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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

REGINA

-v-

DEBORAH BOTHWELL

Before Kerr LCJ, Nicholson LJ and Campbell LJ

KERR LCJ

Introduction

[1] Deborah Bothwell was convicted on 28 October 2005 of the offence of possession of a Class B controlled drug, amphetamine, with intent to supply, after a trial before His Honour Judge Smyth QC and a jury. She was sentenced to eighteen months' imprisonment on 6 February 2006. The Attorney General has applied to refer this sentence to the Court of Appeal on the grounds that it is unduly lenient. On 14 March 2006 an application was made to this court to extend the time within which Ms Bothwell might appeal her conviction. That application was granted and in consequence the Attorney General's reference has been in abeyance.

[2] At the trial before Judge Smyth Ms Bothwell was represented by two solicitor advocates – Barra McGrory and John Greer. They have now applied to this court for leave to represent Ms Bothwell on her application for leave to appeal against conviction. This court decided that, in order that this important question (which has obvious implications for future cases) be fully investigated, an *amicus curiae* should be appointed and we are grateful to Mr Ciaran Murphy who appeared on the instructions of the Attorney General in that role. Mr Murphy's submissions have been of considerable value to the court in dealing with this issue. We also heard from Mr McGrory on his own behalf and on behalf of Mr Greer and we are, of course, also indebted to Mr McGrory for the helpful arguments that he presented to the court.

Statutory background in Northern Ireland

[3] The general rights of audience of solicitors in the Crown Court in Northern Ireland are to be found in section 50 of the Judicature (Northern Ireland) Act 1978. It provides: -

> "50. - (1) A solicitor of the Supreme Court may appear in, conduct, defend and address the court in any proceedings in the Crown Court, other than proceedings of such description (if any) as may from time to time be specified in directions given by the Lord Chief Justice under this section.
>
> (2) In considering whether to exercise his powers under this section the Lord Chief justice shall have regard to any rights of audience heretofore exercised by solicitors at any trials on indictment and to any other circumstances affecting the public interest.
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> (3) Any direction given under this section may be subject to such conditions and restrictions as appear to the Lord Chief Justice to be necessary or expedient.
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> (4) Nothing in this section shall take away or affect the inherent powers of any court or judge to confer a right of audience."

[4] No direction has been made under section 50 (1) and at present, therefore, solicitors enjoy unlimited rights of audience in the Crown Court. That right of audience had not been widely availed of, probably because of the restrictions on legal aid for solicitors who appeared as advocates for clients in the Crown Court. That position has changed since April 2005 when under new legal aid rules, a more structured system of fees payable to solicitors who act as advocates in the Crown Court has been established. We shall refer to these below.

[5] Section 50 is, of course, restricted to the Crown Court. Rights of audience for solicitors in the Court of Appeal are dealt with in section 106 of the Judicature Act. It provides: -

> "106. - (1) A solicitor of the Supreme Court shall have a right of audience in any proceedings in the High Court or the Court of Appeal respecting -

(a) any matter relating to individual voluntary arrangements or bankruptcy under Parts VIII to X of the Insolvency (Northern Ireland) Order 1989;

(b) any matter relating to company voluntary arrangements, receivership or the winding up of a company under Parts II and IV to VII of that Order of 1989;

(c) any matter to be heard in chambers or which is adjourned from chambers into court; or

(d) any matter in which counsel already instructed is for any reason unable to appear, without being required to instruct counsel, or other counsel as the case may be, and may act and plead therein as counsel might have acted or pleaded.

(2) Where in any proceedings in the High Court or the Court of Appeal (other than proceedings to which subsection (1) relates) a solicitor has had no reasonable opportunity, having regard to all the circumstances, of adequately instructing counsel, the court, if of opinion that it is desirable in the interests of justice to do so, may grant the solicitor a right of audience as ample as that which counsel would have enjoyed.

