[2001–02 Gib LR 86]

R. v. STIPENDIARY MAGISTRATE

SUPREME COURT (Schofield, C.J.): November 1st, 2001

Constitutional Law—fundamental rights and freedoms—legal representation—by Constitution, s.8(2)(d) applicant to be provided with legal representation if requested—no requirement for legal aid counsel to have specialist experience of dealing with accused's offences—lack of specialist experience in jurisdiction to be taken into account—sufficient that counsel has adequate criminal experience and aware of specialist problems

Constitutional Law—fundamental rights and freedoms—legal representation—choice of counsel—neither Constitution, s.8(2)(d) nor European Convention, art. 6 gives right to select counsel unprepared to take legal aid case—applicant not denied fair trial if not represented by chosen legal aid counsel

Constitutional Law—fundamental rights and freedoms—legal representation—fair balance of representation between parties needed—if Crown represented by Senior Crown Counsel, applicant to be represented by equally experienced lawyer—"equality of arms" decisions of European Court of Human Rights persuasive though non-binding in Gibraltar

The applicant was charged in the magistrates' court with indecent assault, gross indecency and attempted buggery of a minor.

The applicant sought a stay of the proceedings against him, on the basis that he could not afford to pay for his own legal representation and suitably qualified counsel (with the experience needed to deal with child witnesses) were not available under the Gibraltar legal aid scheme. It was claimed that experienced counsel were not on the legal aid list primarily because of the low rates of legal aid fees. For his trial to proceed without legal representation would be contrary to s.8(2)(d) of the Constitution. The applicant had not, however, applied for legal aid and the counsel of his choice was not on the legal aid list. On refusal of the stay, he instigated judicial review proceedings in the Supreme Court, which, by agreement were converted into an application under s.15.

The applicant submitted that to have the fair trial guaranteed by s.8(1) and (2) of the Constitution, (a) he had to be provided with appropriately qualified counsel; and (b) he had a constitutional right to be provided with the legal aid counsel of his choice.

Held, adjourning the application:

(1) Under s.8(2)(d) of the Constitution, an applicant had to be provided with legal representation where it was sought in order to have a fair trial. The section did not, however, require that any legal aid counsel representing the accused (who was charged with offences against a child) necessarily had experience of cross-examining child witnesses. The lack of specialist experience within the jurisdiction had to be taken into account and it was sufficient that the counsel had adequate criminal experience, and was aware of the problems of handling child witnesses (para. 22; para. 29).

(2) Nevertheless, there should be a fair balance of representation between parties to litigation ("equality of arms" in decisions of the European Court of Human Rights being a persuasive though non-binding doctrine in considering a Gibraltar constitutional provision substantially similar to one in the Convention). Since the Crown was represented by Senior Crown Counsel, the applicant should be represented by an experienced lawyer and not a junior member of the bar (para. 18; para. 22; paras. 23–26).

(3) Moreover, the applicant would not be denied a fair trial by not being represented by the specific legal aid counsel of his choice. Although his wishes would usually be taken into account, neither s.8(2)(d) of the Constitution nor art. 6 of the European Convention gave him a right to select counsel who was not prepared to take on the case on a legal aid basis (paras. 28–29).

(4) The applicant had not established that it would be impossible to obtain effective representation, as he had not yet applied for legal aid. The application would be adjourned and the authorities would be required to make urgent attempts to assign suitable counsel to him under the legal aid scheme, failing which the Attorney-General was urged to approach the Treasury for funding for the defence (paras. 34–37).

