

**BONFANTE v. PIZZARELLO**

SUPREME COURT (Kneller, C.J.): October 9th, 1995

*Legal Aid and Assistance—choice of counsel—appeal from magistrate’s decision—no appeal to Supreme Court from magistrate’s decision under Legal Aid and Assistance Rules, r.4(2) to refuse accused choice of counsel from legal aid list*

*Legal Aid and Assistance—choice of counsel—appointment from legal aid list—familiarity of accused’s previous counsel with background to offence charged may be “special circumstances” justifying departure from appointment in strict rotation under Legal Aid and Assistance Rules, r.4(2)*

The appellant was charged in the magistrates’ court with being drunk and disorderly and being in possession of a quantity of cannabis resin.

Upon an application by the solicitor who had acted for the appellant in matrimonial matters, the Stipendiary Magistrate granted her legal aid, ruling that the brief would go to the next counsel or solicitor on the legal aid list kept by the Clerk to the Magistrates, rather than to her existing solicitor. The appellant then applied to be allocated her own solicitor, who was on the list but not next in turn, giving as her reason the fact that the circumstances of the offences with which she was charged related to the marital dispute with her husband. The Stipendiary Magistrate ruled that he did not consider her representations to reveal special circumstances justifying allocating a counsel out of turn from the legal aid list.

On appeal the appellant submitted that (a) although there was no right of appeal against the refusal of legal aid by the magistrates’ court (except under s.5(3) of the Legal Aid and Assistance Ordinance in the case of an appeal against conviction or sentence) and consequently no right to appeal against the allocation of a particular counsel, the Supreme Court nevertheless had inherent jurisdiction to hear her appeal; (b) the Stipendiary Magistrate had wrongly refused to allocate her own solicitor to act for her under the legal aid certificate, since he had a discretion under the Legal Aid and Assistance Rules, r.4(2) to depart from the strict rotation in which counsel on the legal aid list were allocated if the applicant had made valid representations or shown special circumstances, as she had done; and furthermore (c) the Stipendiary Magistrate’s denial of her request constituted a breach of her right under the Gibraltar Constitution, s.8(2) to be represented by counsel of her choice in criminal proceedings.

The respondent submitted in reply that (a) since the circumstances in which an applicant for legal aid in criminal or civil proceedings could

appeal against the refusal of a certificate were set out in the legislation, and did not include those of the appellant, the appellant had no statutory right of appeal to the Supreme Court, nor did that court have any inherent jurisdiction to hear her appeal in default of such provision; (b) in any event, the Stipendiary Magistrate had properly ruled that the connection between the offences with which the appellant was charged and the matrimonial matters in which her solicitor had acted previously was not a special circumstance justifying his appointment out of rotation on the legal aid list; and (c) the appellant's constitutional right to be represented by counsel of her choice was subject to the limitations of r.4(2) of the Legal Aid and Assistance Rules when that representation was funded at public expense.

**Held**, dismissing the appeal:

(1) The definition of “special circumstances” justifying departure from the general rule under the Legal Aid and Assistance Rules, r.4(2) that counsel were to be drawn in strict rotation from the list depended on the circumstances of each case. In this case, the fact that the appellant's existing solicitor (who was on the list) was familiar with the circumstances of her marital dispute, which, she alleged, had given rise to the offences with which she was charged, constituted special circumstances within the meaning of r.4(2). The Stipendiary Magistrate's refusal was also inconsistent with practice in the Supreme Court and against the spirit of s.8(2) of the Gibraltar Constitution under which, outside of the legal aid system, an accused was entitled to legal representation of his choice (page 124, lines 30–40; page 125, lines 8–26).

(2) However, in the absence of any statutory provision giving a right of appeal from the decision of the magistrates' court to refuse legal aid to a defendant charged with but not yet convicted of, a criminal offence—desirable though such a right might be—the Supreme Court had no jurisdiction to hear the appellant's appeal against the Stipendiary Magistrate's decision. Accordingly, the appeal would be dismissed (page 124, lines 1–18).