(3) A solicitor of the Supreme Court shall have a right of audience in any enquiries or proceedings before a statutory officer sitting in the exercise of his jurisdiction whether original or delegated; and any such officer may in his discretion permit such right of audience to be enjoyed by an experienced solicitor's clerk acting on behalf of his principal.

(4) Nothing in this section shall take away or affect the inherent powers of any court or judge to confer a right of audience."

[6] It will be seen therefore that, apart from a somewhat restricted category of cases (such as commercial proceedings involving bankruptcy, insolvency and similar company matters), the rights of audience of solicitors in the High

Court and the Court of Appeal are restricted to what might be described as emergency situations where counsel who has been instructed is unable to appear or where the solicitor has not had a reasonable opportunity to instruct counsel and it is in the interests of justice that he be allowed to appear. Although section 106 (4) preserves the right of the court to have recourse to its inherent power to confer a right of audience, it seems to us that this power should be exercised with the earlier subsections in mind. In general, the section appears to have been framed to reflect the traditional position that solicitors will not normally have a right of audience in either the High Court or the Court of Appeal. It is to be noted in particular that there is no reference to criminal proceedings in any of its subsections and this, no doubt, is because, before the enactment of the Judicature Act, solicitors did not appear in criminal matters in the High Court or the Court of Appeal.

[7] In the Report of the Committee on the Supreme Court of Judicature of Northern Ireland 1970 Cmnd.4292 (which led to the Judicature Act) at para 312 it is stated that a corresponding right of audience to that of members of the Bar is enjoyed by solicitors only in the County Courts (in both civil and criminal jurisdictions) and in Magistrates' Courts. The report makes it clear that rights of audience of solicitors in the Supreme Court are strictly limited. It recommended some increase in these rights and drafted what is now section 106 almost verbatim. The report stated (at para 318) that it did not propose that the new Act should provide for rights of audience exhaustively, as the inherent jurisdiction of the Court, however uncertain its ambit, could only be completely replaced by enactment and that this would carry the risk of making the law unduly rigid.

[8] The position about solicitors appearing in criminal matters in the Supreme Court may have changed somewhat since 1978 in so far as concerns bail applications in the High Court. From time to time solicitors have appeared in these applications but, so far as we are aware, this has usually been on foot of an application pursuant to section 106 (2). Apart from this somewhat restricted arena, however, we are unaware of any incidence of solicitor representation in the High Court or the Court of Appeal in criminal matters. It is clear, in our view, that the section does not contemplate the grant of a right of audience to solicitors to exercise rights of advocacy for the purposes of the prosecution of a substantive appeal before the Court of Appeal. As Mr Murphy submitted, the express rights granted by the statute must guide the exercise of the inherent power under section 106 (4). It could not be correct that, as a matter of general practice, restrictions on rights expressly conferred by the statute should be undermined, or wholly dispensed with simply by the exercise of the inherent power.

[9] The Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 made provision for fees payable to solicitor advocates in Crown Court proceedings. Rule 2 defines an advocate as including three categories

of representative namely, counsel; solicitors exercising a right of audience under section 50 of the Act who have been certified by the Law Society as an 'advanced advocate'; and solicitors exercising such right who have not been so certified. Tables in Part 2 of Schedule 1 detail the fees payable under the heading for certified and uncertified solicitors. Enhanced fees are payable to solicitors acting as advocates. The rules came into operation on 4 April 2005 and as a consequence, there has been a greater interest among some solicitors in undertaking advocacy work in the Crown Court.

The position in England and Wales and the Republic of Ireland

[10] Section 27 of the Courts and Legal Services Act 1990 dealt with rights of audience and rights to conduct litigation in courts in England and Wales. In broad outline a person was to have a right of audience where it was granted by the appropriate authorising body - section 27 (2) of the Act. The Law Society is one such body –section 27 (9). By virtue of section 33 solicitors were deemed to have been granted by the Law Society the rights to conduct litigation exercisable by solicitors.

