

IN THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

THE QUEEN

-v-

KAREN WALSH (No 2)

HART J

[1] Karen Walsh is charged with the murder of Marie Rankin in Newry on a date unknown between 23 and 26 December 2008. She was first remanded on this charge on 31 October 2008 and committed for trial on 12 May 2010. Her case was originally fixed for trial on 1 November 2010, but for reasons which I outlined in my earlier judgment [2011] NICC 1 the trial had to be adjourned. For present purposes it is unnecessary to consider the circumstances surrounding the adjournment on that occasion. Since then there has been a change of solicitors, and that has given rise to an issue as to the correct form of an order drawn up following my decision on 6 May 2011 when a new solicitor, Mr Houston of John J Rice & Co came on record on behalf of the defendant, who had been represented by Mr Higgins of Higgins, Hollywood and Deazley since her committal for trial on 12 May 2010 when she was granted a criminal legal aid certificate for a solicitor and two counsel.

[2] An issue has arisen whether the original criminal legal aid certificate granted to her on 12 May 2010 continues in force notwithstanding the assignment of Mr Houston as solicitor for the defendant. This is a matter of some significance to the defendant's solicitors because of the change in the rates of remuneration paid to solicitors and counsel appearing on behalf of defendants who receive free criminal legal aid in the Crown Court which came into effect earlier this year. When the matter came before me on the application of the defendant's solicitor last week I was made aware that issues have arisen in other cases in respect of the validity of criminal aid certificates granted to different firms of solicitors before the new regulations came into effect, but there has been a change of solicitor subsequently, and that a judicial review in another unrelated case was being considered by Treacy J, who granted leave to that applicant to apply for judicial review of a decision by the

Legal Services Commission (LSC). However, such is the urgency of the present matter that I felt it appropriate to deal with this matter because the trial in this case has been repeatedly delayed for reasons which it is unnecessary to describe for present purposes, and is due to commence on 12 September 2011. Having had the opportunity to consider the appropriate legislation and regulations I was satisfied that the matter was sufficiently clear to enable me to give an immediate *ex tempore* judgment. I said that I would give my reasons in writing in due course, and that my preliminary *ex tempore* judgment was subject to the considered written judgment which I would deliver, and I now give that judgment.

[3] When the accused was committed for trial on 12 May 2010 on a charge of murder she was granted a criminal aid certificate for solicitor and two counsel. The solicitor assigned to her by the Magistrates' Court at the time of committal was Mr Higgins of Higgins, Hollywood and Deazley. The application for what is commonly referred to as a transfer of legal aid was made by Mr Houston of John J Rice & Co, and on 6 May 2011 I discharged Mr Higgins and assigned Mr Houston as the solicitor for the defendant. I made it clear on that occasion why I was taking this course, and nothing I say in this judgment should be taken as critical of Mr Higgins. I am also aware that John J Rice & Co have since brought judicial review proceedings against the LSC in relation to a decision by the Commission to decline to re-assign a Very High Cost Certificate (VHCC) granted to Mr Higgins in respect of this case to them, and that matter remains to be determined.

[4] For present purposes it is sufficient to say that the relevant dates are that on 12 May 2010, as already indicated, the defendant was granted a criminal aid certificate when Mr Higgins was assigned to her as solicitor. The district judge certified that by reason of the case appearing to represent exceptional difficulty the interests of justice required the defendant to have the assistance of two counsel. On 6 May 2011 John J Rice & Co wrote to the LSC requesting that it "reassign the VHCC granted to the defendant's previous legal representatives" to themselves. There followed an exchange of correspondence, but the LSC has so far declined to take this course, and that is the subject of the judicial review proceedings to which I have referred. It is unfortunate to say the least that this matter was not brought before the court before the Long Vacation and only drawn to the court's attention last week.

[5] The issue before me requires the court to consider the framework of the criminal legal aid structure so far as the granting and transferring (to use the common phraseology) of legal aid is concerned. Rule 3 of the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2011 (the 2011 Rules) which came into operation on 13 April 2011 provide as follows:

" 3.-(1) Subject to paragraph (2), these Rules apply for the determination of costs which are payable in respect of work done under a criminal aid certificate granted under Article 29, or deemed to have been

granted under Article 36(2), of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 on or after 13 April 2011.

(2) The Legal Aid for Crown Proceedings (Costs) Rules (Northern Ireland) 2005 continue to apply as if these Rules had not been made in respect of cases in which a criminal aid certificate was granted under Article 29, or deemed to have been granted under Article 36(2), of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 before 13 April 2011.”

[6] Rule 3(2) of the 2011 Rules refers to the criminal aid certificate having been “granted under Article 29” before 13 April 2011. The submission made on behalf of John J Rice & Co is that the certificate which governs payments to them is the certificate which was granted when the defendant was committed for trial, and a new certificate has not come into existence by virtue of the order made by me on 6 May 2011. In order to resolve this question it is necessary to decide exactly what the nature of the order was which I made on 6 May 2011, and that in turn makes it necessary to look at the structure of the criminal legal aid scheme.

