APPEAL COURT, HIGH COURT OF JUSTICIARY

[2010] HCJAC54

Appeal No: XM16/09

OPINION OF THE LORD JUSTICE CLERK

in

THE PETITION TO THE NOBILE OFFICUM

by

LUKE MITCHELL

Petitioner and Appellant;

against

HER MAJESTY'S ADVOCATE

Respondent:

_____

Lord Justice Clerk

Lord Hardie

Lady Cosgrove

For the petitioner and appellant: Jackson, QC, Murray, McPhie; Robertson & Ross, Paisley

For the Crown: Mackay, AD; Crown Agent

28 April 2010

Introduction

[1] The petitioner has presented a petition to the *nobile officium* in which he seeks leave to argue a ground of appeal that was not argued on his behalf when this court heard and refused his appeal against conviction. On 24 August 2009 Lord Carloway refused to grant a warrant for service of the petition, for the following reason:

"The appeal against conviction was refused on 16 May 2008. That determination is final in terms of sec 124(2) of the 1995 Act. That being so, this petition is incompetent.".

The petitioner now appeals against that decision.

Procedural history

[2] On 21 January 2005 the petitioner was convicted of murder. He appealed against conviction and sentence. His appeal against conviction set out twelve grounds. The petitioner was granted leave to appeal against conviction on six of those grounds, and leave to appeal against sentence. He applied to the court for leave to appeal on five of the remaining grounds. On 14 November 2006 the court granted leave in respect of one of them. There followed a number of procedural hearings. On 20 June 2007 agents for the petitioner lodged a form 15.5.A-B advising that the appeal was now ready in respect of the grounds of appeal that had passed the sift, but that unspecified further enquiries were being carried out.

[3] On 7 December 2007, the petitioner's agents lodged a proposed new ground of appeal 1A. At a procedural hearing on 18 December 2007, senior counsel for the petitioner said that the further enquiries were continuing. The court continued consideration of the proposed ground 1A to the full hearing of the appeal.

[4] In February 2008 the appeal against conviction was heard. Senior counsel lodged three affidavits in support of the proposed ground 1A. He was granted leave to present a further ground of appeal. On 22 February 2008, he advised the court that further work had been done on the proposed ground 1A and that he was close to being in a position to lodge information that would appear to merit proper investigation. He moved that ground 1A be received. The court continued its consideration of the motion *sine die*, under direction that any further proposed evidence should be lodged within four weeks. The four-weeks deadline expired on 21 March 2008.

[5] On 16 May 2008 the court refused the appeal against conviction. It noted that the proposed ground 1A was no longer being maintained. That, it seemed, was the end of the matter.

[6] The petitioner thereafter instructed new agents and counsel. On 21 August 2009 this petition was lodged. The petitioner craves the court to set aside the interlocutor of 16 May 2008 and to allow ground 1A to be argued.

Proposed ground of appeal 1A

[7] Ground 1A is to the effect that there is fresh evidence disclosed in 2006-2007 by witnesses who came forward at a late stage or as a result of other lines of police inquiry. It relates to two named individuals. The first is said to have lived close to the locus at the time of the murder. There are averments about his appearance, interests and behaviour. It is said that forensic evidence from the second individual was found close to the locus. The petitioner avers that if this information had been available at the trial, it would have formed the cornerstone of the defence case and would have been set out specifically in the notice of incrimination, which in the event said only that the deceased was murdered by a person or persons unknown to the petitioner. The petitioner submits that the proposed new evidence is of such significance that the verdict returned in ignorance of it must be regarded as a miscarriage of justice.

The substance of the petition

[8] The petition avers that after 22 February 2008, his solicitor attempted to obtain sanction from the Scottish Legal Aid Board to carry out certain scientific work. On 21 March 2008, the petitioner's counsel consulted with him and his solicitor. They advised him that the proposed ground 1A should not then be pursued but could instead be referred to the Scottish Criminal Cases Review Commission (SCCRC). A letter was then sent to Justiciary Office intimating that ground 1A would not be insisted upon. On the information given to him, the petitioner had not been able to give informed instructions to that effect. He had not been informed fully of the remedies or alternative procedures that were available to deal with the difficulties that were being encountered by his solicitors. He had no knowledge of appeals procedure. After his appeal had been refused he sought advice from another firm of solicitors. The grounds specified in ground 1A were substantial and there was no good reason why they had not been insisted upon. The denial of sufficient advice and information to allow the petitioner to make an informed decision in his appeal meant that he had been denied the fair hearing guaranteed by article 6(1) of the Convention.