Cases cited:

(1) *Airey* v. *Ireland* (1979), 2 E.H.R.R. 305, followed.
(2) *Artico* v. *Italy* (1980), 3 E.H.R.R. 1, followed.
(3) *Bonfante* v. *Pizzarello*, 1995–96 Gib LR 119, referred to.
(4) *Croissant* v. *Germany* (1992), 16 E.H.R.R 135, followed.
(5) *De Haes* v. *Belgium* (1997), 25 E.H.R.R. 1, followed.
(6) *Dombo Beheer B.V.* v. *The Netherlands* (1993), 18 E.H.R.R. 213, followed.
(7) *Kamasinski* v. *Austria* (1989), 13 E.H.R.R. 36, considered.
(8) *McLean* v. *Procurator Fiscal*, *The Times*, July 4th, 2001, followed.
(9) *Robinson* v. *Jamaica*, U.N. Human Rights Committee Report, Case No. 223/1987, followed.
(10) *Robinson* v. *R.*, [1985] 2 All E.R. 594; (1985), 32 W.I.R. 330, not followed.

Legislation construed:
Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p. 3602), s.8(1): The relevant terms of this sub-section are set out at para. 7.
s.8(2): The relevant terms of this sub-section are set out at para. 8.
s.15(1): The relevant terms of this sub-section are set out at para. 4.
(2): The relevant terms of this sub-section are set out at para. 4.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 71 (1953)), art. 6(1): The relevant terms of this paragraph are set out at para. 14.
art. 6(3): The relevant terms of this paragraph are set out at para. 15.

D. Hughes and *K. Navas* for the applicant;
A.A. Trinidad, Senior Crown Counsel, for the Crown.

1 **SCHOFIELD, C.J.:** The applicant is not to be named in these proceedings to protect the identity of the alleged victims. He has been charged with two counts of indecent assault on a boy under the age of 16 years, one count of gross indecency and one count of attempted buggery. The charges are still in the magistrates' court and it is anticipated that if they are to proceed further there will be a long committal. I understand that the proceedings have progressed almost to committal stage but that there are issues relating to disclosure which need to be resolved.

2 The evidence in the case is substantial and includes 21 hours of video evidence which has to be viewed by counsel. Mr. Navas has already spent over 100 hours of work on the case. It is calculated that more than a further 100 hours of work will be needed for counsel to prepare for long committal proceedings. Should the applicant be committed for trial in the Supreme Court it is estimated that it will take at least two weeks. This is a substantial matter evidentially and it has the complication of involving child witnesses, whose examination must be conducted with tact and discretion.

3 The applicant wishes to be legally represented. It is acknowledged that he cannot afford to pay for his own representation in the magistrates' court and the learned Stipendiary Magistrate has indicated that should he apply for legal aid, such application would be granted. So far, the applicant has been represented in the magistrates' court by Mr. Navas on a privately retained basis and in these proceedings on the same basis by Mr. Hughes and Mr. Navas. Be that as it may, from the evidence it is clear that the applicant will be hard pressed to pay for any work so far done by his lawyers on his behalf, let alone pay for any future conduct of his defence on the charges he faces. The applicant's lawyer of choice for the committal proceedings is Mr. Hughes. Should the matter proceed to trial in the Supreme Court, the applicant wishes Ms. Howe, a consultant with

Messrs. Phillips & Co., to represent him. The reason for his choice is that Ms. Howe has extensive experience in dealing with cases of this nature involving sexual allegations by child witnesses. Mr. Hughes says that he does not consider himself to have the necessary experience or expertise to cross-examine a child in relation to such allegations before a jury, although he considers that he could adequately represent the applicant in the committal proceedings.

4 The applicant has not applied for legal aid, for reasons to which I shall return. Neither Mr. Navas nor Mr. Hughes is prepared to undertake his defence on a legal aid basis. They will be unable to prepare the case for Ms. Howe and Ms. Howe herself is not on the legal aid list although, as I understand it, she has not expressly stated that she will not undertake the trial on legal aid. The applicant argues that the rates payable to counsel under the legal aid scheme do not allow him to obtain the services of counsel competent to undertake a case of the size and complexity of this case and so, in the absence of competent counsel, he will not receive a fair trial as provided for by the Constitution. The applicant says that if he is to be deprived of his constitutional right to a fair trial, he should not be tried at all and seeks a stay of the proceedings against him. He made the application first before the Stipendiary Magistrate and it was refused. He then came before me in proceedings which started their life in the Supreme Court as judicial review proceedings. By agreement between the parties, the proceedings were converted to an application under s.15 of the Gibraltar Constitution Order 1969, sub-ss. (1) and (2) of which read:

> "(1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to the Supreme Court for redress.
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> (2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of the preceding subsection, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled."

