

IN THE CROWN COURT AT LEEDS

THE QUEEN v A DEFENDANT

Before The Recorder of Leeds

The application

1. In this matter I have to rule on an application made in writing for an amendment to the Representation Order (“RO”) under Regulation 14(10) of the [Criminal Defence Service \(General\) \(No. 2\) Regulations 2001 \(S.I. 2001 No. 1437\)](#).

2. The current order provides for the defendant to be represented by an advocate; the application is for an extension of the order to provide for representation by a QC and Junior Advocate.

3. In this case the defendant is charged with murder. A trial date has been identified but as yet a trial judge has not been identified. This is a case which I have recommended to the presiding judge has features that require that it should be tried by a High Court Judge. The presiding judge has accepted that recommendation and we await notification as to which judge will be allocated to try the case. This application therefore falls to be determined by me as the resident judge - see para (13)(b) of Regulation 14.

4. Regulation 14 provides, where certain conditions are fulfilled, for the extension of the RO to provide for the services of either:

QC alone - 14 (2)(a); 14 (3)

QC with a junior counsel - 14 (2)(b)(i); 14 (5)

QC with a noting junior counsel - 14 (2)(b)(ii); 14 (5)

Two junior counsel - 14 (2)(b)(iii); 14 (4)

Junior Counsel with a noting junior counsel - 14 (2)(b)(iv); 14(4)

The current application is for a QC and junior.

5. I consider that before dealing with the application it is necessary for me to review some current issues which bear on the basic principles about representation and ROs.

Current issues

The background to rights of audience

6. I am aware that there has in recent times been a change in the pattern of representation in the Crown Court. Prior to the Courts and Legal Services Act 1990, only barristers had rights of

audience in the Crown Court in connexion with trials on indictment. There were a few exceptions, Doncaster Crown Court being one, where there were customary rights of audience for solicitors in all matters which arose from their particular historical and local situations.

7. The 1990 Act made provision for solicitors to attain higher rights of audience, pursuant to regulations. Following negotiations with the Lord Chancellor's Advisory Committee on Legal Education, the Senior Judiciary and others under Schedule 4 of the 1990 Act, the 1992 Regulations were introduced by which solicitors underwent training before they were approved to exercise higher rights of audience. That scheme was reviewed in 1995, and in 1998 new regulations were introduced to provide for greater equality of opportunity for solicitors to achieve higher rights.

8. In 1999 the Access to Justice Act introduced the concept that on admission all solicitors had full rights of audience in all courts in all proceedings but required them to comply with training requirements and rules laid down by the Law Society. This led to new regulations, namely the Higher Courts Qualifications Regulations 2000.

9. Under the current regulations there are a number of different routes by which a solicitor can achieve higher rights. There is the Exemption Route, the Accreditation Route, the Development Route, the Former Barrister Route

10. Currently there is an internal debate within the Law Society being conducted by its regulatory arm, the SRA, to determine whether there is any need for such a "qualification" or whether there is a sufficient safeguard of the public interest provided by the Solicitors' Practice Rules requiring solicitors to work only within their competence and whether there should continue to be some kind of specific quality assurance mechanism, and if so what. What is apparent from all the above is that there is a less rigorous examination of competence in higher court advocacy before a certificate is issued than was in place when higher rights were first instituted.

11. The Ministry of Justice is currently conducting a consultation about what form of quality assurance scheme for advocates should be introduced in order to provide the kind of scheme for advocates envisaged by Lord Carter at Recommendation 5.3 of his Final Report, "Legal Aid a market-based approach to reform".

12. A right of audience is of course only a gateway into the higher courts. The professional conduct rules of the two professions stress that an advocate should only exercise that right to appear in matters in which s/he is in fact competent.

13. Currently the professional rules for barristers and solicitors provide as follows:

Barristers

603. A barrister must not accept any instructions if to do so would cause him to be professionally embarrassed and for this purpose a barrister will be professionally embarrassed:

(a) if he lacks sufficient experience or competence to handle the matter;

(b) if having regard to his other professional commitments he will be unable to do or will not have adequate time and opportunity to prepare that which he is required to do;

Solicitors Note 4 of general guidance to Rule 11 “When acting for a client requiring advocacy services you should always consider whether the interests of the client would be best served by you, another lawyer from the same firm or another advocate providing these services. Factors to be taken into consideration include the nature and complexity of the case, your experience and ability, the cost of the advocacy service and the nature of your practice. See rule 2 (Client relations) and the guidance to it for fuller information on issues which you should discuss with your client when accepting instructions.”

