



SHERIFF APPEAL COURT

[2016] SAC (Crim) 6
SAC/2015-000187/AP

Sheriff Principal Scott QC

Sheriff Principal Lewis

Sheriff Arthurson QC

OPINION OF THE COURT

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

in

the Bill of Advocation

by

ANDREW LAING, Procurator Fiscal, Aberdeen

Complainer

against

BRIAN MILLER

Respondent

Complainer: Cottam AD; the Crown Agent
Respondent: McKenzie; Faculty Services Limited

8 March 2016

[1] The procedural history giving rise to the decision complained of in this Bill of Advocation is summarised in the Bill itself. After two continuations without plea, the

respondent entered a plea of not guilty on 10 November 2015. An intermediate diet was assigned for 4 December 2015 and a trial diet for 12 January 2016.

[2] At the intermediate diet, it emerged that CCTV footage from the date and place libelled would be unavailable for the purposes of any trial. It appears from the Bill that the presiding sheriff determined that the respondent's trial would inevitably be unfair. He, therefore, chose to desert the complaint *simpliciter*.

[3] On behalf of the Crown, the advocate depute submitted that the sheriff's analysis at paragraph [9] in his report was incorrect. Whilst the sheriff proceeded on the basis that identification of the respondent was reliant upon witnesses having viewed the CCTV footage, the advocate depute explained to us that the evidence regarding identification which the Crown proposed to lead at trial emanated from members of the respondent's own family. Accordingly, the CCTV footage was, in reality, of no consequence when it came to the issue of identification. Moreover, the advocate depute submitted that the same could be said regarding what was alleged to have occurred on the occasion libelled.

[4] It was maintained that the sheriff at the intermediate diet had been unable to carry out a proper assessment as to the significance of the evidence which the Crown proposed to lead at trial. He had failed to afford the procurator fiscal depute an opportunity to explain matters properly. The advocate depute argued that, even where the sheriff entertained a doubt about the fairness of the respondent's trial, he ought to have continued the intermediate diet to allow fuller argument or simply continued the case to the trial diet thereby allowing the sheriff presiding at the trial to make what would have been a more informed assessment as to fairness.

[5] Counsel for the respondent supported the sheriff's "detailed and reasoned" report and submitted that there was no proper basis upon which to interfere with the decision

taken, albeit that she accepted that the decision had, in effect, been taken *ex proprio motu*. Counsel referred to the case of *Walker v PF, Edinburgh* [2015] HCJAC 119, at paragraph [5] in particular, and stressed the discretionary nature of the decision taken by the sheriff in the present case. However, we did not understand counsel for the respondent to challenge the core proposition advanced for the Crown, viz. that the CCTV footage was not a necessary feature of the identification evidence to be led at trial.

[6] In light of the submissions advanced in support of the Bill, we find ourselves unable to agree with the sheriff's conclusion that an unfair trial was inevitable owing to the non-availability of the CCTV footage. At the very least, in our view, the sheriff's decision was premature. In advance of the intermediate diet, the Crown had not been placed on notice that they might be facing a motion to desert the complaint. The sheriff's consideration of the issue of unfairness would have benefited from a more informed appraisal as to the evidential basis for the charge against the respondent. However, we formed the impression from the submissions on appeal that (as is averred in the Bill at statement of fact 7) the sheriff proceeded to desertion of the complaint without giving the procurator fiscal depute an opportunity to respond to the proposition that such a disposal was appropriate, particularly where such a disposal had been conceived of by the court itself.

[7] In the course of the appeal, various authorities were mentioned. All concerned were at one to the effect that the case of *HMA v Fleming* 2005 JC 291 correctly sets out the test as to whether an unfair trial would be inevitable (see paragraph [34]) albeit that in *Fleming* the decision for the court was whether to desert *pro loco* or *simpliciter*. Moreover, *Fleming* had involved a trial which had already been underway for a number of days. At all odds, in our opinion, the sheriff erred in his application of that test to the circumstances in the present

case. Therefore, we have decided that the Bill should be passed; that the sheriff's order of desertion *simpliciter* should be recalled; and that the complaint should be remitted to the sheriff with a direction to assign a fresh intermediate diet and trial diet.