**Legislation construed:**

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.8(2): The relevant terms of this sub-section are set out at page 125, lines 9–14.

Legal Aid and Assistance Ordinance (1984 Edition), long title: The relevant terms of the long title are set out at page 122, lines 32–35.

s.4: The relevant terms of this section are set out at page 122, line 38 – page 123, line 3.

s.5(1): The relevant terms of this sub-section are set out at page 123, lines 13–23.

(2): The relevant terms of this sub-section are set out at page 123, lines 27–29.

s.5(3) “Where, on an application made under subsection (1) or subsection (2), the court has refused to grant such certificate, the applicant may apply to the Chief Justice, and the Chief Justice shall have the like power, exercisable on the like grounds, of granting a certificate as the magistrates’ court.”

Legal Aid and Assistance Rules (1984 Edition), r.4:

“(1) The Chief Justice, court or justice granting a certificate for legal aid shall, as soon as may be, after granting a certificate and after taking into consideration any representations made by the person in respect of whom it is granted, assign to him from one of the lists referred to in rule 2 as may be relevant counsel to whose services that person shall be entitled.

(2) In the absence of any representation made by the accused person to which it appears that effect should be given, and of any special circumstances, the assignment of counsel shall be in strict rotation according to the lists kept under rule 2. Any counsel assigned out of his turn will be passed over when his turn comes in the ordinary course.”

r.16: The relevant terms of this rule are set out page 123, lines 35–39.

*J.V. Mockett* for the applicant;

*A. Trinidad, Crown Counsel*, for the respondent.

25 **KNELLER, C.J.:** Mrs. Caroline Bonfante was charged before the Stipendiary Magistrate with being drunk and disorderly and also with being in unlawful possession of cannabis resin on July 31st, 1994. She wanted Phillips & Co. to act for her in his court. She had already instructed one of them in a matter concerning her divorce. She says in her affidavit that the criminal charges were directly connected with the background and circumstances of her dispute with her husband. This has not been refuted by the respondent in this court. I do not know whether she or her legal representative said the same before the Stipendiary Magistrate and whether or not the prosecution in his court had anything to say about it.

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35 On September 13th last year, Mr. Mockett of Phillips & Co. applied for legal aid on her behalf to the Stipendiary Magistrate. He ruled that a legal aid certificate would be granted to Mrs. Bonfante and the brief would go to the next counsel or solicitor on the legal aid list kept by the Clerk to the Magistrates and not to Mr. Mockett unless, of course, he was the next on the list. Mrs. Bonfante was dissatisfied with this and on September 15th, 1994 Mr. Mockett made another application in open court. This time Mrs. Bonfante herself told the Stipendiary Magistrate, among other things, that she wanted Mr. Mockett and no one else to represent her.

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45 The Stipendiary Magistrate refused her application because he did not consider that her representations revealed special circumstances to justify his making an exception under r.4(2) of the Legal Aid and Assistance

Rules and directing that the brief be assigned to Mr. Mockett. So she asks this court to order that she should be assigned the counsel of her choice and Mr. Mockett asks the court to give guidance for applications by other people under r.4(2) as to what the order should be when a defendant asks for the services of a particular counsel.

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The Stipendiary Magistrate wrote to the Attorney-General on September 22nd this year with his instructions for Crown Counsel to place before this court. They are that there is a list of legal practitioners who are willing to appear as counsel on legal aid certificates. The list is kept by the Clerk. In the absence of any representation made by the defendant to which it appears that effect ought to be given and in the absence of any special circumstances, the assignment of counsel is done in strict rotation according to the list kept by the Clerk. This is all in accordance with the provisions of r.4(2).

