SHERIFF APPEAL COURT

[2016] SAC (Crim) 4
SAC/2015-0068/AP

Sheriff Principal Scott
Sheriff Beckett
Sheriff Principal Lockhart

OPINION OF THE COURT

delivered by the Vice President, SHERIFF PRINCIPAL C.A.L. SCOTT QC

in the Bill of Advocation

for

THE PROCURATOR FISCAL, ABERDEEN

Complainer;

against

MUHHAMED TARIQ

Respondent:

Complainer: Goddard, AD; Crown Agent
Respondent: MacKenzie; Faculty Services, Edinburgh

12 January 2016

Introduction

[1] A Bill of Advocation was taken by the procurator fiscal at Aberdeen in respect of the sheriff's decision on 14 October 2015 to refuse to grant a further adjournment in a continued trial. As a consequence of that decision, the respondent had been acquitted of all charges on the summary complaint before the court.

[2] In terms of the charges libelled, it was alleged that the respondent had assaulted his wife on 12 November 2014 and had assaulted his 10 year old son on various occasions between 1 September 2014 and 24 November 2014. Furthermore, the events of 12 November 2014 were said to involve a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 in that the respondent was alleged to have behaved in a threatening or abusive manner towards his wife.

[3] On 20 May 2015, at Aberdeen Sheriff Court, the respondent made his first appearance, from custody. Pleas of not guilty were tendered on his behalf and he was granted bail on the standard conditions along with certain additional conditions. Those conditions, *inter alia*, precluded him from (a) contacting his wife and (b) contacting the son he was alleged to have assaulted (ie both complainers). A trial diet was assigned for 25 June 2015 with an intermediate diet on 11 June 2015.

[4] The court minute for 25 June 2015 discloses that the trial diet was adjourned on defence motion "…in respect of lack of Court time". A fresh trial diet was assigned for 3 August 2015.

[5] On 3 August 2015, the case proceeded to trial before a part-time sheriff, the respondent having maintained his pleas of not guilty. The respondent's wife, the complainer in respect of charges (1) and (2) on the complaint, gave evidence. An interpreter had been engaged to facilitate the respondent's understanding of the proceedings. The court having earlier given effect to vulnerable witness notices, the respondent's wife gave evidence with the use of screens in court and within the presence of a supporter from the Witness Service. It also appears from the note appended by the sheriff presiding on 7 September 2015 that the respondent's wife required the services of an interpreter.

[6] The testimony of the respondent's wife was concluded on 3 August 2015. However, the trial was adjourned until 7 September 2015 for further evidence to be led before the presiding sheriff. The bail order previously granted was continued.

[7] On 7 September 2015, for unexplained reasons, the part-time sheriff who presided at the first trial diet was not in attendance at Aberdeen Sheriff Court. In all other respects, the court was in a position to resume the trial. The case required to call before another sheriff. It was adjourned until 14 October 2015 to call before the trial sheriff. Bail was continued.

[8] On 14 October 2015, again for unexplained reasons other than the fact that he was elsewhere, the part-time sheriff was not in attendance at Aberdeen Sheriff Court. The complainer and the respondent's solicitor were advised that that would be so, during the course of the preceding day, viz. 13 October. In advance of the case calling on 14 October, the sheriff clerk had identified 28 October 2015 as being a suitable date upon which to continue the trial in the event that the sheriff before whom the case was to call on 14 October were minded to grant a further adjournment. However, the sheriff who presided on 14 October refused to grant a further adjournment of the part-heard trial and acquitted the respondent, thus giving rise to the Bill of Advocation by the procurator fiscal.

[9] The sheriff before whom the case called on 14 October 2015 was not a resident sheriff at Aberdeen Sheriff Court or, indeed, within the Sheriffdom of Grampian Highland & Islands. She was a part-time sheriff assigned to deal with business on an *ad hoc* basis. Her report indicates that the primary position adopted by the complainer's depute that day was that no motion on the part of the Crown (or, one assumes, the defence) was required and that the case ought to be adjourned by the court *ex proprio motu*.

[10] *Esto* the court were to decline to adopt that approach, the depute sought an adjournment on Crown motion. The part-time sheriff on 14 October was made aware that a

further diet on 28 October had already been identified as being suitable. The complainer's depute had stressed that the predicament in which the court found itself was not of the Crown's making. The depute argued that there ought to be an adjournment in the public interest and that the charges were serious.

