[2021 Gib LR 623]

ROBINSON v. ATTORNEY-GENERAL

COURT OF APPEAL (Kay, P., Elias and Davis, JJ.A.): October 27th, 2021

2021/GCA/13

Courts—Supreme Court—jurisdiction—no review or appeal of decision by Supreme Court judge by another Supreme Court judge

Constitutional Law—fundamental rights and freedoms—fair hearing within reasonable time—no claim for violation of right to fair trial which allegedly occurred in course of proceedings in which acquitted or which were discontinued

The appellant was charged with false accounting.

During the trial of the Marrache brothers for conspiracy to defraud, the judge stated that he was satisfied that the appellant and a colleague (who were not defendants at that time), as accountants acting for the Marrache law firm, had "cooked the books." Neither the appellant nor his colleague had given evidence at the trial.

During the Marrache trial, the appellant and his colleague were charged with false accounting. An application was made for a stay on the basis of abuse of process, which was refused by Dudley, C.J. (in proceedings reported at 2015 Gib LR 261). The appellant had claimed that he could not receive a fair trial in view of the publicity arising from the finding of "cooking the books." Eventually, the prosecution offered no evidence and the Chief Justice directed verdicts of not guilty (reported at 2015 Gib LR 410).

The appellant brought the present proceedings complaining that his reputation had been damaged by the "cooking the books" finding. He claimed that his grievance remained, notwithstanding the not guilty verdict, because it did not follow a consideration of the merits. He sought various declarations designed to establish that his constitutional right to a fair trial had been violated. The claim was struck out. The judge, Yeats, J., held that seeking a declaration in the Supreme Court that a decision of another Supreme Court judge (*i.e.* the Chief Justice's refusal to stay the proceedings against the appellant as an abuse of process) was a breach of the Constitution would entail a review by one judge of a decision of another judge of the same court. It would be judicial review by another name. It

was not possible for the court to do so. Yeats, J. also held, in respect of claims arising from the prosecution's alleged disclosure failings, that any procedural unfairness and consequential breach of s.8 of the Gibraltar Constitutional Order 2006 was in effect extinguished by the Chief Justice's direction of not guilty verdicts.

Held, dismissing the appeal:
The appeal was misconceived and would be dismissed. In relation to the question of collateral attack, Yeats, J. was plainly correct. It was a long established principle that review or appeal of a decision by a Supreme Court judge by another Supreme Court judge did not lie. It was a fundamental issue of jurisdiction. The appellant's case on the acquittal point was similarly doomed. As a matter of law, there could be no complaint or remedy arising from the "cooking the books" finding once the prosecution offered no evidence against the appellant and the Chief Justice directed the not guilty verdicts. This was clear not only as a matter of common law but also from the jurisprudence of the European Court of Human Rights (which held in *Khlyustov* v. *Russia* that a person could not claim to be a victim of a violation of his right to a fair trial which occurred in the course of proceedings in which he was acquitted or which were discontinued). This approach was reflected in the English authorities on appeals by non-parties who sought to repair reputational damage (paras. 9–14).

Cases cited:
(1) *Gray* v. *Boreh*, [2017] EWCA Civ 56, considered.
(2) *Khlyustov* v. *Russia*, App. No. 28975/05, E.Ct.H.R., July 11th, 2013, considered.

C. Finch (instructed by Verralls) for the appellant;
C. Rocca, *Q.C.* with *M. Zammitt* (instructed by Office of Criminal Prosecutions and Litigation) for the respondent.

1 **KAY, P.:** The background to this appeal is unusual so I shall begin with a brief history. It begins with the trial of the Marrache brothers who were convicted of conspiracy to defraud in July 2014. During that trial the judge (Sir Geoffrey Grigson) discharged the jury and continued to try the defendants without a jury (reported at 2013–14 Gib LR 350). The prosecution case was that the fraud had been assisted by Kenneth Robinson and another employee of Baker Tilly, who were not defendants at that time. In his judgment giving reasons for convicting the Marraches (reported at 2013–14 Gib LR 540), Sir Geoffrey said that he was satisfied that Mr. Robinson and his colleague, as accountants acting for the Marrache law firm at the material time, had "cooked the books." The passage did not refer to them by name but by initials, but it is common ground that, in Gibraltar, their

identities could not be successfully concealed by that. Neither Mr. Robinson nor his colleague had given evidence at the trial.

