SHERIFF APPEAL COURT

[2022] SAC (Crim) 8
SAC-2022-000254-AP

Sheriff Principal D C W Pyle
Sheriff D J Hamilton
Sheriff W A Sheehan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D C W PYLE

in

Crown Bill of Advocation

by

PROCURATOR FISCAL, GLASGOW

Appellant

against

RYAN COOPER

Respondent

Appellant: S Borthwick KC; Crown Agent
Respondent: F Mackintosh; Campbell & McCartney Glasgow
9 December 2022

Introduction

[1] This is a Bill of Advocation in respect of the sheriff's decision to refuse the Crown motion to adjourn a trial diet and as a consequence to desert *simpliciter*. It raises an issue about the performance of the Crown in a summary prosecution, but also two others: first, action or inaction by the Crown, which presented both the court and the defence with a fait

accompli; and secondly, the information provided by the Crown to ensure that the sheriff and, indeed, this court could make an informed decision on the facts.

[2] Given the last issue in particular, it is appropriate that we deal with matters in the following order: first, the sheriff's report; secondly, the terms of the Bill; and thirdly, the submissions before this court.

The Complaint

[3] The complaint contained two charges:

1. On 14 August 2021 at a named public house in Glasgow the respondent sexually assaulted X in that he did seize her vagina and touch her vagina over her clothing, contrary to section 3 of the Sexual Offences (Scotland) Act 2009;

2. On the same date and at the same locus the respondent did assault X and did punch her on the head to her injury.

The Sheriff's Report

[4] The sheriff sets out in detail what he knew of the steps taken by the parties and by the court during the course of the prosecution. In summary, these were as follows:

a. The respondent, who is a serving soldier, appeared from custody on 16 August 2021 (not 2022 as stated in the report). He having pled not guilty, intermediate and trial diets were fixed respectively for 22 November and 7 December 2021. He was released on bail subject to a special condition not to approach, contact or communicate with the complainer, X. He was excused attendance at the intermediate diet.

b. At the intermediate diet on 22 November 2021, the court continued the proceedings to the trial diet. The sheriff records that the minute did not disclose any difficulty with the parties' preparations for trial. It appears that no pre-intermediate diet meeting (PIDM) was fixed.

c. At the trial diet, the court granted a joint motion to adjourn the trial due, as the minute records, to an essential Crown witness being absent and that "a request for disclosure was outstanding". (Senior counsel for the respondent advised us that while certain information had been requested by the defence this statement might be a misunderstanding of the true position.) Further intermediate and trial diets were fixed respectively for 11 April and 22 May 2022.

d. At the further intermediate diet on 11 May 2022, on the Crown's opposed motion the court adjourned the further trial diet and fixed what was the third diet of trial for 4 August 2022, no further intermediate diet being fixed. The minute records the reason for the adjournment being the need to trace "a witness".

e. On 10 June 2022, the Crown lodged a vulnerable witness application for special measures for X, being for screens and a supporter. The application, which was unopposed, was granted by the court on 28 June 2022.

f. At the trial diet on 4 August 2022, the Crown moved to adjourn. The sheriff records that the procurator fiscal depute said that X and the other Crown witnesses were all serving soldiers, that the Crown had had previous problems in contacting X but that she had now been in touch to advise that she and the other witnesses were deployed to Germany and would not return until 15 October. No further information was given. The motion was opposed on the grounds that, first, this was the third trial diet; secondly, the respondent had appeared with an officer from Catterick barracks; thirdly, that as the Crown witnesses were serving soldiers the Army would ensure their attendance, a point confirmed by the

officer; and, fourthly, the respondent had been subject to the special bail condition for a year and could not be deployed until the proceedings were concluded. He was therefore prejudiced. The sheriff refused the motion.

g. The sheriff then asked the depute if she had any further motion to make and on being advised that she did not he deserted the diet *simpliciter* in terms of section 152(2) of the Criminal Procedure (Scotland) Act 1995.

[5] We discuss below the sheriff's reasons for the decision to refuse the Crown motion to adjourn the trial. But for present purposes it should be noted that the above is the sheriff's full understanding of the proceedings at the moment he made his decision. In particular, the sheriff records in his report that the further information contained in the Bill of Advocation either contradicted some of what he had been told by the fiscal depute or was unavailable at that time. We therefore now turn to the terms of the Bill.