[11] The solicitor representing the respondent opposed a further adjournment. Under reference to the procedural history of the case, the respondent's solicitor founded upon the fact that the respondent had been the subject of bail conditions since the beginning of the case. He had not been able to see either of his children. It was also submitted that the respondent had no previous convictions. He had appeared at court when required to do so and had obtempered all court orders. One of his children, the complainer in charge (3), continued to be required to be available to give evidence. It was maintained that it would be unfair to the respondent to adjourn the case to yet another diet.

Sheriff's reasoning

[12] It is apparent from her report that the sheriff on 14 October 2015, in considering whether or not to grant a further adjournment, regarded the matter as "…a question of fairness and balancing the interests of the respondent against the public interest in prosecuting the case to its conclusion." She acknowledged that the charges were serious. In addition, she states that she took into account the public interest and the history of the case.

[13] Set against those features, the sheriff weighed in the balance the fact that an adjournment would give rise to a fifth trial diet in what was a summary prosecution; that a child witness would be required to come to court again; and that the same circumstances had prevailed on the occasion of the previous adjournment. She also commented upon "the length of time" which had passed since the dates involved in the allegations and the length

of time that the respondent had been the subject of bail conditions "…with the impact on the relationship with the children".

[14] Having carried out what she considered to be the necessary balancing exercise, the sheriff refused a further adjournment and acquitted the respondent.

Advocate-Depute's submissions

[15] The advocate-depute elaborated upon the fact that the wife of the respondent (the complainer on charges (1) and (2)) had completed her testimony on the date when the trial began, viz. 3 August 2015. In particular, he stressed that the witness had spoken to the libel. She had spoken to the assault alleged in charge (1) and to the respondent's threatening behaviour all as set out in charge (2). She had also testified regarding the assaults on the 10 year old son (charge (3)). Therefore, the wife's evidence had been wholly incriminatory in nature.

[16] With regard to the dates libelled in the complaint, the advocate-depute explained that the respondent had, thereafter, left the country to go to Spain, whereupon his wife had reported the incidents to the police. Having once again become aware of his presence in the jurisdiction the police arrested him on 19 May 2015 and he appeared from custody on 20 May 2015.

[17] The advocate-depute referred to the fact that the respondent's wife had been a vulnerable witness. He pointed to the fact that, by the time the sheriff had been called upon to determine the issue of further procedure on 14 October 2015, a suitable date for the continued trial had already been identified by the court. It was a date which, leaving aside the respondent's opposition to the substance of the motion, apparently suited all those involved.

[18] Four authorities were cited by the advocate-depute for the benefit of the court, namely *Skeen* v *McLaren* 1976 SLT (Notes) 14; *Tudhope* v *Lawrie* 1979 JC 44; *Paterson* v *Procurator Fiscal, Airdrie* [2012] HC JAC 61; and *Lamb* v *Procurator Fiscal, Hamilton* [2014] HC JAC 138.

[19] In *Skeen*, Lord Justice-General Emslie had stated that:

> "When a motion is made by one party or the other to adjourn a diet of this kind on this ground and no question arises as to whether it is well founded in fact, there are two questions to which the sheriff must address his mind if he is to arrive at a proper decision upon the motion. The first question is whether the granting of refusal of the motion will be prejudicial to the accused and if so what is the probable extent of that prejudice. The second question is whether prejudice to the prosecutor would result from the granting or refusal of the motion and once again the degree of probable prejudice must be estimated. These two questions are the cardinal questions and this can be discovered in the judgments delivered by the court in the case of *MacKellar* v *Dickson* (1898) 2 Adam 504. To these two questions we would add a possible third, namely, prejudice to the public interest which may arise independently of prejudice to the accused or to the prosecution in the particular case in which the motion is made."

[20] In *Tudhope*, where a sheriff had refused to grant an adjournment of a trial diet, Lord Cameron, who delivered the opinion of the court, made the following observations:

> "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. And when it appears that the Sheriff has either failed to have proper regard to the interests which will suffer or may suffer prejudice by a refusal of an adjournment, whether sought by the prosecutor or on behalf of an accused, or has misdirected himself as to the extent or consequences of the prejudice to be suffered or has erred in his balancing of relative prejudice which will or is likely to arise from such a refusal, then his decision is open to attack and may be set aside. Nor will it suffice that a Sheriff has paid lip service to the principles which should guide his decision should it appear that in substance he has failed to pay due and proper regard to them."

[21] In *Paterson*, at paragraph [6] the court recognised that it would only interfere with a discretionary decision regarding an adjournment or otherwise in the absence of a misdirection in law, if it could hold that the court had reached a decision which no reasonable court of first instance could have reached. It also observed that "When making a decision in this context it is important for the court to be aware of the precise terms of Lord Cameron's opinion in the *locus classicus* of *Tudhope* v *Lawrie* 1979 JC 44 (at page 49)." The court in *Paterson* noted that in the case of *Skeen*, the court had laid down that there were three elements which had to be considered: prejudice to the prosecutor, prejudice to the accused and prejudice to the public interest in general.

