SHERIFF APPEAL COURT

[2019] SAC (Crim) 11
SAC/2019/419/AP

Sheriff Principal D L Murray
Sheriff A G McCulloch
Sheriff N McFadyen

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D L MURRAY

in

Appeal in terms of section 174 of the Criminal Procedure (Scotland) Act 1995 by

JONATHAN KELLY

Appellant

against

PROCURATOR FISCAL, HAMILTON

Respondent

Appellant: Ogg, Solicitor Advocate; Gilfedder & McInnes
Respondent: Edwards, Q.C., Advocate; Crown Agent

25 September 2019

[1] This appeal is against the order made by the summary sheriff at Hamilton Sheriff Court on 17 June 2019 whereby the sheriff repelled a preliminary plea as stated by the appellant:- that the prosecution's case was incompetent on the basis of oppression. The complaint against the appellant was in the following terms:

> "(001) On 7th August 2018 at Auchingramont Road Hamilton, you JONATHAN KELLY did behave in a threatening and abusive manner which was likely to cause a

> reasonable person to suffer fear or alarm in that you did swear and offer offensive remarks towards your former wife ... c/o The Police Service of Scotland; CONTRARY to Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 and that it will be proved in terms of Section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 that the aforesaid offence was aggravated by involving abuse of your partner or ex-partner."

[2] It was argued for the appellant before this court as it had been before the summary sheriff that the Crown was seeking to take advantage of an error or incompetent decision by the sheriff. It was submitted that the complaint was incompetent because the sheriff at the previous trial diet on 22 October 2018, on a separate complaint libelling an identical charge to the one now libelled, made an error as to the correct determination. On that date she deserted the case *pro loco et tempore*. The appellant submitted that the sheriff's decision should have been to find the appellant not guilty on the basis of insufficient evidence having been led by the respondent or alternatively to desert the case *simpliciter* in terms of section 152(2) of the Criminal Procedure (Scotland) Act 1995. Although the summary sheriff had not considered that he could review the decision of the sheriff on 22 October, that decision was pertinent to the question of oppression and this court should conclude the sheriff should have deserted the cause simpliciter on 22 October. As a consequence no further proceedings should have been raised and the complainers plea in bar of trial should be upheld.

[3] The advocate depute invited us to refuse the note of appeal and refuse the plea in bar of trial on grounds of oppression. The sheriff had proceeded under the common law to desert the trial *pro loco et tempore*. That was a decision she was entitled to make. The summary sheriff was unable to review the decision of the first sheriff, but had identified the correct test for oppression and had applied this correctly in reaching his decision to refuse the plea in bar of trial. The sheriff had a power at common law to desert a cause *pro loco et*

tempore which permits the prosecutor to re raise proceedings. In *MacLeod* v *Williamson* 1993 SLT 144 the High Court accepted there is a right at common law for the court to desert a summary complaint *pro loco et tempore*. Given the recognition of such a power it may be used *ex proprio moto.* That also found support in the unreported decision of this court *Speight* v *Procurator Fiscal, Edinburgh* 14 February 2017. Accordingly there was no error in the decision of the sheriff or the summary sheriff and the appeal should be refused.

[4] We have received a report from the Sheriff on the circumstances surrounding the minute of 22 October 2018, and we have a joint minute which confirms the factual position. It is convenient to briefly set out what happened on 22 October. The Crown had called its first witness, the complainer, and she had commenced giving evidence. An objection was raised on the admissibility of Crown Label 1: a DVD, on the grounds that it was a copy of a voice recording, but there was no accompanying certificate in terms of section 279 of Schedule 8 of the Criminal Procedure (Scotland) Act 1995 which would allow it to be admitted without further evidence of its provenance, which the defence understood the Crown did not intend to lead. The procurator fiscal depute advised that there was no Schedule 8 certificate and she did not propose any other means of introducing this evidence. The depute then indicated she intended to introduce a further production, a mobile telephone which the witness had with her at court. The defence objected to the introduction of the telephone on the grounds that it had not been previously disclosed to the defence and the defence had not had the opportunity to examine it. The defence objection was upheld. The procurator fiscal depute then moved to adjourn the trial part-heard, which was opposed by the defence. The motion was refused and the Crown led no further evidence. Parties accepted that the terms of the minute, which records the case being deserted *pro loco et tempore* on the motion of the prosecutor, were inaccurate, no such motion having be made

and the sheriff simply deserted the trial *pro loco et tempore.* A Bill of Advocation on behalf of the complainer was refused as being lodged out of time. The Sheriff Appeal Court refused to grant the first order in the Bill of Advocation on the basis that it was late and a Bill of Advocation was not the competent remedy to review decisions made in the course of summary proceedings unless they provided to the Sheriff Appeal Court a reason to review the decision. The President of the Sheriff Appeal Court concluded:

> "Even if it had been lodged timeously, I would not be minded to warrant the bill. The complainer has entered a plea at bar of trial which if sustained would bring proceedings in the second complaint to an end. If the plea is repelled the complainer similarly may appeal to the Sheriff Appeal Court with leave of the sheriff."

