

R -v- ATKINSON & OTHERS

OPINION

238326

Generally

1. There are three potential principal witnesses in this case - Tracey Clarke, Andrea McKee and Michael McKee.
2. Tracey Clarke is the most important in view of the significant direct nature of her evidence. She makes the specific case that some days after the relevant events she spoke to Allister Hanvey who told her that Atkinson had been very good to him, had phoned him on the Sunday morning (27th April) at about 8.00 a.m. and told him to get rid of the clothes he had been wearing on the previous night and, since then, had telephoned him every day to keep him up to date with police investigations.
3. Andrea McKee can prove, inter alia (i) that she heard her husband on the telephone to Atkinson telling Atkinson that Tracey Clarke had told them (the McKees) that Allister Hanvey had told her (Clarke) that Atkinson had telephoned his (Hanvey's) house and told him (Hanvey) to get rid of his clothes; (ii) that, subsequently, she and Michael visited Atkinson's house where, in the presence of Eleanor Atkinson, Robert Atkinson told them the concocted story which they were to tell to cover the telephone call from the Atkinson house to Hanvey's on the morning of 27th April; (iii) that, contrary to earlier assertions by several parties, she and her husband did not stay at the Atkinsons' house on the night of 26/27 April; (iv) that, accordingly, her husband did not make any telephone call to the Hanvey house on the balance of probabilities he morning of 27th; and (v) the general detail of the association between the relevant persons involved.
4. Michael McKee could prove that he did not stay at the Atkinson house during the relevant night, did not make the telephone conversation to the Hanvey house, and, having attended the McKee/Atkinson meeting, told the concocted story.
5. In my view the prosecution in this case should focus on the telephone call on the morning of 27th April and the evidence of the movements of, and clothing worn by, Allister Hanvey at the material time during the events of the early hours of 27th April.
6. Tracy Clarke is unwilling to give evidence. She has been in a relationship with Allister Hanvey and has had a child to him. If called she will be a hostile witness. She has not resiled from the truth of her statement, but her feelings for Hanvey lie at the root of her refusal to testify. It is of significance that she refused to testify against Hanvey at a time when he was charged with the murder of Hamill. It clearly would be inconsistent with

that earlier decision now to compel her to give evidence in what is a less serious set of circumstances.

7. Michael McKee has refused to make any further statement or to testify in the present case. He is also likely to be a hostile witness.

Charges

8. The evidence, if accepted, of Andrea McKee is capable of implicating -
 - (a) Robert and Eleanor Atkinson: each in an offence of conspiracy to pervert the course of public justice, arising out of the meeting of the McKees with Robert and Eleanor Atkinson in the home of the Atkinsons.
 - (b) Robert and Eleanor Atkinson: each in an offence of doing an act tending or intended to pervert the course of public justice, by giving false information about the identity of the person who made the telephone call.
 - (c) Kenneth Hanvey: for an offence of doing an act tending or intended to pervert the course of public justice, by giving false information about the identity of the person who made the telephone to his house which he claims to have answered.
9. The evidence of persons present at the scene of the incident and persons in the presence of Allister Hanvey for the remainder of the night, if accepted, is capable of implicating -
 - (a) Thomas Hanvey: for an offence of doing an act tending or intended to pervert the course of public justice, by giving false information about the movements and clothing of Allister Hanvey.
 - (b) Allister Hanvey: for an offence of doing an act tending or intended to pervert the course of public justice, by giving false information about his movements in the early hours of 27th April and the clothing he was wearing at the relevant time.
10. As presently advised I do not see the basis for a prosecution of Elizabeth Hanvey. I have looked at the Message Form (given the identification mark MI 5) which is the contemporaneous account of the interview of her and her husband on 15th November 1997 by D/I Irwin. The information which was given to D/I Irwin and recorded on the form clearly, on the face of the document, came from Kenneth Hanvey. There is nothing on the face of that document to suggest that Elizabeth Hanvey said anything in relation to the 27th April telephone call. R v Headley [1995] Crim. LR 737 establishes that there must be some positive act on the part of an accused person to amount to the offence of 'doing and act'. No such act appears on the face of the document. Her apparent silence would not justify a prosecution for conspiracy in my opinion. In the circumstances I do not recommend any prosecution of her.

