[1999–00 Gib LR 107]

DIANI v. ATTORNEY-GENERAL

COURT OF APPEAL (Neill, P., Waite and Glidewell, JJ.A.):
March 19th, 1999

Legal Aid and Assistance—qualification for legal aid—insufficient means—Chief Justice has residual discretion under Legal Aid and Assistance Ordinance, s.3(2) to refuse legal aid to person with insufficient means—disapproval of chosen mode of trial improper consideration

Legal Aid and Assistance—refusal of legal aid—appeal—no appeal from Chief Justice's decision under Legal Aid and Assistance Ordinance, s.3(2) refusing legal aid

The appellant was charged in the magistrates' court with the possession of controlled drugs and obstructing a police officer in the execution of his duty.

The appellant pleaded not guilty to the two offences with which he was charged and elected to be tried by the Supreme Court. His application for legal aid was dismissed by Pizzarello, Ag. C.J., who asked why his case was to be tried by jury rather than by the magistrates' court. The judge also refused counsel's request for leave to withdraw from the case. The appellant appealed to the Court of Appeal against the refusal of legal aid.

He submitted that (a) the Court of Appeal had jurisdiction under s.22 of the Court of Appeal Ordinance to hear the present appeal from the Chief Justice's decision; (b) since s.3(1) provided that legal aid "shall" be available if a certificate were granted, the Chief Justice had no discretion to refuse legal aid under the Legal Aid and Assistance Ordinance, s.3(2) once it had been established that the appellant's means were insufficient to fund his own defence; (c) since the Chief Justice had made no finding that his means were sufficient, the refusal must have been based on disapproval of his choice of a jury trial, which was an irrelevant consideration; and (d) the Chief Justice's refusal to allow counsel to withdraw was an attempt to persuade counsel to change his advice on mode of trial, and was effectively a fetter on defence counsel's duty to advise his client appropriately.

The Crown submitted in reply that (a) the Court of Appeal had no jurisdiction to hear an appeal from the Chief Justice's decision under any provision of the Court of Appeal Ordinance; (b) under s.3(2) of the Legal Aid and Assistance Ordinance, the Chief Justice retained a discretion to refuse legal aid even if he concluded that the appellant's means were

insufficient to meet the costs of his defence; and (c) the conclusions drawn by the appellant from the Chief Justice's remarks were unjustified and did not reflect his reasoning.

Held, dismissing the appeal:

(1) In the majority of cases, the only question to decide on an application for legal aid was whether the applicant's means were "insufficient" within the meaning of s.3(3) of the Legal Aid and Assistance Ordinance. However, the use of the word "may" in s.3(2) indicated that the Chief Justice had a residual discretion to refuse to grant a legal aid certificate even if he found the applicant's means to be "insufficient." The circumstances in which he could properly do so would be rare. His disapproval of the applicant's choosing trial by jury would not be a relevant or proper reason, and he certainly could not require counsel to continue to represent his client for no fee (paras. 6–7; para. 11).

(2) However, the Court of Appeal had no jurisdiction to hear the applicant's appeal against the Chief Justice's decision, since the appellate jurisdiction in relation to legal aid was vested in him alone and there was no further right of appeal. The refusal of legal aid did not fall within the scope of s.9 of the Court of Appeal Ordinance, which provided for appeals against conviction or sentence by the criminal courts, or within s.22, which provided for a general right of appeal from decisions of the Supreme Court in civil cases (including some matrimonial cases), subject to certain specified exceptions. The appeal would be dismissed (paras. 12–16).

Case cited:

(1) *Ouzaa* v. *Governor*, 1999–00 Gib LR 94 applied.

Legislation construed:

Court of Appeal Ordinance (1984 Edition), s.9(1): The relevant terms of this sub-section are set out at para. 13.

s.22: The relevant terms of this section are set out at para. 14.

Legal Aid and Assistance Ordinance (1984 Edition), s.3(1): The relevant terms of this sub-section are set out at para. 4.

s.3(2): The relevant terms of this sub-section are set out at para. 4.

(3): The relevant terms of this sub-section are set out at para. 4.

D.G. Hughes for the appellant;
A.A. Trinidad, Senior Crown Counsel, for the Crown.