[7] Prior to 1945 there was only an extremely limited and rudimentary form of free legal aid available to very few defendants in the criminal courts who were sent for trial on indictment. Where the accused was charged with murder it was customary for the State to discharge the fees of solicitor and counsel engaged to represent the defendant, and there were very limited forms of legal assistance available for other accused. To all intents and purposes other than in murder cases virtually no provision was made for free legal aid for defendants in criminal cases. The provisions of s. 41 and following of the Criminal Justice Act (Northern Ireland) 1945 (the 1945 Act) for the first time provided for a scheme whereby a defendant sent for trial on indictment could be granted free legal aid in the preparation and conduct of their defence at the trial, and for that purpose could have the services of solicitor and counsel, and if necessary two counsel, who would be paid by the State.

[8] It is noteworthy that the basic framework enacted by s. 41 of the 1945 Act has remained entirely unchanged to the present day, and indeed the relevant statutory provisions have in many instances been replicated word for word in subsequent legislation. Section 41, and in particular s. 41(3), contained provisions which appear virtually unchanged in the present day statute.

“Defence of Poor Persons

41.-(1) Any person returned 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 to have solicitor and counsel assigned to him for that purpose in such manner as may be prescribed by rules made under section 43 of this Act, if a certificate (hereafter in this Part of this Act referred to as a "defence certificate") is granted in respect of him in accordance with the provisions of this section.

(2) Subject to the provision of this section, a defence certificate may be granted in respect of any person -

- (a) by a court of summary jurisdiction, upon his being returned for trial; or
- (b) by the judge of the court before which he is to be tried, at any time after reading the depositions;

And such court or judge is hereafter in this Part of this Act referred to as "the certifying authority".

(3) A defence certificate shall not be granted in respect of any person unless it appears to the certifying authority that his means are insufficient to enable him to obtain such aid, but where it so appears to the certifying authority, that authority -

- (a) shall grant a defence certificate in respect of any person returned for trial upon a charge of murder; and
- (b) may grant a defence certificate in respect of any person returned for trial upon any other charge if it appears to the certifying authority, having regard to all the circumstances of the case (including the nature of such defence, if any, as may have been set up), that it is desirable in the interests of justice that he should have legal aid in the preparation and conduct of his defence at the trial."

[9] Section 43 of the 1945 Act also merits reference -

“43.-(1) In any case where a defence certificate or a legal aid certificate has been granted in respect of any person, the expenses properly incurred in carrying on the defence of that person, including, in the case of a defence certificate, the cost of a copy of the depositions and the fees of solicitor and counsel and, in the case of a legal aid certificate, the fees of a solicitor and, when counsel has been assigned, of counsel, shall be allowed and paid out of moneys provided by Parliament in the same manner as the expenses of a prosecution in cases of indictment for felony, subject nevertheless to any rules made under this section and to any directions as to the vouching of payments and the keeping of accounts, records or receipts which may be given by the Ministry of Finance.”

[10] The Poor Prisoners (Counsel and Solicitor) Rules (Northern Ireland) 1946 (the 1946 Rules) provided for the issue of what were then called, and continue to be commonly called, defence certificates, and the rates of remuneration for solicitor and counsel. Form A(1) in the Schedule to the 1946 Rules provided as follows:

“I A.B., being a Resident Magistrate (or Justice of the Peace) having committed _____ for trial on a charge of murder and being satisfied that his means are insufficient to enable him to obtain legal aid in the preparation and conduct of his defence at the trial, do hereby grant in respect of him this defence certificate (and I further certify that in my opinion the interests of justice require that he shall have the assistance of two counsel).”

Whilst the form prescribed by the 1946 Rules did not refer to the solicitor assigned to the defendant under the defence certificate, Rule 4(1) of the 1946 Rules required the certificate to be sent by the Clerk of Petty Sessions to the Clerk of the Crown and Peace as soon as it had been granted “together with the name of the solicitor assigned”. Rule 7 of the 1946 Rules provided that:

“Any member of the Bar whose name appears upon the list kept under Rule 2 hereof may be instructed on behalf of the prisoner by the solicitor so assigned”.

It also made provision for two counsel, one of whom may be senior counsel, to be instructed. Rule 9(1) made provision for payment of the fees to counsel and referred

to counsel “assigned under a defence certificate” or, “where two counsel are instructed”.

[11] The scheme created by the 1945 Act therefore contained the following distinct features.

- (1) A defendant who was returned for trial was entitled to free legal aid in certain circumstances in order to conduct his defence.
- (2) Provided that his means were insufficient to obtain legal aid and advice he could be granted a defence certificate.
- (3) For that purpose he could have a solicitor and counsel assigned to him.
- (4) If the defendant was charged with murder it was mandatory that he should receive a defence certificate, provided that his means were insufficient to obtain legal aid and advice.
- (5) In cases other than murder the court had a discretion whether to grant a defence certificate.

