SHERIFF APPEAL COURT

[2019] SAC (Crim) 7
SAC/2019-000353/AP

Sheriff Principal M Stephen QC
Appeal Sheriff P Braid
Appeal Sheriff N McFadyen

OPINION OF THE COURT

delivered by APPEAL SHERIFF N McFADYEN

in CROWN BILL OF ADVOCATION
at the instance of

PROCURATOR FISCAL, DUNDEE

Complainer

against

P.H.P.

Respondent

Complainer: Kearney (sol adv), Advocate Depute; Crown Agent
Respondent: Lawrie; Gilmartin Finlay Macrae, Solicitor, Dundee

8 August 2019

Introduction

Procedure

[1] In this bill of advocation the Procurator Fiscal at Dundee brings under review the decision of the sheriff there to hold, at a diet of debate held in advance of trial being fixed, that certain evidence which the Crown proposed to adduce at trial was inadmissible. The case concerned charges of sending sexual written communications via social media to a

person whom it is alleged the respondent believed to be a child aged between 13 and 16, contrary to section 34(1) of the Sexual Offences (Scotland) Act 2009 and a similar offence in respect of a person whom he allegedly believed to be a child under 13 years, contrary to section 24(1) of the same Act.

[2] The case was continued without plea three times before, on 2 November 2018, the respondent's solicitor lodged a compatibility issue minute, a minute objecting to the Crown evidence on the basis it had been unlawfully obtained in the absence of authorisation under the Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA) and a minute intimating a preliminary plea in bar of trial on the ground of oppression. All three minutes were concerned with the ingathering of evidence against the respondent by a group of what are colloquially known as paedophile hunters. It was adult members of that group who had represented themselves online as the children with whom, it was alleged, the respondent had communicated.

[3] No plea was entered and a debate was fixed and thereafter adjourned twice before being set down and heard on 6 and 7 March 2019 as an evidential hearing and debate. The sheriff adjourned to give his decision, which was ultimately contained in a note dated 23 April 2019, but formally issued by minute of 2 May 2019 which (apparently as corrected by the sheriff) held that the evidence of two named persons (who were members of such a paedophile hunter group) was inadmissible.

[4] It is clear from the sheriff's note that both the compatibility issue minute and the minute grounded on RIPSA were repelled and this court is not directly concerned with them, although the Crown raises the question of the procedure by which they were determined. As regards the third minute, the plea in bar of trial on the basis of oppression, the sheriff concluded that the matter raised – in respect of "entrapment" of the respondent

by the two named persons – was properly one of admissibility of evidence rather than a plea in bar of trial on the basis of oppression and he stated that he approached the question in that way (paras [4] and [12]).

[5] In the bill of advocation as first lodged, the complainer maintained that the sheriff had erred in holding that the conduct of the witnesses amounted to entrapment and was inadmissible. At a procedural hearing before this court (Sheriff Principal Pyle, Appeal Sheriff A MacFadyen and Appeal Sheriff Murphy QC) on 4 June 2019 questions were raised as to the competency of the procedure adopted by the sheriff as regards ruling on admissibility and as to the competency of review by bill of advocation, standing the terms of sections 144 and 174 of the Criminal Procedure (Scotland) Act 1995. The court fixed a further procedural hearing in order to address these points, inviting the Crown to provide for the consideration of the court an amended bill of advocation and calling for written submissions on competency and relevancy.

[6] Accordingly, the hearing before us on 2 July 2019 was concerned only with the question of competency of appeal by bill of advocation, the question of allowing amendment thereof and the competency of the sheriff's decision to determine a question of admissibility of evidence in advance of trial (and indeed in advance of any plea being recorded).

[7] For present purposes it is unnecessary to go into the detail of what the sheriff decided in respect of the question of admissibility, but, having heard evidence from the witnesses from the group and from police officers, he essentially held that the scheme operated by the witnesses from the group was unlawful and fraudulent in character and in consequence of that fraud the respondent was allegedly induced to engage and continue with exchanges which were the subject of the charges and for that reason he held the evidence of the witnesses from the group to be inadmissible.

Powers of the court pre-trial

[8] Section 144 of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) governs procedure at the first diet in summary procedure. A first diet may be adjourned and may be adjourned repeatedly without the court calling upon the accused to plea (section 145) and that is normally described as continuation without plea. The accused is ultimately required to enter a plea to the charges in the complaint, subject to section 144(4) which provides

> "(4) Any objection to the competency or relevancy of a summary complaint or the proceedings thereon, or any denial that the accused is the person charged by the police with the offence shall be stated before the accused pleads to the charge or any plea is tendered on his behalf."