[5] The summary sheriff in his report on the debate noted that he was not sitting in an appellate capacity to determine whether the sheriff had made the correct decision. He did not consider it was competent for him to consider the circumstances of the trial on 22 October 2018 to determine whether it would be oppressive for the accused to proceed to trial on the instant complaint. He could only determine whether the circumstances of the case amounted to oppression such as to uphold the plea in bar of trial. He noted that parties had the opportunity to appeal the decision from the first trial and in particular that the appellant had the opportunity to appeal the decision and did not do so timeously. He was aware of refusal by the Sheriff Appeal Court to grant the first order in the Bill of Advocation. He repelled the plea in bar of trial because he did not consider the appellant had demonstrated prejudice so grave as to prevent him from having a fair trial.

[6] The relevant facts in *MacLeod* v *Williamson* may be briefly stated as follows. During the lunchtime adjournment of trial on a summary complaint the sheriff overheard a conversation between the Procurator Fiscal and the police witnesses in which he heard one of the police witnesses saying that his evidence concerned only "recovering the machete in

his possession". The sheriff concluded that he was unable to cast completely from his mind what he had overheard and deserted the case *simpliciter*. The Crown sought advocation of the sheriff's decision. The Appeal Court found that, although the sheriff might well have concluded the trial could proceed in spite of his having overheard the remark, he was entitled to decide that the trial could not proceed. The Court found the sheriff was not entitled either under statute or at common law *ex proprio motu* to desert the diet *simpliciter* and that the appropriate course for the sheriff to have followed was to discharge the diet and fix a fresh diet of trial to proceed before another sheriff.

[7] In *Speight* v *Procurator Fiscal, Edinburgh* 14 February 2017 the relevant facts were that during a trial the complainer made a prejudicial remark which the appellant accepted was unprovoked by the Procurator Fiscal. After an adjournment the sheriff indicated his difficulty in putting the comment out of mind. The Procurator Fiscal moved to desert the complaint *pro loco et tempore* at common law. It was accepted by the appellant that this was done in the interests of justice and fairness to him. The court in *Speight* accepted that a desertion *pro loco et tempore* may be made at common law. It also recognised that section 152(2) deals with the situation where the court refuses an application by the procurator to desert *pro loco et tempore* and the prosecutor is unable, or unwilling, to proceed to trial which requires the court to desert the diet *simpliciter*. The court's analysis of the purpose and meaning of section 152 resulted in the following conclusions being reached. Sub-section (1) provides that it is competent for the court on the prosecutor's application to desert the trial at any time before the trial starts i.e. the first witness is sworn; subsection (2) provides that the court shall desert the trial *simpliciter* once the trial has commenced if it has refused an application by the prosecutor to adjourn the trial or to desert the diet *pro loco et tempore* if the prosecutor is unable or unwilling to proceed with the trial; subsection (3)

provides that where the court has deserted the diet simpliciter in the circumstances set out in sub-section (2), providing the court's decision has not been reversed on appeal, it is incompetent for the prosecutor to raise a fresh libel.

[8] We accept that *MacLeod* is authority that the court may at common law desert a case *pro loco et tempore*. In both *MacLeod* and *Speight* that power was used in the context of prejudicial comments being made, respectively in the course of the evidence, or outwith the court. The cases of *MacLeod* and *Speight* may be distinguished from the circumstances of the present case where the Crown commenced the trial notwithstanding the prospective evidential difficulties and their motion to adjourn was refused. Those circumstances are as specifically envisaged by section 152(2) which replicates the terms of section 338 A of the Criminal Procedure (Scotland) Act 1975 which expressed the statutory position when the court dealt with *MacLeod*. We read the terms of section 152 as being applicable to the circumstances before the sheriff on 22 October. It is not in dispute that evidence had been led in the original complaint; that the sheriff refused an application by the prosecutor to adjourn the trial; that there was no motion to desert the diet *pro loco et tempore*; and that the prosecutor was unable or unwilling to proceed to trial. In these circumstances the terms of statute directed the sheriff to desert the complaint *simpliciter*. Indeed, we observe that in her Note the sheriff identifies that section 152 (2) may have that meaning.

[9] Accordingly, when the motion to adjourn was made and refused after the commencement of the trial and the prosecutor made no further motion and was unable or unwilling to proceed with the trial, the case should have been deserted *simpliciter*. On the basis, therefore, that on 22 October 2018 the sheriff should have deserted *simpliciter* and section 152(3) prevented the Crown from raising a fresh libel, it was oppressive for the Crown to proceed to re-raise proceedings. As anticipated in the original minute by the

Sheriff Appeal Court this court can properly consider, taking account of all the circumstances, including the decision of the sheriff on 22 October, whether the complainer's plea in bar of trial should succeed, which for the reasons stated we find to be the case. Accordingly taking account of our conclusion on the error on the part of the sheriff on 22 October, which was excluded from the consideration of the summary sheriff, we find his decision in repelling the plea of oppression to be flawed and we shall allow the appeal and dismiss the complaint.