14. In a recent decision of the Privy Council it was held that it would never be justifiable to appoint counsel of three months’ standing to defend a client on his own in a capital murder trial; even when it is not possible to point to specific matters that counsel failed to deal with effectively, it cannot be supposed that such a person would have the maturity of judgment and experience of tactics, handling of evidence and presentation to be able to make correctly the myriad of necessary decisions in the course of a major trial, many of which require instant and sure reaction for which experience alone fits an advocate: *Bernard v. State of Trinidad and Tobago* [2007] 2 Cr.App.R. 284(22), P.C.

15. One would hope that any recently called barrister would know that they were not competent to conduct a serious and complex trial on indictment; they simply lack the necessary skill which in part arises from experience. Equally most solicitors who have just been granted higher rights do not feel able to conduct jury trials, other than the most straightforward, as they recognise that advocacy before judge and jury is very different from advocacy in the Magistrates’ Courts. There is of course a grey area as to how quickly an experienced Magistrates’ Courts advocate can move through the learning curve necessary to equip him or her with the necessary experience to carry out more serious or complex cases before juries.

16. However we live in difficult times and there are many pressures upon advocates and litigators.

The demands of business

17. The provision of Legal Aid has undergone significant changes in recent years and there has been a significant reduction in the earnings per case that both advocates and litigators can earn.

18. The government has implemented to a substantial extent Lord Carter’s recommendations in relation to the Advocates’ Graduated Fee Scheme. That has resulted in an attempt to restore the original value of advocacy fees which had not been increased for 10 years despite inflation. On the other hand litigators have had their fees reduced and the new litigators’ graduated fees to come into force in January 2008 is intended to remove £11 million pounds from the sum currently paid to solicitors for litigation services.

19. I am aware that a number of solicitors firms have decided as a matter of policy that in order to maximise their earnings they should if possible provide their own clients' advocacy services in-house through their own HCAs.

The current situation

20. In the 8 weeks since my appointment as resident judge in Leeds, I have noticed the increasing number of HCAs appearing in the Crown Court not only on guilty pleas, committals for sentence but also in trials. I believe that they have felt welcome in my court and I have at all times attempted to accommodate their availability to deal with their cases. I have however on some occasions been concerned as to whether some of them really had the experience to deal with the cases they had taken on.

21. This is not a matter that only relates to solicitors. I have also, on occasions, wondered why a particular counsel was appearing who also appeared to lack the necessary experience to deal with such a serious or difficult case.

22. I am also aware that there have been a number of occasions when the judiciary have expressed concern about the ability of those who have been instructed as advocates in serious cases to fulfil the roles they have been instructed to fill.

23. As I said earlier, the Ministry of Justice is currently looking at questions of quality assurance and is likely to introduce some system whereby advocates will be assessed and graded so that advocates will not be remunerated from the public purse for work that they have not been assessed as competent to undertake.

24. It is not part of my responsibility and I probably have no power to decline to make an order because I hold any views about the seniority, experience or ability of anyone who is likely to be a recipient of that order. It is of course part of my responsibility to report to their respective professional bodies counsel or solicitors who in my view appear to be in breach of their codes of discipline and practice so that the matter can be investigated, and as I have previously indicated I shall not hesitate to do that if I consider that there is a prima facie case of someone doing that which they are not skilled or experienced enough to do.

25. I consider that it is also a part of my responsibility in relation to the listing and management of cases in this court centre, to give guidance as to what will be expected of those who hold representation orders of particular types. It may be that that guidance will affect the decision making of those who select the advocates for particular cases and of those who are asked to act as advocates in particular cases.

Applications for two counsel

26. The starting point for consideration of this matter is that there is no automatic entitlement either to a QC or to two counsel in any case, including a case where the defendant is charged with murder.

27. The usual default position is that the representation order granted by the magistrates in cases of murder is for a solicitor and advocate. The order says that it covers “work by a solicitor and advocate in respect of Crown Court proceedings”. It is possible under Regulation 14(14)(a) for the justices when sending a case in which the proceedings are for murder to grant a representation order providing for the services of a Queen’s Counsel without a junior counsel. This however is very rarely done.

28. I therefore start with the assumption that the junior advocate who is instructed will be one who will be capable of dealing with the case on his/her own if the order is not amended to provide for a second advocate. It therefore follows that the advocate who is first instructed, now referred to in the 2007 Graduated Fee Regulations as “the instructed advocate”, will be expected to deal with all preliminary matters and may have to deal with the trial if the application to extend the certificate has to be refused. It should therefore be very unusual to find a junior advocate in such serious cases being other than a very experienced jury advocate.

29. This is important because the judge dealing with any application may not be able to say until well into the proceedings that the necessary qualifications have been met – particularly those concerning the volume of papers and the prosecution representation. Hence an application made too early may be refused whereas one made a little later may succeed.