[9] In such an event, the court will be required to address the objection or denial before the accused is required to plea. Unless the point is conceded by the prosecutor, normally the diet will be adjourned for a debate to take place.

[10] In contrast, the equivalent procedure in solemn procedure is more detailed. There, section 79 provides, so far as relevant

> "(1) Except by leave of the court on cause shown, no preliminary plea or preliminary issue shall be made, raised or submitted in any proceedings on indictment by any party unless his intention to do so has been stated in a notice under section 71(2) or, as the case may be, 72(3) or (6)(b)(i) of this Act.
> ……
> (2) For the purposes of this section and those sections–
> (a) the following are preliminary pleas, namely–
> (i) a matter relating to the competency or relevancy of the indictment;
> (ii) an objection to the validity of the citation against a party, on the ground of any discrepancy between the record copy of the indictment and the copy served on him, or on account of any error or deficiency in such service copy or in the notice of citation; and
> (iii) a plea in bar of trial; and
> (b) the following are preliminary issues, namely–
> (i) an application for separation or conjunction of charges or trials;
> (ii) a preliminary objection under any of the provisions listed in subsection (3A);
> (iia) an application for a witness anonymity order under section 271P of this Act;
> (iii)…
> (iv) an objection by a party to the admissibility of any evidence;

> (v) an assertion by a party that there are documents the truth of the contents of which ought to be admitted, or that there is any other matter which in his view ought to be agreed; and
> (vi) any other point raised by a party, as regards any matter not mentioned in sub-paragraphs (i) to (v) above, which could in his opinion be resolved with advantage before the trial".

[11] In sheriff and jury procedure, in terms of section 71, notice of such objections is to be given two days before the first diet (section 71(2)), or, in the case of admissibility of evidence, with leave at the first diet (section 71(2YA)) and may be disposed of at the first diet, or an adjourned further diet, or, in the event of a late objection to admissibility, the court may appoint it to be disposed of at a diet before the trial or at the trial diet (section 71(2ZA)). Section 79(4) makes similar provision as to disposal of non-admissibility objections.

[12] In contrast to solemn procedure, therefore, where there is specific provision for intimation and handling of pleas in bar of trial and objections to admissibility of evidence in advance of trial (and indeed there is a differentiation between preliminary pleas and preliminary issues), in summary procedure section 144 (so far as relevant) only provides for objection to the competency or relevancy of a summary complaint or the proceedings thereon (subsection (4)) at a first diet (or adjourned first diet: section 145).

Competency of advocation

[13] In her written submissions Ms Lawrie, for the respondent, argued that advocation was not competent, as the objection raised in the relevant minute of the respondent was a preliminary plea in terms of section 144(4). The appeal should have been raised under section 174(1). In the course of oral submissions, however, we understood her to accept that if the Crown was arguing that, in holding the evidence to be inadmissible, the sheriff had not in fact determined a preliminary plea then they could proceed by bill of advocation; if this court concluded that the sheriff had reached his decision in the determination of a

preliminary issue, advocation would be incompetent and the appeal would require to be refused. We think that is the correct approach; otherwise the matter would become somewhat circular. The Crown has nailed its colours to competency and must take the consequences of that: but they are entitled to make the argument and can only do so by advocation.

Amendment of the bill of advocation

[14] The original bill of advocation did not directly address the competency of the sheriff's decision, but it was at the invitation of the court that the Crown lodged an amended copy. The amendment consisted of the insertion of a new article of condescendence, article 1, and the renumbering of the remaining articles. The new article 1 directly challenged the sheriff's fixing of an evidential hearing prior to the trial to determine the issues arising in the various preliminary minutes and in his order as regards admissibility following that hearing.

[15] In support of the court allowing amendment, the advocate depute referred us to *Walker* v *Emslie* (1899) 3 Adam 102 (a bill of suspension), in which the High Court allowed the suspender to add a ground at the bar of the court. Since procedure in bills of suspension and advocation follows the same course (Renton and Brown's Criminal Procedure in Scotland, 6th edition, 33-21) it should be equally competent in advocation to raise a new ground. *Walker* v *Emslie* would suggest there is no requirement to lodge an amended bill, but such a bill could only assist the court.

