SCCRC Scottish Criminal Cases Review Commission

Position Paper

Oppression

Introduction

1. Put broadly, the traditional conception of oppression in Scots law is any one of a wide variety of situations in which prosecution (or continued prosecution) of an accused will give rise to unfairness. Depending on the circumstances, oppression may provide the ground for a plea in bar of trial or an application to desert a trial. Oppression may also amount to a ground upon which it may be argued during the appeal process that a miscarriage of justice has occurred.
2. The analogous English doctrine of "abuse of process" covers situations of the type discussed in the previous paragraph. Abuse of process, however, is broader than the traditional doctrine of oppression in the sense that it extends beyond those situations in which it is unfair to try the defendant. The second limb of the court's abuse of process jurisdiction arises where the court exercises its discretion to stay proceedings[1] in situations in which there has been an abuse of state power[2] that amounts to an affront to the integrity of the justice system. Whilst there is little overt analysis of situations of this type in the Scots authorities, there is some support for the proposition that the modern doctrine of oppression extends to cover them[3].
3. The Commission's annual report 2013-14 indicates that "irregular proceedings – conduct of prosecutor" was the main ground of referral in one case, that of JH[4] where it appeared that the libelling of common law offences in connection with the conduct alleged was oppressive, as it allowed the circumventing of a specifically time-barred statutory offence.
4. However, there is at least one other case which, although not framed as oppression, appears to have been referred (and allowed) on what may perhaps be analysed as

[1] Discontinuing prosecution
[2] *R v Horseferry Road Magistrates' Court ex p Bennett* [1994] AC 42
[3] See *infra*
[4] JH subsequently abandoned his appeal.

such – George McPhee[5]. In that case important evidence which, in the words of the High Court at the appeal, "ought not to have been given" about the likely provenance of a footprint had come from a senior police officer. The local fiscal had failed to bring contrary forensic evidence to the notice of Crown Office or the defence. Whilst the court would usually have analysed this situation in terms of fresh evidence[6], in McPhee it concluded simply that the trial had been unfair.

The Commission's Position

5. The High Court has frequently acknowledged that an accused person is entitled to have proceedings against him deserted where the conduct of the Crown is oppressive. In *Mowbray v Crowe*[7], the court, accepting the definition provided by Renton and Brown[8], held that:

> *"Oppression arises when something is done in a cause which amounts to unfairness to the accused from which he is entitled to get relief."*

This formulation was approved by the Judicial Committee of the Privy Council in *Montgomery v HMA*[9].

6. Renton and Brown observes[10] that oppression "may be the result of a mere error of judgment and quite unintentional."[11] Nevertheless, in *Wilson v Harvie*[12], the court observed that the court's disapproval of the conduct of the prosecutor, whilst not determinative, "may be relevant".
7. The *Mowbray v Crowe* formulation, however, is not as broad as the English doctrine of abuse of process, which extends, following *ex p Bennett*, to control abuses of power by the executive even where no unfairness or prejudice to the accused may be demonstrated. In *Criminal Defences and Pleas in Bar of Trial*, Leverick and Chalmers argue persuasively that the Scots law of oppression has widened, on occasion, to encompass situations of this type. The plainest example

[5] [2005] HCJAC 137
[6] See position paper
[7] 1993 JC 212
[8] *Criminal Procedur*e, 5th Edition, at 9-35
[9] 2000 SCCR 1044
[10] *Criminal Procedure,* 6th Edition, at 29-54
[11] In *HMA v JRD* [2015] HCJ 85*,* however, a single judge of the High Court appears to have held that the Crown's apparent bad faith in levelling charges without an evidential foundation was a relevant factor in determining whether or not oppression had been established.
[12] 2015 SCL 433

that may be cited in support of this proposition is the case of *Brown v HMA*[13]. All three members of the bench, influenced by the then recent decision of the House of Lords in *R v Looseley*[14], expressed the view that cases of entrapment, which had hitherto been dealt with through the exclusion of the offending evidence[15] ought instead to lead to the discontinuance of proceedings. These, Lord Philip argued[16], fell into a different category to those traditionally considered "oppression", since "the abuse of state power is so fundamentally unacceptable that it is not necessary to investigate whether an accused has been prejudiced or has been the victim of any form of unfairness." In *Looseley*, the House of Lords had held that every court had the "inherent power and duty" to prevent such an abuse. Lord Clarke expressed the view that he would "find it a strange and unsatisfactory position, if that statement of principle as to the inherent powers of the court was to be regarded, in any respect, at odds with, or incapable of being subsumed within, the principles of the law of Scotland."

