Position Paper:

Oppression

This paper sets out, in broad terms, the Commission's approach when dealing with this area of law. If you intend to apply to the Commission because you believe that your prosecution was oppressive, you may wish to consider the guidance appended to this paper, as well as the Commission's general guidance on submissions.

Oppression – in Brief

- "Oppression" refers to a variety of situations in which the prosecution of the accused gives rise to unfairness that cannot be remedied by a direction from the trial judge
- A trial may also be oppressive where an abuse of executive power has occurred, compromising the fairness of the trial at common law
    - In determining the position, the court will have regard to the nature of the executive conduct, the seriousness of the charge and the public interest in ensuring that crime is detected and prosecuted.

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 has referred to the High Court one case on the basis of prosecutorial conduct[4], that of JH[5], 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. The Commission also referred the case of *Gordon v HMA*[6] on the basis that cumulative failures in the police investigation might have compromised the fairness of the trial.

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 such – George McPhee[7]. 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[8], 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*[9], the court, accepting the definition provided by Renton and Brown[10], held that:

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[1] Discontinuing prosecution
[2] *R v Horseferry Road Magistrates' Court ex p Bennett* [1994] AC 42
[3] See *infra*
[4] See the Commission's 2018-19 Annual Report at page 24
[5] JH subsequently abandoned his appeal.
[6] 2010 SCCR 589
[7] [2005] HCJAC 137
[8] See position paper "Fresh Evidence"
[9] 1993 JC 212
[10] *Criminal Procedure*, 5th Edition, at 9-35

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

6. This formulation was approved by the Judicial Committee of the Privy Council in *Montgomery v HMA*[11].

7. Renton and Brown observes[12] that oppression "may be the result of a mere error of judgment and quite unintentional." Nevertheless, in *Wilson v Harvie*[13], the court observed that the court's disapproval of the conduct of the prosecutor, whilst not determinative, "may be relevant"[14].

8. The *Mowbray v Crowe* formulation, however, is not, on its face, 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*[15], Leverick and Chalmers argue persuasively that the Scots law of oppression has widened, on occasion, to encompass situations of this type. The plainest example that may be cited in support of this proposition is the case of *Brown v HMA*[16]. All three members of the bench, influenced by the then recent decision of the House of Lords in *R v Looseley*[17], expressed the view that cases of entrapment, which had hitherto been dealt with through the exclusion of the offending evidence[18] ought instead to lead to the discontinuance of proceedings. These, Lord Philip argued[19], 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

[11] 2000 SCCR 1044
[12] *Criminal Procedure*, 6th Edition, at 29-54
[13] 2015 SCL 433
[14] See also *KP v HMA* 2017 SCCR 451 and *HMA v JRD* [2015] HCJ 85. In the latter case, a single judge of the High Court appears to have held that the Crown's alleged bad faith in levelling charges without an evidential foundation was a relevant factor in determining whether or not oppression had been established.
[15] 2006, W Green, Edinburgh
[16] 2002 SCCR 684
[17] [2002] 1 Cr App R 29
[18] *Weir v Jessop (No 2)* 1991 SCCR 636
[19] At paragraph 14

any respect, at odds with, or incapable of being subsumed within, the principles of the law of Scotland."

9. The court followed the decision in *Brown v HMA* in *Jones v HMA*[20] 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.

10. 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.

11. In the more recent case of *Withey v HMA*[21], the court expressed the view[22] that the law "does not recognise a distinction between cases where a fair trial cannot take place and those where the holding of a trial would be, as it is put in other jurisdictions, an affront to justice." However, it went on to add that the common law conception of fairness is sufficiently broad to encompass the submission that the conduct of the Crown has amounted to an "affront to justice" or that justice cannot be seen to be done.

12. Accordingly, the Commission takes the view that oppression may arise either where:

    - 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, compromising the fairness of the trial at common law

13. Both situations are aspects of the broad common law conception of fairness. Tentatively, however, the Commission would conclude that in the first situation, but perhaps not the second, it is necessary to demonstrate some real effect on the ability of the applicant to defend himself. In *Gordon v HMA*, for example, a case in which the court analysed cumulative but unintentional failures on the part of investigators as oppression, the court refused the appeal on the basis that there was

[20] 2010 SCCR 523
[21] [2017] HCJAC 47. See also *Potts v Procurator Fiscal Hamilton* 2017 SCL 222
[22] At paragraph 39

nothing to suggest that a more competent investigation might have altered the outcome.

