Regina v Solicitors Reeves & Co

No: 201005203 C5

Court of Appeal Criminal Division

24 March 2011

[2011] EWCA Crim 819

2011 WL 1060197

Before: Lord Justice Elias MR Justice Mackay Mr Justice Hickinbottom

Thursday, 24th March 2011

Representation

Mr E Culver appeared on behalf of the Appellant.
Mr A Heaton-Armstrong appeared on behalf of the Crown.

Judgment

Lord Justice Elias:

1 This is an appeal against the making of a wasted costs order under Regulation 3C of the Costs in Criminal Cases (General) Regulations 1986 . The appellant is a firm of solicitors who, at the Crown Court at Snaresbrook before Her Honour Judge Kamill, represented Gabriel Slowik on a single-count indictment alleging fraud. The order was made on the day listed for the trial of the defendant when the Crown, in view of material disclosed by the defence on that day, offered no evidence and the defendant was acquitted on the direction of the judge.

2 The background stated a little more fully is as follows. The defendant faced trial at Snaresbrook on 18th August 2010. The prosecution alleged that the defendant had gone into a "money shop" with a cheque on 26th May 2009. He walked up to the cashier's desk and presented the cheque in order to cash it. The cheque was made out for £3,000. The cashier called a manager, who became suspicious and called the police. The defendant was subsequently arrested at the scene and interviewed. He answered all questions in interview without a solicitor or interpreter, he being a Polish national. His case was that he did not know if the cheque was valid or not and he had gone into the money shop to check its validity. If it was valid, he was going to cash it. He said that had been sent the cheque by someone in Poland whom he did not know. This person had arranged some security work for him and the cheque was paid ostensibly in part payment for the work he would do and he was to return the excess money to the third party. He had been contacted by e-mail by this third party and he still had the e-mails and was willing to provide copies. The e-mails were not, however, at that stage provided to the police. He was eventually charged with the offence on 3rd November.

3 A plea and case management hearing was heard on 3rd February, when a new indictment was preferred. This was when the count of dishonest possession of a cheque, rather than dishonestly attempting to cash the cheque, was placed on the indictment. Counsel instructed for the trial attended. She indicated that his defence would be that he had gone to ascertain the validity of the cheque and not until the validity was established did he intend to cash it. She also indicated that in the absence of any statement from the cashier, who apparently was not willing to give evidence, she felt the Crown had an insurmountable problem in proving their case. Counsel was at that stage in possession of the two e-mails and she showed them to prosecuting counsel, but no copies were taken by the Crown on that occasion. At that stage defence counsel apparently intimated that she would send the e-mails to the prosecution. However, on reflection she thought that the quality of the e-mails was such that it would not necessarily be in her client's interest to do that. However, in the defence statement the name of the e-mail contact was provided as was the e-mail address of the sender of the cheque so the police could make enquiries of their own, but it appears that none were made.

4 On the day of the trial prosecuting counsel indicated that if e-mails were provided then the case would be reviewed. This was the first time that that had specifically been stated. Trial counsel was then provided with copies of the e-mails, though it was made clear that if the case continued then the defendant would still be contending that he had not acted dishonestly. Following consideration of these e-mails the Crown decided to offer no evidence and a not guilty verdict was entered.

5 At that point an application was made for a wasted costs order against the solicitors. Oral notice of this application was apparently given to defence counsel shortly before going into court. At no stage was notice given to the solicitors that this was an issue was under consideration.

6 The basis of the Crown's application was that the e-mails could have been provided earlier. Had that occurred then certain costs such as counsel's fee could have been saved, and witnesses would not have had to attend court. The sum sought was not less than £500.

7 Defence counsel indicated that the nature of the defence was wholly different to the basis on which the Crown decided to offer no evidence. The defendant's principal case was going to be to see whether the Crown could adduce sufficient evidence to make a case out against him. His lawyers took the view there was potentially a big hole in the prosecution case. Because there were some concerns about the e-mails, they had not made these available at an earlier stage.

8 Counsel did stress to the judge before the ruling was made that although attempts had been made to contact the solicitors, they had been unsuccessful. The principal submission of counsel in relation to this application was that neither he nor the solicitors had acted unreasonably or negligently and that there was no warrant for any order being made.

9 The judge made the order. She concluded that essentially honesty was the real issue in the case from the police interview onwards and she described the failure to serve the e-mails as a “negligent omission”. Costs had been incurred as a result, although she

did not identify specifically what they were. She said they had been incurred as a result of the attendance of counsel at trial and the attendance of witnesses. She exercised her discretion as to the amount by hazarding what she called a "guess" of the costs which would have been incurred, which she fixed at £250.

