APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 5
HCA/2022/250/XC

Lord Justice General
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL UNDER SECTION 65 OF THE
CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

BS

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: S Collins (sol adv); Collins & Co
Respondent: Borthwick, AD; the Crown Agent

5 August 2022

Introduction

[1] This appeal, which challenges a decision of the sheriff to extend the twelve month time bar under section 65 of the Criminal Procedure (Scotland) Act 1995, is directed towards

whether the extension should have been granted in the absence of the appellant. Having reviewed the progress which the case has made generally, it raises a wider question about the use of First Diets in sheriff court solemn procedure. It may not be easy for this court to grasp all of the practical difficulties in scheduling, with which a busy sheriff court may be faced. What is clear nevertheless is that the procedure which was followed in this case is unacceptable.

The First Diet Procedure

[2] The appellant appeared on petition on 16 June 2020. He was indicted, along with a co-accused, to a First Diet at Edinburgh Sheriff Court on 15 January 2021. The substantive charge is a single one of wilful fireraising at the Wester Hailes Education Centre on 13 March 2020.

[3] Because of Covid restrictions, the First Diet was continued administratively until 1 March and then 25 May. Thereafter, there followed six further FDs with repeated continuations for a variety of reasons. At each of the seven FDs, a different procurator fiscal depute, and five different sheriffs, were present. This reflects, as will be seen, a lack of ownership of the case by either the prosecution or the court. This is particularly disturbing given that the appellant is a child.

[4] Since the reforms to solemn procedure in the sheriff court, introduced by part 3 of the Criminal Justice (Scotland) Act 2016 (see also Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (Miscellaneous) 2017), a First Diet, like a Preliminary Hearing in the High Court, is intended to mark the end of the preparation stage of a case (*HM Advocate* v *Forrester* 2007 SCCR 216, Lord Bracadale at para [16] approved in *Murphy* v *HM Advocate* 2013 JC 60, Lord Carloway, delivering the opinion of the court, at para [28]). Continuations

or adjournments should be the exception rather than the rule (*HM Advocate* v *Forrester* at para [17]). The statutory direction (1995 Act ss 71B) is that at the FD, having disposed of any preliminary pleas and issues, the court must fix a trial diet. The procedure, which was followed in this case on and from the FD of 25 May, flies in the face of the statutory scheme. That scheme was effectively and repeatedly ignored.

[5] The First Diet of 25 May was adjourned, purportedly under section 75A(2) of the 1975 Act, on joint motion "for further time to prepare". This bland explanation requires deeper exploration. The case had already been in court for some six months. As matters stood immediately before the FD, the only matters of which the appellant sought disclosure in terms of the defence statement were four statements given by witnesses to the police. However, on 21 April, the appellant's agent had requested disclosure of "all material" relating to a High Court prosecution against different accused. Although that case principally involved a charge of attempted murder, it did include a libel of fire raising which had occurred on the same date as that in the appellant's case. The accused in the High Court case had been seen in the vicinity of the WHEC after the fire had started. That fact had been intimated by the Crown to the appellant as part of the general disclosure which had been carried out in November 2020.

[6] The appellant's request for additional disclosure had been sent in error to the sheriff clerk rather than the Crown. It was only on the day of the First Diet that an amended defence statement, which raised the issue of the other episode of fireraising, was lodged. The minute makes no reference to this. The statement sought "All disclosure" which had been made in the High Court case; a request which was, on any view, excessive given the limited part which the fireraising charge played in the other indictment. The PFD conjoined

in the appellant's motion to continue the FD, presumably as an alternative to trying to ascertain in the midst of the FD court what had previously occurred in relation to disclosure.

[7] As the advocate depute correctly acknowledged, far from there being an adjournment of the First Diet to allow "further time to prepare", any application to do so ought to have been opposed and refused. In terms of the statutory scheme, a trial diet ought to have been fixed. Because of the pressures of business brought about by the Covid pandemic, such a diet may have had to have been many months, perhaps even a year, into the future. Even if the request for additional disclosure had been legitimate, there would have been ample time to comply with it in advance of any trial.

[8] Matters then went from bad to worse. After the First Diet of 25 May, a principal PFD from the Crown's sheriff and jury unit reviewed the material in the High Court case. It was decided that no further disclosure was necessary. This was intimated to the appellant in advance of the next FD on 22 June. This diet was adjourned on an unopposed motion from the appellant "for specification of documents to be lodged". This motion too should have been opposed and refused. Once again, a trial diet should have been fixed. Quite apart from the fact that any specification, or application for disclosure, ought to have been made in advance of this diet, there would have been ample time for one to be dealt with in the months before the trial which ought then to have been scheduled.

