APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 40
HCA/2024/000002/XM

Lord Justice Clerk
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LADY DORRIAN the LORD JUSTICE CLERK

in

BILL FOR CRIMINAL LETTERS

by

A.B.

Complainer

against

PAUL COONEY

Respondent

For the Crown: The Lord Advocate (Bain KC), Gill KC AD, MacNeill AD; Crown Agent
Complainer: Mitchell KC, Ross; Livingstone Brown, Glasgow
Respondent: Moir KC, Henry; Levy & McRae Solicitors

29 October 2024

Introduction

[1] The complainer alleges that the respondent used lewd, indecent and libidinous practices towards her whilst she was between the ages of 12 and 15. The alleged offences took place between August 1977 and April 1980 during which time the respondent was a

teacher and the complainer a pupil at a school in Ayrshire. It is admitted that the complainer's allegations against the respondent were first investigated by the police in the early 1990s, but for reasons unknown, no prosecution was instructed, intimation to that effect being given to the respondent. Subsequent inquiries in 2016, and then in 2019, led to service of an indictment on 24 June 2020. The respondent tabled a plea in bar of trial that the Lord Advocate had renounced her right to prosecute him. It was agreed that a letter dated 21 December 1992 from the Crown Office and Procurator Fiscal Service to the respondent's solicitors was an intimation to the respondent that no further proceedings were to be taken against him in respect of the acts forming the subject matter of the indictment. The sheriff upheld the plea in bar of trial, and that decision was upheld on appeal (*HM Advocate* v *Cooney* 2022 HCJAC 10).

[2] The complainer now seeks authority to bring a private prosecution in an application for criminal letters. The Lord Advocate, in a letter dated 21 February 2024, informed the complainer that she "considers herself unable to provide concurrence to the Bill by reason of the Crown's decision of 21 December 1992 and the Appeal Court's decision of 9 February 2022…". Nevertheless, the Lord Advocate, whilst refusing her concurrence, does not oppose the Bill.

Background

[3] The facts relating to the 1991/1992 investigation, insofar as known, may be summarised thus:

(i) The complainer lodged a complaint with the education authority in 1991 or 1992;
(ii) The EA took the complaint seriously and appointed investigators to inquire into it;
(iii) The complainer was interviewed and stated to them what she later told the police in 2016;

(iv) Minutes were taken of the interview and a report sent to the EA;
(v) A corroborating witness, DD was also interviewed during the EA investigation; he also told them what he later told the police in 2016, effectively a contemporaneous admission by the respondent of conducting a relationship with a female pupil; the name of the complainer "rang a bell" with DD; contact was made with another witness in Newcastle, who provided further information;
(vi) The investigators sent a report to the EA;
(vii) The matter was reported to the police. The exact circumstances in which this was done are unclear. In *HMA v Cooney* the parties proceeded on an inference that the EA must have done so, in the belief that the complainer had not done so. However the agreed material before the court suggests that the complainer may well have done so. The EA investigator was told by the complainer that she had reported the matter to the police and to the social work department. The complainer certainly knew that it had been reported to the police, and that there had not been a prosecution. In 2016 the complainer contacted the police asking them to re-open the inquiry. The officer she spoke to was unable to find any trace of the matter. The complainer told her she believed she had reported it in 1992.
(viii) The respondent was interviewed by the police during the latter half of 1992; they must have had sufficient information, either from the complainer or the EA to enable them to conduct such an interview.
(ix) A police report must have been sent to the PF or he would not have been able to answer the solicitor's letter;
(x) The PF letter has a reference which appears to be both a person reference "JBK/RM" and a case reference 10442/92; that must have been written on consideration of the police report;
(xi) The EA brought disciplinary proceedings against the respondent, who was moved to an un-promoted post at another school;
(xii) No documentation from 1992/1993 now remains in the hands of COPFS; the police; the EA; or the Social Work department.

[4] Following the complainer's approach to the police in 2016 a fresh investigation was commenced. Numerous potential witnesses were interviewed. The respondent was detained and interviewed under caution. He made no comment, and was not charged. Thereafter further investigation was carried out and he was eventually charged on 8 October 2019.