[11] Section 33 of the 1990 Act was substituted by section 31 of the Access to Justice Act 1999. In effect every solicitor and barrister is now deemed to have been granted a right of audience by his or her professional body, exercisable in accordance with the qualification regulations and rules of conduct of that body which have been approved by the Lord Chancellor. As a matter of practice, solicitors wishing to exercise rights of audience in the higher courts must obtain a Higher Court Qualification. We have been informed by Mr McGrory that this is significantly less arduous than the solicitor advocacy course organised by the Law Society each year. We have no means of verifying or disputing this claim but, for the purposes of these proceedings, we are prepared to assume that those who undertake the solicitors' advocacy course in this jurisdiction (and this includes Mr McGrory and Mr Greer) are as well qualified in advocacy as are their English and Welsh counterparts.

[12] In the Republic of Ireland section 17 of the Courts Act 1971 gives a general right of audience in all courts to all barristers and solicitors qualified in that jurisdiction.

Article 6 of the European Convention on Human Rights and Fundamental Freedoms

[13] Article 6 (3) (c) of ECHR provides: -

> "3. Everyone charged with a criminal offence has the following minimum rights:-
>
> …

> (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;"

[14] We have been told by Mr McGrory that Ms Bothwell has given firm instructions that she wishes him to continue to represent her and that she is aware that she is entitled to be represented by senior and junior counsel. While not going so far as to claim that to refuse Ms Bothwell's application to be represented by him and Mr Greer would constitute a violation of her article 6 rights, Mr McGrory submits that considerable attention should be given by this court to her wishes and in this context the right under article 6 to be represented by a counsel of one's own choice should weigh heavily with the court.

[15] ECtHR has held that, in general, an accused's choice of lawyer should be respected – see *Goddi v Italy* (1984) 6 EHRR 457. In this jurisdiction also the Divisional Court has recognised that that the right to choose one's own counsel should be respected by courts unless there are substantial reasons for concluding that the interests of justice require otherwise – *Re Doherty's application* [2001] NIQB 41. It is clear, however, that article 6 does not guarantee an absolute right to counsel of one's choice. In *Croissant v Germany* (1992) 16 EHRR 135, ECtHR held that the appointment by the Regional Court of Germany of a lawyer to represent the applicant against his wishes did not constitute a breach of article 6. At paragraph 39 of the judgment the court said: -

> "It is true that article 6 para. 3 (c) (art. 6-3-c) entitles "everyone charged with a criminal offence" to be defended by counsel of his own choosing (see the *Pakelli v. Germany* judgment of 25 April 1983, Series A no. 64, p. 15, para. 31). 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 (Article 142 of the Code of Criminal Procedure; see paragraph 20 above). However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice."

[16] If it is concluded that the solicitor advocates chosen by Ms Bothwell do not enjoy a right of audience before this court and that there is not a sufficient basis to have recourse to the inherent power of the court to confer a right of audience on them, her wishes, while they must certainly be taken into account, could not prevail over those considerations. As Mr Murphy put it, the article 6 right must be judged in the context of the statutory entitlements of those providing representation. To allow a general right to representation of choice would be unworkable in the legal system as it currently operates in this jurisdiction. Besides this, the interests of justice require that there be a system of ensuring that those who present cases, particularly in criminal courts where the liberty of the subject is at stake, are sufficiently competent and qualified to do so. Those interests cannot be overridden by the wish of an individual to be represented by someone who does not fulfil the eligibility requirements for advocates in the superior courts in this jurisdiction.