[22] Finally, in the case of *Lamb*, the advocate-depute accepted that "…questions of what weight ought to be attached to a particular factor are, of course, primarily for the court of first instance to determine." (See paragraph [6]).

[23] However, when it came to the application of the principles which emerged from these four cases, the advocate-depute submitted that the sheriff had erred. It was the advocate-depute's position that the sheriff had identified the correct test but had applied that test incorrectly. He submitted that, in all the circumstances facing the court on 14 October 2015, prejudice to the Crown and to the public interest far outweighed the element of prejudice to the respondent.

[24] The advocate-depute stressed that, a decision not to adjourn the continued trial gave rise to prejudice on the part of the prosecutor which was significant. The entire prosecution would come to an end and proceedings against the respondent could not be re-raised. This consequence was all the more acute owing to the incriminatory nature of the evidence already given by the first witness led by the Crown, the respondent's wife.

[25] In regard to the public interest, the advocate-depute suggested that the outcome arising from a failure to adjourn the continued trial was a prime example of obvious and substantial prejudice. There was, he submitted, a strong public interest in ensuring that cases involving allegations of domestic abuse were, where possible, prosecuted by the Crown and prosecuted to a conclusion.

[26] The advocate-depute identified only two features in the context of prejudice to the respondent. Firstly, there was the existence of the bail order. A bail review might have addressed any perceived prejudice but even if that were not so, the reasonable expectation was that the continued trial would be heard and concluded no more than 2 weeks later. Therefore, the prejudice to the respondent was, in fact, minimal. The same contention was advanced as regards the issue of further delay, generally. The advocate-depute acknowledged that further delay was not necessarily a desirable feature but maintained that both of the foregoing factors were easily outweighed by the prejudice afflicting the interests of the Crown and the public.

[27] Therefore, the advocate-depute submitted that there had been an error in the balancing exercise undertaken by the sheriff. The important fact that evidence had been led and concluded lay at the heart of the Crown's interest in the prosecution and that of the public interest. The court was invited to pass the Bill and to remit the case back to the trial sheriff to proceed as accords forthwith.

Counsel for the respondent's submissions

[28] Counsel for the respondent was constrained to rely upon the court's observations in the case of *Paterson*. In other words, she stressed the nature of the decision and the

circumstances in which it was arrived at. It was a discretionary decision by a sheriff at first instance.

[29] An appellate court, counsel reminded us, would only interfere where a plain error of law had arisen or where the decision being criticised was one which no other reasonable sheriff might have arrived at. Counsel emphasised that the test for interference with such a decision was a high one.

[30] In relation to certain factual details, counsel informed the court that, according to her information, the respondent had only left this country for a relatively short period of time after the dates in the libel although she was unable to be specific in any suggestion that there had been a delay in his arrest. Whilst the date of 28 October 2015 had been identified by the court, there had been no agreement on behalf of the respondent to the effect that the trial *would* be rescheduled then.

[31] Counsel for the respondent referred to the case of *Peter Walker* v *PF, Edinburgh* [2015] HCJAC 119 where, after a significant passage of time, a Justice of the Peace refused a Crown motion to adjourn a trial *ex proprio motu* at 3.45 pm. Owing to the lateness of the hour, the Crown witnesses had been sent away. However, one witness was retrieved and the trial commenced at 5.00 pm. Thereafter, almost immediately, the Justice of the Peace adjourned the trial for a further month or so.

[32] The court in *Walker* reiterated that it would only interfere with a discretionary decision on whether or not to adjourn a trial where there was a misdirection in law or where a demonstrably unreasonable decision had been reached. It also stated that:

> "The test for unreasonableness is a high one. It must be stressed in that respect 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. For an appeal to succeed, the court would have to be shown to have left the factor out of account entirely (see *Berry, Petitioner* 1985

> SCCR 106, LJG (Emslie) at 113). It is of note that the matters complained of, as averred in the Bill, are solely matters to which, it is said, the JP gave insufficient weight. There is no averment of general unreasonableness or why the decision should be categorised in that manner. The averments are essentially irrelevant."