Defence application to stay proceedings

11. It seems to me that the defence may seek to stop the prosecution on one, or other, or both, of two bases - that the continuation of the proceedings amounts to an abuse of the process of the court and/or Article 6 (of the Convention) delay.

Delay

12. Prior to the implementation (in October 2000) of the Human Rights Act 1998 the law in relation to the staying of criminal proceedings on the ground of delay causing an abuse of process was governed by cases such as R v Telford Justices, ex p Badham [1991] 2 QB 78 and A-G's Ref (No. 1 of 1990) [1992] QB 630 and, in this jurisdiction, by Re DPP for NI's Application for Judicial Review [1999] NI 106. From those authorities the position, prior to the implementation of the Act, was that there were two categories of cases of abuse of process - (i) those where delay or some factor such as manipulation of the prosecution process would or might lead to unfairness in the trial process and (ii) those where, even though the defendant could receive a fair trial, by reason of some previous matter, it would be an abuse of the process to put him on trial at all. In addition, the courts had indicated that the jurisdiction to stay proceedings should be exercised very carefully and only for very compelling reasons. Any possible prejudice depended on the nature and strength of the evidence. The discretion to stay proceedings was not a disciplinary jurisdiction and ought not to be used to express the court's disapproval of official conduct.
13. Those decisions require to be viewed in the context of the introduction of the 1998 Act. From October 2000 the Convention became a part of domestic law.
14. Article 6 provides (in its entirety)
 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
 3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) 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;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

15. In criminal cases, the reasonable time guarantee runs from the date of charge until the final determination of the case, including any appeal. A person is subject to a 'charge' within the meaning of Article 6 when he is "officially notified" of the allegation or from the date when he is "substantially affected" by the proceedings - Deweert v Belgium (1980) 2 EHRR 439 (paragraph 46); Eckle v Germany (1982) 5 EHRR 1 (paragraph 73). In the case of Howarth v UK (1982) 5 EHRR 1 the European Court stated that time began to run from the first interview of the suspect.
16. The issue of Article 6 delay was considered by the Court of Appeal in England in A-G's Reference No. 2 of 2001 reported at [2001] EWCA Crim 1568. It was held (paragraph 10) that, ordinarily time will begin to run for such purposes when the Defendant is either charged or is served with a summons. In paragraph 11 the court recognised that there may be circumstances when a broader approach is required to be adopted in order to give full effects to a Defendant's Article 6 rights. The court did not appear to refer to the case of Howarth.
17. The issue of the Article 6 guarantee was most recently considered in the House of Lords in the case of Magill v Porter [2001] UKHL 67, particularly in the speech of Lord Hope beginning at paragraph 106. From that speech it is clear that the right in Article 6 to a determination within a reasonable time "is an independent right, and that it is to be distinguished from the article 6(1) right to a fair trial" - paragraph 108. The apparent conflict between the Privy Council's observations in Darmalingum v The State and Flowers v The Queen has been resolved in favour of the views in Darmalingum.
18. It may well be, therefore, that the approach of the Court of Appeal in A-G's Reference No. 2 of 2001 is not in accordance with the Convention nor in line with the decision in the Porter case.
19. In A-G's Reference No. 2 of 2001 the court expressed the view (paragraph 20) that the remedy of staying the proceedings is a remedy which "the court can grant, but it is certainly not a remedy which the court is required to grant" and that the remedy should be confined to "situations which in general terms can be described as amounting to an abuse of the process of the courts". In paragraph 20 the court also set out other remedies which the can be provided for the defendant.
20. I think that the analogy with a defendant in civil proceedings is not an appropriate analogy. It is strongly arguable that criminal proceedings are not similar (for present purposes) to civil proceedings (between individuals to which human rights attach) since, in criminal proceedings, the proceedings are between the individual (with human rights) and the state - from whom human rights are claimed. It may also be that to designate the 'public bodies' in the way in which the court did is artificial. (In Strasbourg the state is

always the respondent). Provided the delay is not the fault of the defendant it must be the fault of some organ of the state concerned with the criminal justice system.