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The Stipendiary Magistrate did not find any good reason why Mrs. Bonfante should have Mr. Mockett assigned. Mr. Mockett was already dealing with other matrimonial matters relating to Mrs. Bonfante—presumably on a legal aid certificate—but here she was facing criminal charges, the Stipendiary Magistrate explained, which were separate. There was no nexus between these criminal charges and the divorce matter with which Mr. Mockett was dealing for Mrs. Bonfante. So it did not appear to the Stipendiary Magistrate that any effect ought to be given to her representations, nor did he find any special circumstances for departing from the strict rotation rule.

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Mrs. Bonfante then took out what looks like an originating summons but half-way through it she refers to it as her appeal against the refusal by the Stipendiary Magistrate to assign Mr. Mockett to be her counsel in the criminal proceedings in the magistrates' court in accordance with the requirements of r.4 of the Legal Aid and Assistance Rules. She also asked for the costs of the appeal to be provided for.

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The long title to the Ordinance is this:

“An Ordinance to make better provision for the granting of free legal aid and assistance to persons of small means, to enable the costs of such legal aid and assistance for such persons to be defrayed out of the consolidated fund, and for purposes connected therewith.”

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Legal aid in the magistrates' court in criminal proceedings is provided for in s.4 which reads as follows:

“Any person who appears or is brought before an examining justice or the magistrates' court charged with an indictable offence or an offence which is punishable on summary conviction with imprisonment, other than imprisonment in default only of payment of a fine, may apply to the justice or court, as the case may be, for free legal aid in the preparation and conduct of his defence before that justice or court, and, if on such application the justice or court is satisfied that the applicant has insufficient means to enable him to

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obtain legal aid for the purpose aforesaid, the justice or court shall grant in respect of the applicant a certificate which shall entitle him to have counsel assigned to him for that purpose.”

5 We know that the Stipendiary Magistrate granted Mrs. Bonfante a certificate which entitled her to have counsel assigned to her for the purpose of the preparation and conduct of her defence to two charges of which one—for unlawful possession of cannabis resin—is punishable on summary conviction with imprisonment.

10 I do not find any provision for the applicant to appeal or to apply to the Chief Justice or the Supreme Court if the justice or magistrates’ court refuses to grant a certificate. There is provision, however, under s.5(1), that—

15 “any person who has been convicted by the magistrates’ court of an offence which is punishable with imprisonment, other than imprisonment in default only of payment of a fine, and who desires to appeal to the Supreme Court against the conviction or the sentence imposed on such conviction or both may apply to such court for free legal aid for the preparation and conduct of his appeal, and, if on such application the court is satisfied that the applicant has insufficient means to enable him to obtain legal aid for the purpose  
20 aforesaid, the court shall grant in respect of the applicant a certificate which shall entitle him to have counsel assigned to him for that purpose.”

25 Under s.5(2), any person who has been convicted of an offence which is *not* punishable with imprisonment may succeed in having counsel assigned to him on a free legal aid certificate if the Supreme Court is satisfied his means are insufficient for that purpose “and that by reason of exceptional circumstances it is desirable in the interests of justice that he should have such aid.”

30 When it comes to civil proceedings, the application for a certificate is made to the Registrar of the Supreme Court under r.16(1) of the Legal Aid and Assistance Rules. If he refuses that application he has to notify the applicant, setting out why it has been refused and on what ground. Under r.16(3)—

35 “any applicant considering himself aggrieved by the decision of the Registrar as to his entitlement to receive legal assistance or as to the amount of contribution or as to the discharge or revocation by the Registrar of his legal assistance certificate may within fourteen days of receipt of the decision appeal in writing to the Chief Justice.”

40 Mr. Mockett for Mrs. Bonfante says that the order refusing to appoint him as Mrs. Bonfante’s counsel at her request was an order of a subordinate court in a criminal matter and therefore appealable to the Supreme Court in the same way as an order refusing bail. The Supreme Court may grant bail if an inferior court refuses to do so under s.53 of the Criminal  
45 Procedure Ordinance.

