SHERIFF APPEAL COURT

[2016] SAC (Crim) 12
SAC/2016/000145/AP

Sheriff Principal M M Stephen QC
Sheriff Principal D L Murray
Sheriff K M Maciver, QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

BILL OF ADVOCATION

for

PROCURATOR FISCAL, PAISLEY

Complainer;

against

AMREEK SINGH SHAAN

Respondent:

Act: Brown QC, Advocate Depute, Crown Agent
Alt: McIntosh, Advocate, Rahman, solicitors

19/04/2016

[1] This Bill of Advocation relates to a summary complaint at the instance of the complainer which charges the respondent with assault to injury at the Justice of the Peace Court in Paisley :-

> *"(001) on 13th March 2015 at Ajubi restaurant ,133 Main Road, Elderslie you AMREEK SINGH SHAAN did assault Gurthag Singh ,care of the Police Service of Scotland and did repeatedly punch him on the head and body and strike him on the head with an unknown object to his injury "*

[2] The Bill complains that the decision of the Justice of the Peace to refuse a Crown motion for adjournment of the trial diet on 11 February 2016 leading to the complaint being deserted simpliciter, is unjust ,erroneous and contrary to law. The complainer seeks recall of that decision and remit to the Justice of the Peace Court for further diets to be fixed.

[3] The respondent pled not guilty to the charge by letter intimated to the complainer. On 12 October 2015 the court fixed intermediate and trial diets for 20 January and 11 February 2016 respectively. At the intermediate diet the case was continued to the trial diet in February.

[4] At the trial diet the complainer in this charge attended, however another civilian witness necessary for corroboration of the charge did not. Police officers had delivered correspondence relating to his attendance at court to him at his home address which had not been responded to. Enquiries made after the intermediate diet disclosed that the witness had moved to London. When contacted by police the witness indicated that he did not intend returning to Paisley to give evidence.

[5] The complainer's depute made a motion for adjournment of the trial and for a witness warrant. That motion was opposed by the respondent's solicitor on the basis that nearly a year had passed since the incident. The Justice of the Peace refused to grant an adjournment or a witness warrant.

[6] The justice in his report gives reasons for his decision to refuse both the Crown motion for a witness warrant and to adjourn the trial. In his report he states:

> *"In coming to this conclusion I noted that the offence had allegedly taken place in March 2015 and was therefore almost one year old .I also took into account that there had been no reference ,at intermediate diet stage ,to any difficulty in citing witnesses. Rather, parties had indicated that they were ready for trial and the matter was accordingly continued to the trial diet already fixed. I did not consider it cost effective to bring the witness from London (in custody).I also had some doubts as to whether he would reappear for trial, given his reluctance so far. Finally, I took into account the public interest in having summary justice dealt with expeditiously "*

[7] The advocate depute referred to the procedural history of the complaint which first called in court in October 2015. The decision complained of was taken at the first trial diet in February 2016. The Crown motion to adjourn was due to the corroborating witness failing to attend court. He had moved to London and was avoiding service. The respondent's opposition to an adjournment rested solely on the age of the case. It was submitted that the Justice of the Peace had failed to apply the test set out in *Tudhope* v *Lawrie* 1979 JC 44 which required him to consider the question of prejudice – that is prejudice to the prosecutor; the accused and public interest. The justice has misdirected himself in law by failing to consider adequately the prejudice to the prosecutor and the lack of prejudice to the accused. The advocate depute referred to the *dicta* of Lord Cameron in the final paragraph of *Tudhope* v *Lawrie* which encapsulated the justice's error:-

> *"Having considered the admitted facts in the Sheriff's Report we are of the opinion, for the reasons we have given, that he has materially miscalculated the relative weights to be given to the prejudicial consequences to which his decision would give rise and that this material miscalculation fatally vitiates his decision. In our opinion to refuse the adjournment which the Crown sought was oppressive, and the Sheriff's interlocutor must be recalled and the case remitted to the Sheriff at Hamilton to proceed as accords."*

In any event, it was argued that the justice misdirected himself in law by refusing the complainer's depute's motion for a witness warrant. The justice took into account an improper and irrelevant consideration namely, the cost effectiveness of bringing the reluctant witness from London to Paisley. Accordingly, the Bill should be passed.

[8] Counsel for the respondent under reference to *Walker* v *Dunn* [2015] HCJAC 119 argued that the Justice of the Peace had referred correctly to the various prejudices which he had to give consideration to and that a failure to give a particular factor a greater or lesser amount of weight was not in itself a ground for the successful review of his discretionary decision. The Bill should be refused.

[9] When a decision is challenged by way of Bill of Advocation it is necessary to consider whether the sheriff or justice at first instance reached a decision which no reasonable court or justice could have reached. Lord Cameron in *Tudhope* v *Lawrie* 1979 JC 44 at page 49 when referring to *Skeen* v *McLaren* 1976 SLT (Notes) 14 points out that there requires to be a balancing of the various interests involved, these being, prejudice to the prosecutor; prejudice to the accused and prejudice to the public interest in general. In this case, we are of the opinion that the Justice of the Peace failed to weigh up these considerations properly. Had he done so he ought to have recognised that this is a serious charge especially in the justice's jurisdiction; it is in the public interest that the complainer be afforded the opportunity of bringing evidence to prove the charge. The decision of the justice brought this prosecution to an end. There is no fault, error or carelessness which can be attributed to the complainer in his preparation for trial. The witness was a reluctant witness and had failed to co-operate with the prosecutor. He was said to be avoiding service. The justice appears to have misdirected himself in his assessment of the extent of the prejudice to the complainer who by the decision of the justice is prevented from proceeding with the prosecution of this case. The justice erred in ignoring or discounting the public interest that those charged with violent conduct are brought to justice. In the circumstances which faced the justice in this case, the legitimate aim of speedy justice yields to these other considerations. No specific prejudice was advanced on behalf of the

respondent other than the time which had passed between the incident and the date of the first trial diet in February this year. The procedural history indicates that the case proceeded to trial without delay. Finally, in refusing the complainer's motion for a witness warrant the justice misdirected himself by placing weight on an irrelevant factor namely the cost effectiveness of bringing the witness from London which is essentially a matter for the prosecutor not the court. In so doing the justice fell into error. We are of the opinion that *Walker* v *Dunn* is of limited assistance in this case where the justice misdirected himself in addressing the test he required to apply when considering whether or not to grant the adjournment. In refusing the Crown adjournment in the absence of any real prejudice to the accused and in the face of significant prejudice to the prosecutor the justice reached a decision which no reasonable justice could have reached. The justice also erred in refusing the Crown motion for a witness warrant as he took into account an irrelevant consideration relating to the cost of bringing the witness to court. We propose to pass the Bill, recall the decision of 11 February 2016 and remit the case to the Justice of the Peace Court in Paisley for diets to be set.