29. There are however other reasons why the instructed junior advocate needs to be a senior and experienced jury trial advocate. Firstly there will be occasions when the leading advocate may have to be elsewhere such as the Court of Appeal Criminal Division or even in another case in another Crown Court, dealing with a PCMH. Or, the leading advocate may be taken ill. Any of these things may happen at a critical stage of the case. On these occasions the timetable will not usually permit the case to be adjourned and the junior advocate will be expected to step up to the plate and take over.

30. There is another reason. The variety of combinations of advocate permits of the QC being assisted by someone less than an experienced advocate who can take over, namely a noting junior. (Paragraph 19 of Schedule 1 to the Criminal Defence Service (Funding) Order 2007 provides for a daily payment of £125 to such an advocate). I am of the view that if the timetable of the case has to be substantially rearranged to cope with the leader’s absence, as has happened on some occasions, then it is difficult to argue that the junior is more than a noting junior. Equally if it is apparent that the junior advocate is devoting a lot of time to other matters such as Magistrates’ Courts cases before attending at the Crown Court each morning it would be difficult to argue that he is playing the role of a full junior assisting in all the work that goes on each day before the case commences at 10.30. As the court has a duty to keep the order under review and to ensure that the representation coincides with the grant, the court may have to consider varying an order for QC and junior to one of QC and noting junior if that is the role that it appears that the junior has been playing.

31. The regulations clearly anticipate that a case which “cannot be adequately presented except by a QC assisted by junior counsel” is one in which the QC and junior are a team working together at the preparation and presentation of the case and does not permit of what used to be called a “straw junior”.

32. I am very aware that it is often difficult for a QC to request a different junior when s/he knows that the judge has granted a certificate for QC and junior on the application of an in-house HCA junior.

33. In all these circumstances it seems necessary to provide guidance as to (i) what information the court will require in the future when granting an amendment under Reg 14; (ii) what the court's expectation will be when granting such an amendment and (iii) what the court will do when it considers that that expectation has not been fulfilled.

Future applications

34. The court will henceforth require a written advice from the proposed "instructed advocate" on the question as to what representation is needed in the proceedings as set out in paragraph (11).

35. That advice should set out:

(i) the order that is sought;

(ii) the basis upon which it is said that the qualifying criteria are met. It is essential that paragraph 5(b) is addressed and that either the case of murder is shown to be exceptional when compared with other murders so as to pass the test in 5(b)(i) or one of the features of paragraph 5(b)(ii) is shown to exist, and that latter course may often not be apparent until the CPS has made a decision about its own representation and/or served the full case papers prior to the PCMH

Expectations

36. I have set out above what the court will henceforth expect of the instructed junior advocate namely that s/he is sufficiently experienced to play the part of a full junior in the trial, does play that part and is not simply there to take a note, or to "gain valuable experience".

Review

37. The court will henceforth keep matters under review and if it considers that a junior has not played a proper junior's part, either by being absent for significant parts of the case, or by playing a role less than that required of a full junior, it will give consideration, subject to the right of any party affected to make representations, as to whether the order should be amended under paragraph (15).

The instant application

38. I have already stated that this is a case which has features making it suitable for trial by a High Court Judge. The proposal, as I understand it, is that experienced Queen's Counsel will be instructed if the representation order is amended to enable that to happen. I believe enquiries

have been made and that a QC has been identified who is available for the trial dates. I also understand that the proposal is to instruct as junior advocate an HCA from the firm representing the defendant. Upon enquiry of the firm I am informed that the HCA has had higher rights for 2 years but that until now the proposed advocate has conducted no jury trials.

39. It does seem to me that it is unlikely that he would be able to fulfil the expectations that I have spoken about above. However ultimately that will be a matter for the litigator to decide, although there might be a subsequent review of the order as the role played became apparent.

40. However at the moment I have not been provided with material that enables me to say that either of the criteria in paragraph 5(b) are satisfied. In those circumstances I am not able to grant a certificate for QC and junior. If the QC advises in writing that this is a case where he is able to deal with the case with the benefit of a noting junior I would be prepared to grant such a certificate. However I would have thought that the complexities of law and fact in this case are such that Queen's Counsel would wish for a full junior advocate. In due course if I am provided with evidence that the criteria in paragraph 5(b) are satisfied then I would grant the application in the expectation that an advocate able to fulfil that role will be instructed.

41. I shall therefore adjourn this matter for further consideration by the defendant and his representatives, and so that they can make further representations as to the basis upon which they say that the case is made out for an extension of the application giving particular attention to the matters I have to consider under paragraph (5)(b)(ii).

His Honour Judge Peter Collier QC The Honorary Recorder of Leeds

30th October 2007