beckett had the power to do what he did. As we have already observed, section 56(5) provides:

> "(5) The court may, on the motion of the prosecutor and after hearing the accused, at any time desert the examination of facts *pro loco et tempore* as respects either the whole indictment or, as the case may be, complaint or any charge therein"

On the court deserting *pro loco et tempore*, section 56(6) specifically provides that the Lord Advocate may raise and insist in a new indictment. The section 56(5) power may be exercised "at any time" but that must mean at any time during the subsistence of the examination of facts; otherwise there would be no examination of facts to desert. We take it that that was the point that concerned the administrative judge: Lord Beckett had made his findings in terms of section 55(2) that he was satisfied that the complainer had done what was alleged in the outstanding charges in the indictment and that there were no grounds for acquitting him; the function of the examination of facts had therefore been exhausted. Essentially that was the position taken on behalf of the complainer in his note of argument; by the time Lord Beckett acceded to the Crown motion to desert, the court has moved on to a different stage in the proceedings, namely disposal in terms of section 57.

[21] As Mr Jackson recognised, that position does not survive scrutiny when one has regard to the associated provisions of the Act. Section 55(7) provides that the examination of facts is only concluded when the court acquits the person before it, or makes an order for disposal or decides to make no order. Lord Beckett did not do any of these things. Thus, the examination of facts still subsisted when he exercised the power to desert conferred by section 56(5). The note of argument sought to contend that section 56(5) was qualified (or "caveated") by section 55(6), and that by analogy with what would be the position at trial where once an accused has been convicted, it is no longer competent for the Crown to move to desert, once a finding has been made in terms of section 55(1) that the person has done the act constituting the offence and that there are no grounds for acquitting him, it is too late for the Crown to move to desert the examination of facts. It occurs to us that the position at trial might be a little more complicated than that but be that as it may; section 55(6) cannot have the effect attributed to it in the note of argument. The subsection is in these terms:

> "(6) Subject to the provisions of this section, section 56 of this Act and any Act of Adjournal the rules of evidence and procedure and the powers of the court shall, in respect of an examination of facts, be as nearly as possible those applicable in respect of a trial."

Thus, while the procedure and powers of the court in respect of an examination of facts shall be as nearly as possible those applicable in respect of a trial, that is subject, *inter alia*, to section 56, and therefore the express power to desert the examination of facts conferred by section 56(5). On this matter drawing an analogy with what might be the position at trial is simply not to the point.

[22] Lord Beckett therefore had power to desert. We do not accept that it was unreasonable for him to exercise that power in the circumstances with which he was presented on 3 October 2019.

[23] It is true that Lord Beckett was motivated by a concern that the complainer might be fit to stand trial whereas Lord Boyd, after a hearing of evidence directed at that very issue, had recently determined that the complainer was unfit for trial. However, Lord Beckett's concern was informed by reports from three psychiatrists, two of whom were specialists in the area of learning disability, to the effect that the complainer, who had been indicted on serious charges, was fit for trial. Mr Jackson asserted that, in contrast to what might be the case with other conditions bearing on a person's fitness for trial, the complainer's learning disability was not a condition that is susceptible to change. That may or may not be so, but that is not to say that the complainer's condition is not open to different interpretations or different understandings, regard always having to be had to what adjustments to the process might be available with a view to facilitating a fair trial. In his report Lord Beckett drew attention to what had been said by the Lord Justice Clerk (Cullen) in *Stewart* at 220I to 221A:

> "….that from time to time there may be alterations not merely in condition of an accused *but also in the extent to which insights into his fitness to stand trial are obtained*. These matters, which bear on the question of whether the accused can receive a fair trial, provide support for the view which we have taken of the legislation." [emphasis added]

[24] Moreover, at the point when Lord Beckett made his decision he did not have sufficient material to make an order in terms of section 57(2). As he observed in his report, the statute does not provide for a procedure whereby the court can ensure it has the information necessary for it to make an order. While counsel might have hoped to persuade him that in these circumstances he should make no order (a course which could not be avoided in the absence of power to desert or power to continue), that does not appear to us to be a satisfactory way of proceeding when its implications are not capable of full consideration.

[25] It is important to keep in mind, as Lord Beckett did, that nothing in his decision prejudiced the status of the complainer or further consideration of what would be a fair way of proceeding having regard to the various relevant interests. Lord Beckett did not determine that the complainer was fit for trial. That is an issue which can be considered under reference to an appropriate plea in response to the new indictment. In any event a finding of unfitness for trial, such as was made by Lord Boyd, followed by a finding in terms of section 55(2), such as was made by Lord Beckett, does not mean that the person in respect of whom these findings are made has tholed his assize, even once an order for disposal is made in terms of section 57(2). The matter is made clear by section 56(7) and (8) which provide:

> "(7) If, in a case where a court has made a finding under subsection (2) of section 55 of this Act, a person is subsequently charged, whether on indictment or on a complaint, with an offence arising out of the same act or omission as is referred to in subsection (1) of that section, any order made under section 57(2) of this Act shall, with effect from the commencement of the later proceedings, cease to have effect.
>
> (8) For the purposes of subsection (7) above, the later proceedings are commenced when the indictment …is served."

Thus, had Lord Beckett made no order when faced with the circumstances before him on 3 October 2019 it would have been open to the Crown, on reconsidering matters on the basis of the three psychiatric reports, to re-indict. On one view Lord Beckett's decision was of no real consequence. That said, it appears to us that it was a pragmatic and practical response which had the result of moving matters forward towards an expeditious and just resolution of the case.

[26] The Bill is accordingly refused.