[9] The next First Diet on 16 July was adjourned on the unopposed motion of the Crown "for further investigations". Although it is nowhere recorded in the minute, on 14 July (ie two days beforehand) the appellant had lodged an application for disclosure under section 128 of the Criminal Justice and Licensing (Scotland) Act 2010 (what happened to the specification is a mystery). This called for "all material which could be considered discloseable (*sic*) evidence from the ongoing" High Court case. This merely repeated the

inspecific request which had been made much earlier on 25 May. That matter had already been considered and determined (from the Crown's point of view) by the principal PFD. The motion should not have been made and it should certainly not have been granted.

[10] As it happened, thereafter the Crown disclosed a fingerprint report on one of the accused, and a fire report, relative to the High Court case. That only happened at the next First Diet on 30 July. This diet was, remarkably, adjourned yet again, this time on joint motion, "for disclosure to be obtained". At the next FD on 20 August, it was said that the Crown advised the court that all disclosable material had been provided, whereas the appellant said that further material was sought. The PFD suggested that the Crown might meet with the appellant's agents to discuss this. Hence, on joint motion, the FD was adjourned "for discussions to be made". According to the appellant, at the next FD on 26 August, the section 128 application was withdrawn, although the minute states that it was continued. At all events, the FD was adjourned "for further investigations". At the risk of unnecessary repetition, none of these adjournments should have been granted.

[11] Sheriffs who preside over First Diets must ensure that this type of pointless saga does not happen. The system of FDs in each sheriff court must allow the sheriff time to prepare the cases adequately in light of the written record of the state of preparation, any notices of preliminary pleas or issues (1995 Act ss 71B and C; Criminal Procedure Rules, rules 9.1 and 3A) and any other application, such as one for disclosure, so that all issues are resolved either at, what in non Covid times, is the first (and hopefully only) FD. The court recognises that, at present, defence agents may be experiencing difficulties in lodging the required documents in advance of the FD. Exceptionally, therefore, it may be appropriate to appoint a continued FD. Nevertheless, routine continuations of FDs for further time to prepare, further investigation and disclosure or similar causes should be refused in favour of

fixing a trial diet for a time which allows any additional preparatory work to be completed and/or granting a time limited order for the provision of whatever relevant information is required.

[12] As has already been observed, it is not for this court to attempt to manage the scheduling of business in any particular sheriff court. That is primarily the responsibility of the sheriff principal. However, it does have the knowledge and experience to realise that, if sheriffs do not take firm control of the management of the FD cases, all that occurs is, as happened here, repeated and unnecessary churn. This, in turn, results in an overloading of FD courts with multiple continued cases. The court understands that sheriffs are given time to prepare the cases and are not normally burdened with more than 20 FDs in a day. That ought to allow the sheriff to manage the cases at the FD properly. In order to do so, they require the assistance of both the Crown and the defence in carrying out the necessary preparation in advance. This is not a plea to create a judicial idyll, it is a request for the reformed system to operate as it is intended it should do.

The Trial Diets

[13] This court was informed that the system of trial allocation at Edinburgh involves some 5 trials for a one week "sitting" of floating trials, commencing on the Monday, in each of two trial courts. Balloting is only conducted on the Monday afternoon, with any trial commencing on the Tuesday. No balloting is conducted on the Friday. There are then four days in which to complete the scheduled trials, with any left uncompleted cases being continued to a new diet well into the future. On the assumption that this system is designed to ensure the disposal, that is to say the completion, of cases at the trial diet, there is an evident likelihood that this will not happen and that a high proportion of trials (ie in excess

of one in four) will be adjourned. The more likely it is that a trial will not commence at the allocated diet, the less likely it is that the case will be resolved at that diet. Once more, the court recognises that the allocation of trials is a difficult task, involving predictions on the percentage of cases which will be capable of being started during the period of the float. Sudden difficulties, such as the non-appearance of cited witnesses, can occur. However, the new system of First Diets is, as distinct from the previous one, designed to ensure that only cases which are ready for trial are allocated a diet. The corollary of that is that almost all cases which have a trial diet allocated can be expected to be ready to proceed. Any system which is designed to ensure the efficiency of criminal justice must be based on that assumption.

[14] Eventually, at a continued First Diet on 16 September 2021, a floating trial diet was fixed for 7 February 2022. When the trial diet called on 10 February, it was adjourned "*ex proprio motu*" until 6 June. The reason was minuted as being "lack of court time". The time bar was extended, unopposed, to 10 June. It should only be in exceptional circumstances that a trial, which has already been adjourned on the basis of lack of court time, should be adjourned again for the same reason. This is especially so where the accused is, as here, a child. This appeal concerns what happened when the case called on 10 June; the end of the float. It is not disputed that the trials, which had been set down for the week, were scheduled to take place in either court 10 or 11.

