

SCOTLAND / JUDGMENT

Telford v HM Advocate [2012]

ScotHC HCJAC_88 (26 April 2012)

[2012] ScotHC HCJAC_88

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

[Home] [Databases] [World Law] [Multidatabase Search] [Help] [Feedback] [DONATE]
Scottish High Court of Justiciary Decisions You are here: BAILII >> Databases >> Scottish High Court of Justiciary Decisions >> Telford v HM Advocate [2012] ScotHC HCJAC_88 (26 April 2012)
URL: <https://www.bailii.org/scot/cases/ScotHC/2012/2012HCJAC88.html> Cite as:

[2012] ScotHC HCJAC_88 [New search] [Help] APPEAL COURT, HIGH COURT OF JUSTICIARY
Lord Justice Clerk Lord Carloway Lord Hardie Lord Bonomy

[2012] HCJAC 88 Appeal No: XC134/10 OPINION OF THE LORD JUSTICE CLERK In the application
by STEVEN TELFORD Applicant; against HER MAJESTY'S ADVOCATE Respondent:

Act: Shead; John Pryde & Co, Edinburgh Alt: Shand QC AD; Crown Agent 26 April 2012

- [1] I agree with the Opinion of Lord Carloway.
- [2] Towards the end of the hearing on this application Mr Shead acknowledged that he did not challenge my colleagues' recollection of the hearing that took place on 10 August 2011, namely that Miss Mackenzie, who appeared for the applicant in Mr Shead's absence, told the court that no further grounds of appeal were to be argued and that therefore it would be appropriate that the appeal should simply be refused.
- [3] That being the case, it is now apparent that the incompetent petition to the nobile officium that was lodged in November 2011 was based on averments that were manifestly untrue.
- [4] When I refused to grant a first order on that petition, those advising the applicant, notwithstanding paragraph 13 of Schedule 6 to the Scotland Act 1998, sought a hearing to enable counsel to move for leave to appeal to the Supreme Court against that decision on some unspecified devolution issue. When that application was refused, the applicant's agents made a further application for leave to appeal to the Supreme Court. That application was based upon an Opinion of Mr Shead which again proceeded on an incorrect account of the hearing held on 10 August 2011 . I refer to Lord Carloway's narration of the history of the case (*infra* paras [15]-[17]).

- [5] In order to resolve the issue once and for all, we convened a hearing to consider the application. At the hearing Mr Shead confirmed that leave to appeal to the Supreme Court was being sought for the purpose of arguing Ground of Appeal 2. That course would not be open to the applicant if it were the case that Miss Mackenzie had unequivocally given up the remaining grounds of appeal. When we eventually obtained a straight answer from Mr Shead on the question whether he challenged the recollection or the integrity of my three colleagues who had constituted the Bench on 10 August 2011, he said that he did not do so.
- [6] That being so, I consider that this application falls to be refused for the reasons that are given by Lord Carloway.
- [7] I wish only to add that the time, trouble and expense incurred in consequence of the petition to the nobile officium and of the present application would have been avoided if the correct account of the hearing on 10 August 2011 had been accepted on behalf of the applicant at the outset. The petition to the nobile officium and the Opinion of Mr Shead were based on the assertion that the remaining parts of Ground of Appeal 1 had not been withdrawn, but that it had been accepted that Ground of Appeal 2 was not to be pursued. The present application seeks to revive Ground of Appeal 2. It is therefore regrettable that Mr Shead not only failed to produce an affidavit from Miss Mackenzie giving her account of the hearing on 10 August 2011 but, as he told us, had not even discussed that matter with her. It is disappointing that both the petition and the application should have been presented in such circumstances. APPEAL COURT, HIGH COURT OF JUSTICIARY Lord Justice Clerk Lord Carloway Lord Hardie Lord Bonython

[2012] HCJAC 88 Appeal No: XC134/10 OPINION OF LORD CARLOWAY in the application by STEVEN TELFORD Applicant ; against HER MAJESTY'S ADVOCATE Respondent :

Act: Shead; John Pryde & Co, Edinburgh Alt: Shand QC AD; Crown Agent 26 April 2012