21. Accordingly, in the light of the decision in the Porter case the decision in A-G's Reference No. 2 of 2001 may not be followed. The court in that case strove to find that the pre-Human Rights Act law relating to abuse of process equated to Convention fairness. The domestic concept of fairness is narrower than the concept of fairness in Article 6, demanding as it does a finding that the Defendant cannot have a fair trial because of demonstrable prejudice or because it would be unfair to try him because of some unacceptable behaviour by the police or the prosecution. It is interesting that no Scottish case appeared to have been cited to the Court of Appeal, particularly Crummock (Scotland) Ltd. v HM Advocate (copy attached), a case decided in the Appeal Court. In that case it was held that in order to establish a breach of Article 6 through unjustified delay it is unnecessary to show that the defendant has suffered prejudice in the preparation or presentation of his defence. The court referred to Stögmüller v Austria in which the ECHR pointed out that the provision as to reasonable time in Article 6 had as its aim to protect the parties 'against excessive procedural delays; in criminal matters, especially it is designed to avoid that a person charged should remain too long in a state of uncertainty about his fate'. It is likely that in view of the remarks of Lord Hope at paragraphs 108 and 109 of the Porter judgement the approach of the Court of Appeal to the remedy should be re-examined.
22. The reasonableness of the length of the proceedings must be assessed in each case taking into account all the circumstances. The circumstances must be those relevant to the individual case. Suggested criteria are set out in detail in their discussion on this aspect of Article 6 by the authors of "The Law of Human Rights" (Clayton & Tomlinson) at paragraph 11.220. They include the complexity of the case, the conduct of the applicant (here the accused persons), the conduct of the judicial authorities and the conduct of the relevant (administrative) authorities. The editors of "Human Rights Law and Practice" say (at paragraph 4.6.49) that "the state is ... responsible for delays by its administrative or judicial authorities". The fact that a defendant is detained in custody is also relevant. Examples of matters relevant to the 'complexity of the case' are referred to by the authors of both texts - the complexity of the evidence, the number of charges, the number of witnesses, the intervention of other parties or the need to obtain expert evidence.
23. In König v Federal Republic of Germany (1978) 2 EHRR 170 the matter was put in the following way:

"The reasonableness of the duration of the proceedings covered by article 6(1) of the Convention must be assessed in each case according to its circumstances. When enquiring into the reasonableness of the duration of criminal proceedings, the court has had regard, inter alia, to the complexity of the case, to the applicant's conduct and to the manner in which the matter was dealt with by the administrative and judicial authorities."

24. In addition the court is constrained to consider what is "at stake" for the defendant - Zimmerman and Steiner v Switzerland (1983) 6 EHRR 17 (paragraph 24).
25. The court is a 'public authority' within the meaning of the Human Rights Act 1998 - Section 6(3) - and, as such, is bound not to act in a way which is incompatible with a Convention right - Section 6(1). This involves the court in ensuring that any defendant's rights to a trial within a reasonable time are not violated.
26. In the present case I consider that, if there is any delay, some part of it can be said to be directly the fault of the relevant accused persons. If the prosecution case is correct, each of them told lies to investigating officers, which lies went undiscovered for some period of time. Further, until June 2000 there was no cogent evidence which would have permitted the police to bring charges, such as are presently contemplated. Only after Andrea McKee changed her evidence could investigations begin into the present charges. Further, not until after the accomplice (Andrea McKee) had been dealt with at court for her admitted offence, could charges be brought. In my opinion, considering also the complexity of the police investigation, involving the interview of a very great number of witnesses, the court should be slow to condemn the 'state' for any delay. In my opinion, therefore, the court should not make an order staying the proceedings on the ground of Article 6 delay.

Abuse of process

27. As presently advised I do not see anything on the papers which would justify a court in coming to the conclusion that there has been manipulation of the process such as to cause it to order a stay of the proceedings.
28. It will be essential, to rebut the defence applications for a stay, to have a detailed chronology drawn up by the investigating officers to trace, for the benefit of the court, the progress of the investigations - bearing in mind that it is for the 'state' to satisfy the court of the reasons for any apparent delay.