1 **GLIDEWELL, J.A.:** This is an attempt to appeal against the decision on October 6th, 1998 of Pizzarello, Ag. C.J. to refuse to grant a certificate for legal aid to the intended appellant, Mr. Edward Diani, for the conduct of his defence in criminal proceedings.

2 The facts which give rise to these proceedings can be stated shortly. Mr. Diani was charged with two offences, namely, unlawful possession of a controlled drug and intentional obstruction of a police officer in the execution of his duty. Both offences are triable either way, that is to say they are triable on indictment but may be tried summarily if, but only if, the accused consents to this mode of trial. Mr. Diani did not consent to summary trial. He elected to be tried on indictment and pleaded not guilty to both charges.

3 Mr. David Hughes was instructed to represent Mr. Diani at his trial. His original instructions were that funds would be provided from private sources to meet the costs of Mr. Diani's defence, but in the event no such funds were forthcoming. An application was then made on Mr. Diani's behalf for criminal legal aid, which was heard by the Acting Chief Justice on October 6th, 1998.

4 Before coming to what occurred at that hearing, it is helpful to consider the regime for the grant of legal aid in criminal cases. It is to be found wholly in statute, namely, Part I of the Legal Aid and Assistance Ordinance, together with rules made under the authority of that Ordinance. The relevant part of the Ordinance is to be found in s.3, which provides, so far as is material:

> "(1) 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.
>
> (2) A certificate may, subject to the provisions of subsection (3), be granted in respect of any person—
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> (*a*) by the committing justice, upon the person being committed for trial; or
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> (*b*) by the Chief Justice, at any time after reading the depositions. . .
>
> (3) A certificate shall not be granted under this section in respect of any person unless it appears to the committing justice or the Chief Justice that his means are insufficient to enable him to obtain such aid."

5 Mr. Hughes submits that when a person who has been committed for trial applies for legal aid, the court's only task is to consider whether his means are insufficient to enable him to pay for the preparation of his case and his defence at the trial. If they are, the court, whether it be the committing justice or the Chief Justice, has no discretion. It is required by s.3 to grant a certificate. Mr. Hughes accepts, of course, that s.3(2)

provides that a certificate "may" be granted, but submits that this is to be read subject to the words of s.3(1) "*shall* be entitled to free legal aid. . ." and thus "may" in s.3(2) is to be read as meaning "shall."

6 I do not accept Mr. Hughes's submission that the court has no discretion. In my judgment, even if the court had determined that the defendant's means were not sufficient to enable him to pay for his defence, there might still be circumstances in which the court would be entitled to refuse to grant a certificate for legal aid. The phraseology in s.3(2)—"a certificate may . . . be granted"—necessarily gives such a discretion in my view. But, nevertheless, the circumstances which will justify such a refusal will be rare, and clearly must relate to the offence or the offender.

7 One possible such situation might arise (I am not saying it necessarily would) if a defendant made it clear that he intended to plead guilty and the nature of the offence and his personal characteristics were such that there could be no question of him receiving a custodial sentence. I agree with Mr. Hughes to this extent, that in the large majority of cases the only question that the court will have to decide will be under sub-s. (3), namely: Does the defendant have sufficient means for his defence or not?

8 Mr. Hughes's main submissions in this appeal are based on what occurred during the hearing before Pizzarello, Ag. C.J., as described in his memorandum of appeal. Since those grounds involve some criticism of the learned judge, we would normally expect any such account of facts to be proved or supported on affidavit. However, in this case, Mr. Trinidad, for the Attorney-General, has frankly accepted that the memorandum of appeal contains an accurate account of what occurred before the judge. In those circumstances, we accept this account without requiring formal proof.

9 Mr. Hughes makes two points. First, he says that the Acting Chief Justice enquired of him why the charges against Mr. Diani were to be tried by a jury rather than the magistrates' court. Since the judge did not find that Mr. Diani had sufficient means to pay for his defence, Mr. Hughes therefore asks this court to infer that the judge refused the application for legal aid solely because of his disapproval of the defendant's unwillingness to agree to a summary trial. If this was the reason, or even *a* reason for refusal, Mr. Hughes submits that the judge based his conclusion on an irrelevant consideration, which must vitiate the decision.