- [8] On 4 October 2004, at the High Court in Glasgow, the applicant pled guilty to the murder of a woman living in a flat in Allison Street by setting fire to her block of flats and causing an explosion. He was sentenced to life imprisonment with a punishment part of ten years.
- [9] Notwithstanding his plea of guilty, on 23 February 2010 the applicant was allowed to lodge a Note of Appeal and leave was granted at the first sift. The grounds of appeal were: "1. ... [The appellant's] plea was tendered on the basis that he was acting in concert with others. His role was to purchase cans of petrol... The libel... does not aver an assault on the deceased nor does it aver that there was any deliberate act intended to cause physical injury. Accordingly the libel does not disclose a sufficient basis for a conviction for murder. Separatim. There was insufficient causal connection between the acts of the appellant and the death of the deceased. Separatim. On the Crown narrative it could not be said that the appellant had subscribed to a common purpose which included pouring petrol in the flat and setting fire to the premises or that in any event he had subscribed to a murderous

purpose.

2. ...the libel did not provide sufficient notice of the crime the appellant was alleged to have committed. He was entitled to such notice in terms of Article 6(3) & 6(1) [of the European Convention]... In the circumstances there has been a miscarriage of justice".
- [10] The appeal was appointed to be heard at the same time as one relative to the co-accused Samuel Petto, who had also pled guilty. Both cases raised a similar issue of principle, notably whether the libel, which did not aver an assault or intention to cause injury to a person, could instruct a relevant charge of murder. If it could not, the pleas of both accused had been tendered in error and they ought to be allowed to withdraw them. A diet was assigned at which the common issue was considered by a bench of five judges. Mr Shead appeared for the applicant at that diet.
- [11] On 10 August 2011 the appeal was rolled for an advising at which the Opinion of the Lord Justice Clerk and the concurring Opinions of the other members of the court were issued to the parties. The applicant was personally present at the advising and was represented by counsel and agents. The Opinions of the Lord Justice Clerk (see *Petto v HM Advocate* 2011 SCCR 519) made it clear (*Petto* para [10]; *Telford* para [6]) that: (1) there was no substance in the argument that the libel was irrelevant; (2) in any event, no timeous objection had been taken to its relevancy; and (3) the appellants had not advanced a sound basis upon which to allow them to withdraw their pleas.
- [12] At the advising, the bench consisted of Lords Carloway, Hardie and Bonomy. The court adjourned to enable the applicant's counsel, who was Miss Mackenzie in place of Mr Shead, to consider the written Opinions in detail, to take instructions and to state the applicant's position relative to any remaining grounds of appeal which he wished to argue. In that connection, although Mr Petto's appeal was obviously exhausted, the applicant's appeal was to be continued in respect of any grounds which had not been argued at the appeal hearing. It was important therefore for the court to understand if the applicant wished to insist upon any remaining grounds. Had his counsel done so, a further hearing would have been appointed to deal with them.
- [13] The court reconvened. It offered the applicant's counsel yet further time for consideration, but this was declined as unnecessary. The following exchange, which chanced to have been recorded, then took place in the presence of the applicant and agents: Miss Mackenzie "... having perused both judgments it seems that the point made in ground number 2 has been covered by the opinion issued by the court ... and its been clarified that there are no other grounds so I think that would bring matters to an end insofar as the grounds of appeal on behalf of Mr Telford are concerned. Lord Carloway So basically the appeals in Mr Telford's case, then its simply refused is that the position? Miss Mackenzie Yes. Lord Carloway All right. Well in that case ... both appeals are therefore refused." The court accordingly refused the applicant's appeal (and that of Mr Petto) on the basis that it was accepted clearly and unequivocally that there were no other grounds to be argued. Since the applicant was

personally present, this must have been stated upon his express instructions.