[5] The parties have lodged a Joint Minute of Agreement and a Joint Note. It is a matter of agreement that the complainer has title and interest; and that the evidence discloses a

prima facie sufficiency of evidence against the respondent on the charge in question. The respondent no longer insists on arguments relating to oppression or delay. The parties were further agreed that the primary focus of the hearing should be on the following issues:

(a) The question of exceptional circumstances;

(b) The complainer's right to an effective investigation and prosecution under Articles 3 & 8 ECHR.

Submissions for the Lord Advocate

The Lord Advocate's concurrence

[6] Having renounced the right to prosecute, the Lord Advocate is barred from granting her concurrence to the bill, which if granted would establish the Lord Advocate as "*master of the process*" (*Mackintosh* v *HM Advocate* (1872) 2 Coup 236; and *Couhoun,* cited in Hume, *Commentaries* (4th ed) II. 269), entitled to intervene should circumstances so demand. By virtue of the Crown's renunciation of the right to prosecute the Lord Advocate is unable either to prosecute the respondent herself or to concur in the complainer's bill. It would be inappropriate for her to comment on the merits of the bill. However, having concluded that the respondent should be indicted and prosecuted, nor does she oppose the passing of the bill. She appears in this process in the public interest, solely in order to assist the Court as to the correct test it should apply in considering whether to pass the bill in the circumstances of the case. Nevertheless, the Lord Advocate's presentation of the indictment, and her lack of opposition to this bill, mean that she has concluded that there is a *prima facie* sufficiency of evidence against the respondent and that prosecuting him would be in the public interest. These are important considerations.

"Exceptional" Circumstances

[7] Where the Lord Advocate does not oppose a bill, the requirement for establishing "*exceptional"* circumstances for the bill to pass do not apply. The institutional writers recognised that, a system of public prosecution having been established, authorising a private prosecution was an exceptional step, but did not suggest that exceptional circumstances were required for the court to take that step. The key issues, apart from whether the Lord Advocate concurred, seem to have been whether there was a *prima facie* case and whether proceeding would be reasonable. Where the authorities made reference to "exceptionality" it was for the purpose of noting that it was the remedy that was exceptional, not the circumstances which had to exist for its operation. The statement in *X* v *Sweeney* 1982 JC 25, where the Crown had renounced the right to prosecute, that the test was whether there were

> "very special circumstances which would justify ... the now exceptional step of issuing criminal letters at the request of a private individual"

was not the subject of reasoned discussion.

Convention rights

[8] Before the court could pass the bill, it required to be satisfied that there are circumstances- but not exceptional circumstances- which justified the passing of the bill. In turn, in considering the application, in which the complainer's article 3 and article 8 rights were engaged, as were the respondent's article 6 rights, the court required to carry out a balancing of the conflicting rights of the complainer and the respondent.

Submissions for the complainer

[9] Senior Counsel for the complainer invited the court to grant the bill. Apart from showing the admitted facts that she had title and interest, and that there was a sufficiency of evidence, the complainer had to show:

i. that she had applied for the concurrence of the Lord Advocate; and

ii that concurrence having been refused, there are exceptional circumstances to justify granting the bill (*Stewart* v *Payne* 2017 JC 155; *J & P Coats Limited* v *Brown* (1909) 6 Adam 19 (at 37–38); *X* v *Sweeney* (at 79); Renton & Brown, *Criminal Procedure* 6th Ed, [para 3-09]).

Concurrence of the Lord Advocate

[10] This had been sought and refused, although it was apparent that the Lord Advocate was sympathetic to the situation the complainer found herself in. The Crown's renunciation did not affect the private rights of the complainer: it did not render further, private, prosecution incompetent. There was no reason in principle, or any rule of law, to the effect that the Lord Advocate could not have granted concurrence to a private prosecution in the present circumstances.

Exceptional circumstances

[11] Senior Counsel for the complainer accepted that, where the Lord Advocate refused concurrence, the complainer had to satisfy the court that exceptional circumstances justified the granting of the bill (*Stewart* v *Payne*, paras 85-87). The exceptionality requirement arose because in general in the modern era criminal prosecutions in Scotland proceed at the instance of the Lord Advocate as public prosecutor:

> "The case for such a remedy must be the exception to the rule, calling for exceptional treatment" (*Stewart* v *Payne*, para 89).

