ATTORNEY-GENERAL v. HARRIS

SUPREME COURT (Schofield, C.J.): April 10th, 1996

Criminal Procedure—costs—appeals—defence counsel's appeal against taxation of bill for work done to be filed as separate action, not brought by notice of motion in main proceedings

Legal Aid and Assistance—fees and expenses of counsel—criminal cases—Legal Aid (Fees and Expenses) Rules intra vires Legal Aid and Assistance Ordinance in respect of fees in criminal cases even though purportedly made under s.19 and not s.8(2)

Legal Aid and Assistance—fees and expenses of counsel—preparation of case—counsel's preparation of case included within scale of fees set out in Legal Aid (Fees and Expenses) Rules, Schedule—no additional payment possible

Defence counsel sought to obtain his fees for acting on behalf of an accused person in a criminal case.

The accused, who was legally aided, instructed counsel to conduct his defence both at trial and on the subsequent appeal by the Crown against his acquittal. In the Court of Appeal, the President issued a certificate under r.8 of the Legal Aid (Fees and Expenses) Rules, stating that as the case raised matters of such difficulty or complexity, counsel's fees could be paid at a higher rate than that provided for in an ordinary case by the Schedule to the Rules.

On taxation, defence counsel provided details of the time he had spent both in court and in preparing the accused's case and undertaking research; however, the Registrar allowed fees to be paid only in respect of his actual court appearances and not for the preparation time, albeit at the highest rate possible under the Rules to reflect the difficulty or complexity of the case.

On appeal against taxation, brought by way of notice of motion in the accused's appeal to the Court of Appeal, counsel submitted that (a) because the Schedule to the Rules did not make allowance for the time spent preparing a case, it placed an improper limit on the fees of counsel in a legal aid case, since it was clearly right for counsel to be remunerated for work done; (b) he should therefore receive fees for his preparatory work, including research, either (i) on the basis of rules which could be made (but which did not currently exist) by the Chief Justice under his power to do so conferred by s.10 of the Legal Aid and Assistance Ordinance, which allowed him to make such rules as appeared to him

necessary or desirable for giving effect to that Part of the Ordinance which allowed for defendants in criminal cases to be legally aided; or (ii) on the basis that the taxing officer should grant his fees for preparation time at a reasonable rate.

The court also considered (a) whether the matter had properly been brought before the court by notice of motion in the original appeal; (b) whether in relation to criminal matters the Legal Aid (Fees and Expenses) Rules were *intra vires* the Legal Aid and Assistance Ordinance in that at their head they purported to have been made under s.19 of the Ordinance (rules for fees in civil matters), whereas in relation to criminal matters (for which fees were payable according to the scales set out in the Schedule to the Rules by virtue of r.3) those Rules should have been made by the Governor under s.8(2); and (c) the scale of fees payable under the Schedule, in particular, those payable for the taking of instructions—the higher fees payable for counsel's court appearance on the first day of a trial than on subsequent days.

Held, dismissing the appeal:

(1) Because counsel's appeal against the decision of the Registrar did not affect either party to the main trial, it should have been filed as a separate cause and not brought by notice of motion in the accused's appeal. However, this was immaterial to the present proceedings because the Attorney-General would have represented the interests of the Registrar in any event (page 251, lines 28–39).

(2) Although the Rules purported to have been made under s.19 of the Ordinance, which authorized the making of a scale of fees for legal aid in civil rather than in criminal cases, for which rules should have been made under s.8(2), such an error at the head of subsidiary legislation did not necessarily vitiate it: by r.3, the Rules clearly envisaged the payment of fees in criminal matters and they were therefore *intra vires* the Ordinance (page 253, lines 26–42).

(3) It was clearly proper that counsel be fully remunerated for work done in preparation of cases for trial and in the present case he had been. It was properly allowed for by the Rules, because (a) a fee was allowable for the taking of instructions, which was part of the preparation for trial; (b) counsel was allowed a higher fee for the first day of his appearance before the court than on subsequent days, which reflected time spent in preparation of the case; and (c) the judge or magistrate had the power to certify that a case had been of exceptional difficulty or complexity and so warranted a higher level of fees, which allowed for the extra preparation needed in such a case. These fees clearly included payment for research done and in the present case, the payments made to counsel had been at the top of the scale. The court in any case had no power to order the payment of any extra fees, because (i) it would be unsatisfactory to have certain fees payable according to a fixed scale of fees and others, such as

preparation, determined on an *ad hoc* basis; and (ii) the Chief Justice had no power to make rules relating to fees despite the wide terms of s.10 of the Ordinance, since the power to make those rules was expressly given to the Governor by s.8(2). For these reasons the taxation would not be interfered with (page 255, line 28 – page 257, line 6).