10 Secondly, after the judge had refused legal aid, Mr. Hughes sought leave to withdraw from the case but the judge refused to allow him to do so. I am not certain that, as a matter of strict protocol, Mr. Hughes needed the judge's leave to withdraw, but having sought it as a matter of courtesy, counsel could hardly disregard the judge's refusal of leave. This refusal,

Mr. Hughes submits, was unjustified for several reasons, of which the most important is that if the judge refused leave to withdraw because he believed that it was advice from Mr. Hughes which had led Mr. Diani to elect trial by jury, then the refusal was an attempt to persuade Mr. Hughes to change his advice, and thus was a fetter on counsel's duty to give what he considered appropriate advice about the mode of trial.

11 If this court thought it right to draw from this account of what occurred during the hearing the inferences which Mr. Hughes invites us to draw, I would see great force in his submissions. A judge's disapproval of a defendant electing trial by jury in an either-way case could never, in my judgment, be a relevant or proper reason for refusing legal aid. Moreover, I find it difficult to understand how a refusal of counsel's application to be allowed to withdraw could be justified. Certainly a court has no right to require counsel to continue to represent a client for no fee. Counsel may undertake such a task voluntarily, but cannot be required to do so.

12 However, before we decide whether or not to accept Mr. Hughes's submissions, there is a more fundamental difficulty which he needs to overcome if he is to succeed. Mr. Trinidad submits that a defendant who has been refused criminal legal aid has no right to appeal to this court. I have already said that the right to apply for criminal legal aid derives wholly from statute. Neither the Legal Aid and Assistance Ordinance nor the Rules provide for any appeal to the Court of Appeal against a refusal by the Chief Justice. Indeed, this is also true of a refusal by the Chief Justice on an appeal to him against a refusal by the Registrar to grant a certificate for legal assistance for civil proceedings, though we need make no decision about legal assistance in this case. If, therefore, Mr. Diani has a right to appeal to this court, that right must derive from some provision other than the Legal Aid and Assistance Ordinance and Rules.

13 Mr. Hughes accepts this, and seeks to rely on the Court of Appeal Ordinance. Section 9(1) of that Ordinance gives a right to "a person convicted on indictment or a person convicted by the magistrates' court" who has appealed unsuccessfully to the Supreme Court against that conviction to appeal to this court against conviction or sentence, subject to the obtaining of "the leave of the Court of Appeal or . . . the certificate of the Supreme Court" where that sub-section requires this. However, Mr. Hughes correctly and sensibly accepts that a refusal of a legal aid certificate does not fall within s.9.

14 He argues, however, that s.22 of the Court of Appeal Ordinance does grant the right he seeks. Section 22 is the first section in Part III of the Ordinance which is headed: "Appeals in Civil Cases." That section starts with the words: "Without prejudice to anything contained in the Constitution of Gibraltar an appeal shall lie to the Court of Appeal from any decision of the Supreme Court other than. . ." There then follows a

list of exceptions to the general right of appeal. Both the heading to Part III of the Ordinance and the nature of these exceptions lead me to conclude that s.22 is concerned with appeals against decisions in civil and matrimonial litigation, not against decisions to refuse criminal legal aid.

15 In other words, the Court of Appeal Ordinance does not grant a right to appeal against a decision by the Chief Justice to refuse a criminal legal aid certificate. Moreover, the judgment which this court will deliver today in *Ouzaa* v. *Governor* (1) establishes that s.22 does not grant a right of appeal against a decision of the Chief Justice on any appeal or application to him under the Legal Aid and Assistance legislation, whether it relates to legal assistance for civil litigation or to criminal legal aid. Reference should be made to that judgment for the reasons for that decision.

16 I therefore conclude that the legal aid appellate jurisdiction is vested in the Chief Justice alone. It stops with him. There is no right to appeal to this court against a decision by the Chief Justice refusing legal aid. It follows that this court has no jurisdiction to hear or decide the appeal which Mr. Diani seeks to bring.

NEILL, P. and **WAITE, J.A.** concurred.

Application dismissed.