14. The court in *Withey* went on to add that the decision as to whether or not a fair trial was possible would depend, inter alia, upon:

    1. The nature of the Crown's conduct
    2. the seriousness of the charge
    3. the public interest in ensuring that crime is detected and prosecuted

15. In *Bakhjam v HMA*[23], the court questioned the utility of framing an issue of prosecutorial misconduct as "oppression". It observed that oppression was a preliminary plea, whilst the test in a criminal appeal was "miscarriage of justice". It accepted nonetheless that improper conduct on the part of the Crown may lead to a miscarriage of justice. It went on to add that the assessment of the question of miscarriage would require regard to the "whole proceedings including earlier opportunities which the defence may have had to raise matters with the trial judge". The court accepted, however, that a failure to raise such an issue "will not necessarily be fatal to a post-conviction appeal."[24]

Examples of Oppression

Delay

16. In respect of undue delay, the test to be applied is set out by the High Court in *McFadyen v Annan*[25] . 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.

17. 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

[23] 2018 JC 127 at paragraph 28
[24] On this point, see also *Gordon v HMA*, particularly at paragraph 100
[25] 1992 SCCR 186

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

18. In respect of prejudicial publicity the leading case on the matter in Scots law is *Stuurman v HMA*[26], 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 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.[27] Where the publicity has been local prejudice may be avoided by transferring the trial to Edinburgh or elsewhere[28] . 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[29].

Entrapment

19. Entrapment is the creation of crime by the state[30] for the purpose of prosecuting it[31]. 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"[32]. The leading Scots authorities, *Brown* and *Jones*, draw heavily from

[26] 1980 JC 111
[27] *Coia v HMA; Clow v HMA*
[28] cf *HMA v Hunter* 1988 JC 153
[29] *Mitchell v HMA* [2008] HCJAC 28 at paragraph 68
[30] The courts in England have given substantial consideration to the concept of "private entrapment", which is to say entrapment by non-state actors (see *R v Hardwicke and Thwaite* [2001] Crim LR 220). The higher Scottish courts have not extensively explored this possibility. In *P v Procurator Fiscal Dundee* [2019] SC DUN 39, however, Sheriff Alastair Brown considered the relevant authorities in considerable detail. Sheriff Brown repelled a plea in bar of trial in relation to entrapment by private individuals who had induced the accused to attempt a child sex offence. Nonetheless, on the basis that they had procured their evidence through fraud, and after due consideration of the public policy implications, the sheriff held that the witnesses' evidence was inadmissible. It had been obtained irregularly, and the Crown had failed, in terms of *Lawrie v Muir* 1950 JC 19, to provide an explanation adequate to excuse this.
[31] *Anderson v Brown* 2012 SCCR 303
[32] *Brown v HMA per* Lord Philip at paragraph 10 although cf *Withey*

the most significant English case on the subject, *R v Looseley*. Both approved the "useful guide" that Lord Nicolls provided[33] 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."[34] 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[35]. The degree of state participation permissible will vary depending on the nature of the crime.

Specific Considerations

20. Section 118(8) of the Criminal Procedure (Scotland) Act 1995[36] has no application to an allegation of oppression. There may, however, be interests of justice 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[37].

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[33] At paragraph 23
[34] See also the more recent case of *HMA v P* 2017 SCL 877
[35] *Teixeira de Castro v Portugal* (1999) 28 EHRR 101
[36] And its equivalent in summary procedure, s192(3)
[37] See the "Referrals to the High Court: the Commission's Statutory Test" position paper

Appendix:

Guidance on Submissions

What Type of Oppression Ground Is This?

First try to decide why you feel that the proceedings against you were oppressive. Was it because:

- The proceedings were an affront to justice?
    - In other words, did the authorities (the police, the prosecutor, etc) behave so badly that any proceedings against you were unfair?
- A lengthy delay made a fair trial impossible?
- The pre-trial publicity (including TV, newspaper, internet) was so bad that a fair trial was impossible?
- The police or some other public authority entrapped you?
- Some Other Reason

Affront to Justice

In your application explain why you consider that the conduct of the authorities was unacceptable.

When did you find out about the unacceptable behaviour? If it was before the trial, did you discuss it with your lawyer(s)? Did they tell the court about it?

If you have made a complaint about the behaviour (eg to Police Scotland, the Police Investigations and Review Commission or Crown Office) you should provide details of this.

Delay

In your application, explain what the delay was, what it was caused by and how it impacted negatively upon your trial.

Did you discuss this matter with your lawyers? What did they say? Did they make any submissions to the court about it?

Bad Publicity

In your application, set out the nature of the negative publicity. If you have examples, provide them to us.

Did you discuss this matter with your lawyers? What did they say? Did they make any submissions to the court about it? try to decide why you feel that the proceedings against you were oppressive.

Entrapment

In your application, set out the nature of the entrapment operation. Was it carried out by the police or someone else?

Did you discuss this matter with your lawyers? What did they say? Did they make any submissions to the court about it?

Something Else

In your application, set out the nature of the issue and explain why you think it prevented a fair trial.

Did you discuss this matter with your lawyers? What did they say? Did they make any submissions to the court about it?