APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 7
HCA/2021/409/XC

Lord Justice General
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

APPEAL FROM THE SHERIFF APPEAL COURT IN TERMS OF SECTION 194ZB OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

STEPHEN MOTRONI

Appellant

against

PROCURATOR FISCAL, KILMARNOCK

Respondent

Appellant: Dean of Faculty (Dunlop QC), Findlater; Livingstone Brown, Glasgow
Respondent: A Prentice QC (sol adv) AD; the Crown Agent

2 February 2022

Introduction

[1] This is an appeal under section 194ZB of the Criminal Procedure (Scotland) Act 1995 against a decision of the Sheriff Appeal Court. It raises a short point of statutory construction. The provision in question is the Criminal Law (Consolidation) (Scotland) Act 1995, section 16B as amended.

[2] Section 16B as originally enacted, was inserted into the 1995 Act by the Sex Offenders Act 1997, with effect from 1 September 1997. It did not make express provision for the trial of offences in the sheriff court.

[3] As a result of *McCarron* v *HM Advocate* 2001 JC 199, section 16B was amended by the Criminal Justice (Scotland) 2003, section 19(2)(c), which came into force on 27 June 2003. That added sub-sections (6A) and (6B). The relevant parts of section 16B now read as follows:

> "16B.– **Commission of certain sexual acts outside the United Kingdom**
>
> (1) …, any acts done by a person in a country or territory outside the United Kingdom which–
>
> (a) constituted an offence under the law in force in that country or territory; and
>
> (b) would constitute a listed sexual offence if it had been done in Scotland,
>
> shall constitute that sexual offence.
>
> …
>
> (6A) A person may be proceeded against, indicted, tried and punished for any offence to which this section applies–
>
> …
>
> (b) in such sheriff court district as the Lord Advocate may determine,
>
> as if the offence had been committed in that district; and the offence shall, for all purposes incidental to or consequential on trial or punishment, be deemed to have been committed in that district."

It should be noted that subsection (6) provided that in proceedings on indictment the question whether the condition in subsection (1)(a) was satisfied was to be decided by the judge alone.

Background

[4] The problem which gives rise to this appeal arose in the following way. The appellant faced trial on a summary complaint libelling two charges of lewd, indecent and libidinous behaviour which had allegedly occurred at various *loci* in Scotland and Italy between 1992

and 2001. At the conclusion of the evidence, the sheriff *ex proprio motu* raised the question whether he had any jurisdiction over the incidents in Italy. Having heard submissions, the sheriff decided that he did not have such jurisdiction and deserted those parts of both charges *pro loco et tempore*. He then acquitted the appellant of the remainder of both charges.

[5] The respondent appealed to the Sheriff Appeal Court. The appeal was upheld, the verdict of acquittal was quashed and the case was remitted to the sheriff to proceed as accords. It is against that decision that this appeal is now taken.

Submissions

Appellant

[6] The only question in the appeal was whether the amendment of section 16B in 2003 was retrospective, such as to give the sheriff jurisdiction to deal with matters arising between 1997 and 2001. Without the amendment, the sheriff had no jurisdiction, as was pointed out in *McCarron*. The presumption is that statutory provisions are not applied retrospectively, although there are exceptions. Such an exception is where they are purely procedural. See the discussion in *Yew Bon Tew* v *Kenderaan Bas Maria* [1983] 1 AC 553 and *L'Office Cherifien des Phosphates* v *Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486. The Crown and the Sheriff Appeal Court proceeded on the basis that the amendment to section 16B was procedural. That was wrong. Provisions allocating jurisdiction were substantive. They could not be waived or affected by the agreement of parties. *Benedictus and Others* v *Jalaram Ltd* (1989) 58 P & CR 330. This was fundamental, particularly where the statutory provision created a fiction that the alleged offences, despite being said to have been committed in Italy, were deemed to have been committed in the sheriffdom. That gave the procurator fiscal the power to prosecute when previously only the Lord Advocate could do so in the High Court, as

explained in *McCarron*. The identity of the decision-maker was not merely procedural. *Colonial Sugar Refining Co Ltd* v *Irving* [1905] AC 369 and *Association of Chartered Certified Accountants* v *Awodola* [2021] EWCA Civ 1635. A complete defence to the proceedings on summary complaint, namely lack of jurisdiction, had been removed. Cases which involved time limits, such as *R* v *Chandra Dharna* [1905] 2 KB 335, fell to be distinguished. Even in such cases, if a right to rely on a time limit had accrued before the limit was extended, then the "procedural" amendments became substantive.

Respondent

[7] *McCarron* identified "a failure to enact the necessary procedural machinery" to confer jurisdiction in respect of the sheriff court. The amendment put that necessary procedural machinery in place. The provision for a lower form of prosecution than previously allowed resulted in no possible prejudice to an accused person. The amendment was purely procedural and fell squarely within the compass of *Yew Bon Tew* v *Kenderaan Bas Maria*. There could be no clearer example of a procedural provision than one which governed the forum in which an accused person could be prosecuted. The maximum penalties available were far less than would be available in the High Court. No one had a vested right to any particular form of procedure.