Legislation construed:

Legal Aid and Assistance Ordinance (1984 Edition), s.3: The relevant terms of this section are set out at page 252, lines 35–39.

s.3A: The relevant terms of this section are set out at page 253, lines 2–8.

s.4: The relevant terms of this section are set out at page 252, lines 17–28.

s.8(2): The relevant terms of this section are set out at page 253, lines 21–25.

s.10: "The Chief Justice may make such rules as appear to him necessary or desirable for giving effect to this Part."

s.19: "The Governor may make rules—

(*i*) prescribing the scale of fees which shall be paid to a solicitor or barrister acting for a person receiving legal assistance."

Legal Assistance (Fees and Expenses) Rules, r.3: The relevant terms of this rule are set out at page 253, lines 29–31.

r.8: The relevant terms of this rule are set out at page 255, lines 12–19.

Schedule: The relevant terms of this Schedule are set out at page 254, line 1 – page 255, line 8.

K. Azopardi appeared in person;
D.J.V. Dumas for Crown.

SCHOFIELD, C.J.: This is an appeal made pursuant to r.9 of the Legal Aid (Fees and Expenses) Rules against a decision of the Registrar, as taxing officer, refusing to allow fees on a legal aid taxation towards preparation of the defence of Richard John Harris. This appeal has been brought by way of notice of motion in the original appeal but it appears to me that as this is counsel's appeal against a decision of the taxing officer which does not affect either party to the original action, it ought to have been filed as a separate cause in the Registry. By analogy with O.58 of the Rules of the Supreme Court, such an appeal would lie to the Chief Justice in chambers. No point was taken by counsel for the Attorney-General on this because the Attorney-General would have been brought in to represent the interests of the taxing officer in any event.

The defendant, Harris, was charged with various offences under the Drugs (Misuse) Ordinance. He pleaded guilty to all but one charge on which he was acquitted by Harwood, A.J. The Crown appealed against Harwood, A.J.'s decision, unsuccessfully as it turned out. The appeal raised matters of such difficulty or complexity that the President issued a certificate to that effect which enabled the taxing officer to allow, in the

appeal to the Court of Appeal, twice the fees prescribed (see r.8 and the Schedule to the Legal Aid (Fees and Expenses) Rules).

Mr. Azopardi, who is the real appellant in this matter, submitted to the taxing officer details of the time he had spent on the case before the magistrates' court, the Supreme Court and the Court of Appeal. Mr. Azopardi claimed fees for his appearance in the magistrates' court. In respect of his work for the Supreme Court and Court of Appeal hearings, he divided his claim between time spent in court and time spent in research and preparation and added an item for disbursements. The taxing officer allowed the fees in respect of the court appearances but was of the view that the Legal Aid (Fees and Expenses) Rules do not allow for payment to be made for preparation time. It is in respect of that decision that this appeal has been lodged.

The scheme for legal aid in Gibraltar is contained in our Legal Aid and Assistance Ordinance. Part I of the Ordinance deals with the grant of legal aid in criminal proceedings. Section 4 states:

> "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 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."

It was pursuant to s.4 that legal aid was granted to Harris. A bill was subsequently presented to the taxing officer by Mr. Azopardi for his attendances in the magistrates' court and no objection is taken regarding the taxation of that bill. Section 3 of the Ordinance provides for the grant of legal aid to a person committed for trial by the magistrates' court. Section 3(1) reads:

> "Any person committed for trial for an indictable offence shall be entitled to free legal aid in the preparation and conduct of his defence at the trial, and shall be entitled to have counsel assigned to him for that purpose, if a certificate is granted in respect of that person under this section."

Of course legal aid is not available to every person committed for trial: it is available only to those with insufficient means to pay for their own legal representation (see s.3(3)). A legal aid certificate may be granted by the committing justice or the Chief Justice (see s.3(2)). It will be seen that by s.3(1) the entitlement to free legal aid is for the preparation as well as the conduct of a person's defence.