8. The court followed the decision in *Brown v HMA* in *Jones v HMA*[17] and *Anderson v Brown*. In *Jones,* both Lord Reed and Lord Menzies (Lord Carloway dissenting) considered that the doctrine of oppression was sufficiently broad to allow the court to consider situations in which it was alleged that the executive had abused its power.
9. Whilst it is true that the line of authority beginning with *Brown* is concerned exclusively with cases of alleged entrapment, there would appear to be no reason in principle why it ought not to apply to other cases of abuse of executive power.
10. The Scottish courts appear, tentatively, to have adopted the criteria used in England for determining whether or not to discontinue a prosecution where there has been an abuse of executive power. In England, the courts will stay a prosecution where to allow the defendants to stand trial would amount to an "affront to the public conscience"[18] or would "bring the administration of justice into disrepute"[19].
11. Accordingly, the Commission takes the view that oppression may arise either where:

[13] 2002 SCCR 684
[14] [2002] 1 Cr App R 29
[15] *Weir v Jessop (No 2)* 1991 SCCR 636
[16] At paragraph 14
[17] 2010 SCCR 523
[18] *R v Latif* [1996] 2 Cr App R 92
[19] *Looseley*

- an unfairness to the accused has arisen, which has caused such prejudice that he is entitled to relief, and which cannot be remedied by an appropriate direction from the trial judge; or
- an abuse of executive power has occurred, amounting to an affront to the public conscience

Examples of Oppression

Delay

12. In respect of undue delay, the test to be applied is set out by the High Court in *McFadyen v Annan*[20] . The accused must show:

    (i) that there is prejudice to the prospects of a fair trial such that it would be oppressive to require the accused to face trial; and

    (ii) that the risk of prejudice from the delay is so grave that no direction by the trial judge could be expected to remove it.

13. The court is entitled to consider any delay before the Crown raised proceedings as well as any delay after. In summary procedure, the latter part of the test is whether the prejudice was so grave that the sheriff or justice could not be expected to put that prejudice out of his mind and reach a fair verdict.

Prejudicial Publicity

14. In respect of prejudicial publicity the leading case on the matter in Scots law is *Stuurman v HMA*[21], in which a full bench held (1) that the High Court has power to intervene to prevent the Lord Advocate from proceeding upon a particular indictment only where to require an accused to face trial would amount to oppression and (2) that oppression occurs only where the risk of prejudice to the accused is so grave that no direction of the trial judge could reasonably be expected to remove it. Generally speaking, the courts take a fairly robust line in dealing with claims of unfairness arising from prejudicial publicity, recognising that trials take place in the real world and cannot be conducted in a "prophylactic

[20] 1992 SCCR 186
[21] 1980 JC 111

vacuum", and depend heavily on the assumption that juries follow judicial directions, an assumption which can be overcome only by powerful indications to the contrary.[22] Where the publicity has been local prejudice may be avoided by transferring the trial to Edinburgh or elsewhere[23] . A decision on the question of pre-trial publicity taken by the judge at first instance is considered to be an exercise of his judicial discretion. Any challenge to such a decision must be based upon the contention that the trial judge exercised his discretion unreasonably[24].

Entrapment

15. Entrapment is the creation of crime by the state for the purpose of prosecuting it[25]. It is "objectionable because of the unacceptability of the conduct of the state, as opposed to any prejudice or unfairness which may be suffered by the perpetrator of the crime"[26]. It is accordingly the case that the key question when determining whether or not the behaviour of the authorities might have amounted to entrapment is whether or not it amounts to an affront to the public conscience. The leading Scots authorities, *Brown* and *Jones*, draw heavily from the most significant English case on the subject, *R v Looseley.* Both approved the "useful guide" that Lord Nicolls provided[27] in that case, defining entrapment negatively by excluding cases in which "the police did no more than present the [accused] with an unexceptional opportunity to commit a crime." The police must, in general, have some form of pre-existing reasonable suspicion of criminality, although that may, as was the case in *Anderson,* attach to a place or organisation rather than an individual. The operation must be properly supervised and authorised[28]. The degree of state participation permissible will vary depending on the nature of the crime.

Specific Considerations

16. Section 118(8) of the Criminal Procedure (Scotland) Act 1995[29] has no application to an allegation of oppression. There may, however, be interests of justice

[22] *Coia v HMA; Clow v HMA*
[23] cf *HMA v Hunter* 1988 JC 153
[24] *Mitchell v HMA* [2008] HCJAC 28 at paragraph 68
[25] *Anderson v Brown* 2012 SCCR 303
[26] *Brown v HMA per* Lord Philip at paragraph 10
[27] At paragraph 23
[28] *Teixeira de Castro v Portugal* (1999) 28 EHRR 101
[29] And its equivalent in summary procedure, s192(3)

considerations where the basis of the allegation was known but not used to found a plea in bar of trial or challenge to the admissibility of the resulting evidence[30].

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[30] See the "Commission's Statutory Test" position paper