- [14] Notwithstanding that the applicant had accepted that his appeal ought to be refused, on 14 November 2011 he presented a petition to the nobile officium craving the court to "set aside" what was described as a "purported interlocutor" of 10 August. This petition contained several untrue statements of what had happened on the day of the advising. In particular, it averred (para 6) incorrectly that the applicant's counsel had only been asked about whether ground 2 had been "overtaken" by the decision of the court. It correctly stated that it had been accepted that ground 2 was not being pursued further, but went on to assert that there had been no discussion upon the remaining parts of ground 1 "which had yet to be argued". This was also incorrect. There was such a discussion and counsel had confirmed that not only was ground 2 not being insisted upon but that "there are no other grounds" and that matters were at "an end insofar as the grounds of appeal on behalf of Mr Telford are concerned". The petition went on to state (para 7) that "It does not appear to have been appreciated by the Court that there were two aspects of ground 1 yet to be argued". That was not true. The court did appreciate this, but counsel had stated that the applicant's position was that all grounds had been exhausted. The petition averred that the court had been asked to "recall the case" on the same day as the advising "in an effort to dispel the misunderstandings which had apparently occurred" (para 9). There was no misunderstanding and the court is unaware of any application to "reconvene" on that day.
- [15] On 9 December 2011, the Lord Justice Clerk declined to grant a first order in respect of the petition having regard, inter alia, to section 124 of the Criminal Procedure (Scotland) Act 1995 which provides that: "every interlocutor and sentence pronounced by the High Court... shall be final and conclusive and not subject to review by any court whatsoever...". The refusal by a single judge to grant a warrant for service of a petition to the nobile officium is not susceptible to an appeal. However, on 6 February 2012 the applicant's agents wrote to the Justiciary Office requesting a hearing: "to allow counsel to move for leave to appeal to the United Kingdom Supreme Court" in respect of the interlocutor of 9 December 2011 which, it was said, determined an unspecified devolution issue.
- [16] It was pointed out to agents that a decision of a single judge could not be appealed to the United Kingdom Supreme Court (see Scotland Act 1998, Sched 6, para 13(a)). Accordingly, on 22 March 2012, the request for an oral hearing was declined by the court.
- [17] On 29 March 2012, the applicant's agents wrote to the Justiciary Office again asking for a hearing for leave to appeal to the United Kingdom Supreme Court. Attached to this letter was an Opinion of Counsel dated March 2012. This Opinion sets out a "background" containing statements which, as before, do not correspond with the facts, notably (once more) that only ground 2 was not insisted upon after the advising. It states, again incorrectly, that the court had not considered that "the remaining parts of ground one" were still to be argued. The Opinion then proceeds to assert that: "There can be no doubt that the refusal of the appeal involved the determination of the devolution issue embodied in ground two". It only then became apparent that the leave to appeal to the United Kingdom Supreme Court

now sought was not, as previously requested, in respect of the refusal to warrant the petition, but relative to ground 2 of the original Note of Appeal. This ground was expressly not insisted upon by the applicant at the time of the advising. Furthermore, although ground 1 did not involve any form of devolution issue, the Opinion appears to attempt to revive parts of that ground as an aspect of the case which might also be appealed in some way because the Crown had been present at the advising (although the advocate depute did not say anything of note during that hearing).

- [18] The court convened a hearing to consider this application to appeal to the United Kingdom Supreme Court, which had been made seven months after the decision of the court. At this hearing, the appellant was again represented by Mr Shead. At the outset, Mr Shead appeared to be rehearsing the incorrect account of the advising on 10 August 2011 that had been set out in the petition to the nobile officium. Somewhat to the surprise of the court, he stated that he did not know whether Miss Mackenzie accepted the account put to him by the court, notably that she had stated that there were no further grounds to be argued in the appeal. He produced no statement or affidavit from Miss Mackenzie stating what her position was. In order to be entirely clear about exactly what was being said, the court repeatedly asked Mr Shead in simple terms whether it was accepted that at the time of the advising the applicant's counsel had stated to the court that there were no grounds remaining to be argued and that the appeal could be refused in its entirety. After what can only be described as obfuscation and the passage of some considerable time, having suggested that there had been a misunderstanding on the part of this court, and notwithstanding the untrue assertions contained in the material previously presented to the court, Mr Shead eventually stated that he was not challenging the recollection or integrity of the court.
- [19] Counsel's attention was drawn by the court to *Follen v HM Advocate* 2001 SC (PC) 105, in which the Privy Council stated that, where a party has departed from an argument under the European Convention before the Appeal Court, the Privy Council did not have jurisdiction to entertain an appeal, since the Court had not determined a devolution issue. Counsel sought to distinguish that case as being "radically different" from the present application, although the nature of that difference remained obscure.
- [20] The court has refused to grant leave to appeal. There are three separate reasons for this. First, there was no reason advanced for this application coming at such a late stage after the decision of the court. It is important, in the interests of finality and certainty, that applications for leave are presented within a reasonable time of the court's determination. That period has been exceeded without adequate explanation in this case.
- [21] Secondly, and of more significance, the court has not determined any devolution issue in this appeal. Its decision related to whether: (1) the indictment relevantly libelled murder; (2) in any event, an objection to the libel could now be maintained; and (3) the applicant could, in effect, withdraw his plea of guilty to murder. All these questions, which are ones confined to matters of Scots criminal law and procedure, were answered in a manner unfavourable to the applicant. The applicant did not argue, as a discrete point, ground 2 of his appeal, which

was the only one in which a breach of the European Convention is alleged. This ground was not insisted upon and therefore the court did not determine it and, in particular, any relative devolution issue. The ground having been withdrawn, the court refused the appeal. That did not involve any decision on ground 2. In this regard, *Follen v HM Advocate* (*supra*) appears in point.