Section 3A provides for the grant of legal aid on appeal. It states:

> "The Chief Justice or the Court of Appeal may at any time assign counsel to an appellant in any appeal, or proceedings preliminary or incidental to an appeal, in which in the opinion of the Chief Justice or the Court of Appeal, it appears desirable in the interests of justice that the appellant should have legal aid and that he has not sufficient means to enable him to obtain that aid."

In respect of an appeal, counsel may be assigned in any proceedings preliminary or incidental to an appeal as well as in the appeal. Presumably that provision is meant to provide an impecunious appellant with legal assistance in the drafting of his notice and grounds of appeal and other matters preliminary to the actual arguments before the court.

So far, so good. We have in place adequate provisions setting out the entitlement to legal aid of those persons of insufficient means who are charged with offences before the magistrates' court, before the Supreme Court or wish to appeal against decisions of those courts. The Ordinance also sets out a mechanism by which counsel are appointed to act for a legally aided person and how they are to be paid. Section 8(2) of the Ordinance reads:

> "Counsel shall be assigned to any person applying for free legal aid under this Part in such manner as the Chief Justice may direct, and shall be remunerated out of the Consolidated Fund in accordance with such scale as may be prescribed by rules made by the Governor."

The Governor has made rules prescribing the scale of fees to be paid to counsel under the Legal Aid and Assistance Ordinance. These are the Legal Aid (Fees and Expenses) Rules, made on October 8th, 1981, r.3 of which provides that "fees to be allowed for counsel assigned under any of ss. 3, 3A, 4 and 5 of the Ordinance shall be taxed in accordance with or within the limits set out in the Schedule" to the Rules. The Rules therefore apply to fees paid for legal aid and assistance granted in criminal cases. Unfortunately, at the head of the Rules it is stated that they are made under s.19 of the Ordinance which is the section giving power to the Governor, *inter alia*, to prescribe a scale of fees for legal aid granted in civil proceedings. The Rules should have been stated as being made under s.8(2) of the Ordinance. It is not argued that this error invalidates the Rules, and quite rightly so. A simple error in the recitation of a section of an Ordinance at the head of subsidiary legislation, when the scope of that legislation is clearly prescribed and is *intra vires*, cannot affect the validity of subsidiary legislation itself.

It is not possible to do justice to the arguments presented in this appeal without setting out the scale of fees set out in the Schedule to the Rules in full. Here it is:

"SCHEDULE

Fee No.		Rule 3.
		£
1. On assignment, (to include the taking of instructions)		
(*a*) in the Supreme Court and the Court of Appeal	from	10
	to	30
(*b*) in the magistrates' court	from	5
	to	10
2. For a necessary attendance at the prison		
(*a*) for the first hour or part thereof		10
(*b*) for each subsequent hour or part thereof		5
3. For attending a practice direction in the Supreme Court		15
4. For attending in chambers on an application to the Supreme Court or the Court of Appeal		15
5. For appearing in the magistrates' court		
(*a*) on any application other than for an adjournment		10
(*b*) where the proceedings are adjourned otherwise than at the request of the defence		7.50
(*c*) on the hearing of committal proceedings or on summary trial		
(i) for the first three hours or part thereof	from	15
	to	50
(ii) for each subsequent three hours or part thereof	from	7.50
	to	25
6. For appearing in the Supreme Court		
(*a*) on an application		20
(*b*) on a trial on indictment		
(i) for the first five hours or part thereof	from	30
	to	200
(ii) for each subsequent five hours or part thereof	from	15
	to	100
(*c*) on an appeal from the magistrates' court		
(i) against conviction or against conviction and sentence	from	30
	to	150
(ii) against sentence or against any order from which an appeal lies under section 278 of the Criminal Procedure Ordinance	from	20
	to	75

7. For appearing in the Court of Appeal
   (*a*) on an application 20
   (*b*) on an appeal from the Supreme Court
      (i) for the first five hours or part thereof from 30 to 300
      (ii) for each subsequent five hours or part thereof from 15 to 100."

One last provision needs to be set out. That is the rule which allows for the increase in fees allowable in cases of exceptional difficulty or complexity. Rule 8 reads:

> "Notwithstanding rule 3, the judge or magistrate presiding in the Court of Appeal, the Supreme Court or the magistrates' court, as the case may be, may at the conclusion of a case, on application, certify that the case was one of exceptional difficulty or complexity, and in that event the taxing officer shall allow such fees as appear to him to represent reasonable remuneration for the work done by counsel, but so that such fees shall not be more than twice the fees prescribed in the Schedule."

