SHERIFF APPEAL COURT

[2016] SAC (Crim) 23
SAC/2016/000396/AP

Sheriff Principal M M Stephen QC
Sheriff Principal M Lewis
Sheriff P J Braid

OPINION OF THE COURT

delivered by SHERIFF PRINICIPAL M M STEPHEN QC

in

BILL OF ADVOCATION

by

JOHN ARCHER

Complainer;

against

PROCURATOR FISCAL, GLASGOW

Respondent:

Appellant: More; Robert More & Co
Respondent: McCormack, AD; Crown Agent

26 July 2016

[1] The complainer, John Archer, is charged by the respondent on summary complaint as follows:

> *"(001) on 08 February 2015 at the 'YES' bar, 14 Drury Street, Glasgow you JOHN ARCHER did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did act in a threatening manner, shout at employees there and threaten to make video footage of said employees and post said video footage to the internet, placing said employees in a state of fear and alarm;*

CONTRARY to Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 you JOHN ARCHER did commit this offence while on bail, having been granted bail on 22 December 2014 at Livingston Sheriff Court

(002) on 08 February 2015 in Glasgow City Centre Police Office, 50 Stewart Street, Glasgow you JOHN ARCHER having been required in terms of Section 13(1)(a) of the Criminal Procedure (Scotland) Act 1995 by a constable, namely David Whyte, Constable of the Police Service of Scotland to provide your name and address, did without reasonable excuse fail so to do;
CONTRARY to the Criminal Procedure (Scotland) Act 1995, Section 13(1) and 13(6)(a)(i) you JOHN ARCHER did commit this offence while on bail, having been granted bail on 22 December 2014 at Livingston Sheriff Court

(003) on 08 February 2015 at Glasgow City Centre Police Office, Stewart Street, Glasgow you JOHN ARCHER did resist, obstruct or hinder Danielle Ball and David Whyte, both constables, the Police Service of Scotland, then in the execution of their duty and did struggle violently with them;
CONTRARY to the Police and Fire Reform (Scotland) Act 2012, Section 90(2)(a) you JOHN ARCHER did commit this offence while on bail, having been granted bail on 22 December 2014 at Livingston Sheriff Court"

[2] The complainer presents to this court a Bill of Advocation in which he contends that the summary sheriff's decision to adjourn his trial on Crown motion on 25 May 2016 was erroneous and oppressive. This court is asked to pass the Bill and desert the complaint.

[3] The Bill narrates the procedural history to these proceedings. The two previous trial diets on 7 August 2015 and 7 January 2016 had been adjourned on Crown motion due to witness difficulties. The second trial was adjourned because one of the civilian witnesses again failed to attend despite the court having granted an apprehension warrant when the same witness failed to attend the first trial diet (and an invitation having been extended by the Crown which the witness failed to accept). The third trial diet on 25 May 2016 was adjourned by the sheriff on Crown motion due to lack of court time on account of the lateness of the hour. It appears that by the time this case called for trial on 25 May it was sometime after 4pm. The adjournment was opposed by the complainer's solicitor and granted by the sheriff.

[4] The complainer advanced two arguments in support of the Bill. Firstly, the sheriff had failed to apply the principles of summary justice when considering whether to adjourn the third trial. Mr More accepted that the decision whether to grant an adjournment was primarily for the court of first instance in terms of *Paterson v McPherson* [2012] HCJAC 61. However, due to the passage of time alone no reasonable court would have exercised its discretion to grant the adjournment. We were asked to follow the approach of the appeal court in *McCowan v Dunn* [2013] HCJAC 119. The sheriff had failed to balance the prejudice to the complainer with the prejudice to the prosecutor and the public interest. The second proposition related to the Crown approach to the trial diet in May. The respondent had prioritised another trial with a domestic component where the offence was alleged to have been committed at the end of July 2015. Fault can therefore be imputed to the respondent.

[5] The advocate depute considered that *McCowan (supra)* could be distinguished from the facts of this case. The Crown had prioritised the domestic breach of bail over this case for proper reasons. It was not unreasonable for the Crown to invite witnesses to attend court rather than execute the witness apprehension warrant which might have appeared 'heavy handed'. The Bill should not be passed, allowing the trial to proceed in November 2016.

[6] The decision whether a trial diet should be adjourned is primarily one for the court of first instance having regard to the circumstances of the particular case and of the court in general. The appeal court will only intervene with such a discretionary decision if it can be shown that the court at first instance has either misdirected itself in law or reached a decision which no reasonable court could have reached (*Paterson v McPherson* [2012] HCJAC 61*)*. In *Paterson* the court approves the classic dictum of Lord Cameron in *Tudhope* v *Lawrie* 1979 JC 44 at 49 which emphasises the need to have regard to the interests affected or

prejudiced by the exercise of discretion, the three elements of prejudice being – to the prosecutor, the accused and the public interest (*Skeen* v *McLaren* 1976 SLT (Notes) 14). The question in this case is whether the complainer has met the high test for successful review of the summary sheriff's discretionary decision? In other words did the summary sheriff misdirect himself in law with regard to the test to be applied when he considered whether to grant or refuse the motion to adjourn the trial and did he then apply that test? The summary sheriff's report is brief. At para [12] the sheriff states: "*The case was not particularly old*" when more than 15 months had elapsed since the date of the alleged offending and adjournment would cause a further 6 month delay. The sheriff refers at paragraph [8] to the courts being overloaded resulting in delay. A general comment such as this does not assist the appellate court in the context of a fact specific appeal. However, an efficient system of summary justice requires the parties to be prepared and ready to proceed to trial. Unfortunately the report by the summary sheriff gives scant information as to his approach to the test which he must apply when considering whether to grant or refuse an adjournment. Indeed, the report fails to enunciate the test which the sheriff had applied when considering the Crown motion to adjourn. Accordingly, we have little confidence that the sheriff addressed the correct test and had regard to the three elements of prejudice to which we have referred. Accordingly, it is for this court to address the issue of prejudice.

[7] The sheriff is correct to say that charge 3 at least, is not a minor one. Nonetheless, the charges are not the most serious that the sheriff summary criminal court has to deal with (cf the charge in *McCowan v Dunn* which was a contravention of s.4(3(b) of Misuse of Drugs Act 1991 (diamorphine)). We have to consider whether the adjournment was necessary in the interest of justice. Such a motion has to be considered on its merits having regard to the

relevant circumstances; the prejudice which will arise for the parties and the public interest and where the balance of prejudice lies. The prejudice to the Crown that refusal may lead to the instance falling and the prosecution coming to an end is not of itself a conclusive consideration. The Crown has contributed to the difficulties in the procedural history of this case by choosing not to execute the warrant which had been granted by the court when the witnesses failed to attend at the first trial diet. On 25 May 2016 the procurator fiscal elected to proceed with another trial and failed to accord this case the priority one would expect of a complaint calling for trial for the third time. It is only proper to acknowledge that decisions as to convening witnesses to court and prioritising trials are for the respondent to make. Nevertheless, the respondent must accept the risks to the continued prosecution of a complaint if the attendance of witnesses is not secured and in failing to accord priority to cases which are of some age and have a history of adjournment. In other words the prosecutor, and indeed defence, must act in a manner which respects and is compatible with summary procedure. We have been addressed today about the prejudice to the complainer. As the charges are not the most serious we conclude that the consequences for the respondent of not being able to proceed with this complaint lose some significance in the balancing exercise. In these circumstances we are minded to pass the Bill and allow the appeal. The complaint will be deserted simpliciter.