[12] The 1946 Rules clearly implied that the court assigned a specific solicitor to the defendant under the defence certificate, but gave authority to that solicitor to instruct counsel of his choice, notwithstanding that the 1945 Act and the 1946 Rules referred to counsel being “assigned”. However, it has never been the practice of the court (save in the highly unusual case originally provided for by s. 43(2) of the 1945 Act whereby a judge could request counsel or solicitor or both to undertake the defence of a person who had not been granted a defence certificate) to decide which counsel should appear on behalf of a defendant. That is a matter for the solicitor who has been assigned by the court. In other words, the court assigns a designated solicitor to act on behalf of the defendant, and gives that solicitor power to instruct the counsel of his choice within the ambit of the authority granted by the court under the defence certificate, i.e. one or two counsel as the case may be.

[13] Whilst some details of the scheme, the rates of remuneration, and the regulations governing the assessment and payment of the appropriate amounts to solicitors and counsel, have changed over the years, it is striking that from time to time the relevant legislation reproduced, and still reproduces, almost exactly the provisions of the 1945 Act. Thus the relevant provisions of Part II of the Legal Aid and Advice Act (Northern Ireland) 1965 were to all intents and purposes identical to the provisions of s. 41 of the 1945 Act. The only significant change made in the context of the present case was that in 1966 Form A(1) of the Schedule to the Legal Aid in Criminal Cases: Legal Aid Certificates Rules (the 1966 Rules) required the court to insert in the certificate the name of the person who was being assigned to the

defendant as solicitor. The form, as had its predecessor, merely stated that where the court considered it appropriate it certified that in its' opinion "the interests of justice require that he shall have the assistance of two counsel", and did not name the counsel.

[14] The 1965 Act and its provisions were repealed by the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, art.29 of which is to all intents and purposes identical to its statutory predecessors to which I have referred. Article 29(1) provides that:

"Any person returned 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 to have solicitor and counsel assigned to him for that purpose in such manner as may be prescribed by rules made under Article 36, if a criminal aid certificate is granted in respect of him in accordance with the provisions of this Article."

It will therefore be apparent that the provisions of Rule 3(2) of the 2011 Rules have to be considered in the context of the statutory framework to which I have referred. I am entirely satisfied that the present statutory framework continues to provide for the grant of what is now a criminal aid certificate (and was formerly a defence certificate) to an individual as the first stage in the process. It is the individual who is granted criminal legal aid, not the solicitor or counsel. Provision is made that the court assigns a specific solicitor to the defendant in respect of whom a criminal aid certificate has been granted. That solicitor is then entitled to instruct the counsel of his choice in accordance with the authority conferred upon him by the criminal aid certificate, either one counsel or two counsel. The difficulty which has arisen in the present case is that from time to time it is considered necessary to change the representation authorised by the appropriate court under the terms of the criminal aid certificate.

[15] The circumstances in which this can arise have been considered on a number of occasions and I have had occasion to refer to the relevant decisions in R v. Morrison [2010] NICC 36, but for present purposes the seminal judgment is that of Mr Justice Higgins, in R v. Lees [2003] NIJB 17. As he pointed out at page 19

"Thus it seems tolerably clear that the certifying authority (the Magistrates' Court or the Crown Court) has power -

- (a) to grant a criminal aid certificate in respect of a person for the preparation and conduct of his defence at trial; and

- (b) to assign solicitor and counsel to that person for that purpose.”

The learned judge went on to point out that it is not unknown for applications to be made in the Crown Court for a

“defence certificate to be transferred to another solicitor. However an application couched in those terms would seem to be inappropriate. It would seem that what is meant or intended by such an application is that a different solicitor be assigned to the person charged. The criminal aid certificate is granted in respect of the person charged and not to or in respect of a solicitor.”

[16] I respectfully agree with the reasoning of the learned judge which is in accordance with the structure of the framework contained in the statute and the rules to which I have referred. The distinction between granting a criminal aid certificate to an individual defendant, and then subsequently assigning to that defendant an identified solicitor is not always clearly expressed by judges or practitioners, who frequently refer to “granting a new defence certificate” when the court assigns a new solicitor under a criminal legal aid certificate, and I for one have been guilty of the same lack of clarity in the past. When an application is made by a solicitor who has agreed with a client to take on his case in the Crown Court in place of the solicitor initially assigned by the court, the court does not grant a new criminal aid certificate, but assigns a new solicitor in place of the previous solicitor assigned by the court under the criminal aid certificate which has already been granted. The result is that the original criminal legal aid certificate continues in force, but a different solicitor is substituted for the original solicitor by way of an assignment by the court under the original defence certificate.

[17] This was what happened when I made the order assigning Mr Houston as the defendant’s solicitor. This was not correctly described in the original order drawn up by the court, and accordingly I amended the criminal legal aid certificate to correctly record that Mr Higgins had been discharged as the defendant’s solicitor under the criminal legal aid certificate, and assigned Mr Houston as the defendant’s solicitor in his place. The effect of the order made by me is that the original criminal aid certificate granted to the defendant by the district judge at the time of the defendant’s committal for trial on 12 May 2010 therefore remains in force, and so this case is governed by Rule 3(2) of the 2011 Rules, and not Rule 3(1). I am fortified in this conclusion by the knowledge that a number of other judges have taken this course in the past when similar issues have arisen, and more recently His Honour Judge Devlin has, I understand, made a similar order.