[15] At some point, in the week before the trial diet and perhaps before that, the Crown decided that the priority trial for court 10, to which the appellant's trial had been allocated, was a three week fraud case. On 3 June, which was the Friday before the Monday sitting, the Crown advised the appellant that it was "highly unlikely" that his trial would proceed. It would require to be adjourned. This was notwithstanding that the trial was up against the

time bar of 10 June and would thus require the court to sanction any extension. On the Monday, a trial from the previous "sitting" spilled into that week. On that day, the appellant's agent was told again that his trial needed to be adjourned. In relation to what eventually happened on Friday 10 June, the Crown found upon the absence of any mention by the appellant on the previous Friday that there would be opposition to an extension of the time bar.

[16] Meantime, courts 10 and 11 exchanged priority trials, with the fraud case commencing in court 11 on the Wednesday and a one week trial, balloting in court 10, began on the Monday. By the Thursday, three cases, including the appellant's trial, none of which could be accommodated in the "sitting", remained due to call. The Crown decided that these should be called in the First Diet court (court 6) for the purposes of adjournment. The appellant had previously been excused attendance. His agent was not told that the case was to call in court 6. The sheriff clerk was so informed at some point and a door list and a courtroom list, neither of which is published, would, if consulted, have shown the new arrangements. The defence agent did not consult these; seeing no reason to do so, given the previous allocation to court 10.

[17] When the case was called in court 6, no-one appeared for the appellant, although his agent, who is a well known local defence solicitor, was in the building or its vicinity. The co-accused had not appeared; a warrant for his arrest being granted as a result. The case was only "called" in the courtroom. It was not called in the court building generally, using, for example, the Tannoy system. There are several means by which the calling of a case in Edinburgh may be communicated to a defence agent. One is for the bar officer to search for the agent in the building, and in particular in the agents' room. The Crown in this case rather feebly reported that, prior to the calling of the case, the bar officer had left the

courtroom and the PFD had assumed that he had gone in search of the agent. There was nothing said to the bar officer which instructed such a search or from the bar officer that he had carried one out. Other methods of communication include a WhatsApp group designed to advertise callings. More obviously, the agent had a mobile phone. His office had a phone which could re-direct calls to him. No phone call was made.

[18] The appellant attributes this lack of contact to the bad faith of the PFD, who is accused of calling the case in the absence of the agent in order to secure an adjournment of the trial diet and an extension of the time bar unopposed. The Crown respond by saying that it was, at least partly, the appellant's agent's fault in failing to communicate with the PFD in court 10.

[19] The sheriff granted the motion to adjourn in respect that "no court room is available". A new trial diet was set for 20 September, with the time bar extended to 23 September. The sheriff accepts that, in retrospect, he should have done more to ascertain the whereabouts of the agent, even if that agent did have some responsibility for keeping in touch with the Crown. The sheriff acknowledges that, when granting an extension of time under section 65(3) of the 1995 Act, there is a statutory requirement that the court "shall give the parties an opportunity to be heard". It is of interest to note that the minute records that the adjournment was *ex proprio motu*. It was not. It must have been on the Crown's motion or at least a Crown representation that there was no space in which the trial could be accommodated. It is interesting also to note that the minute recorded that not only the appellant but also the co-accused pled not guilty at this calling, even although neither the co-accused nor his agent was present.

[20] There is irresistible force in the sheriff's acceptance that greater efforts should have been made to locate the appellant's agent. That should undoubtedly have happened. If the

agent could not be located immediately, consideration of the application should have been postponed until later in the day. It could not have been difficult for the Crown or the court to have communicated effectively with the appellant's agent to tell him where and when the case was to be called. The failure to do so is a substantial irregularity. It should not have happened. The explanation for it not happening is not satisfactory. Although the court is not prepared to hold that there was any bad faith, it is not surprised that the agent attributed this to the PFD given the simplicity of contacting him.

[21] Notwithstanding the seriousness of the failure, the court requires to be satisfied that, had the appellant's agent been present, a different decision might have been reached. Such a decision would have been, in effect, to bring an end to this prosecution of a fireraising which took place at an educational centre where some 100 people, mostly children, were present. Having regard to the procedural history, which includes considerable delay at least some of which has been attributable to the appellant's belated amendment to the defence statement and consequent application for an excessive degree of disclosure, that is not a consequence which would be consistent with the interests of justice. For these reasons, the court will affirm the determination to extend the time bar in terms of section 65(8). Needless to say, the court expects this trial to commence on 20 September.