5 The provision of the Constitution which the applicant says is being or is likely to be contravened is s.8, which provides for the right to a fair trial.

6 The first question I have to answer is whether the applicant is entitled to be legally represented at public expense. The Constitution gives him

the right to a fair trial, but does it follow from that right that he enjoys the further right to a publicly-funded defence because he does not have the wherewithal to fund his own defence?

7 Section 8(1) of the Constitution reads:

> "If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

8 Section 8(2) provides further protection for a person charged with a criminal offence in the following terms:

> "Every person who is charged with a criminal offence—
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> (a) shall be presumed to be innocent until he is proved or has pleaded guilty;
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> (b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence;
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> (c) shall be given adequate time and facilities for the preparation of his defence;
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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 provided at the public expense;
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> (e) shall be afforded facilities to examine, in person or by his legal representative, the witnesses called by the prosecution before any court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before that court on the same conditions as those applying to witnesses called by the prosecution; and
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> (f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence,
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> and, except with his own consent, the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence."

9 It will be seen that s.8(2)(d) gives a person charged the following choices—

(i) to defend himself in person; or

(ii) to defend himself at his own expense by a legal representative of his own choice; or

(iii) "where so prescribed" to defend himself by a legal representative provided at the public expense.

10 The words "where so prescribed" are interesting, for the Constitution is silent on who should so prescribe. Be that as it may, the Gibraltar legislature, in the Legal Aid and Assistance Ordinance, has provided for a system of free legal aid for those with insufficient means to pay for their own legal representation. I need not go into questions of eligibility for legal aid, for it is accepted in this case that the applicant is entitled to have counsel assigned to him under the Ordinance. What the applicant is saying is that if he is granted legal aid, either he will not be able to find a legal representative to represent him or, if such a legal representative is found, he will not have the necessary experience or expertise to effectively represent him. The applicant contends in either case that his right to a fair trial, as prescribed by s.8(1) of the Constitution, is contravened.

11 In his ruling the learned Stipendiary Magistrate had this to say:

> "It is conceded by the Crown in their skeleton argument and in their submissions (and it seems to me properly so) that the restrictions contained in s.8(2)(d) of the Constitution to publicly-funded legal representation must be read as being subject to the right to a fair trial."

12 By this he no doubt meant that the provision of a legal representative at public expense must be made in every case where it is necessary to enable a person charged to have a fair trial. It would offend the Constitution to deny legal representation at public expense if a person charged was thereby denied a fair hearing. In this I consider the learned magistrate was correct. The overriding right is to a fair hearing. Section 8(2) provides certain rights which are minimum requirements within the context of the right to a fair hearing.

13 The cases from the European Court of Human Rights support this view. Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms establishes the right to a fair hearing in both criminal and civil trials, in very similar terms to those provided to a person charged with a criminal offence by s.8(1) of the Constitution.

14 The relevant part of art. 6(1) reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public

hearing within a reasonable time by an independent and impartial tribunal established by law . . ."

15 Article 6(3) then provides for certain minimum rights for those charged with criminal offences in terms not dissimilar to s.8(2) of the Constitution.

"Everyone charged with a criminal offence has the following minimum rights—

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

16 In *Artico* v. *Italy* (2) the European Court of Human Rights said (3 E.H.R.R. at 12):

"Paragraph 3 of Article 6 contains an enumeration of specific applications of the general principle stated in paragraph 1 of the Article. The various rights of which a non-exhaustive list appears in paragraph 3 reflect certain of the aspects of the notion of a fair trial in criminal proceedings. When compliance with paragraph 3 is being reviewed, its basic purpose must not be forgotten, nor must it be severed from its roots."