The Bill of Advocation

[6] The Bill states that for the first trial diet, being 7 December 2021, the reason the Crown had sought an adjournment was that a Crown witness, Y, had not been cited and that the respondent sought an adjournment "due to outstanding disclosure and investigations into medical evidence".

[7] The Crown motion at the second intermediate diet on 11 April 2022 to adjourn the second trial diet was because X had not been cited as a witness.

[8] On 8 July 2022, the Crown received an email from X advising that she was deployed abroad until 15 October and was unable to return to give evidence prior to that date.

[9] At the third trial diet on 4 August 2022, the Crown moved an adjournment "to secure the attendance of [X]". The Bill goes on:

> "The Crown was not afforded the opportunity to respond [to the respondent's grounds of opposition] and inform the court that the complainer had stated that she was unable to return prior to 15 October 2022". (We note that this flies in the face of what the sheriff says in his report.)

Crown Submissions before this Court

[10] At the beginning of his submissions the advocate depute readily acknowledged that there had been failures by the Crown as set out in the Bill. But we indicated to him that there were still gaps in the information provided, which we required to be filled. The advocate depute was unable to respond immediately to the questions posed and had to take instructions. He admitted that there had been relatively limited information when the Bill was drafted. By the end of the hearing before us the following further points had emerged:

a. Upon receipt of the email from X no action had been taken by the Crown either to contact the defence or to seek an adjournment of the third trial diet by the court, despite the email being received nearly a month before that diet;

b. Initially, the advocate depute was unable to say whether the Crown witnesses were cited for the first trial diet. He eventually advised that all the witnesses, bar Y, were cited postally. The system did not allow identification of the date of postal citation, but before the intermediate diet the fiscal depute would normally check for witness responses and if they were missing the police would be instructed to make inquiries. He was unable to tell us whether any or all of that had been done. Nor was he able to explain why the Crown failed to tell the court at the first intermediate diet that Y was not cited or indeed whether the other postal citations had received positive responses and, if not, whether the police had been instructed and, if so, what was the result. Nor was he able to say whether any witnesses were in attendance at court;

c. For the second intermediate diet on 11 April, the witness recorded in the minute as requiring to be traced was X, the complainer. At that stage, the "information was that [X] had moved address". The advocate depute was unable to say whether the other witnesses had been cited;

d. For the third trial diet, the advocate depute was able to say that on 4 July X was cited postally, doubtless resulting in her immediate response with the email four days later. For two other witnesses, he said that it appeared that the police had been instructed to trace them, had attempted unsuccessfully to effect personal service on 28 and 30 July and had advised the Crown of that on 3 August. When the postal citations had been sent was unknown, although based upon an email from the Crown to senior counsel for the respondent it seemed clear that certainly on or before 8 July they had not been sent. However, the advocate depute also conceded that in light of X's email the Crown had already decided that no witnesses would be able to attend the third trial diet. (It is not obvious why therefore the Crown had allowed the police to waste their time attempting personal citation.);

e. The advocate depute was unable to advise whether a PIDM had taken place prior to the second intermediate diet. Senior counsel for the respondent, however, told us that a PIDM took place on 24 March 2022 when the Crown apparently confirmed that as of that date no witness citations had been served;

f. The advocate depute accepted, as he was bound to do, that the application for special measures for X misled the court in that it stated that she had been cited as a witness, which was untrue. He was unable to explain why the Crown had not sought special measures for the first trial diet when, at least according to the Crown, X had been cited postally, assuming of course that citation was successful which remains in doubt.

Sheriff's Reasoning for Refusal of Adjournment

[11] The sheriff noted that in deciding on the motion to adjourn the trial diet, he had to have regard to the interests of justice (*Tudhope* v *Lawrie* 1979 JC 44). That included the interests of the parties and the public interest. He was critical of the Crown's performance throughout the prosecution, particularly their failure to take any steps once they became aware of the inability of the witnesses to attend the third trial diet, which, he concluded, presented the court with a fait accompli. The sheriff also referenced as a factor the seriousness of the charges (*Donaldson* v *Kelly* 2004 SCCR 153), albeit he does not express a view on it. He acknowledged that the Army had been unable to deploy the respondent, although he considered that to be a minor consideration. He weighed in the balance the interests of the respondent who had been on bail under a special condition, had faced three aborted trial diets and had been unable to be deployed as a serving soldier. The sheriff concluded that the interests of the accused outweighed the interests of the Crown and the public interest.