[9] We heard further representations from senior counsel now instructed for the petitioner. He understood that a meeting took place on 17 March 2008, four days before the expiry of the deadline imposed by the court, between the petitioner's solicitor, his senior counsel and his two junior counsel. The petitioner was not present. There were discussions and disagreements about the way forward. It was thought that there were difficulties with the proposed ground 1A, so they decided to abandon it on the basis that it could be pursued with the SCCRC. This advice was conveyed to the petitioner at the consultation on 21 March 2008. The petitioner had no option but to accept the advice. Senior counsel now instructed said that it was not obvious to him why this course of action had been taken. As far as he could tell, the petitioner's then agents had had available to them material that supported the proposed ground 1A.

The nature of the remedy

[10] The nature of the remedy of the *nobile officium* was considered by a bench of five judges in *Beck, Petr and Ors* (2010 SCCR 222). The petitioners in that case had petitioned the *nobile officium* on averments that, for various procedural reasons, the High Court had acted incompetently in disposing of their appeals. The court dismissed the petitions as incompetent. It held that while an incompetent interlocutor of the High Court or an interlocutor that involved fundamental non-compliance with the right to a fair trial, was open to challenge under the *nobile officium*, the *nobile officium* could not be invoked to challenge a decision on the merits by the High Court in its appellate capacity. That would be to breach the rule on the finality of High Court interlocutors set out in section 124 of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act).

Statutory provision

[11] Section 124 of the 1995 Act provides *inter alia* as follows:

"(2) Subject to Part XA of this Act and paragraph 13(a) of Schedule 6 to the Scotland Act 1998, every interlocutor and sentence pronounced by the High Court under this Part of this Act shall be final and conclusive and not subject to review by any court whatsoever and , except for the purposes of an appeal under paragraph 13(a) of that Schedule, it shall be incompetent to stay or suspend any execution or diligence issuing from the High Court under this Part of this Act."

Submissions for the petitioner

[12] Counsel for the present petitioner sought to distinguish *Beck, Petr and Ors* (*supra*) on the basis that the proposed ground of appeal 1A had never properly been put before the court. It had been abandoned without the petitioner's understanding why. The advice to abandon the appeal and pursue the point with the SCCRC was odd. The appropriate course of action should have been to ask the court for more time. In *McIntosh, Petr* (1995 SCCR 327), the petitioner abandoned his appeal after receiving inaccurate advice from his solicitor about senior counsel's opinion on the prospects of success. The court held that it would not conflict with the finality rule if it were to exercise its *nobile officium*. The circumstances here were sufficiently exceptional and unforeseen to justify that course.

[13] Counsel for the petitioner said that he was in a position to argue the proposed ground 1A on the information available to him; but that he would not pursue it so far as it related to the second-named individual.

Conclusion

[14] In my opinion, the petition is incompetent. The principle restated in *Beck, Petr and Ors* (*supra*) applies in this case. As this court has said on many occasions, the *nobile officium* is a remedy of last resort. It is open to the petitioner to apply to the SCCRC under Part XA of the 1995 Act. Counsel for the petitioner told us that he would go to the SCCRC immediately if we refused the petition. That, in my view, is the appropriate course for the petitioner. For that reason alone, the petitioner's case is distinguishable from *HM Adv* v *McIntosh* (*supra*).

[15] The proposed ground of appeal 1A was formally abandoned on senior counsel's advice. The *nobile officium* cannot be invoked to allow the reinstatement of that ground of appeal on the basis that the advice was erroneous.

[16] In any event, I doubt whether the proposed ground of appeal is relevant. The note of appeal does not specify the nature of the proposed fresh evidence. It does not spell out why that evidence is material. Nor does it explain why the evidence could not have been led at the trial or how it would have altered the course of the trial had it been led (cf *Fraser* v *HM Adv* 2008 SCCR 407).

Decision

[17] I propose to your Lordship and your Ladyship that we refuse the appeal.

APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Justice Clerk

Lord Hardie

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OPINION OF LORD HARDIE

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For the Crown: Mackay, AD; Crown Agent

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[18] For the reasons given by your Lordship in the chair, I agree that we should refuse the appeal.

APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Justice Clerk

Lord Hardie

Lady Cosgrove

[2010] HCJAC54

Appeal No: XM16/09

OPINION OF LADY COSGROVE

in

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by

LUKE MITCHELL

Petitioner and Appellant;

against

HER MAJESTY'S ADVOCATE

Respondent:

_____

For the petitioner and appellant: Jackson, QC, Murray, McPhie; Robertson & Ross, Paisley

For the Crown: Mackay, AD; Crown Agent

28 April 2010

[19] For the reasons given by your Lordship in the chair, I agree that this appeal should be refused.