

SCOTLAND / JUDGMENT

HER MAJESTY'S ADVOCATE v. COLIN BRYSON CAMPBELL [1999] ScotHC 225 (28th September, 1999)

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[1999] ScotHC 225 [New search] [Help] HER MAJESTY'S ADVOCATE v. COLIN BRYSON
CAMPBELL [1999] ScotHC 225 (28th September, 1999) HIGH COURT OF JUSTICIARY
OPINION of THE RIGHT HONOURABLE LORD CAMERON OF LOCHBROOM in causa HER
MAJESTY'S ADVOCATE against COLIN BRYSON CAMPBELL

21 September 1999 In his Minute the Minuter intimated that he intended to raise a Devolution issue within the meaning of Schedule 6 of the Scotland Act 1988 on the following grounds: "On 8th June 1999 the said Colin Bryson Campbell was required to participate in an Identification parade at Police Headquarters, Stirling. On said date the said Colin Bryson Campbell advised Inspector Rennie, Central Scotland Police that he wished his legal representative, Mr. Crawford, to attend at the Identification Parade. Intimation of the Identification parade was made to the Minuter's agents. The Minuter's agent advised that, due to court commitments that morning he would not be able to attend at the specified time of 11am but would attend as soon as possible thereafter, probably around 12 Noon. By said time the Identification parade had been concluded, it had taken place in the absence of the Minuter's legal representative. The proceedings at the identification parade will form part of the evidence at the Trial of the Minuter and Report of the proceedings at the Identification parade has been lodged as a production by Her Majesty's Advocate. In terms of Article 6 of the Convention on Human Rights all accused persons have a right to a fair Trial. In particular, in accordance with Article 6.3 everyone charged with a criminal offence (h)as the following minimum rights:"(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....." In accordance with the same, therefor the Minuter was entitled to have legal representation at the Identification parade which will be used in evidence against him. By

conducting the parade without legal representation the terms of Article 6.3 were contravened." It remains only to mention that in the course of the debate the solicitor advocate who appeared for the Minuter stated that although not mentioned in the Minute, the identification parade took place on the instructions of the procurator fiscal. The Advocate Depute intimated that the Crown did not take issue with the recital of fact as set out in the Minute notwithstanding there were other matters of fact relevant to the question that might have been included. Nor did he challenge the statement that the parade took place on the instructions of the procurator fiscal. In that event I proceed upon what it set out as fact in the Minute itself as having been an identification parade undertaken by police officers on the instructions of the procurator fiscal. Two questions arose in the course of the debate. The first was an issue directed to the competency of the Minute, namely, whether the assertion for the Minuter that in the circumstances averred a Devolution issue within the meaning of Schedule 6 of the Scotland Act did arise, was well founded. The second was whether there had been established a breach of Article 6 of the Convention on Human Rights in reference to the right of the Minuter, as an accused person, to have a fair trial. In this regard particular reference was made to the terms of Article 6(3)(c), namely the minimum right of a person charged with an offence "to defend himself in person or through legal assistance of his own choosing.....". For the Minuter it was submitted, under reference to section 57(2) and (3) of the Scotland Act and Schedule 6, paragraph 1(d), that the carrying out of an identification parade in the circumstances was an act which involved a question as to whether there had been an exercise on the Lord Advocate's part of a function which was incompatible with the Minuter's right to have a fair trial. In acting to instruct such an identification parade, the procurator fiscal was representing the Lord Advocate in prosecuting an offence or at least in representing the Lord Advocate in his capacity as head of the system of criminal prosecution as provided in section 57(3). To carry out such an identification parade without the presence of the Minuter's legal representative was unlawful under section 6(1) of the Human Rights Act. In the course of the debate, however, the solicitor advocate accepted, as I understood him, that he could not have challenged this "act" of the Lord Advocate as a devolution issue until an indictment had been served upon the Minuter in which intimation was given in the list of productions and witnesses that at the trial the Crown might seek to found upon evidence derived from the holding of the identification parade. In that regard, the "act" of the Lord Advocate would be in no different case from an identification parade carried out by the police under their duty to investigate by search after a lawful arrest but without reference to any instruction by the Lord Advocate or a procurator fiscal. I did not understand the solicitor advocate to argue that at such a parade a devolution issue arose if the parade was conducted in the absence of a legal representative of the accused's choice. However it is proper to bear in mind that special provision is made for an accused to obtain legal aid at any identification parade held in connection with or in contemplation of criminal proceedings against him. As the solicitor advocate pointed out, the presence of a legal representative on such an occasion is a guard as to the fairness of the conduct of the parade generally in relation to the accused. However the principal point to be made is that the holding of an identification parade takes place at the stage of pre-trial investigation and as terms of the Minute recognise, it is not until the indictment is served that the prosecutor gives notice, and an accused will know, that the material obtained