Exercise of the inherent power

[17] Mr McGrory does not contend that he and Mr Greer come within any of the exceptional circumstances categories in section 106 of the Judicature Act. He accepts that he must rely on the exercise of the court's inherent power. He argues that it would be anomalous to refuse rights of audience to solicitors who have completed an advocacy course in Northern Ireland when solicitors throughout the rest of the British Isles are indisputably entitled to present appeals in courts of equivalent jurisdiction. Moreover, his experience and that of Mr Greer in representing Ms Bothwell in the Crown Court place them, Mr McGrory says, at a distinct advantage over counsel who might otherwise be engaged for her application for leave to appeal. These considerations taken together with Ms Bothwell's desire that she be represented by Mr McGrory and Mr Greer make a compelling case, he claims, for the exercise of the court's inherent power.

[18] The circumstances in which a court should have resort to its inherent power have been discussed in a series of cases in this jurisdiction and in England and Wales. In *Braithwaite & Sons Limited -v- Anley Maritime Agencies Limited* [1990] NI 63 Carswell J considered the inherent jurisdiction of the court to dismiss actions for want of prosecution. He referred to the fact that rules of court prescribed a number of circumstances in which a prosecution might be dismissed and examined the question whether this should restrict

the exercise of the court's discretion to invoke its inherent jurisdiction. At page 70 he said: -

> "… I consider on reflection that there may be cases which do not come within the terms of the rule, yet which should not be allowed to proceed. I do not think that the court need tie its hands by declining to resort to its jurisdiction in such cases, if it is satisfied that justice requires it to invoke it. I am reinforced in this conclusion by the willingness of the English courts in the cases which I have cited to use the powers contained in their inherent jurisdiction to stay frivolous and vexatious actions in an area almost but not quite co-terminous with that governed by the Rules of Court."

[19] The theme that courts should be prepared to invoke their inherent jurisdiction where justice requires it is a frequently encountered one. Although not expressed in quite that way, it is to be found in *Connelly v DPP* [1964] AC 1254, where Lord Morris at page 1301 said: -

> "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

[20] Also in *Bremer Vulcan v South India Shipping Corporation* [1981] 1 All ER 289, 295 Lord Diplock put the matter thus: -

> "It would I think be conducive to legal clarity if the use of [the] two expressions ['inherent power' and 'inherent jurisdiction'] were confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice."

[21] In *Braithwaite* Carswell J quoted from a paper on the subject of inherent jurisdiction by Sir Jack Jacob (from Current Legal Problems 1970) which described the concept of inherent jurisdiction as: -

> "… the reserve of fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

[22] It appears to us, therefore, that the question whether this court should exercise its inherent jurisdiction to confer rights of audience on Mr McGrory and Mr Greer must be answered primarily by considering whether it is necessary in the interests of justice that this should be done. We have concluded that it is not. It is unquestionably true that, by appearing for Ms Bothwell on her trial, they will have obtained a familiarity with the issues that will arise on the hearing before this court but there is nothing about the circumstances of the case that suggest that participation in the trial is indispensable to appearance on her behalf on the application for leave to appeal. We cannot leave out of account the fact that neither Mr McGrory nor Mr Greer has presented a criminal appeal previously. We must also bear in mind that Ms Bothwell will be entitled to have senior and junior counsel appear on her behalf and there is every reason to suppose that experienced counsel, fully *au fait* with the issues that such an application will involve, will be engaged.

Conclusions

[23] The only basis on which we could have acceded to the application which has been made was by invoking our inherent jurisdiction. If we had been prepared to do so, it would have had the effect of bringing about a substantial change in the legal position about rights of audience in the Court of Appeal for we are satisfied that solicitor advocates who appear in future cases in the Crown Court would make similar applications. It is clear that legislation was required to bring about this change in England and Wales. It is not for us to say whether similar legislative provisions should be introduced in Northern Ireland.

[24] If we had been satisfied that the interests of justice required the conferring of rights of audience on these particular solicitor advocates we would not have shirked from doing so, notwithstanding that this may have heralded the change that we have referred to in the previous paragraph. In the event, however, for the reasons that we have given, we concluded that there was no such imperative. The application is therefore dismissed.