The Legal Aid and Assistance Ordinance and Rules, as I have said, do not provide for an appeal. Furthermore, under s.5(3), the Legal Aid and Assistance Ordinance does so where the magistrates' court refuses legal aid for an appeal against conviction or sentence or both, whether the offence is punishable by imprisonment or not. There is also provision for an appeal to the Chief Justice if the Registrar refuses an application for legal assistance in civil matters. There is, in my judgment, no room for applying the court's inherent jurisdiction in favour of Mrs. Bonfante. 5

It is highly desirable that there should be a right of appeal for an applicant considering himself aggrieved by the decision of the magistrates' court before or during the trial—either in respect of his entitlement to receive legal assistance, or to whom the brief should be assigned if the applicant has proposed someone who is on the panel of lawyers willing to do legal aid work. I find, however, that there is no such right of appeal from the refusal of the magistrates' court to grant legal aid before or during criminal proceedings and I would therefore dismiss the appeal with no order as to costs because Mrs. Bonfante has been given a legal aid certificate. 10 15

If I am wrong on that, and there is a right of appeal from the refusal by the justice or magistrates' court to allot her the services of a counsel or a solicitor whom she names who is on that panel, I go on to deal with whether the Stipendiary Magistrate was, in the circumstances, correct in finding that she had failed to persuade him to assign Mr. Mockett to her. 20

Let me just rehearse again the fact that Mrs. Bonfante made representations, namely that Mr. Mockett had been acting for her in her matrimonial troubles. She also swears in her affidavit that these charges were connected with her husband's behaviour and the divorce. Whether or not she said that in court is unclear. The affidavit has not been answered by the respondent. The magistrate also said there were no special circumstances. Special circumstances are by their nature impossible to define and they depend on the facts of each application. I would, with respect to the Stipendiary Magistrate, say that the special circumstances in this case were that the alleged unlawful possession of cannabis resin and the alleged drunkenness and so forth are said by Mrs. Bonfante to be connected with her matrimonial troubles and her husband's behaviour and that Mr. Mockett had been her counsel for those matters. So in my view the assignment of counsel did not have to be in strict rotation according to the list kept by the Clerk to the Justices of legal practitioners who are willing to appear as counsel in proceedings before the magistrates' court. 25 30 35 40

There was some discussion of what was the purpose behind the Legal Aid and Assistance Ordinance and Rules. The long title starts with the fact that it is to make better provision for the granting of free legal aid and assistance to persons of small means. The counsel and solicitors who join the scheme would not want the certificates to be assigned in anything but 45

strict rotation so that each of them would have a slice of the cake, so to speak, in turn. It would also stultify any attempt to tout outside the magistrates' court. There is provision, however, for the rotation rule to be bypassed when the defendant makes representations to which effect ought to be given or there are special circumstances, and if that assignment goes to a counsel or solicitor out of turn he will be passed over when his turn comes in the ordinary course of events under r.4(2).

The Gibraltar Constitution, s.8(2) provides that—

“Every person who is charged with a criminal offence—

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(d) shall be permitted to defend himself in person or, at his own expense, by a legal representative of his own choice or, where so prescribed, by a legal representative at the public expense . . . .”

The wishes of the defendant to be represented by one named counsel or solicitor and not by any other on the list should, in my view, be a special circumstance because the defendant would not be able to complain about being assigned some counsel or solicitor whom he finds unhelpful.

We have the same strict rotation rule according to lists kept for the assignment of counsel or solicitors in the Supreme Court but, in practice, if the defendant in criminal proceedings is granted a legal aid certificate for the preparation and conduct of his defence in the Supreme Court and he tells the Registrar that he wants a legal practitioner whom he names and that legal practitioner is on the list and is willing to appear as his counsel in the trial, that counsel or solicitor is assigned to the defendant. It should be the same in practice in the magistrates' court.

*Appeal dismissed.*