[16] In her written submissions, Miss Lawrie argued that amendment should not be allowed because there was no error in the procedure which was to determine a plea in bar of trial and advocation was itself incompetent. Again, we understood her position in submissions to be essentially as it was in relation to advocation itself.

[17] We have no difficulty in accepting that the court can properly be moved to allow amendment of a bill of advocation. The procedure adopted appears to be *a fortiori* of *Walker* v *Emslie*, it was at the court's invitation and it enables the court to focus properly on the question of competency, as opposed to the merits, of the sheriff's decision on admissibility. It is, in any event, *pars judicis* to note matters of competency (see, eg *SJS* v *HM Advocate* [2015] HCJAC 64), although, where possible, the more convenient course is for these to be properly focused in the relevant pleadings.

Reference to the High Court

[18] It was accepted that reference of a point of law to the High Court under section 175A was incompetent, since that is only permitted in appeals under Part X of the Act, whereas advocation is (for present purposes) not an appeal under that Part.

Competency of the sheriff's ruling

Submissions

Crown

[19] The advocate depute submitted that, in contrast with solemn procedure, there is in summary procedure no provision for holding a separate evidential hearing to deal with such preliminary pleas and issues as are specified in section 79 of the 1995 Act for solemn cases. Only preliminary pleas and challenges to the identification of the accused as the person charged by the police (under section 144(4)) or fitness to plead (in terms of section 52) require to be intimated and determined prior to the plea being determined. In any event, the court may consider that a plea in bar cannot be determined until after the trial: *HM Advocate* v *ARK and AR* [2013] HCJAC 107, 2013 SCCR 549. The High Court had considered entrapment in *Jones* v *HM Advocate* [2009] HCJAC 86, [2010 JC 255 and the question of an overall assessment of the evidence. It was accepted that the sheriff was entitled to consider

that he required to hear evidence in relation to the "entrapment minute" (the plea in bar of trial on the basis of oppression), but the only available diet for that purpose in summary procedure was the trial diet. That was also the position in relation to a compatibility issue minute under section 288ZA.

[20] Objection to admissibility of evidence was properly taken at trial, by timeous objection, followed by trial within a trial, if requested by the defence, or hearing evidence under reservation: Renton and Brown 20-24, *Thompson* v *Crowe* 2000 JC 173, *Britz* v *HM Advocate* [2006] HCJAC 90, 2007 JC 75. This court had held that where the issue was admissibility of evidence, the holding of a hearing on a plea to the competency under section 144(4) was "superfluous" and "irregular" and such matters should be determined at the trial diet: *Warwick* v *Harvie* [2016] SAC (Crim) 13, 2016 SCCR 261 at [10] and [11]. As soon as the sheriff identified that he would not determine the preliminary minutes without hearing evidence he should have continued all three matters to trial. The sheriff himself had accepted, in para [12] of his note that, the matter being exclusively one of admissibility, it should properly be determined at trial, by a trial within a trial and indeed that was the approach that he would take "in any similar case in the future".

[21] It appeared that the sheriff had followed the approach of Lord Carloway in *Jones* at [87] in converting a plea in bar of trial to consideration of exclusion of evidence as unfair, but that was in the context of solemn procedure and was contained in a dissenting opinion. Nonetheless, the majority of the court in *Jones* appeared to accept that the point (as regards entrapment) may be taken as an objection to admissibility. The sheriff was arguably wrong in "converting" the plea in bar to a matter of admissibility, but he should in any event have continued all perceived matters of admissibility to trial.

Respondent

[22] Ms Lawrie submitted that the preliminary plea was properly raised as such and the fact that the sheriff ultimately determined the matter on the basis of admissibility did not prevent it being treated as a preliminary plea which required to be determined before the respondent was called upon to plead; that starting point determined the procedure to be followed thereafter.

[23] She accepted that section 144 did not expressly refer to pleas in bar of trial, but submitted that such a plea still fell to be dealt with under that section. That was supported by the annotations to section 144 in Renton and Brown's Criminal Procedure Legislation, A4-311, that

> "Before any plea is tendered any plea in bar, plea to the competency or relevancy…. should be stated (subs.(4))…"

[24] Support for that approach was also found in the Stair Memorial Encyclopaedia, Criminal Procedure (2nd Reissue), 3. Summary Procedure, at para 247:

> "A preliminary plea to the competency or relevancy of the complaint or the proceedings, including pleas in bar of trial and a denial that the accused was the person charged by the police with an offence, must be stated before any other plea, normally at the first calling".

