



SHERIFF APPEAL COURT

**[2024] SAC (Crim) 3
SAC/2023/000495/AP
SAC/2023/000496/AP
SAC/2023/000498/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

DEBBIE CUMMING

Complainer

against

PROCURATOR FISCAL, FALKIRK

Respondent

**Complainer: A Ogg (sol ad); MTM Defence Lawyers
Respondent: A Prentice KC (sol ad), AD; Crown Agent**

23 April 2024

[1] The complainer is being prosecuted by the respondent on three summary complaints at Falkirk Sheriff Court. The first complaint libels a contravention of section 39 of the Criminal Justice and Licensing (Scotland) Act 2010 in the following terms:

“Between 1 February 2021 and 29 June 2022 both dates inclusive at 31 Don Street, Grangemouth you DEBBIE CUMMING did engage in a course of conduct which caused Darren McNiven, Lindsay McNiven and Kieran McNiven, then aged 15 years, born 23 July 2006 all c/o the Police Service of Scotland, fear or alarm in that you did repeatedly maintain observations on said Darren McNiven, Lindsay McNiven and Kieran McNiven, repeatedly stare at them and repeatedly hold a mobile telephone in such a manner that it appeared you were filming them, and in particular that you did (a) repeatedly maintain observations on said Kieran McNiven while he was within said dwelling house and while he was in a state of undress; (b) repeatedly maintain observations on said Lindsay McNiven, repeatedly stare at her and repeatedly stand at your window and hold a mobile telephone in such a manner that it appeared you were filming her on the occasions when she was arriving home from shopping trips, when she was reversing her motor vehicle and when she was removing items from her motor vehicle; (c) repeatedly maintain observations on said Darren McNiven, repeatedly stare at him, repeatedly bring a deck chair out of your dwelling house and into your garden, face it in the direction of said Darren McNiven, sit in said chair and repeatedly hold a mobile telephone in such a manner that it appeared you were filming him on the occasions when he was washing his car and when he was in his back garden;

CONTRARY to Section 39(1) of the Criminal Justice and Licensing (Scotland) Act 2010.”

[2] The second and third complaints were raised in September and November 2022 respectively. Each libels a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 and a contravention of section 27(1)(b) of the Criminal Procedure (Scotland) Act 2010. All three complaints libel conduct by the complainer against the same individuals and for convenience they ended up being called together.

[3] On 24 November 2023 the Crown moved for an adjournment of the trial diet as its witnesses were unavailable. The motion was opposed by the complainer. The summary sheriff allowed the adjournment. A new trial diet was fixed for 22 December 2023.

Thereafter, the complainer lodged three Bills of Advocation (one for each complaint) with this court. The trial diet on 22 December 2023 did not proceed.

Procedural history

[4] To give context to the decision that the summary sheriff required to make on 24 November 2023, it is necessary to set out the procedural history:

- i. On 27 July 2022 the complainer tendered a plea of not guilty in relation to the first complaint. The sheriff fixed an intermediate diet for 10 October 2022 and a trial diet fixed for 25 October 2022;
- ii. A pre-intermediate trial diet took place on 7 September 2022. Both parties agreed to continue the matter to the trial diet on 25 October 2022 and the intermediate diet fixed for 10 October 2022 did not call as a result;
- iii. On 25 October 2022 the sheriff was notified that the Crown had not made full disclosure to the complainer. One of the Crown's witnesses was also unavailable for trial. A joint motion was made to adjourn. An intermediate diet was fixed for 30 November 2022 with a trial diet fixed for 13 December 2022;
- iv. On 30 November 2022 the complainer moved for the trial diet on 13 December 2022 to be adjourned. The Crown had disclosed all material on 25 October 2022 but it included a photograph said to have been extracted from a lengthier video of an incident forming part of the complaint. The complainer requested the full video from the Crown. The Crown undertook to try and recover it. As a consequence, the trial diet was adjourned and a new intermediate diet was fixed for 30 January 2023 with a new trial diet set for 14 February 2023;