[12] The requirement of exceptional circumstances does not create an insurmountable hurdle. It is simply a circumstance that is unusual, atypical or out of the ordinary, involving facts and circumstances which might take the case out of the norm (*M* v *Procurator Fiscal, Ayr* 2009 HCJ 3 para 27). There are three reasons why the complainer's case was exceptional:

(a) There is a strong public interest in the prosecution proceeding. This is not a case where the Lord Advocate refused to prosecute. Had it not been for the 1992 letter of renunciation the prosecution would have proceeded.

(b) The Lord Advocate, whilst not lending her concurrence, is supportive of the bill.

(c) Under Articles 3 and 8 ECHR, the complainer is entitled to an effective investigation and prosecution of the crimes alleged. (*MC* v *Bulgaria* 2005 40 EHRR 20; *O'Keefe* v *Ireland* 2014 59 EHRR 15; *Commissioner of Police for the Metropolis* v *DSD* 2019 AC 196; *HM Advocate* v *Cooney*). As a result of the renunciation letter, a prosecution at the instance of the Lord Advocate is not now possible. That alternative, civil remedies may be available is not sufficient to avoid a breach of these rights: the Convention requires a criminal prosecution. Granting the bill is the only way to enable the complainer to assert her article 3 and 8 rights, and for the court to comply with its obligations under section 6 of the Human Rights Act 1998.

Submissions for the respondent

The Lord Advocate's concurrence

[13] Senior Counsel for the respondent agreed with the submissions for the Lord Advocate, that the Lord Advocate was disabled from concurring in the bill.

Exceptional circumstances

[14] This was a case where the Crown had renounced the right to prosecute in 1992. The circumstances of the presentation of the indictment in 2020 had to be considered in that light. The implication of the Lord Advocate's submissions, and those of the complainer, is that the original decision not to prosecute the respondent was a mistaken one, an exercise of discretion which should not have been made (*HM Advocate v Cooney*, at para 23). However, the material upon which that decision was made is not known, distinguishing the facts from *X* v *Sweeney* and *C* v *Forsyth*, 1995 SLT 905 in both of which the reasons for renunciation were known. Where it is suggested that the Crown have erred in their assessment of the sufficiency of evidence against an accused person, there are strong public policy reasons for the requirement of exceptionality before the court would be entitled to pass a bill for criminal letters on that basis, which would necessarily involve a review of that initial decision.

[15] There was a clear line of authority which required the complainer to demonstrate exceptional circumstances in support of the bill, notwithstanding the Lord Advocate's decision not to oppose it (*McBain* v *Crichton* 1961 JC 25; *C* v *Forsyth; X* v *Sweeney; Stewart* v *Payne).*

Whether exceptional circumstances exist

[16] There were no exceptional circumstances disclosed by the complainer in support of the bill. The circumstances are not unusual, as noted in *HM Advocate* v *Cooney,* para 23*;*

> "A decision was knowingly made in the case…There was a decision. It applied to this accused. It applied – as agreed in the joint minute – to the charge against him on the current indictment. The Crown do not wish to be held to that decision because they claim that re-examination of the circumstances in 2016 suggest that there is a sufficiency of evidence, and that this would have been disclosed by a competent investigation at the time. What is being suggested is that the decision was a mistaken

> one – in other words it was an exercise of discretion which should not have been made."

An error of judgment by the Crown would not be sufficient to justify passing the bill: see *Stewart* v *Payne* para 91. What is required is an egregious or outrageous failure by the Crown in 1992. It could not be said one way or the other whether there was a full investigation and assessment of the evidence by the Crown in 1992. The process before the court was not one of Judicial Review and the court did not have investigatory powers. The court could not in the circumstances find that exceptional circumstances existed.

The complainer's convention rights

[17] There is no provision of the Convention which guarantees the complainer a right to secure the prosecution of a third party (*Öneryildiz* v *Turkey No 2* (2005) 41 EHRR 20, at paras 96, 147), and it is thus not clear how refusal of the bill would breach her convention rights. The complainer's submissions do not demonstrate any systemic deficiency; or identify any conspicuous or substantial errors in investigation such as would constitute a breach of her Convention rights.