Analysis and Decision

[8] Canons of statutory construction are tools which may assist a court to ascertain the intention of Parliament. That is the task which faces this court. If the amendment was intended by Parliament to be retrospective, then the sheriff had jurisdiction. If not, then the opposite is true. A statute should not be interpreted as applying retrospectively if it will affect

an existing right or obligation unless that is unavoidable on a plain construction of the language. There is an exception in the case of provisions which are purely procedural, because no person has a vested right in any particular procedure. In this respect the court agrees with Lord Brightman in *Yew Bon Tew* (at 558). However, the words "retrospective" and "procedural" can be misleading. The court should proceed on the basis that, as a generality, a statute is not intended to have retrospective effect. However, care has to be taken when applying such a presumption. The basis of the rule is fairness. Changing the character of a person's acts or omissions after the event is often regarded as unfair. It is assumed that Parliament seldom wishes to act unfairly. The court agrees with the sentiments to this effect expressed by Lord Mustill in *L'Office Cherifien* (at 524 -525) citing *Secretary of State for Social Securiy* v *Tunnicliffe* [1991] 2 All ER 712, Staughton LJ at 724.

[9] How the question of fairness will be answered in relation to a particular provision will depend on several factors. The degree of likelihood that retrospectivity is what Parliament intended will vary from case to case as will the clarity of the language used and the light shed on it by the context in which the provision was enacted. In *L' Office Cherifien*, having explained (at 527) that a rigid application of the distinction between substantive and procedural rights could be misleading, Lord Mustill recommended an approach which, whilst keeping the distinction in view, looked at:

> "the practical value and nature of the rights… involved as a step towards an assessment of the unfairness of taking them away after the event."

[10] Lord Mustill did not suggest that the distinction between procedural and substantive provisions should be abandoned. The extent to which that distinction is helpful, however, will depend on the nature of any rights which have been accrued and the nature of any interference with them. As was said, the ultimate question is one of fairness. Parliament is

not to be presumed as intending to act unfairly, but if that is the intention of an Act of Parliament, then effect must be given to it. Of particular importance, is Lord Mustill's reference to the clarity of the language used by Parliament and the light shed on it by consideration of the circumstances in which the legislation was enacted.

[11] Those circumstances should now be examined.

[12] The appellant in *McCarron* was indicted in the sheriff court at Dunfermline and pled in bar of trial that the sheriff had no jurisdiction in respect of a charge alleging conduct said to have taken place in Spain. The Crown relied on section 16B of the 1995 Act. The sheriff repelled the plea, but his appeal was allowed. The jurisdiction of the sheriff court was territorial and nothing in the Act determined in which sheriff court a crime or crimes committed abroad could be tried. The Lord Advocate had no power to select any particular district. At paragraph [5] Lord Justice General (Rodger), delivering the Opinion of the Court, said this:

> "[5] … [the Advocate Depute] put forward a powerful argument, based on section 16B(6) of the Consolidation Act, for saying that Parliament must have envisaged that the offences specified in sec 16B(7) could be tried summarily. Had that not been so, he pointed out, Parliament would not have needed to say that, 'in proceedings on indictment', the judge alone was to decide whether the condition in subsec (1)(a) was satisfied. The choice of wording showed that summary proceedings were possible and so *a fortiori* Parliament must also have intended that the offences should be triable on indictment in the sheriff court. We accept that this is so."

Having considered the arguments, the court reluctantly reached the view that there was no statutory basis for the supposed jurisdiction of the sheriff court at Dunfermline. Paragraph [9] of the Opinion, reads as follows:

> "We add two observations. First, as the solicitor advocate was the first to recognise, the appellant's success in this appeal does not mean that he cannot be tried for the offence in charge (2). It simply means that no sheriff court has jurisdiction to try the offence. There is, on the other hand, no doubt that, since the offence is triable on indictment, it can be tried by the High Court sitting at any place in Scotland (1995 Act, section 3(2)). So, the upshot of the appellant's success may be that he comes to face an

> indictment in the High Court. That is, of course, a matter for the Lord Advocate and not for us and we say no more about it. Secondly, the point taken in this case reveals a flaw in the drafting of the Sex Offenders Act 1997 which failed to enact the necessary procedural machinery for the courts to carry out the intention of the legislature. The Scottish Ministers may wish to consider putting appropriate remedial legislation before the Scottish Parliament for their consideration."

[13] It is quite clear that in *McCarron* the court was of the view that amending legislation would be procedural in nature. As we have indicated, that of itself is not a complete answer to the question before us. We respectfully agree, however, with that court that the intention of the legislature in enacting section 16B was to enable crimes allegedly committed abroad to be libelled in Scotland and, more particularly, in the sheriff court both on indictment and on summary complaint. The legal fiction whereby these crimes were deemed to have been committed in Scotland, was in the section before the 2003 amendment was inserted. Deeming them to be committed in the relevant sheriff court district was the machinery which Parliament chose to remedy the defect spelled out in *McCarron*. The amendment did not introduce anything of substance which involved a departure from Parliament's original intention. It merely provided the procedural machinery to allow it to be carried into effect in line with the court's suggestion in *McCarron*. It had been Parliament's intention when the provision was originally enacted that the sheriff court have jurisdiction both on indictment and on summary complaint.

[14] There is nothing unfair in giving retrospective effect to this amendment. There is no right in an accused person in this country to be tried by a jury. The choice of forum is always a matter for the Crown, except where that is restricted by law. Before the amendment, the only forum which could try the offences covered by section 16B was the High Court of Justiciary. We acknowledge the authorities which provide that the identity of the decision-maker in a case is of importance. On the other hand, there is nothing unfair in a provision

which allows cases to be prosecuted in a summary fashion with restricted penalties in the event of a conviction and where the decision-maker is expected to give reasons.

[15] The amendment is merely procedural. It produces no unfairness if retrospective effect is given to it. It was clearly intended to provide a machinery to give effect to the intention of Parliament, which had been since 1997 to allow the sheriff court to deal with these offences.

[16] The appeal is refused and the matter will be remitted to the sheriff to proceed as accords.