APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 22
HCA/2022/546/XC

Lord Justice General
Lord Woolman
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL UNDER SECTION 65(8) OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

TB

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: W Culross; John Pryde & Co (for Bruce the Lawyers, Glasgow)
Respondent: Goddard KC (sol adv) AD; the Crown Agent

17 February 2023

[1] The appellant is charged with engaging in an abusive course of behaviour in relation to his ex-partner from February to November 2020, contrary to section 1 of the Domestic Abuse (Scotland) Act 2018. The offence is said to have been in breach of two bail orders, one granted in April 2019 and the other in September 2020. He appeared on petition on

24 November 2020 but was not indicted to a first diet until 1 April 2022. The delay is thought to be attributable to COVID restrictions. The appellant remained on bail.

[2] At a first diet on 1 April 2022 the sheriff fixed a trial diet with a 4 day float period to commence on 30 May 2022. He extended the 12 month time bar, within which to commence the trial, to 7 June (Criminal Procedure (Scotland) Act 1995, s 65(1)(b)). On 31 May, the sheriff, on the unopposed motion of the Crown, adjourned the trial diet due to a lack of court time until another 4 day float commencing 8 August, and extended the time bar to 19 August. On 12 August, the sheriff, *ex proprio motu*, again adjourned the trial diet because of a lack of court time, until yet another 4 day float commencing Tuesday, 6 December (the previous day being a public holiday). On the unopposed motion of the Crown, the sheriff extended the time bar until Friday, 9 December. On that date the Crown were in a position to proceed to trial, but planned to do so on Monday, 12 December. The procurator fiscal depute had thought that, as this would be the last day of the float, the time bar would align with that date. The defence appear to have been suffering from the same misunderstanding until at least sometime after the court had risen for the day.

[3] On the Friday, it had been the defence's intention to move the sheriff to adjourn the trial diet for a fourth time to enable him to recover the appellant's phone records. As it happened, the case did not call on the Friday and thus no applications were made to the sheriff. Rather, he had been told "informally" by the PFD at the conclusion of another trial that any applications would be made on the Monday. Unfortunately, the defence do not appear to have been informed of this communication at the time and remained in the court building unaware that the trial diet had been continued administratively until, according to the Minutes, the following day. That was a Saturday.

[4] Unsurprisingly, the diet did not call until Monday 12 December. On that date, the sheriff extended the time bar until 25 April 2022 (*sic*). The appellant had opposed the Crown's motion to do so, but then requested the adjournment. The sheriff granted the adjournment and the trial is due to commence during a 4 day float commencing on 19 April 2023.

[5] In granting the extension, the sheriff held that the two stage test in *Swift* v *HM Advocate* 1984 JC 83 had been satisfied: in particular, that: (a) the defence had laboured under the same misapprehension about the dates until after the close of business on the Friday; and (b) the interests of justice required that the extension be granted.

[6] At the hearing on the appeal, the appellant acknowledged the series of cases which had been decided in the modern post *Swift* era. Nevertheless, she contended that the sheriff had erred in failing to pay sufficient attention to the importance of the time limit and the errors of the Crown in failing to realise that the time bar expired on the Friday and not the Monday. These errors did not justify a retrospective extension. The interests of justice favoured the appellant. There had been three adjournments already because of a lack of court time.

[7] This court has said on several occasions that neither *Swift* nor *Early* v *HM Advocate* 2007 JC 50 apply to the adjournment of trial diets. That is a matter which is, or at least ought to be, under judicial control, as are any consequential time bar extensions (see *Preliminary Hearings Bench Book* para 5.4.2). The sole question for the sheriff was: where do the interests of justice lie? As was said in *Barr* (LJG (Carloway), delivering the opinion of the court, at para [22]):

> "This will involve a balancing of the interests of the accused in being brought to trial within the statutory time limit with those of the complainer and the public in general in allowing the system of justice to determine the charges libelled on their

> substantive merits as opposed to on grounds that are essentially procedural in nature. If the interests of justice dictate that the time bar ought to be extended, cause to do so will have been shown."

[8] Although the sheriff's apparent reliance on *Swift* and *Early* is unfortunate, he correctly concluded that the interests of justice lay in extending the time bar. The appeal is therefore refused. The minutes will be corrected. The refusal of the appeal does not detract from the extremely disappointing fact that this trial diet has been adjourned four times. This is something which simply should not happen. All those in the criminal justice system must bear that in mind, given the negative impact that it can have on public confidence.