- v. On 30 January 2023, the Crown moved for an adjournment. Yet again, one of their witnesses was unavailable for trial. The summary sheriff fixed a new intermediate diet for 20 March 2023 with a new trial diet of 6 April 2023;
- vi. On 15 February 2023, the Crown, following discussion with the complainer, lodged a joint minute of acceleration with the sheriff at an accelerated diet. The Crown had become aware one of their witnesses would not be available for trial on 6 April 2023. The existing intermediate diet of 20 March 2023 was retained; however, a new trial date was set for 17 April 2023;
- vii. At the intermediate diet on 20 March 2023, the case was continued to trial on 17 April 2023;
- viii. On 22 March 2023, the second complaint called for the first time. An intermediate diet was fixed for 15 May 2023 and a trial diet fixed for 1 June 2023;
- ix. On 29 March 2023, the third complaint called for the first time. An intermediate diet was fixed for 15 May 2023 and a trial diet fixed for 30 May 2023;
- x. On 17 April 2023, the complainer moved to adjourn the trial for the first complaint. She had been attempting, via Falkirk Council's mediation service, to find a resolution with the complainers (ie the Crown's witnesses). The motion was allowed and a notional trial diet was fixed for 15 May 2023;
- xi. On 15 May 2023, all three cases were continued on joint motion to 28 June 2023 with a view to establishing witness availability;
- xii. On 28 June 2023, both parties agreed to a trial diet for all three complaints on 29 September 2023;

- xiii. On 29 September 2023, the complainer made a motion to adjourn the trial as the principal solicitor for the complainer dealing with the case was unavailable. Before fixing a new trial diet, the court officer was tasked with checking the availability of the Crown's witnesses. The provisional date identified was 24 November 2023. The Crown's witnesses, who were at court that day, advised they had a pre-booked holiday at the end of November into the start of December. The sheriff fixed a new trial for 7 December 2023;
- xiv. On 5 October 2023 the Crown witnesses booked a holiday which coincided with the trial fixed for 7 December 2023;
- xv. The Crown became aware on 16 October 2023 that its witnesses were unavailable for 7 December 2023, having booked a holiday. It moved for an accelerated diet to call before the sheriff to allow it to adjourn the trial diet of 7 December 2023; however, it did so only with respect to the first complaint;
- xvi. The first complaint called for trial on 8 November 2023. The sheriff proceeded on the basis that the decision required was whether to adjourn the trials back to 7 December (the complainer's position) or to a different date (the Crown's position). By the time of the Crown's motion, there had been seven adjournments of the trial, consisting of a mixture of Crown, complainer and joint motions to adjourn. The sheriff noted that the motion to adjourn on the basis of the witnesses booking their holiday was not a good ground to adjourn; however, the sheriff was advised that the procurator fiscal depute designated to the case was not available either on 7 December 2023. The Crown advised that 24 November 2023 was viable. The prosecution motion to adjourn was granted and a new trial diet set 24 November 2023;

- xvii. The Crown did not issue its witness citations for the new trial diet until 21 November 2023 due to an oversight;
- xviii. On 24 November 2023, it became apparent the procurator fiscal depute who appeared on 8 November 2023 had not had the correct information. The Crown's witnesses had advised in a reply form relating to their availability as long ago as 12 July 2023 that they would not be available for trial between 21 and 24 November 2023. The reply form had not been uploaded to the case folder used by the procurator fiscal depute who had appeared and the information was not available to the court. Due to its lack of witnesses, the Crown made a motion to adjourn which was opposed. The motion was allowed and a new trial was fixed for 22 December 2023.
- xix. Thereafter, the Crown presented a joint minute of acceleration to the summary sheriff in respect of the second and third complaints to discharge the trial diet fixed on 7 December 2023 for those two complaints. The summary sheriff fixed their trial diets for 22 December 2023 also.

Summary sheriff's report

[5] The complainer challenges the decision of the summary sheriff on 24 November 2023. The summary sheriff has reported that she had been advised by parties of the terms of the opposed motion to adjourn which had been before the sheriff on 8 November 2023 in relation to the first complaint.

[6] The summary sheriff considered the procedural history of the first complaint and recognised it was extremely protracted. The trial had been adjourned due to the lack of availability of Crown witnesses on 25 October 2022, 30 January 2023, 15 February 2023 and

15 May 2023. The complainer provided detailed submissions regarding her personal circumstances and the impact the delays in proceeding to trial were having upon her.

