SHERIFF APPEAL COURT

[2024] SAC (Crim) 4
SAC/2023/000499/AP

Sheriff Principal S F Murphy KC
Appeal Sheriff F Tait
Appeal Sheriff D J Hamilton

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL S F MURPHY KC

in

Bill of Advocation

by

DAVID O'REILLY

Complainer

against

PROCURATOR FISCAL, DUMBARTON

Respondent

Complainer: S Loosemore; Pryde & Co (for Fleming & Reid, Glasgow)
Respondent: A Prentice KC (sol ad), AD; Crown Agent

23 April 2024

[1] The appellant was charged on summary complaint with a contravention of section 5(1)(a) of the Road Traffic Act 1988 as amended and a breach of Regulation 12(1) of the Health Protection (Coronavirus Restrictions) (Directions of Local Authorities) (Scotland) Regulations. Both offences were alleged to have been committed on 6 December 2020. He

pled not guilty at Dumbarton Sheriff Court on 15 September 2021. The defence moved to adjourn the first trial diet on 11 March 2022 for his legal aid application to be completed. Further trial diets set for 17 August 2022 and 9 December 2022 were adjourned on Crown motion due to the unavailability of a witness. The court *ex proprio motu* adjourned two further diets of trial which had been set down for 4 May 2023 and 13 September 2023 due to lack of court time. The next trial diet called on 24 November 2023. The Crown moved to part-hear the case on that day because an essential prosecution witness, a doctor, had been called to give evidence in the High Court on the same day. Unfortunately another part-heard trial which had started on an earlier occasion had to take priority and it took longer than expected with the result that there was insufficient time left at the end of the day for the present case to commence. Accordingly the sheriff adjourned once again *ex proprio motu.* She insisted that a custody diet was to be used to limit any further delay and the case was set down for 1 March 2024. A Bill of Advocation has been brought to challenge that decision.

Submissions for the appellant

[2] The key element here was the sheriff's failure to recognise the cumulative effect of repeated failures to give the matter priority. She had failed to note that the defence had been ready for trial on every occasion over the period of more than 18 months which had passed after the first adjournment in March 2022. It had been reasonable for the defence to consent to the first Crown adjournment at an accelerated diet but thereafter the prosecution should have been ready as they ought to have been at the first diet (*PF Glasgow* v *Cooper* [2022] SAC (Crim) 8). At the very least the case should have been prioritised by the Crown on 4 May 2023 and thereafter, but it was not. On 13 September 2023 the sheriff expressed

concern and indicated that the Crown would be expected to proceed on 24 November 2023. On the latter date the Crown started another case. The absence of the doctor was not the fault of the Crown but the complainer had been ready to proceed at five diets of trial. The present offences were not trivial but neither were they at the highest end of the scale. The further adjournment was not reasonable. The complainer had attended all trial diets and the matter had been hanging over him for a lengthy period of time when disqualification would limit and compromise his employment options. In *Archer* v *Orr* 2016 SCL 832 the court had passed a bill with some similarities to the present one and stated, at paragraph 7:

> "On 25 May 2016 the procurator fiscal elected to proceed with another trial and failed to accord this case the priority one would expect of a complaint calling for the third time. It is only proper to acknowledge that decisions as to convening witnesses to court and prioritising trials are for the respondent to make. Nevertheless, the respondent must accept the risks to the continued prosecution of a complaint if the attendance of witnesses is not secured and in failing to accord priority to cases which are of some age and have a history of adjournment. In other words, the prosecutor, and indeed defence, must act in a manner which respects and is compatible with summary procedure."

The bill should be passed and the complaint deserted *simpliciter.*

Submissions for the respondent

[3] Advocation was not a competent remedy in the absence of very special circumstances; *AMI* v *PF Glasgow* [2014] HCJAC 9. There were no such circumstances in the present case. The court had refused a pass the bill in *Kane* v *PF Hamilton* [2018] SAC (Crim) 13, a case in which there had been some five adjournments after noting the position in *AMI* and concluding that the decision made was not one which no reasonable sheriff would have reached.

[4] *Esto* the decision was not unjust, erroneous or oppressive. The test was set out in *Skeen* v *McLaren* 1976 SLT (Notes) 14. The power to refuse to grant an adjournment with the

consequence that the instance must fall must be exercised only after the most careful consideration of all the interests involved: *Tudhope* v *Lawrie* 1979 JC 44. It is a matter for the court of first instance and an appellate court should only intervene, in the absence of a misdirection of law, if the lower court had reached a decision which no reasonable court could have reached: *Paterson* v *McPherson* [2012] HCJAC 61. The reasonableness test was a high one: failure to give a particular factor greater or lesser weight should not give rise to review, and appeal would only succeed where a significant factor had been left out of account entirely: *Walker* v *Dunn* [2015] HCJAC 119.