Analysis and Discussion

Whether the Lord Advocate is barred from giving her concurrence

[18] This is an academic issue, since the Lord Advocate has not given her concurrence. The complainer's submissions that there is no rule of law or principle preventing her from having done so seem mainly directed to trying to persuade the Lord Advocate to change her mind, given that they are not directed to any relevant plea in law. We consider that the submissions of the Lord Advocate that she is disabled from concurring are correct, since it would seem strange, in a case where she has renounced the right to prosecute, to concur in a

bill for criminal letters in respect of the same behaviour. Given the importance to be attached to concurrence, were the Lord Advocate able to concur when she has renounced prosecution, this would significantly weaken and undermine the effect of renunciation. Both *Sweeney* and *C* proceeded on the basis that in such circumstances the Lord Advocate was unable to give concurrence. We do not necessarily accept the Lord Advocate's submission as to the effect of *Mackintosh* and *Couhoun:* it must be doubted whether the asserted consequence could ever follow in a case where the Lord Advocate has renounced the right to prosecute. However, since only very brief submissions were made on the issue, and determination is not required to accept that the Lord Advocate is, by renunciation, barred from concurring, we say no more on the matter.

The need for exceptional circumstances

[19] The Lord Advocate submitted that where she did not oppose the bill, it was not necessary for a complainer to show exceptional circumstances to justify the granting of the bill. If the Lord Advocate remains neutral on the matter, whether disabled from consenting or otherwise, all that would be required, on this argument, would be that the complainer has title and interest; that there was a sufficiency of evidence; and that to allow the prosecution would be "reasonable", in the sense that there were no compelling reasons against it, for example, such as a validly advanced plea of oppression based on delay, or other such fundamental point. This is a strange and unprecedented submission, the effect of which would ultimately be to render the concurrence of the Lord Advocate, or lack of it, an irrelevance. The adoption of a "neutral" position by the Lord Advocate would effectively be treated as equivalent to concurrence. It would enable a Lord Advocate, barred from granting concurrence by having renounced the right to prosecute, effectively to concur by an

indirect means. Most significantly it would seriously undermine our established system of public prosecution, developed and honed over hundreds of years.

[20] The Lord Advocate submitted that it was not clear from Hume's treatment of the issue that there was any requirement for exceptional circumstances but the passages to which she refers are those primarily dealing with the identification of the title and interest of a complainer, rather than any of the additional requirements which might be found necessary before a bill for criminal letters may be authorised. Even if it be the case that at the time of Hume there was no strongly developed requirement for exceptional circumstances, it does not follow that the same applies today, when the system of public prosecution and the role of the Lord Advocate is so much more entrenched and settled. Even at the time of *J & P* Coats this was acknowledged to be the case, as can be seen by the submissions of the Lord Advocate (Alexandre Ure KC, later Lord Justice-General Strathclyde) in that case*:*

> "I do not dwell upon the law applicable to the situation with which your Lordships are now to deal. You will find it very clearly and fully expounded in the opinion of learned and very experienced judges in the administration of the criminal law in two cases within comparatively recent times, which, in my humble judgment, supersede entirely the views which are expressed in the text writers, due, no doubt, to the great development of the administration of the criminal law and to the improved method of investigation which is now followed. The particular cases 1 refer to are the case of *Mackintosh* [*Mackintosh v HM Advocate* (1872) 2 Coup 236] and *Robertson* [*Robertson v HM Advocate* (1887) 1 White 468]*."*

The need for exceptional circumstances is emphasised and repeated in a long line of modern authorities. The matter was explained in *Stewart* v *Payne:*

> "[85] Scotland has for many centuries had a system of public prosecution in which the Lord Advocate is recognised as prosecutor in the public interest. By 1961 this system of public prosecution had become so well acknowledged and respected that the court was able to say that 'private prosecutions have almost gone into disuse' (*McBain v Crichton*, Lord Justice-General, p 29). Although it remains open to a private citizen to apply to the court for permission to bring a private prosecution where the Lord Advocate has declined to prosecute or grant his concurrence to a private

