APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 73
HCA/2017/457/XC

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

SECTION 65 APPEAL

by

AMANDA COWAN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Findlater; Faculty Services Limited, for Lawson, Coull & Duncan, Dundee
Respondent: M Meehan, AD; Crown Agent

13 September 2017

Background

[1] The appellant was originally indicted to a first diet at Dundee Sheriff Court on 28 March 2017, charged with a contravention of section 35 of the Tax Credits Act 2002. Prior to the First Diet further productions had been intimated by HMRC. A section 71 minute

challenging the relevancy and specification of the indictment had also been served. The Crown intimated that the indictment would not call on that date.

[2] Subsequently, a fresh indictment in identical terms save for the addition of the word "thereafter" in line 24, was served with a first diet fixed for 2 May and a trial for 15 May. A second, identical, section 71 minute was lodged. On 2 May, Crown motions, unopposed, to adjourn the trial and to extend the twelve month timebar to 18 August were granted. A continued first diet was fixed for 18 July with 31 July as the trial diet.

[3] At the continued first diet, at which the indictment remained in its original form, the sheriff was again asked to continue the diet. He refused to do so and proceeded to hear submissions on the section 71 minute. He upheld the minute and deserted the indictment *pro loco et tempore.*

[4] Thereafter, the Crown sought a further extension of the timebar in terms of section 65(3) of the 1995 Act, which was granted to 18 October 2017. That decision has been appealed on the basis that there was no sufficient reason to grant the motion.

Analysis and Decision

[5] Counsel submitted that the Crown had not provided a sufficient reason to grant the extension; no reason is contained in the sheriff's report. Under reference of *HMA* v *Swift* 1984 JC 83, the sheriff indicates that he "treated the first stage as conceded." Both parties submitted that there was no such concession, nor was the argument advanced on a basis which would entitle an inference of concession to be drawn. In any event, in our view this is a matter upon which the court requires to be satisfied: it is not a matter for concession by parties. It is not clear from the report what the sheriff considered to be the relevant reason

for the purposes of the first part of the test, but it cannot be other than fault on the part of the Crown.

[6] The identification of the reason is an important factor at both stages of the relevant test. As the court pointed out in *Early* v *HMA* 2007 JC 50, if the reason is not one for which the Crown is responsible, consideration of whether the reason was a sufficient one would require the court to address the interests of parties other than the Crown. If the reason is error on the part of the Crown, the court requires to consider what the error was and why it occurred. Only at the second stage is it appropriate to consider the nature of the charge, the public interest, the issue of potential prejudice and similar matters.

[7] At the first stage, it is not appropriate to proceed on the basis of the error being "major" or minor": rather the court requires to consider how the error came to be made; how readily it could have been avoided or detected; the circumstances in which it came to light; whether the defence were aware of it and failed to draw it to attention. In the present case, no consideration was given to any of these issues.

[8] The sheriff's decision to dismiss the indictment is not and has not been challenged. The advocate depute accepted that the decision not to amend was an incorrect one. Essentially, the reason no action was taken was that those in the local office thought that the degree of specification was similar to that given in other such cases, and that it gave adequate notice of the Crown case. However, if that be so, it is difficult to understand why the Crown was not in a position to advance these arguments to the sheriff on 18 July, when, the sheriff tells us the depute "advanced no useful submissions in defence of the indictment" beyond the proposition that the defence could obtain further specification by looking at extraneous material produced by the Crown. The advocate depute accepted that the basic fact was that at the time when the sheriff insisted on the minute being heard, the Crown had

not given sufficient attention to the minute either to be able to answer it or to propose amendment of the indictment.

[9] The Crown had indicted the appellant twice, on a virtually identical libel, despite the defence drawing to their attention the deficiencies in the indictment which eventually led the sheriff to dismiss it. They failed to address these issues, despite having already been granted the benefit of one extension of the time bar.

[10] The advocate depute submitted that it would be sufficient reason to grant an extension that it would enable the Crown to prepare an indictment which provided sufficient relevancy and specification, in the face of an original indictment which had been so lacking in these as to be dismissed. Given the way in which this matter has arisen we cannot accept that. As the court pointed out in *Early* (para 22, Lord Justice Clerk (Gill)):

> "... it is not enough for the Crown merely to show that an error was made. It must explain why it was made, and, before any question of discretion arises, the explanation must satisfy the court that the error is capable of being excused."

We are not so satisfied and will grant the appeal.