Decision

[12] The test for this court in considering the decision of the sheriff is as set out by the High Court of Justiciary in *Walker* v *Dunn* 2016 SLT 116, in which the Lord Justice-Clerk, delivering the opinion of the court, emphasised the restricted nature of the power of the appellate court and in particular stressed that a failure to give a particular relevant factor a greater or lesser amount of weight is not, of itself, a ground for the successful review of a discretionary decision and that for an appeal to succeed it would have to be shown that the sheriff had left the fact out of account entirely.

[13] In the Bill the Crown addressed the test set out in *Tudhope* v *Lawrie* and *Walker* v *Dunn* and averred that the decision of the sheriff was one which no reasonable court of first instance could have reached. In particular, the Crown averred that there was no real prejudice to the respondent while there was clear, obvious and significant prejudice to the complainer and the public interest, given the nature of the charges; that the motion to adjourn was to facilitate the attendance of the complainer as a witness; that a trial date was available on 16 November 2022; and that there was no systemic failure by the Crown. Having had sight of the sheriff's report, the advocate depute submitted that the sheriff had failed to give sufficient weight to the prejudice to the complainer, although perhaps mindful of the test in *Walker* v *Dunn* he eventually submitted that the sheriff had failed to have any regard at all to the complainer's interests, given that only a general reference was made to that in his report. Instead, the sheriff had focussed entirely on the failures of the Crown.

[14] In our opinion, the scrutiny by this court of the reasoning of the sheriff should be tested by reference to what was known to him at the time of his decision, not what the Crown might later disclose either in a Bill of Advocation or in submissions before this court. It is a matter of concern that the Bill sets out circumstances which were not fully explained to the sheriff. Indeed, it is worse than that: it was only during close questioning by this court that other relevant circumstances were made known (for which the advocate depute had to seek instructions during the hearing) and, moreover, even then there were gaps which he was unable to fill. In saying that, we do not wish this to be regarded as a personal criticism of the procurator fiscal depute. Nor do we criticise the advocate depute (a very senior one) who drafted the Bill. The advocate depute before us conceded that the Bill was prepared on limited information. We also accept that he was put in a difficult position by not being able to elicit from those instructing him answers to all the questions we posed.

[15] Systemic failure is a difficult concept to identify from one case; indeed, by the fact that the court is concerned only with that one case it is probably impossible. The members of this court have many years of experience of sitting as sheriffs at first instance and can think of past examples of failures by the Crown in summary prosecutions. Equally so, however, they can recall examples of excellence. Nevertheless, it is possible to identify general themes which, if not systemic, are potentially so – and about which, we suggest, the Crown should also be concerned. In particular, we identify the following matters:

1. The Crown should be ready to proceed with a trial at the first trial diet. It is not a dress rehearsal. The purpose of the intermediate diet is for parties to confirm that they are ready to proceed, having discussed the case at the PIDM. If they are not, they should draw that to the attention of the sheriff who can then decide whether or not the case should be continued to the trial diet. Without a frank disclosure of any problems, the sheriff will be unable to perform his or her duty. In certain circumstances, the sheriff might decide to continue the intermediate diet, but that should be rare given that the parties are expected to have fully carried out their preparations beforehand. In this case, even now we do not know whether or not all the Crown witnesses had been properly cited before the first intermediate diet. We suspect that postal citations had been sent, but had not been properly followed up. We also suspect that at the first trial diet no Crown witnesses were present. But that we have to speculate about that remains a matter of concern. This lackadaisical approach to providing proper information to the sheriff on the citation of witnesses continued to the second intermediate diet. And, again, we are still in the dark about the true position on the Crown preparations for the second trial diet.

2. The sheriff complains that at the third trial diet he was presented with a fait accompli. We agree. Nearly a month before the diet the Crown well knew that there was a problem with

the attendance at trial of all of the prosecution witnesses. It took no steps to inform the defence or the court. Instead, a decision was made (whether as a matter of neglect or general policy, we do not know) simply to appear at the trial and move an adjournment. Again, that is unsatisfactory. The proper course would have been to secure the attendance of the witnesses with the assistance of the Army and if that proved to be impossible, which we readily accept could be the position, to make an application to the court to adjourn the diet. That is not just a matter of courtesy; it is to ensure that the time of the court is not wasted. For aught yet seen, an early adjournment might have allowed the court to deploy the unused slot in the diary for other business.

3. The advocate depute was unable to explain why no application was made for special measures for the complainer earlier than for the third trial diet. There is nothing to suggest that her circumstances had changed in any way. The grounds for the application were, so far as we are aware, the same as before the two earlier diets. The Crown failure was compounded by the statement in the application that she had been cited, which the drafter must have known to be untrue. That is a grave failure, in the context not just of the administration of justice but also of the personal interests of the complainer.