> prosecution, the circumstances in which such permission may be granted have repeatedly been described as exceptional.
>
> [86] The reasons for the requirement of exceptionality are related to the constitutional role of the Lord Advocate. In *McBain* v *Crichton* the Lord Justice-General (p 29) observed that the Lord Advocate:
>
> > 'is the recognised prosecutor in the public interest. It is for him, in the exercise of his responsible office, to decide whether he will prosecute in the public interest and at the public expense, and under our constitutional practice this decision is a matter for him, and for him alone. No one can compel him to give his reasons, nor order him to concur in a private prosecution. The basic principle of our system of criminal administration in Scotland is to submit the question of whether there is to be a public prosecution to the impartial and skilled investigation of the Lord Advocate and his department, and the decision whether or not to prosecute is exclusively within his discretion.'
>
> These features were also mentioned by Lord Guthrie (p 31) to explain why it would only be in 'highly exceptional circumstances' that private prosecution will be authorised.
>
> [87] This exceptionality is emphasised in every case in which an application for criminal letters has been made. So, for example, in *C* v *Forsyth* (p 912) the Lord Justice-Clerk (Ross) noted that '[i]t is well recognised that private prosecution is allowed only in exceptional cases', and in *Meehan* v *Inglis* (p 12) the Lord Justice-Clerk (Wheatley) observed that permission of the court to proceed with a bill for criminal letters 'will only be granted in very special circumstances'."

The case of *J & P Coats* was referred to as an example where the court did not seem to require exceptional circumstances. In *Stewart* v *Payne* the court explained (paras 92-94) why *J & P Coats* was a very particular case. However, it should not be thought that exceptionality was not an issue. It is obvious, for the reasons explained in *Stewart* v *Payne,* that the court did treat the circumstances as being exceptional. The issue of exceptionality was before the court: it had been referred to in detail in the Lord Advocate's submissions as a necessary requirement. Lord McLaren referred to it (p44) as "an extraordinary remedy for an extraordinary and unprecedented occurrence". Although he was in the minority on the central issue of whether the Lord Advocate's lack of concurrence could be overridden, there is no reason to doubt the validity of these comments or that they formed the basis upon which the majority of the court acted, namely that they did indeed find that there was an extraordinary and unprecedented occurrence justifying this extreme step.

[21] It is of note that in making her submission on this point the Lord Advocate departed from her answers to the bill, which state, paragraph 9:

> "Only once sufficient admissible evidence to establish the charge beyond reasonable doubt is established will the Court proceed to determine whether "special circumstances" are present which entitles the grant of the Bill of Criminal Letters which is now an exceptional remedy due to private prosecutions having been rendered rare, such that the remedy is deemed extra-ordinary. Private prosecution is permitted where special or very special circumstances are present, and no public prosecution will be raised. *MacKintosh* v *HMA*, May 20, 1872, Couper, vol ii, 259, *Robertson* v *HMA*, (1887) 1 White, 468, *Coats* v *Brown*, 1909 SLT, 370, 1909 SC (J) 29, *McBain* v *Chrichton*, 1961 J.C. 25, *X* v *Sweeney*, 1982 J.C. 70, *C* v *Forsyth*, 1995 SLT 905, *Stewart and Convy* v *Payne and McQuade* and *Reilly* v *Clarke*, 2017 J.C. 155"

In contrast with the submission made that is a correct statement of the law.

Do exceptional circumstances exist?

[22] It is important not to let the fact that the respondent was eventually indicted obscure the fact that the Lord Advocate had no right to serve that indictment: the right to prosecute had been renounced many years before the service of that indictment. What prevents the Lord Advocate from pursuing a prosecution against the respondent is a decision made on her behalf in 1992, following a police investigation. We do not know the outcome of the investigation nor do we know the reason for the decision. No party in this case has made, or could make, proper and informed averments about what gave rise to that decision being made, the reasonableness of the decision, the evidence which was considered or the circumstances in which the letter was issued. To suggest otherwise would be speculation. Taking the complainer's case at its highest, there ***may*** have been an error in judgement in issuing the letter without reservation as to the future; we simply do not know.