Proofs

29. I have set out below the matters to be proved and, broadly, the witnesses necessary for the proof of those matters.
- a. Generally the events at the scene in the early hours of 27th April 1997 and the presence of Allister Hanvey ("AH") and what he was wearing.
- Const. Neill
 - R/Const. P40
 - R/Const. Cornett
 - R/Const Warnock

- Sgt. **P89**
 - Jonathan Wright
 - (Note: we may in due course need the evidence of [REDACTED] and Jim Murray to the effect that Tracey Clarke bought the silver jacket with the orange sleeves for AH).
- b. Atkinson's hours of duty - his notebook, his relevant F40 overtime claim & and amendment to the F40 to change the actual hours of duty -
- Insp. McCrum
 - the appropriate witness from the RUC finance section to prove the amended form
- c. That Atkinson was aware of the presence of AH at the scene -
- Sgt. **P89** (above)
 - Wm. Trevor Leathem
- d. That Atkinson did not mention AH's presence at the scene to the investigating officers (and the date and the circumstances when he first mentioned AH to investigating officers) -
- his statement of 7th May 1997 and notebook entries
 - D/Sgt. Bradley
 - his interviews
- e. Andrea McKee can prove -
- that she heard her husband on the telephone to Atkinson telling Atkinson that Tracey Clarke had told them that AH told her that Atkinson had telephoned his house and told him to get rid of his clothes.
 - that she and Michael visited Atkinson's house where, in the presence of Eleanor Atkinson, Atkinson told them the concocted story they were to tell to cover the telephone call from the Atkinson house to Hanvey's on the morning of 27th April.
 - that on the night of 26/27 April she and her husband did not stay at the home of the Atkinsons.
 - that her husband did not make any telephone call to the Hanvey household on the morning of 27th April.
 - the general detail of the history of association between the relevant persons.
- f. To corroborate Andrea McKee about the history of association of the various persons -
- the banking documentation, relating to the Tae Kwon Do club, including lodgment documentation showing Atkinson's association with McKee's club.
 - the evidence of telephone calls between relevant premises.

- g. [REDACTED] will prove the relevant telephone details including the identities of the subscribers to the relevant telephone numbers. He also will prove the telephone call on the morning of 27th April.
- h. Can he also prove that a telephone call was made from the McKee home on the night of 26/27 April 1997 to the taxi firm? If not this witness, then the appropriate witness should prove the phone call to Call-a-Cab. [I do not intend to call any witness to prove, maybe, that they were in the McKee home that night, whether watching boxing or not. It is to be hoped that the evidence that a call was made from the premises will be sufficient to corroborate Andrea McKee.]
- i. [REDACTED] (no relation) the Call-a-Cab dispatcher (plus the taxi log).
- j. Can we get evidence to prove that some event involving boxing was on some TV channel that night (26th/27th April 1997), even if she is wrong in her belief that she watched the Hamed fight?
- k. To prove that Atkinson's hours of duty and his presence in the station and the timings of travel could have allowed him to be at home to make the call at 8.37 a.m. -
- Const. Neill (above)
 - Const. Godly
 - Sgt. [REDACTED], Traffic Branch
- l. The officer in charge of the prosecution of Michael and Andrea McKee should be in a position to prove the certificates of conviction in respect of both.
- m. D/Const. McCrumlish and D/Const. McIntosh to prove their interview with Kenneth (and Elizabeth) Hanvey on 11th May 1997 and the fact that neither mentioned the receipt of a telephone call on the morning of 27th April.
- n. Evidence of AH's movements after the attack which led to the death of Robert Hamill (and which contradicts what Thomas Hanvey told the police) from -
- Jonathan Wright (above)
 - Christopher Henderson
 - Jason McClure
 - the relevant bank officials to prove the withdrawal of money at 8.46 a.m.
- o. The appropriate police witnesses to prove all witness statements made, at various times, by the accused, all 'witness' interviews of them and all after caution interviews of them.

Gerald Simpson

Bar Library,
30th August, 2002