from the holding of the identification parade may be led in evidence for the Crown. But the Crown is not obliged by the giving of such notice to lead such evidence. Therefore it is not correct to assert that "the proceedings will form part of the evidence at the Trial". Indeed at his trial the Minuter himself would be able to make reference to the evidence and lead that evidence even if the Crown decides not to do so. Furthermore at the trial it is open to the defence to challenge the evidence, if led by the Crown, on the ground that it was unfairly obtained and should not be admitted in evidence. It is then a matter for the court to rule as to the admissibility of the evidence. I note in passing that in the Minute no allegation is made that the conduct of the parade was unfair in any way or prejudicial to the Minuter other than that it was conducted in the absence of the Minuter's chosen legal representative. Against this background it seems to me that the question to be asked is whether at this stage it can be asserted that what has been done on behalf of the Crown constitutes an "act" of the Lord Advocate within the meaning to be given to that word in the provisions of the Scotland Act. It is undoubtedly the case that under section 57(2) of the Scotland Act the Lord Advocate has no power to act in a manner which is incompatible with Convention rights. As was said by the Lord Justice General in the recent appeal case of *H. M. A. v. Montgomery and Coulter* (14 September 1999 unreported): "Therefore, putting the matter generally, (the Lord Advocate) and his representatives have no power to act in a manner which would prevent an accused person from having a fair trial. But it is always the case that a Lord Advocate and his representatives were not entitled to act oppressively, in a manner which would prevent an accused person from having a fair trial: if they did, the court could intervene and sustain a plea of oppression in bar of trial..... While the authority now given to Convention rights in our law means that, when considering what constitutes a fair trial, the court must take account of Convention law and jurisprudence, the issue will still fall to be dealt with under our existing procedures..." If consideration is given to the provisions of section 57(2) of the Scotland Act it appears to me that the kind of "act" which Parliament had in mind was one which put the matter beyond recall and was thus determinative in relation to the issue of Convention rights in a manner that was akin to the making of subordinate legislation by a member of the Scottish Executive or what might be described as complete and binding administrative acts. But the matter has to be looked at within the context of the particular system in which what has been done and how it bears upon the individual who seeks to maintain that a Convention right to which he is entitled has been infringed, have to be judged. In so considering the matter it seems to me that it is important to look at the question having in mind the respective powers of the prosecutor and of the court and the limits to those powers. Thus it was accepted for the Crown that standing the concession made for the Crown in *H. M. A. v. Little*, a devolution issue might well arise from an "act" of the Lord Advocate which took place in advance of a trial and which could be determined in advance of the trial. However in *Little* the Court was adjudicating upon an "act", namely a decision to prosecute charges at the instance of the Lord Advocate, in which the issue was whether the Lord Advocate should be able to proceed to trial in respect of those charges after a lengthy period of time had elapsed from his being charged with the offences. It was not asserted for the accused in *Little* that he could not have a fair hearing. The decision proceeded upon the basis that to proceed to trial on the charges after such a lengthy period of time in the circumstances of the case was to act in a way incompatible with Convention rights