[7] On being advised by the procurator fiscal depute that the Crown's motion to adjourn was based upon witness availability, the summary sheriff did not consider the motion had much merit standing that procedural history. She enquired where the witnesses were and was told they were in London. Although a hotel booking confirmation reference was provided, the summary sheriff noted it failed to provide information on when the holiday had been booked by the witnesses.

[8] The summary sheriff then enquired when the witnesses had been cited, only to be told that it had been 21 November 2023. It was on the basis of that information that she decided to grant the Crown motion and adjourn the trial. In making her decision, she took into consideration that she had no evidence to show that the Crown witnesses were reluctant or unwilling to engage in proceedings. They had attended on 29 September 2023 when the trial was adjourned on the complainer's motion. Moreover, the complainers had only been given 48 hours' notice of the trial diet and were in London at the time.

[9] Having considered the submissions, the summary sheriff decided that refusing the motion would unduly prejudice the interests of justice and would prevent the allegations being brought before the court. The wider public interest outweighed the prejudice which would be suffered by the complainer, particularly if any adjournment were short. The earliest possible date was 22 December 2023 and that was when the trial was fixed for.

[10] With respect to the adjournment of the second and third complaints, the summary sheriff recalls receiving joint minutes of acceleration for each. She did not note and does not recall any opposition by the complainer to the Crown's motion to adjourn these two cases.

She also does not recall receiving submissions on the procedural history of either of those two complaints.

Submissions for the complainer

[11] The complainer accepted that there required to be special circumstances before a Bill of Advocation could be allowed. The complainer founded upon (i) the protracted length of the case; (ii) the conduct of the Crown's witnesses and (iii) the failures of the Crown in progressing the case to trial.

[12] The Crown's witnesses had told the court on 29 September 2023 that they were available on 7 December 2023. Notwithstanding that, they proceeded to book another holiday on 5 October 2023 which meant they would be on holiday on 7 December 2023. There was a trend for the Crown witnesses not to be available for trial due to holidays. The trial diets lost due to the Crown's witnesses not being available included: 25 October 2022, 14 February 2023, 6 April 2023, 15 May 2023, 8 November 2023 and 24 November 2023.

[13] Despite a new trial diet being fixed on 8 November 2023 to call on 24 November 2023, the Crown had failed to cite its witnesses until 21 November 2023. The citations were received on 22 November 2023. No proper explanation was provided for the delay. Moreover, if the witnesses were on holiday it is not entirely clear as to how they came to know that citations had been posted to them.

[14] The summary sheriff stated that it was on the basis of the delay in sending the citations that she decided to grant the Crown's motion to adjourn. That was not a sufficient reason to grant adjournment. The summary sheriff granted the adjournment on the basis of that reason alone and had overlooked the remainder of the procedural history. No sheriff or

summary sheriff would have reached the decision that the summary sheriff did on 24 November 2023. The court was moved to pass the three bills before it.

Submissions for the Crown

[15] The advocate depute submitted that the reasons for delay in coming to trial were fairly balanced between the parties. It could not be said that a clear preponderance of reasons lay with the respondent. While the delay was regrettable, the delay was not excessive to the point of amounting to oppression.

[16] The respondent's primary submission was that a Bill of Advocation was not a competent remedy to review decisions made *pendente processu*, other than in very special circumstances (*I v Dunn (No. 2)* 2014 SCL 281 at para [20] and *Kane v Procurator Fiscal, Hamilton* 2018 SCCR 337 at para [8]). The circumstances of this case were not sufficiently special such that the Bills of Advocation were a competent remedy and accordingly the bills should be refused on that basis.

[17] Even if the bills were competent, the crux of the complaint concerned the period of 29 September 2023 to 24 November 2023. The Crown and its witnesses had expected the trial to proceed on 29 September 2023: the only reason it did not was because the complainer's solicitor was not available on the day. As for the Crown's witnesses not being certain of the dates of their holidays when they were asked in court on 29 September 2023, that was excusable. The advocate depute refuted the assertion that the Crown's witnesses were trying to manipulate the progress of the trial. The error in identifying the dates was addressed within seven days of 8 November 2023, resulting in the acceleration of the diet to 24 November 2023. The Crown was aware as at 8 November 2023 that its witnesses were

not available for the new trial diet; however, it had not updated the papers available to the procurator fiscal depute in court. For that error, the Crown bore responsibility.