17 In my judgment, the same applies to the relationship between sub-ss. (1) and (2) of s.8 of the Constitution. This means that where a case falls outside an entitlement prescribed by s.8(2), if the right to a fair hearing requires an accused person to be legally represented, s.8(1) prescribes him that right. Here again there is helpful authority from the European Court of Human Rights in the decision of *Airey* v. *Ireland* (1).

18 I ought here to say a word or two about the relevance of decisions of the European Court of Human Rights to our own jurisdiction. The

Convention has not been incorporated into the laws of Gibraltar and so decisions of the European Court of Human Rights have no direct application. However, where, as in this case, this court is asked to make a decision on constitutional provisions which are substantially similar to provisions of the Convention, the decisions of the European Court of Human Rights must be regarded as of powerful persuasive authority. There is a rich body of jurisprudence emanating from the European Court of Human Rights, which can be of assistance to this court.

19 *Airey* v. *Ireland* (1) concerned a marital dispute in which the applicant sought a decree of judicial separation. She did not have the wherewithal to pay for a lawyer and legal aid was not available for such an application made in the Irish courts. The case did not fall within the Convention's express requirements for free legal assistance, which (see art. 6(3)(c)) only relate to criminal proceedings. Nonetheless, argued the applicant, the fact that public funding was not available for her application denied her access to the court, which was secured by art. 6(1). The Irish Government argued that the applicant was not denied access to the court because she could have made her application without the assistance of a lawyer. The European Court of Human Rights rejected the submission because the procedure before the Irish court was procedurally complex, involved complicated points of law and the case entailed emotional involvement which was scarcely compatible with the degree of objectivity required by advocacy in court. The European Court of Human Rights considered it most improbable that the applicant could effectively present her case and held that she had been denied her rights, notwithstanding that art. 6(3) did not expressly make provision for legal aid in civil proceedings.

20 For the sake of completeness, I ought to mention the decision of the Privy Council in *Robinson* v. *R.* (10), in which the appellant was charged in Jamaica with murder. After several adjournments over a period of two years because prosecution witnesses could not be found, the case was eventually ready for trial. However, the appellant's counsel were not present because they had not been put in funds. A jury was sworn, counsel for the prosecution opened his case and the trial was adjourned to the next day to allow junior counsel for the defence to appear. When he did so, he sought the leave of the judge, on his own and senior counsel's behalf, to withdraw. The judge refused, but invited him to appear on a legal aid basis. Upon counsel refusing the offer, the judge informed him that the case would continue and it did so, with the appellant being unrepresented. The appellant appealed and argued that he had been denied his right under s.20(6)(c) of the Jamaican Constitution to "be permitted to defend himself . . . by a legal representative of his own choice." A majority of the Board held that the appellant's rights had not been infringed as a result of his being left without legal representation at

his trial, because s.20(6)(c) of the Constitution did not give him an absolute right to legal representation but merely permitted him to exercise the right to be legally represented, provided that he first arranged for his legal representation, whether on legal aid or privately.

21 I do not think this decision holds good today because it was disapproved of in *Robinson* v. *Jamaica* (9) when the matter was referred by the appellant to the United Nations Human Rights Committee. In view of the report of the Human Rights Committee, should a case similar to *Robinson* v. *R.* (10) reach the Privy Council again, the Board would, I am sure, reach a conclusion different to that reached by the majority in that case and follow the dissenting opinion of Lord Scarman and Lord Edmund-Davies. The following passage from the dissenting opinion is, perhaps, relevant ([1985] 2 All E.R. at 604):