[5] No particular prejudice to the complainer had been shown. While the delay in this case had been substantially longer than desirable, the covid pandemic had contributed by causing issues for court scheduling. The respondent was not responsible for court scheduling but trial had been scheduled for six weeks after the last adjournment. If the sheriff had refused to grant the adjournment the prosecution would have been deprived of the right to continue with the case despite not being responsible in any way for several of the previous postponements. The offences were significant, especially the contravention of section 5(1)(a) of the 1988 Act which attracted a significant public interest in its determination, which had led to a bill being refused despite five adjournments in *Christiansen* v *Harvie* 2015 JC 77. The bill in the present case should be refused.

Decision – Competency

[6] The first issue to be addressed is the question of the competency of the Bill. Advocation is a mode of review which may be used *pendente processu* to correct errors of procedure by an inferior court at any stage prior to final sentence (*Muir* v *Hart*) but only in

very special circumstances (see eg *Kane* v *PF Hamilton).* In *I* v *Dunn (No. 2)* the Lord Justice Clerk (Carloway) stated, at paragraph 20:

> "Quantum valeat, a bill of advocation is not a competent remedy either to review decisions made *pendent processu* other than in very special circumstances (*Muir* v *Hart* (1912) 6 Adam 601) which are not present here."

[7] The question therefore becomes whether the circumstances of this case are such that we consider them to be "very special". The history of the matter is very unfortunate. The essence of the complaint in the present case is the delay in bringing this matter to trial on account of the repeated adjournments. Delay causes prejudice and is incompatible with summary justice. The striking feature in this case is the number of repeated adjournments attributed to lack of court time. The complainer was ready for trial at every diet after 11 March 2022. The Crown had witness issues on two occasions thereafter but had dealt with one of these by way of accelerating the diet. However, after 9 December 2022 each adjournment had been caused by lack of court time, a factor which was not the direct responsibility of either party. While the pandemic had affected court timetables, we consider that this period of delay, of approximately 11 months, is unacceptable. Overall the time gap between the appellant's plea of not guilty and the trial diet is approximately 2 years and 6 months. In the circumstances of this case these repeated delays in the administration of justice amount to very special reasons and we consider this bill to be competent.

Decision – Merits

[8] In deciding whether to grant an adjournment the court must consider (i) whether the grant or refusal of the motion would be prejudicial to the accused, and the probable extent of any such prejudice; (ii) whether it would be prejudicial to the prosecution, and the probable

extent of any such prejudice; and (iii) whether prejudice would arise to the public interest: see *Skeen* v *McLaren* 1976 SLT (Notes) 14.

[9] The decision on whether or not to grant a motion to adjourn a trial is very much a matter for the court of first instance and an appellate court should only intervene if there has been an error of law or a decision has been reached which no reasonable court could have reached: *Paterson* v *McPherson* [2012] HCJAC 61. The unreasonableness test is a high one and questioning the weight to be attached to a particular factor is not of itself sufficient grounds for a successful appeal against a discretionary decision; rather, it must be shown that the court at first instance had left the factor entirely out of account: *Walker* v *Dunn* [2015] HCJAC 119.

[10] Refusal to grant an adjournment with the consequence that the instance may fall is a power which must be exercised only after careful consideration and on weighty grounds, with due and accurate regard being given to the interests which may be prejudiced: *Tudhope* v *Lawrie* 1979 JC 44, per Lord Cameron at page 49.

[11] The sheriff's decision of 24 November 2023 had to be made in the context of the circumstances which pertained at that date. The procedural history of the case was part of that context but so was the immediate reason advanced to justify the decision at that particular time. Any opinion expressed by another sheriff at a previous diet was a factor to be considered but such comments could not bind the sheriff at any subsequent diet, when the decision to adjourn would have to be made on the basis of the overall situation which pertained at that later diet. In her report to this court the summary sheriff has indicated, at paragraph 24 that she took into account the factors identified in *PF Glasgow* v *McIntyre* [2020] SAC (Crim) 7. In that case this court was following the guidance given in *Skeen* v *McLaren.* It follows that she applied the correct test.

[12] Her initial instinct, to part-hear the trial, was the correct one. Some witnesses were present and the trial should have been able to start. We have not been told if that had been considered at any previous diet. Unfortunately an essential Crown witness, a doctor, had been called to give evidence in the High Court at Inverness on the same day so that it could not have been concluded. In the event it was not possible to make a start because another trial had to take priority as it had already been part-heard and that took up the available time. At the end of the court day the summary sheriff adjourned the case *ex proprio motu*. In our view she had no realistic choice to do otherwise, having tried to get the trial underway earlier without success. We are satisfied that she correctly balanced the competing considerations identified in *Skeen* v *McLaren* and *PF Glasgow* v *McIntyre* in deciding to adjourn. The case was concerned with a significant offence and it was in the public interest to allow it to continue (*Tudhope* v *Lawrie; PF Glasgow* v *Cooper).* She further specified that a custody diet was to be used as a device to ensure that the case would be heard as soon as the court could accommodate it. In our view her decision was reasonable in the face of the unfortunate procedural history of the case and of the difficult situation which presented itself on 24 November of last year.

[13] It follows that we shall refuse to pass this Bill of Advocation on its merits.