[33] Counsel for the respondent appeared to draw a comparison between the case of *Walker* and the circumstances in the present appeal where, she submitted, the argument merely was that the sheriff had failed to give particular factors a greater or lesser amount of weight. What mattered here, argued counsel, was that the sheriff had been alert to the interests involved in prosecuting the case to its conclusion as could be seen from her report. She had carried out the appropriate balancing test and her report also demonstrated that a detailed and careful consideration had been given to the issues involved. Therefore, counsel cautioned against interference with the sheriff's decision and invited the court to refuse the Bill.

Discussion

[34] Whilst it may be that we have some sympathy for the sheriff who presided on 14 October 2015 having regard to the situation in which she found herself, we are unable to agree with her decision on that date or with the basis upon which she arrived at that decision.

[35] It would appear that, when it came to the "cardinal questions" to be addressed (see LJ-G Emslie in *Skeen*) by the court, the sheriff's approach was somewhat confused. In our view, it was *not*, as the sheriff put it, "…a question of fairness and balancing the interests of the respondent against the public interest in prosecuting the case to its conclusion."

[36] The three clear and distinct elements to be considered by the court, viz. prejudice to the prosecutor, prejudice to the accused and prejudice to the public interest were

highlighted by the court in *Paterson*. Accordingly, we are not satisfied that the sheriff, in arriving at her decision, had proper and accurate regard to the particular interests involved.

[37] In any event, we consider that the sheriff either misdirected herself "as to the extent or consequences of the prejudice to be suffered" or erred when balancing the prejudice likely to arrive from her decision to refuse an adjournment. She attached significance to the special bail conditions. We agree with the advocate-depute's contention that this was no more than a marginal feature where the proposed date for the continued trial was two weeks later. Similarly, and particularly in the context of where the Crown case stood evidentially, we are doubtful that the requirement for the accused's son to give evidence ought to have attracted the weight given to it by the sheriff.

[38] In contrast, there were certain important factors which the sheriff failed to give consideration to. It was, in our opinion, very significant that the first Crown witness having given evidence had implicated the respondent when it came to each of the charges. A refusal to adjourn meant that the Crown were materially prejudiced in that they were denied the potential for using the wife's testimony along with other evidence in the case to ensure that, at the very least, the respondent had a case to answer upon the conclusion of the Crown evidence.

[39] Of course, the other Crown evidence was to include that of the respondent's son. The third charge alleges that the respondent had assaulted his son on various occasions over a 3 month period and that "…he did strike him on the head and body." In this context, the sheriff's reference to "a child witness" being "required again" is ill-conceived.

[40] In the sense that the child witness, his son, might give evidence supporting the libel, the respondent might be "prejudiced". However, we do not regard that as a tenable or relevant consideration. In all other respects, the son being required to give evidence gave

rise to no prejudice *quoad* the respondent. (In any event, we were advised that on the occasion of the two previous trial diets, steps had been taken in advance to avoid the son's attendance at court).

[41] However, the balancing exercise undertaken by the sheriff, in our view, failed to recognise that the public interest would be prejudiced where serious allegations of assaults upon a young child would be wholly undermined by a refusal to adjourn in circumstances where all the evidence led thus far in the trial served to confirm those allegations. There was no suggestion that the son was not prepared or was reluctant to testify. In so far as the sheriff placed weight upon the son being required as a witness "again" we cannot conceive that such a factor properly outweighed the more obvious interest in providing the son with the opportunity to testify, to corroborate his mother's evidence and to substantiate the allegations regarding him having been assaulted by his father.

[42] A third important factor concerned the minimal further delay of 2 weeks. The sheriff makes no reference to this in her report. At the very least, she ought to have explained why this particular factor failed to attract any weight as far as she was concerned. In our opinion, as the advocate-depute submitted, the overall procedural passage of time was entirely proportionate for summary proceedings and the passage of time since the events libelled was not necessarily excessive. Therefore, the very short period of continuation involved ought to have weighed heavily with the sheriff.

Decision

[43] Accordingly, whilst this was, indeed, a discretionary decision by the sheriff, we regard ourselves as entitled to interfere with that decision. We are satisfied that the sheriff misdirected herself as to the nature of the interests to be considered where determining such

a motion. Moreover, in our view, the "weighty grounds" desiderated by Lord Cameron in the case of *Tudhope* were noticeably absent. Therefore, the balancing exercise carried out by the sheriff was flawed. The circumstances facing the court when called upon to consider the motion for an adjournment comfortably suggested that the prejudice to be suffered by the Crown and by the public interest far outweighed any prejudice affecting the respondent.

[44] In the whole circumstances, therefore, we have passed the Bill of Advocation. The matter has been remitted back to the trial sheriff at Aberdeen Sheriff Court with the request that he proceed as accords all with a view to achieving an expeditious conclusion to the trial.