> "We come, therefore, to the crucial question. By ordering the trial to continue after the withdrawal of the appellant's counsel and in circumstances which effectually prevented the appellant from being able to defend himself by counsel, did the trial judge fail to grant him the permission to which he was by the Constitution entitled? We agree with the majority that the issue of the appeal turns on the meaning to be attributed to the word 'permitted' in s.20(6)(c) of the Constitution. We accept, of course, that the duty imposed by the subsection is an obligation to permit, not to ensure, legal representation. We also accept that the judge did so permit up to the moment when he decided to continue the trial in the absence of counsel who had made plain their intention to withdraw from the defence of the appellant. But did he by that decision fail to meet the constitutional requirement that the accused man be permitted the option of defence by counsel? We think the answer is beyond doubt: he did so fail, and his failure was a contravention of the Constitution.
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> 'Permit' is an ordinary English word of wide range and scope and is apt in our judgment to cover a negative obligation; in this case the obligation not to prevent the accused from choosing to be defended by a legal representative. We would have reached this conclusion on the wording and context of s.20(6)(c) even without the benefit of authority. But our opinion has the support of the approach to the interpretation of constitutional provisions which the Privy Council has declared to be correct. In *Thornhill v. A-G of Trinidad and Tobago* [1981] A.C. 61, Lord Diplock, delivering the judgment of the Board, emphasised the difference in character between constitutional provisions protecting fundamental rights and freedoms and other statutory provisions. Constitutional provisions, he said, are not drafted with the particularity that would be appropriate to an ordinary Act of Parliament nor are they expressed in words that bear precise meanings as terms of legal art.

In a later case, *A-G of the Gambia v. Momodou Jobe* [1984] 3 W.L.R. 174 at 183, Lord Diplock dealing with the Constitution of Gambia reverted to the same theme, saying:

> 'A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.'

Putting a generous and purposive construction on the subsection, we have no doubt that by taking the course which he did the trial judge failed to permit the appellant to defend himself by a legal representative of his own choice."

22 In my judgment, if the applicant seeks legal representation to enable him to have a fair hearing rather than represent himself, then he must be provided with such representation. And I do not think that it can be gainsaid that the applicant needs to be legally represented in this case, if he is to defend himself properly. He could not be expected to review the prosecution evidence, marshal his own evidence, consider the law, examine the prosecution witnesses and present his own case without the assistance of a lawyer. Furthermore, to be able to defend himself effectively he needs a lawyer of some experience. A very junior member of the bar would not be able to cope with this case. In this connection, it is not without significance that the prosecution is being conducted by Mr. Trinidad, who is next in seniority to the Attorney-General in his chambers. For these findings, I again derive assistance from the decisions of the European Court of Human Rights. In the first place, the European Court of Human Rights has held that the Convention is intended to guarantee rights that are practical and effective and not theoretical and illusory: see *Artico* v. *Italy* (2). The question of the shortcomings of counsel was discussed in *Kamasinski* v. *Austria* (7), in which the applicant complained about the inadequacies of his lawyer's preparation. The European Court of Human Rights said (13 E.H.R.R. at 62):

> "It follows from the independence of the legal profession of the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed. The Court agrees with the Commission that the competent national authorities are required under Article 6(3)(c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way."

23 There is the further question of "equality of arms." The European Court of Human Rights has laid down that there must be a fair balance between parties to litigation. In *Dombo Beheer B.V.* v. *The Netherlands* (6) it was said (18 E.H.R.R. at 230):

> "The Court agrees with the Commission that as regards litigation involving opposing private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case—including his evidence—under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent."

24 The European Court of Human Rights affirmed that principle in *De Haes* v. *Belgium* (5) in the following terms (25 E.H.R.R. at 56):

> "The Court reiterates that the principle of equality of arms—a component of the broader concept of a fair trial—requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent."

25 Although *Dombo Beheer B.V.* and *De Haes* were both cases of a civil nature, the right to equality of arms can be no less important in criminal cases, and the Privy Council has so held: see *McLean* v. *Procurator Fiscal* (8).

26 It follows that for the applicant to be effectively represented, he must be assigned a legal representative of adequate experience. I consider that it is the duty of the official who assigns counsel to a defendant, in this case the clerk to the justices, to ensure that counsel assigned is adequately experienced and of sufficient seniority. There is, of course, the commensurate duty on the part of counsel not to accept a case he is not equipped to undertake.