2 Before the Marrache trial had commenced, it was known that Mr. Robinson was under investigation but he had not yet been charged. There was an application by the defence to adjourn the trial so that the Marraches and their accountants could be tried together but, unsurprisingly, that application was refused. It was during the Marrache trial that Mr. Robinson and his colleague were finally charged. I do not need to make further reference to the colleague.

3 In the criminal proceedings against Mr. Robinson, an application was made for a stay on the basis of abuse of process but, on July 31st, 2015, Dudley, C.J. refused the application (reported at 2015 Gib LR 261). The central feature of the application had been a submission that Mr. Robinson could not receive a fair trial in view of the prejudicial publicity arising out of Sir Geoffrey's finding of "cooking the books." Thereafter, the prosecution made repeated applications for the adjournment of the trial because of disclosure issues. Two such applications succeeded but on the third occasion, on December 18th, 2015, Dudley, C.J. refused to adjourn, leading inevitably to the prosecution offering no evidence and the Chief Justice directing verdicts of not guilty, pursuant to s.288(3) of the Criminal Procedure and Evidence Act 2011 (reported at 2015 Gib LR 410).

4 In these civil proceedings, Mr. Robinson complains that his reputation has been trashed by Sir Geoffrey's "cooking the books" finding, which was made in his absence and with no opportunity to respond. He claims that his grievance remains, notwithstanding the not guilty verdict in his own case, because they did not follow a consideration of the merits. He commenced proceedings by a claim form issued on June 28th, 2017. The final formulation of his claim came in amended particulars of claim dated October 25th, 2019. It sought various declarations designed to establish that his constitutional right to a fair trial had been violated.

5 In due course, the respondent issued a notice applying for the striking out of the amended particulars of claim, pursuant to CPR 3.4(2)(a) and (b), alleging that the pleadings disclosed no reasonable grounds for bringing the claim and amounted to an abuse of the court's process. On November 23rd, 2020, Yeats, J. made a striking out order. He granted Mr. Robinson permission to appeal and it is that appeal with which we are now concerned.

The judgment of Yeats, J.

6 The judgment below is wide-ranging but its principal holding for present purposes is contained in para. 17:

> "Seeking a declaration in the Supreme Court that a decision of another Supreme Court judge [in this case Dudley, C.J.'s refusal to stay

> proceedings against Mr. Robinson as an abuse of process] was a breach of the Constitution would entail a review by one judge of a decision of another judge of the same court. It would require an analysis of the decision and the passing of judgment on its merits and/or whether making the decision was necessary. It is a judicial review by another name. In my judgment, it is not possible for this court to do so and this part of Mr Robinson's claim therefore fails at this first hurdle."

Turning to the parts of the claim arising from the prosecution's disclosure failings, Yeats, J. said:

> "any procedural unfairness, and consequential breach of section 8, was in effect extinguished by Dudley CJ's refusal to grant the prosecution a further adjournment of the case in December 2015."

7 In other words, the directed not guilty verdicts amounted to just satisfaction of Mr. Robinson's grievance and it is irrelevant that he continues to complain about the consequences of an outcome that he himself had sought. The amended particulars of claim pleaded other complaints and remedies (for example, wasted costs consequential upon the findings of the prosecution) but they all ran aground on two principal obstacles—collateral attack on earlier judgments of the same court and the fact that, at the end of the day, Mr. Robinson had been acquitted.

The appeal

8 In order to succeed on this appeal, Mr. Robinson would have to show that Yeats, J. was wrong about what I have just described as the two principal obstacles—the collateral attack point and the acquittal point—or that there is some other protective principle of which he can avail himself.