[16] The Covid pandemic has created huge challenges for the justice system. There is a massive backlog of summary prosecutions. Considerable efforts have been made to deal with it, including a recovery programme which involves the use of additional scarce public resources. Moreover, many important summary prosecutions have been considerably delayed, causing real prejudice, never mind inconvenience, to accused, complainers and witnesses. For these resources to be used effectively in the public interest, it is essential that the Crown plays its proper part. During the course of his submissions, the advocate depute described the charges as serious ones. We agree: if they were proved, there would have

been two assaults by a male on a female, one sexual and the other involving punching on the face to injury. The fact that they are both serving soldiers is a further factor. But the seriousness of a charge should never be treated by the Crown, even if subconsciously, as a useful card to be deployed just to excuse wholesale failures in a prosecution. Seriousness of a charge is something which the court must take into account, not least for the public interest, but the other side of the same coin is that it should also be in the mind of prosecutors when discharging their responsibilities.

[17] The classic test on adjournment of a trial diet is set out by Lord Cameron in *Tudhope* v *Lawrie* (at page 49):

> "There can of course be no doubt that it lies within the power of a Sheriff to refuse to grant an adjournment of a diet with the consequence (as in this case) that an instance may fall and a prosecution brought to an end. But at the same time this is a power which, in view of the possible consequences of its exercise to parties and to the public interest, must be exercised only after the most careful consideration, on weighty grounds and with due and accurate regard to the interests which will be affected or prejudiced by that exercise."

As the High Court pointed out in *Paterson* v *PF, Airdrie* 2012 HCJAC 61, Lord Cameron drew attention to *Skeen* v *McLaren* 1976 SLT (Notes) 14 where the court laid down the three elements of prejudice to the prosecutor, prejudice to the accused and the public interest in general. The complainer's interest is not specifically stated. Yet we recognise that this interest can be properly encompassed within the general public one. We also agree that the sheriff says little about her. But his report has to be viewed in light of the information provided to him. While he does not say so in terms, he might well have concluded that she was showing little or no interest (in the other sense) in the prosecution. In fact, the opposite was true: when eventually cited the complainer responded within a matter of days to explain her whereabouts and the problems she had attending the trial.

[18] In these wholly unsatisfactory circumstances and in particular what we now know about the attitude of the complainer and the prejudice she has suffered due to the failings by the Crown, we might have been minded to pass the Bill. However, we must also have proper regard to other aspects of the public interest. That interest extends further than the individual case (*Donaldson* v *Kelly*, para [15]). In particular, we must have regard to the rule of law that decisions of sheriffs should be scrutinised in the context of the information provided to them (*ibid*, para [18]). To say otherwise undermines the principle that the decision to adjourn is primarily one for the court at first instance (*Walker* v *Dunn*, para [5]). It is not in the interests of justice that the Crown makes submissions in a slipshod manner to the court at first instance in the knowledge that it can all be resolved on appeal. On the information before him, the sheriff was well entitled to come to the conclusion he did. Accordingly, we refuse the Bill.

[19] The sheriff had no choice but to desert *simpliciter* once he had refused the adjournment in the absence of a Crown motion to desert *pro loco et tempore*. Such a motion should be made only if the Crown intends to raise another prosecution, but we find it unusual to be advised, as we were by the advocate depute, that the reason the motion was not made was that the fiscal depute "did not think it would be granted". Whether to grant such a motion is a matter for the court having regard to the interests of the parties and the public interest. The latter encompasses the interest to ensure the protection of the victims of crime. The court will rightly have proper regard to any circumstances of delay or otherwise which resulted in difficulties for the Crown only because of the pandemic (*PF, Glasgow* v *McIntyre* [2020] SAC (Crim) 007, para [17] et seq), but it should also bear in mind that there is a public interest in ensuring, particularly during the recovery programme and indeed in

any future programme for recovery of backlogs in other areas of court business, that court time is not wasted.

[20] The advocate depute in the course of his submissions referred us to two embargoed opinions of the High Court. These are important decisions but are in the context of solemn procedure. The extent to which they were relied upon by the advocate depute was to emphasise that the sheriff's decision in this case should be taken in the interests of justice and with due regard to the interests of the complainer. They add nothing to the general principles set out in the existing authorities on adjournments in summary prosecutions.