It was competent to hear evidence in determining a preliminary plea and that was recognised in Renton and Brown, 20-19, giving the example of determining the date of the offence.

[25] There was no error in the procedure adopted by the sheriff in hearing evidence and legal submissions and determining the pleas. Although it was accepted that he had ultimately concluded that the plea in bar of trial was not well founded and had indicated that in future he would deal with the matter by trial within a trial, that was a conclusion only reached at the end of the process.

[26] The case had been correctly approached on the basis of a plea in bar of trial and, if that was so, the sheriff was entitled to determine the matter prior to the plea being recorded and there was no incompetency or irregularity in the procedure followed. She referred us to *Jones* at [96], per Lord Menzies.

[27] Even if the procedure followed by the sheriff was incompetent, it would be expedient for us to overlook that and determine the merits of the substantive arguments, given that evidence had been heard and would require to be heard again at trial if we passed the bill. This court had taken such an approach in *Warwick* v *Harvie.* Despite holding that there had been a similar irregularity the court dealt with the appeal, observing

> "In summary proceedings, especially proceedings where two trial diets have been lost due to lack of court time, care must be taken to avoid superfluous procedure which merely serves to duplicate and protract these proceedings which should be summary in nature".

Decision

[28] The compatibility issue minute and RIPSA minute were not before us or indeed made available to us and we are thus reluctant to be drawn into the procedure adopted as regards these minutes. The time at which a compatibility issue minute will be determined will depend very much on its subject matter and there is nothing in section 144 to prevent the court continuing consideration of any minute to trial, unless it is a matter which requires to be determined on a preliminary basis. An issue as to time bar, for example, will be one which can and should be resolved without calling on the accused to plead guilty, but it is also one which may require the court to hear evidence – for example, where the grant of a warrant has interrupted time bar but it is claimed there has been unreasonable delay in the execution of the warrant (1995 Act, section 136(3)). That example alone demonstrates that the Crown is in error in submitting that the only diet at which evidence can be heard is the

trial diet. It is, however, correct that in summary, as opposed to solemn procedure there is no specific mechanism for determining issues of admissibility before trial. The rationale of such a procedure in solemn cases is quite different: in particular there is value in juries not being unnecessarily inconvenienced by the delay of debates, especially those involving trial within a trial.

[29] It is true that section 144 does not use the expression "plea in bar of trial", but the concept of a plea in bar of trial is a familiar one in summary procedure and we consider that it readily comes within the scope of the expression "proceedings thereon" in the phrase

> "Any objection to the competency or relevancy of a summary complaint or the proceedings thereon".

On the other hand, an objection to admissibility is not properly an objection to the proceedings and it would be artificial and unnecessary to treat it as such. It is instructive that in solemn procedure, which provides explicitly for pleas in bar, such an objection falls to be dealt with as a preliminary issue, which of course is not a concept known to summary procedure. It is artificial to treat an objection to admissibility as an objection to competency of the proceedings, because it only goes to exclusion of particular evidence, which may or may not be practically conclusive of matters in any particular case. It is unnecessary, because there is an established procedure for making timeous objection at trial and hearing evidence at trial within a trial or under reservation.

[30] All of this demonstrates, as the sheriff now recognises, that it was inappropriate to determine the issue on a preliminary basis. Whether that extended to the determination of the other minutes is not something we are in a position to say, but if, as it seems, they largely turned on consideration of the same evidence it is likely to have been more appropriate to continue them to trial. As far as concerns what the sheriff in our view ultimately treated as

an objection to admissibility, we conclude that it was inappropriate and incompetent to resolve that on a preliminary basis, just as this court concluded in *Warwick* v *Harvie*.

[31] In that case this court was clear about the incompetency of using section 144(1) to determine an issue of admissibility. The court was, however, prepared to take the pragmatic approach of determining the merits of the appeal. There is a superficial attraction in doing that once more, but if the appeal is successful the result would be the evidence being heard again.

[32] We have not heard submissions on the merits of the ruling on admissibility and do not wish to offer any particular view on that at this stage, since there will require to be further procedure, including very possibly a trial, but, that said, if it had been clear to us that there was no arguable case for the sheriff's decision on the merits being wrong, we would have been prepared to follow the pragmatic approach taken in *Warwick* v *Harvie* and we would have refused to pass the bill of advocation. We are not so satisfied and it follows that the correct disposal is to pass the bill and remit to another sheriff to proceed as accords.