10 The grounds of appeal fall into two broad categories. First, it is said that the Recorder acted in a procedurally unfair way and in breach of the guidelines which had been laid down. Second, there was, in any event, no proper basis on which the judge could properly conclude that these solicitors had been negligent.

11 We agree with both these submissions. This order was, in our view, littered with errors. First, the solicitors were given no notice of the case against them. Although counsel had made representations, some of which were applicable to them, he was not in fact their representative. This was a breach of the fundamental rules of natural justice, as well as a breach of the relevant procedural rules.

12 Mr Heaton-Armstrong, counsel for the Crown, has submitted to us today that there were no adverse consequence flowing from this breach because there was nothing the solicitors could say in addition to that which had been put on their behalf by counsel. With due respect, it is never an answer for somebody who has been deprived of the elementary principles of fairness by being denied the chance to represent themselves or to have representatives act on their behalf that they could not in any event have had anything additional or persuasive to say. Nor do we think counsel is correct to say that there was nothing more that could be said. The solicitors may well have wanted to advance an argument that they were simply acting on counsel's instructions and therefore had not personally been negligent.

13 The second procedural error is that ever since the case of *Re a Barrister (Wasted Costs Order (No 1 of 1991) [1993] QB 293* set down guidelines to be adopted in cases of this kind, it has been emphasised that the judge must determine what costs have been wasted as a result of the relevant conduct and then decide whether all or part of those costs should be borne by the representative. In this case there was no proper analysis of the loss caused at all. Counsel for the defence admitted in written submissions that since counsel had attended the plea and case management hearing, the fee for trial would have been incurred in any event. He submitted that this was the case where there might have been no loss. In any event, the judge then picked the figure of £250, apparently out of nowhere.

14 We have been provided by the prosecution with figures now which suggest that there were costs incurred, but even were we persuaded that this was the only error in the judgment, it is quite inappropriate, it seems to us, for us to go into that sort of disputed question of fact in an appeal of this nature

15 The substantive ground of appeal is that the judge was in any event wrong to say that the conduct was negligent. Mr Heaton-Armstrong accepts that that was an inappropriate word and that it would have been better if the judge had said "unreasonable". But focusing on negligence which the judge found, and having regard to the observations of Sir Thomas Bingham, then Master of the Rolls, in *Ridehalgh v Horsefield [1994] Ch 205* , we must ask whether the lawyer fell short of the reasonable conduct expected of ordinary members of the profession. In our judgment, it was a

perfectly proper decision for counsel to take in this case that they would not volunteer the e-mails, particularly since the Crown knew of them and were not pressing for them, because they did not believe the prosecution would be able to prove their case. It was an entirely sensible decision in the interests of the client to put the prosecution to proof of its case and to keep the e-mails in reserve in order to advance a defence of honesty should that be necessary. Accordingly, we think that both as a matter of substance and fundamentally as a matter of procedure, that this order should not have been made.

16 Mr Heaton-Armstrong has accepted that there were three errors in the judgment: not notifying the solicitor, not assessing what loss was caused as a result of the alleged misconduct, and wrongly describing the conduct of the representatives wrongly as negligent, rather than as unreasonable.

17 These are serious orders to make against professional people and we do not accept, even if there was substance in the conclusion of the judge, that the procedural errors can be glossed over in the way he suggests. Accordingly, the appeal succeeds and we quash the order.

18 MR HEATON-ARMSTRONG: My Lord, I am afraid I misled you earlier. I asserted that when I applied for the wasted costs order I did not specify who the judge might make it against. I did actually indicate that she might wish to make it against the defence solicitors, that is in the transcript.

19 LORD JUSTICE ELIAS: I thought that, but then when you told me I assumed I had that wrong. I will correct the transcript.

20 MR HEATON-ARMSTRONG: Thank you for your trust, but I am afraid it was misplaced.

21 LORD JUSTICE ELIAS: Thank you for telling me.

22 MR CULVER: My Lords, in relation to costs, as I understand it there is no possibility of ordering costs from central funds for today's hearing, and as I understand it again — I am grateful to your clerk for providing this to me — from Holden & Co v Crown Prosecution Service (No 2) 1 AC 22 that it would not be paid out of central funds. That is for today's hearing and, as I understand reading it, for the application itself. My Lords, I have the case here. That is my understanding of it. Obviously if costs can be awarded, if your Lordships are minded to do so, then I seek them. I have not put my learned friend on any notice.

23 LORD JUSTICE ELIAS: I am sorry, we have not looked into this. You are telling me that you do not think we have power to do it and you are essentially asking us to go away and have a look to see if we have power, and if we have to give it to you. I am sorry, we cannot do that. You have to make your application if you think we can properly exercise jurisdiction. If you do not, you should not make it. I am sorry we cannot help you.

24 MR CULVER: My Lord, I cannot take it further.


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