27 The applicant's case is that the fees payable under the legal aid scheme do not allow him to obtain the services of counsel who is competent to undertake a case of the size and complexity of the criminal case against him. He goes further and argues that the nature of the criminal case requires that he be represented by counsel with substantial experience of handling child witnesses and that he has chosen Ms. Howe to represent him in the Supreme Court, should the case be committed for trial, because she is far more experienced than any other local practitioner in criminal cases of this nature. The applicant has produced a letter from Hogg, J., a judge of the English Family Division and a witness statement of Mr. Trembath, an English barrister specializing in cases such as this. Hogg, J. says that not every counsel can cross-examine a child witness with the necessary tact, empathy, skill and expertise and that it is of great importance that experienced and skilled counsel be instructed in such cases. Mr. Trembath says that the interests of justice require that any person facing charges such as these be represented by counsel with considerable experience in the criminal courts, and in particular of handling child witnesses.

28 Section 8(2)(d) does not give the right to a person who is provided with legal representation at public expense to choose his own counsel. Of

course, if such a person expresses a wish that he wants the assignment of a particular counsel who is on the legal aid list and is willing to represent him, then his wishes ought usually to be granted, see *Bonfante* v. *Pizzarello* (3). But s.8(2)(d) does not give a right to a person to select counsel who is not prepared to take his case on legal aid rates. Nor do the requirements of a fair trial give a right to a person provided with counsel at public expense to choose his own counsel. In *Croissant* v. *Germany* (4), the European Court of Human Rights had this to say (16 E.H.R.R. at 151):

> "It is true that Article 6(3)(c) entitles 'everyone charged with a criminal offence' to be defended by counsel of his own choosing. Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant's wishes; indeed, German law contemplates such a course. However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice."

29 In my view, the fact that the applicant cannot, for whatever reason, be represented by Ms. Howe does not mean that he will not get a fair hearing. Whilst it would be desirable for the applicant to be represented by counsel of his choice and with the maximum of experience at handling child witnesses, we must necessarily work within the constraints of a small jurisdiction and the lack of specialist experience within our jurisdiction. Mr. Trinidad for the prosecution has extensive experience in the criminal court, but I am sure that his experience of handling child witnesses is limited. A fair hearing demands that the applicant be represented by counsel with adequate experience in the criminal courts and with sufficient experience to be alive to the problems of handling child witnesses and that he be given the opportunity of adequately preparing for the task ahead of him.

30 Can the applicant be assigned counsel to represent him with the necessary experience and ability to prepare the case at public expense? He has not applied for legal aid and has not looked beyond his present representatives and Ms. Howe, none of whom seems able to represent him on a legal aid basis. I received a good deal of evidence to demonstrate that it will be extremely difficult, if not impossible, for him to be effectively represented under the legal aid scheme.

31 The application for stay was made before the Stipendiary Magistrate in March 2001 and the application to this court soon followed. This was

before the fees for legal aid were substantially increased by the Legal Aid (Fees and Expenses) (Amendment) Rules 2001, which came into effect in June. Prior to the increase in fees they had remained static from 1981. The evidence of Mrs. Stagnetto, the chairman of the justices, was that she was so concerned about the difficulties her court was facing in finding counsel to represent clients on a legal aid basis that she felt that unless the situation changed, the criminal justice system would cease to function. Mr. Vasquez, chairman of the Bar Council, stated that he had formed the view that the criminal legal aid scheme was on the brink of collapse, if it had not already done so. Witness statements were tendered by a number of counsel, some of whom were stalwarts of the legal aid scheme, that they had decided to come off the legal aid list.