and in particular, with the accused's right, under Article 6, to a hearing within a reasonable time. The "act" of the Lord Advocate in Little was service of the indictment containing such charges after an unreasonable time had elapsed from the making of the charges. Nothing that the court could do, short of holding that to proceed to trial on such charges was oppressive, could serve to prevent such charges being presented at the trial, albeit that the prosecutor in the exercise of his discretion might subsequently decide not to proceed with one or more of them. But that, it seems to me, is a different situation from one where in the indictment the prosecutor gives notice to an accused person that evidence derived from certain productions or witnesses may be presented at the trial and where it is open to the court to hold in the course of the trial that should the evidence be adduced for the Crown, it had not been fairly obtained in the circumstances of the case and was not admissible. In that event the "act" which would affect the fairness of the accused's trial in the sense of the leading of that evidence, cannot be said to have been determined upon by the Crown until the Crown seeks to introduce the evidence. I am therefore of opinion that there is presently no devolution issue properly before this court and that the Minute is therefore incompetent. I am fortified in this opinion by a circumstance which arises more properly in relation to the second question since the crucial issue must be whether the Convention provides for a right to which the Minuter appeals, namely a right to have a lawyer of his choice present at any identification parade, and in particular at an identification parade which is conducted on the instructions of the Lord Advocate or his representative, the procurator fiscal. Thus it is only an act which is incompatible with any of the Convention rights which is struck at by section 57(2) and which becomes a devolution issue for the purposes of Schedule 6 (see paragraph 1(d)). The Advocate Depute pointed out that there is no specific provision in Article 6 for the presence of a lawyer of an accused's choice at an identification parade. In *Imbrioscia v. Switzerland* the Court made clear that while the primary purpose of Article 6 so far as criminal matters were concerned was to ensure a fair trial by the tribunal competent to determine the criminal charge, it did not follow that the Article had no application to pre-trial proceedings. The Court went on to observe that the right set out in paragraph 3(c) of Article 6 was one element, amongst others, of the concept of a fair trial in criminal proceedings contained in paragraph 1. While it conferred on everyone charged with a criminal offence the right 'to defend himself in person or through legal assistance...', Article 6(3)(c) did not specify the manner of exercising this right. It thus left to the Contracting States the choice of the means of ensuring that it was secured in their judicial systems, subject to the overriding supervision of the Court in its task of ascertaining whether the method chosen was consistent with the requirements of a fair trial. In *Imbrioscia* the Court was concerned with a complaint that the applicant had not been assisted by a lawyer during several interrogations by the police and by two district prosecutors at the pre-trial stage. It pointed out that the manner in which Article 6(1) and (3)(c) was to be applied during the preliminary investigation depended on the special features of the proceedings involved and on the circumstances of the case. In order to determine whether the aim of Article 6 - a fair trial - had been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case. It noted that in subsequent hearings before the Swiss courts following the preliminary investigation, there had been opportunity for the applicant, with legal assistance, to give evidence and to challenge submissions for the prosecution. It was following "a scrutiny of

the proceedings as a whole" that the Court concluded that the applicant had not been denied a fair trial. The Court was however careful to point out that in certain instances, one of which related to exceeding the requirement that a trial take place within a 'reasonable time' as specified in Article 6(1), and including other requirements of Article 6 - especially of paragraph (3) - it might also be relevant to a determination that there had been a breach of an applicant's right even before the case was sent for trial "if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them". In *Murray v. United Kingdom* the Court referred to its decision in *Imbrioscia*. It then said this: "National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing". The Court went on to hold that the scheme contained in the Criminal Evidence (Northern Ireland) Order 1988 was such that it was of paramount importance for the rights of the defence that an accused had access to a lawyer at the initial stages of police interrogation. It held that at the beginning of police interrogation an accused was confronted with a fundamental dilemma relating to his defence and that to deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence might be irretrievably prejudiced, was - whatever the justification for such denial - incompatible with the rights of the accused under Article 6. But the case of *Murray*, which concerned the fundamental right of an accused to silence, seems to me to be wholly different from the present in which it is open to the Minuter at the trial to challenge the fairness of the identification parade both as to its conduct, with a view to having the evidence excluded as inadmissible, as well to challenge the accuracy of any material given in evidence concerning it. Accordingly I do not consider that on the basis of the factual matter set out in the Minute, and not least in that no reference is made to any suggestion that the right of the defence at the trial is now irretrievably prejudiced, any breach of a Convention right has presently been made out. It follows that any present actions of the Lord Advocate, even if they or any one of them be regarded as an "act" in terms of the Scotland Act carried out in the exercise of a function of the Lord Advocate, have not been incompatible with the Minuter's rights under the Convention. For all these reasons I hold that the Minute does not raise a devolution issue and is incompetent. HIGH COURT OF JUSTICIARY OPINION of THE RIGHT HONOURABLE LORD CAMERON OF LOCHBROOM in causa HER MAJESTY'S ADVOCATE against COLIN BRYSON CAMPBELL

Crown: Brailsford Q. C. A. D., McKenzie Defence: Ms A. Ogg, Solicitor Advocate Virgil M. Crawford, Stirling 21 September 1999 © 1999 Crown Copyright BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotHC/1999/225.html>

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