[22] Thirdly, even if the court had made a decision upon ground 2, the applicant did not proffer any basis upon which an appeal in some way related to ground 2 might succeed. The libel appears to give the applicant clear notice of the charge against him; that being the murder of the deceased by, acting along with others, setting fire to a block of flats and causing an explosion as more fully detailed in the indictment itself. He himself, in pleading guilty, accepted that he had had a concerted role in the murder by obtaining the petrol for the purpose of setting the fire. APPEAL COURT, HIGH COURT OF JUSTICIARY Lord Justice Clerk Lord Carloway Lord Hardie Lord Bonomy

[2012] HCJAC 88 Appeal No: XC134/10 OPINION OF LORD HARDIE in the application by STEVEN TELFORD Applicant ; against HER MAJESTY'S ADVOCATE Respondent :

Act: Shead; John Pryde & Co, Edinburgh Alt: Shand QC AD; Crown Agent 26 April 2012

[23] Lord Carloway has helpfully narrated the factual background in this case and has explained the reasons for refusing the application for leave to appeal to the Supreme Court. I agree with his Opinion that for these reasons the application should be refused.

[24] I share the concerns expressed by the Lord Justice Clerk about the manner in which this case has been conducted since 10 August 2011 . I would simply add that the responsibility for the waste of court resources cannot be attributable either to counsel alone or solely to the applicant's solicitors. Each of them has failed in his professional responsibility to the court to ensure that cases are presented on a basis which is factually accurate and accordingly each must bear a share of that responsibility.

[25] In addition it seems to me that this case highlights the need for counsel and solicitors to respect professional practices which have regulated their respective roles in litigation for many years. In all cases counsel should insist upon proper instructions. In the present case such instructions should have included at least a detailed statement or a precognition of the applicant as well as Miss Mackenzie and any representative of the applicant's solicitor who was present on 10 August 2011 about the events that day in court and at any consultation with the applicant during the court adjournment, including the instructions given by the applicant to his solicitor about the outstanding grounds of appeal. In the absence of such information the instructions should have been returned as inadequate. Of equal importance, solicitors must observe their professional responsibilities to the court by preparing cases properly and, where appropriate, they should advise their client that they are not prepared to act in a case which is unstateable. Had the solicitors in this case fulfilled

these basic responsibilities by taking statements from the applicant, Miss Mackenzie and their own representative as to what transpired on 10 August 2011, no responsible solicitor would have instructed counsel to prepare the petition to the nobile officium or the application for leave to appeal to the Supreme Court on the basis upon which it was.

[26] Finally, I note from the case file that the applicant has been in receipt of legal aid but it is not clear whether that extended to the petition to the nobile officium or to this application. If it did, that is simply another manifestation of the waste of public funds occasioned by the respective failures of the solicitors and counsel in this case to act in a professional manner. Having regard to the accurate factual position of the events of 10 August 2011, the Scottish Legal Aid Board might wish to consider whether fees and outlays incurred in this case since 10 August 2011 are a proper charge on the Legal Aid fund. APPEAL COURT, HIGH COURT OF JUSTICIARY Lord Justice Clerk Lord Carloway Lord Hardie Lord Bonython

[2012] HCJAC 88 Appeal No: XC134/10 OPINION OF LORD BONOMY in the application by STEVEN TELFORD Applicant ; against HER MAJESTY'S ADVOCATE Respondent :

Act: Shead; John Pryde & Co, Edinburgh Alt: Shand QC AD; Crown Agent 26 April 2012

[27] I agree that the application should be refused for the reasons given by Lord Carloway.
BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL:
<https://www.bailii.org/scot/cases/ScotHC/2012/2012HCJAC88.html>

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/scot/cases/ScotHC/2012/>

CASE PAGE <https://chat.esheria.ai/case-law/scotland/telford-v-hm-advocate-2012-scothc-hcjac-88-26-april-2012>

Prepared on 28 October 2026 · Esheria