32 It was hoped that the increased fees would resolve the problem, but the signs are that whilst this could be true in respect of cases of normal length and complexity, the fees have not increased to the extent sufficient to attract members of the bar to take on cases which require a great deal of preparation or which take them out of their usual practice for any length of time. According to Mr. Vasquez, there is no incentive for counsel of mid- to senior-level experience to take on a case on legal aid. His belief is that the system does not work for a complex case. The Bar Council has expressed concern that if counsel puts his name on the legal aid list he may be subject to the "cab-rank" rule and may be in breach of his professional duty if he refuses to take on a complex case. For this reason, the members of his own firm, the second largest in Gibraltar, have decided that although they are prepared to take on some work on a *pro bono* basis, they will not join or rejoin the legal aid scheme. There was evidence which demonstrated the great disparity between the amount of fees which counsel could expect if he were privately instructed, or indeed instructed on a legal assistance basis in a case of similar length and complexity under the civil legal assistance scheme, on the one hand and the fees he could expect from the legal aid scheme.

33 The evidence before me is that whilst there has been some drift back into the legal aid scheme as a result of the increase in fees, a number of experienced counsel still refuse to be drawn back. Mr. Cardona, the clerk to the justices, testified that by early June the number of counsel who were undertaking legal aid work had effectively reduced to four. 13 counsel have now returned to the legal aid list, giving him a list of 17 who are prepared to accept assignments of legal aid work. Of these 17, 8 or 9 are counsel who he would regard as senior. He cannot operate a "cab-rank" rule, he says, because some of those on his list have remained on, or returned to, the list on the basis that they do not necessarily have to accept a case. One factor in their decision whether to accept or reject a case is the length of the case.

34 From the evidence I have, I think it will be very difficult for the clerk to the justices to find counsel who meet the criteria I have outlined above to undertake the defence of the applicant. But this has not been put to the test because the applicant has not applied for legal aid. It has been Mr. Trinidad's point throughout that this application is premature and I agree with him. I have sympathy with Mr. Hughes who, in making his application for stay, may have wanted to avoid first taking on the case on legal aid for fear of finding himself in the same situation as the lawyers in *McLean* v. *Prosecutor Fiscal* (8). If he started the case on a legal aid basis he could not, of course, later abandon his client because he was finding himself substantially out of pocket. In *McLean* the lawyers argued that the appellants would be denied a fair trial because they would be deprived of effective legal assistance to which they were entitled under art. 6(3)(c) of the Convention, the reason being that the lawyers would receive wholly inadequate remuneration under the legal aid scheme. Their argument that they would be tempted to cut corners in the preparation of the appellants' case because of the lowly remuneration, met with no success in the Privy Council. The Board held that there was nothing to suggest that the lawyers would depart from the professional standards required of them. The solicitors had indicated that they would not abandon their clients (and, indeed, they could not according to their code of conduct) and it would be wrong to assume that they would reduce their standard of preparation simply because they considered they would not receive adequate remuneration for their work.

35 However, in failing to make an application for legal aid, the applicant has failed to satisfy me that he will not be able to obtain effective legal representation. He has satisfied me that it will be difficult: he has not satisfied me that it will be impossible. I cannot, therefore, grant his application for stay. Be that as it may, this is an ongoing criminal case and it may be that at the end of the day the applicant will not be able to be effectively represented, having exhausted all avenues open to him. It would not be in the interests of justice for me simply to reject his application and leave him in danger of having to make a subsequent application, should an application for legal aid fail to provide him with a suitable legal representative.

36 The order I make is to adjourn the application to December 3rd, 2001. The clerk to the justices should make urgent attempts to assign counsel to the applicant on a legal aid basis. Such counsel must meet the criteria I have set out above. The clerk to the justices should report to me on the outcome at the adjourned hearing.

37 I must make it clear that an order for a stay of criminal proceedings for the reasons set out in this application is an order that I would make only if compelled to do so to avoid the applicant being denied a fair

hearing. It is not in the best interests of justice for a criminal case to be abandoned on these grounds and it would only be so ordered if there were to be the greater injustice of the applicant being denied a fair hearing. There is an avenue open to the Attorney-General should the clerk to the justices fail to secure the services of counsel under the legal aid scheme. He can approach the Treasury for funds to pay for defence counsel outside the legal aid scheme and, should the clerk to the justices reach a blank, I urge this course upon him.

Application adjourned.