9 As regards to the question of collateral attack, the judge was plainly correct. The principle is long established. By way of illustration, he referred to *In re Marrache* (2010–12 Gib LR 14) in which the claimants had sought to divide the Supreme Court into separate units. One judge had refused bail when exercising her criminal jurisdiction. On an application to the Chief Justice for a writ of habeas corpus (which in England and Wales would be made to the Queen's Bench Division), he said (*ibid.*, at para. 12):

> "By virtue of the Gibraltar Constitution Order 2006, this court is a court of unlimited jurisdiction, it is also a court that by virtue of various statutory provisions discharges the functions which in England are discharged by the Crown Court. However, judges of this court sit not *qua* Crown Court judge or indeed *qua* judges of the Divisional Court but as Supreme Court judges, albeit undertaking the functions which in England are discharged by distinct courts or divisions of courts. Therefore, review or appeal of a decision by a

Supreme Court judge by another Supreme Court judge does not lie irrespective of the jurisdiction in which the decision is taken."

10 This is a fundamental issue of jurisdiction. Mr. Finch sought to circumvent it by claiming some sort of exception for purely declaratory relief but that is wholly unpersuasive. Declaratory relief is simply one remedial tool in the box of judicial review. It provides no jurisdictional trump card. He also said that the acquittal of Mr. Robinson was in proceedings other than the proceedings in which the adverse finding by Sir Geoffrey was made but that cannot avail him, if only because the matter had been addressed by the Chief Justice on the abuse application when he decided that Mr. Robinson could still have a fair trial.

11 Mr. Robinson's case on the acquittal point is similarly doomed. As a matter of law, there could be no complaint or remedy arising from Sir Geoffrey's "cooking the books" finding once the prosecution offered no evidence against Mr. Robinson and the Chief Justice directed the not guilty verdicts. This is clear not only as a matter of common law but also from the jurisprudence of the European Court of Human Rights. In *Khlyustov* v. *Russia* (2), the Strasbourg Court said (App. No. 28975/05, at para. 103):

> "The applicant complained under Article 6 § 3 (c) and (d) that the criminal proceedings initiated against him on 18 July 2005 for forgery of documents had been unfair. The Court observes that a person may not claim to be a victim of a violation of his right to a fair trial under Article 6 of the Convention which, according to him, occurred in the course of proceedings in which he was acquitted or which were discontinued . . ."

In its *Guide on Article 6 of the ECHR, Right to a Fair Trial*, the court cites *Khlyustov* and adds (at para. 6): "the dismissal of charges against an applicant deprives him or her of the victim status for the alleged breaches of the Article 6 rights."

12 This approach is reflected in the English authorities on appeals by non-parties who seek to repair reputational damage, see *Gray* v. *Boreh* (1), where Gloster, L.J. put purely reputational damage below the protection of financial and proprietary interests ([2017] EWCA Civ 56, at para. 35(i)) and concluded (*ibid.*, at para. 50):

> "50. . . . I express my concern that to permit a non-party witness in a commercial case of this type to exercise an independent right of appeal, in which he is free to challenge adverse factual findings made against him by a first instance judge, merely on the grounds that such findings have reputational consequences for him, has the potential to lead to highly undesirable satellite litigation. That in my judgment would be likely to waste court resources contrary to the interests of

> other litigants and to bring the administration of justice into disrepute."

13 Mr. Finch's ultimate submission is that Mr. Robinson's claim that his fair trial or other human rights under s.8 of the Gibraltar Constitution Order 2006 (which resembles art. 6 of the ECHR) must be actionable in the Supreme Court because, if it is not, there will be a breach of art. 13 of the ECHR which requires the provision of an effective remedy. In the Gibraltar courts, this submission is fatally flawed. The ECHR is not incorporated into the domestic law of Gibraltar. Accordingly, any reliance on art. 13 would have to be pursued, not in the domestic courts, but in Strasbourg where, because of the constitutional arrangements, the proceedings would have to be against the United Kingdom. They would of course also have to establish a breach of a substantive right and, on the basis of the Strasbourg jurisprudence to which we have been referred, that would present a further difficulty for Mr. Robinson.

Conclusion

14 It follows from what I have said that I consider this appeal to be misconceived and I would dismiss it.

15 **ELIAS, J.A.:** I agree.

16 **DAVIS, J.A.:** I also agree.

Appeal dismissed.