[18] The circumstances giving rise to the delay in bringing matters to trial did not amount to “special circumstances”. The decision whether or not to grant an adjournment was primarily for the court at first instance and an appeal court should only intervene, in the absence of a misdirection in law, if the court had reached a decision which no reasonable court of first instance could have reached (*Paterson v McPherson* [2012] HCJAC 61 per Lord Carloway at paras [6] and [8]). The summary sheriff had applied the correct legal test (*Tudhope v Lawrie* 1979 JC 44 per Lord Cameron at 49 and *Walker v Dunn* 2016 SLT 116 per Lord Justice General (Carloway) at para [5]). The summary sheriff had not made a decision which no other reasonable sheriff or summary sheriff would have made.

Decision

[19] 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 *pendente processu* other than in very special circumstances (*Muir v Hart* (1912) 6 Adam 601) which are not present here.”

[20] 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 offence is alleged to have been committed between 1 February 2021 and 29 June 2022. The pleading diet took place on 27 July 2022. Thereafter four trial diets were adjourned at the

request of either side for different reasons before trial was set down for 22 December 2023.

We have been provided with more details regarding the reasons behind the previous motions to adjourn than were available to the sheriff. In particular the series of administrative errors which led to the very late citation of the witnesses for the November trial diet has been explained by the advocate depute in a forthright manner which clearly indicates that fault lay with the Crown rather than with the witnesses themselves.

[21] The essence of the complaint in the present case is the delay in bringing this matter to trial on account of the repeated adjournments. Not all of these were the responsibility of the Crown and on one particular occasion it was caused by the unavailability of the principal defence agent. Delay causes prejudice and is incompatible with summary justice but it does not otherwise strike at the heart of a fair trial in the way in which, for example, the pre-trial exclusion of a material report or witness for either Crown or defence might do.

[22] The complainer's second point relies on the supposition that the Crown witnesses were attempting to disengage with the trial process by making themselves unavailable at times when they knew that a trial was to be scheduled. However, the explanation provided by the advocate depute indicated that there had been a series of errors in recording and processing the information regarding their availability which the witnesses had provided. That information provides a different perspective on that aspect of the matter.

[23] Taking all of these factors into consideration we have reached the view that what occurred in this case to cause the delays, while very regrettable, does not reach the standard of being very special circumstances. Accordingly, we do not consider that the present bill is competent.

[24] Having heard submissions in full we shall set out our views on the merits of the summary sheriff's decision of 24 November 2023. 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.

[25] 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.

[26] 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.

[27] The decision whether or not to adjourn which the sheriff had to make on 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 motion 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 indicated, at paragraphs 24-26, that she took the factors identified in *Skeen v McLaren* into account. It follows that she applied the correct test.

[28] The summary sheriff reports that she considered the circumstances which had brought about the witness difficulties which were the fault of the Crown and not the responsibility of the witnesses themselves. Thereafter she concluded that on balance a refusal to grant the adjournment sought would unduly prejudice the interests of justice by preventing serious allegations from being tried so that the wider public interest outweighed the prejudice which would be suffered by the present complainer. She clearly carried out the correct balancing exercise. She sought to mitigate the prejudice to the complainer by fixing a trial diet as soon as could be accommodated by the court on 22 December 2023. It is an unfortunate consequence of the bringing of this Bill of Advocation that the diet could not be met.

[29] We detect no error of law in the approach of the summary sheriff. She has applied the correct test and has conducted the correct balancing exercise. Her decision was not one which no reasonable sheriff or summary sheriff could have made. It follows that the decision which she made was a matter for her discretion and we shall not interfere with it.

[30] Accordingly, had we been required to do so, we would have refused to pass the bill on its merits.

[31] The second and third complaints were effectively following the same course as the first one from 15 May 2023 onwards so that the same considerations apply to the bills relating to those complaints and we were not addressed separately in relation to any specific

matter arising from either of those complaints. Accordingly we do not consider that the circumstances surrounding either of those bills was sufficiently special for them to be competent for the reasons given above and we shall refuse each. Had we required to consider their merits we would have refused each on account of the same considerations discussed above. In fact each of the second and third complaints has a shorter procedural history than the first one overall.