It will be remembered that the President of the Court of Appeal granted a certificate in this case which permitted the taxing officer to allow fees which are twice those prescribed by the Schedule. As I understand the position, for his court appearances Mr. Azopardi was allowed the maximum fees permissible under the Schedule to the Rules. His argument is that despite the fact that the Schedule provides no specific head for fees for research and preparation, he should be allowed the fees he claims.

It is quite right and proper that counsel should be remunerated for work done in preparation for a hearing. The case is, more often than not, won or lost in that preparation stage. The Legal Aid and Assistance Ordinance states that a suitably qualified person shall receive free legal advice for the preparation and conduct of a trial before the magistrates' court or the Supreme Court and for proceedings preliminary or incidental to an appeal to the Supreme Court or Court of Appeal. It would not be right for the Rules made by the Governor pursuant to s.8(2) of the Ordinance to limit the amount of fees payable under a legal aid certificate to the conduct of the trial or appeal when clearly the intention of the statute is for legal aid to be available for the preparation and conduct of a trial or appeal. Mr. Azopardi contends that the Rules do place this improper limit in failing to make provision for fees for preparation for the trial. It is, he says, for the Chief Justice in these circumstances to make rules prescribing a scale of fees for preparation pursuant to s.10 of the Legal Aid and Assistance Ordinance, which are necessary and desirable for giving effect to Part I of the Ordinance, or for the taxing officer on

taxation to give a reasonable rate of remuneration for preparation for a trial or appeal.

Neither of these solutions is attractive, even if I were persuaded by Mr. Azopardi's argument. Despite the wide scope of s.10 of the Ordinance, it would not be for the Chief Justice to make rules relating to scales of fees when the power to make such rules is expressly given to the Governor by s.8(2). The alternative of permitting the taxing officer to allow fees according to a prescribed scale under one head and then to go outside any such scale when allowing fees under another head is hardly a more attractive solution.

As it is, I do not have to find a solution for I am unpersuaded by Mr. Azopardi's main argument that the scale of fees prescribed by the Governor does not provide for time spent by counsel on preparation. I say this for three reasons. First, it will be seen that a fee is allowable under the Rules on assignment which includes the taking of instructions. That fee is on a scale from £10 to £30. The taking of instructions is part of the preparation for the trial. That there is a scale (meagre though it may be) must be so that the taxing officer can reflect the complexity of the case when he taxes Counsel's bill. Secondly, counsel is allowed a fee for each appearance in the Supreme Court in a trial or indictment. Again, this is on a scale and must be meant to allow for a reflection of the complexity of the case. More importantly, however, there is a higher scale for the first five hours or part thereof than there is for each subsequent five hours or part thereof. It cannot be that the drafters of the Rules considered that counsel's time on the first day was more valuable than his time on any subsequent day of the trial. The first day's higher fee is meant to permit the taxing officer to reflect in his taxation of a bill the amount of time spent in preparation for the trial. Thirdly, the very existence of the power contained in r.8 of the Rules for the judge or magistrate to certify that the case is one of exceptional difficulty or complexity so as to allow the taxing officer to increase the fees is a clear indication that extra preparation is to be remunerated (in some small way it is admitted). The remuneration is to be for "work done by counsel" according to the Rule and in a difficult or complex case, more work is often done in preparation than in argument in court. The Rules reflect that.

In my judgment, therefore, the Rules do provide for remuneration for preparation, which of course includes research. It may well be that the scale of that remuneration is far from generous, and I understand that the scales may be subject to a well-deserved review, but the Rules do not offend the scheme of the Ordinance.

From the correspondence, it may be that the Registrar of the day did not allow for preparation, but as she went to the top of the permissible scale, which scale provides for preparation, there is no room to increase the fees which she allowed on taxation. In the event and on my findings,

Mr. Azopardi received fees for preparation of the trial in the Supreme Court and for the appeal to the Court of Appeal. There is no scope to pay him any extra fees.

The appeal is dismissed. As this point is one which seems to have been of concern to counsel who undertake legal aid work and to successive taxing officers, I do not propose to make any order for costs.

Appeal dismissed.