[23] Senior counsel for the complainer drew attention to the fact that certain witnesses, identified and interviewed during the post-2016 investigation had not been interviewed by the police in 1992. It was submitted that this was indicative of a failed and inadequate

investigation. However, we do not know the reasons for that. It does not follow from the fact that the inquiry in 2016 onwards resulted in a decision to prosecute that the earlier decision to do otherwise was wrong. A report had been made to the police; the police had carried out an investigation; we do not know the extent of that investigation. The complainer says she was not interviewed, but the police had enough information to enable them to detain the respondent and to interview him under caution. We also know that the police investigation resulted in a report to the Fiscal, who made the no pro decision. The Fiscal must have considered he had enough information to reach a decision. Given the known availability of potentially corroborating witnesses in 1992 (DD and the witness in Newcastle) it cannot be assumed that the decision was made on the basis of insufficiency.

[24] Even if we assume that the sending of the letter constituted an error, this issue was also considered in *Stewart* v *Payne* where the court stated:

> "An error of judgement by the Crown is not sufficient to meet the test of exceptionality. In our view the test of exceptionality would require to show that the Lord Advocate's decision not to prosecute had to be viewed in the circumstances as an egregious or outrageous failure in the exercise of his public duty. For example, as discussed in *J&P Coats Ltd v Brown,* if it could be shown that the Lord Advocate had failed in his public duty, and had acted oppressively, capriciously, or wantonly, the circumstances might properly be described as exceptional, allowing a bill to be passed. It is quite difficult to conceive of circumstances in which the court would pass a bill where the Lord Advocate had examined and investigated the circumstances of the case and concluded as a matter of informed judgement that the whole tenor and weight of the evidence did not justify prosecution."

The circumstances of this case come nowhere near meeting that test.

ECHR Considerations

[25] The complainer's submissions essentially replicate those made by the Solicitor-General in *HM Advocate* v *Cooney,* in respect of which the court (para 29) considered that the following propositions could be drawn:

> "– Article 3 may give rise to a positive obligation to conduct an official investigation. A failure properly to investigate allegations may constitute a violation of the complainer's rights under Arts 3 and 8;
> - States have a positive obligation inherent in Arts 3 and 8 to enact provisions which effectively punish crimes and to apply them in practice through effective investigation and prosecution;
> - In order to be an effective deterrent, laws which prohibit conduct constituting a breach of Art 3 must be rigorously enforced and complaints of such conduct must be properly investigated. Enquiries should, in principle, be capable of leading to the identification and punishment of those responsible. That investigation should be conducted independently, promptly and with reasonable expedition, allowing effective participation by the victim;
> - A breach may be established through systemic or operational defects, but in respect of the latter it will be necessary to establish serious failures which were egregious and significant going beyond simple errors or isolated omissions."

As senior counsel for the respondent submitted, the Convention does not guarantee the complainer a right to secure the prosecution of a third party or for prosecution to result in conviction (*Öneryildiz* v *Turkey No 2* (2005) 41 EHRR 20). An obligation to investigate is not an obligation of result, but of means: not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant's account of events; although it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible. The present case, however, is not one in which the court can conclude that there was a failure of investigation. It is not possible on the information available to the court to reach a properly reasoned view that there have been conspicuous or substantial errors in investigation such as would constitute a breach of the complainer's Convention rights. The position remains as noted by the court in *HM Advocate* v *Cooney*, para 30:

> "It has not been suggested that there is any systemic deficiency. There is in place a system of investigation and public prosecution of crime in Scotland, which at a general systemic level is compliant with Arts 3 and 8. The process for investigation of crime incorporates all of the aspects envisaged in *O'Keeffe*. It is not the fact that the Crown may be held to a clear and unequivocal renunciation of the right to prosecute which is the problem, if problem there be, but the Crown decision to issue the letter

in the first place, knowing the consequences thereof. *Thom* does not require the Crown to issue such letters, nor does it prevent the Crown from attaching suitable qualifications to any such letters. Rather, the argument is that any potential contravention of the complainer's Art 3 rights arises by way of human error in the operation of the system. However, as we have noted above, whether what occurred in this case merits that description is open to question. On the question whether operational deficiencies may constitute a relevant breach 'only conspicuous or substantial errors in investigation would qualify' (*DSD,* Lord Kerr, paras 29, 53, 72; Lord Neuberger, para 98). It is not possible on the information available to us to reach a properly reasoned view that there have been failures which meet the test for operational deficiencies to constitute a breach of Convention rights."

[26] For the reasons given we refuse to pass the bill.