APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 1
HCA/2021/280/XC

Lord Justice General
Lord Menzies
Lord Malcolm

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL UNDER SECTION 65(8) OF
THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

HER MAJESTY'S ADVOCATE

Appellant

against

NEIL THOMAS GEORGE GRAHAM

Respondent

Appellant: L Ewing QC AD; the Crown Agent
Respondent: A Ogg (sol adv); Paterson Bell

17 September 2021

Introduction

[1] This is an appeal against the sheriff's refusal to extend the 12 month time limit, within which a person who has appeared on petition must be brought to trial, under section 65(3)(b) of the Criminal Procedure (Scotland) Act 1995.

The history given to the Sheriff

[2] The respondent appeared on petition on 1 October 2019. The 12 month time bar would have been due to expire a year later but for the intervention of the Coronavirus (Scotland) Act 2020, which extended it by six months to 1 April 2021.

[3] Meantime, on 11 August 2020, the respondent was cited to a First Diet on 15 September 2020 on an indictment containing two charges involving sexual offences occurring sometime in 2011 and in either 2016 or 2017. The libel was of the digital, vaginal penetration of two complainers, namely: ALW, who was under the age of 13 at the time, and TS.

[4] The First Diet was postponed, for COVID related reasons, until 8 December 2020, 9 February 2021 and 16 March 2021. On the latter date, a trial was fixed for 20 July, with the 12 month period being extended without opposition until 23 July. The trial was one of two "priority" trials which were set down for a four day sitting commencing on Tuesday 20 July; it being a local public holiday on the Monday. Three other trials, including one multiple accused, were set down for the same sitting.

[5] On 20 July, the complainer, TS, failed to attend. She is an essential witness in respect of both charges; a sufficiency of evidence deriving solely from the application of mutual corroboration. The procurator fiscal depute decided to commence the other priority trial, which was one of "serious domestic assault". Late in the afternoon of Friday 23 July, he moved the sheriff to adjourn the respondent's trial diet until 6 September and to extend the 12 month period to 10 September.

[6] The history of the citation of TS, as presented to the sheriff, was a convoluted and partially inaccurate one. The sheriff had gained the impression that the PFD had been unaware that the respondent's trial was a priority one for the sitting until the preceding

Friday; a matter which was not, according to the transcript of proceedings, discussed at the hearing. The PFD had told the sheriff that he had not sought a warrant for the witness's arrest on becoming aware of her failure to appear on 20 July because he did not then have the execution of the personal citation which had only been carried out by the police on the previous Friday (16 July). The PFD reported that TS was a reluctant witness. The PFD produced an execution of service upon which was noted "Hostile – stated they won't attend". The sheriff was under the impression that the PFD had said that the Crown's system for ensuring the attendance of witnesses was defective, although that too is not immediately obvious from the transcript.

[7] The sheriff was concerned that the PFD did not appear to be aware of the two stage test in *HM Advocate* v *Swift* 1984 SCCR 216 and *Early* v *HM Advocate* 2007 JC 50. He applied that test. The first stage was to determine whether the Crown had shown a reason which might be sufficient to justify an extension of time. The sheriff was not satisfied that they had. The failure to commence the trial timeously could have been avoided by the Crown. When the Crown had requested a trial diet to be fixed, they were assuring the court that they were ready for trial. They should therefore already have engaged with their witnesses to see if they would be available to attend. There had been no explanation of why the complainer had not been cited until the Friday before the trial was due to start on the Tuesday.

[8] Had the sheriff reached the second stage of the test, he would have exercised his discretion in favour of refusing an extension. He would have had regard not only to the serious nature of the charges, but also to the foremost consideration that the respondent ought not to be deprived of his important right under the prevention of delay regime. The Crown had paid little heed to that element and had not properly understood that the case

was a priority one because of the time limit, which was about to expire. Exercising his discretion in favour of the Crown would have amounted to condoning their approach and the wider interests of justice would not have been served by doing so.

A more expansive history

[9] At the hearing of the appeal, the Crown explained that, upon the trial diet being fixed in March, automatic postal citation of the witnesses had been attempted. In the case of TS, the citation was not effective. This in turn had generated an automatic request to the police to cite her personally. This ought to have been carried out and the execution of citation returned to the Procurator Fiscal by 5 July. Either on 2 June or 2 July, the police had made efforts to cite TS, but it transpired that she had moved addresses. On 16 July, she was traced to a new address and personally cited. She told that police that she did not intend to attend the trial because of "repercussions". This information was emailed to the Procurator Fiscal but, for unexplained reasons, it was said that an execution of service was not available. In fact, it had been sent to the Procurator Fiscal and could have been accessed from 19 July.

[10] Meantime, the Crown had been making attempts to advise TS of the progress of the case. Some six letters had been sent to her by the Crown's Victim Information and Advice department. The first of these had been when the respondent had appeared on petition. It told TS about VIA and asked for a telephone number. On 12 December 2019 VIA had tried to call TS without success and again asked for a phone number. After the First Diet in December 2020 a further letter was sent advising TS of what had occurred. The same happened after the continued First Diet in February 2021, when a phone number was again requested. On 18 March, VIA wrote to TS to tell her of the trial diet in July 2021. She was

told to contact VIA if she had had any concerns about her attendance as a witness. She had not, when requested, attended for precognition. At that stage the prosecution were relying upon a statement which she had given to the police. The police had visited her on 15 July 2020. A further statement had been taken from her. This indicated that she was continuing to co-operate with the prosecution.

Submissions

[11] The Crown's appeal proceeded upon the two stage test in *Swift* and *Early*. Until receipt of the sheriff's report, the Crown had been under the erroneous impression that the sheriff had accepted that the first stage had been met and that only the second stage required to be addressed. On being disabused of this, and under reference to the greater detail of the history of the case, the Crown explained that the first stage of the test had been met. The reason why the trial had not commenced within the 12 month time bar, as extended, was TS's failure to appear, having been duly cited personally by the police. That was a basis upon which the sheriff would have been entitled to excuse the Crown's failure to commence the trial timeously (*Neil* v *HM Advocate* 2010 SCCR 7).

[12] The PFD's decision to commence the other trial had been a reasonable use of court time. Even if the PFD had been aware of the execution of service on 20 July, he would not have moved for a warrant to arrest the complainer in a sexual offences prosecution. Rather, attempts would have been made to ascertain the reason for the complainer's reluctance and to overcome any difficulties. It would not have been reasonable to carry out these efforts and leave the courtroom empty until the outcome was known.

[13] Insufficient weight had been given to the serious nature of the charges; especially the first, which involved an 8 year old child. The extension sought was moderate (see *HM*

Advocate v *Richards* 2010 SCCR 843 at para [21]) and necessary. There was no real prejudice to the respondent in the event of an extension being granted. Although the length of time since the commencement of proceedings was significant, much of that had been attributable to the interruption of court business caused by the COVID 19 pandemic (on which see *CS* v *HM Advocate* 2021 SCCR 39 at paras [21] and [22]).

[14] The respondent argued that the system employed by the Crown to alert them to witness difficulties was not effective nor was the system to ensure that witnesses attended court. There was no indication that the Procurator Fiscal had spoken to the complainer at any time from the date of the respondent's appearance on petition and her citation. When the Crown had said that at the continued First Diet they were ready for trial, all this seemed to mean was that statements had been taken from the witnesses. The Crown were unable to say when instructions to cite the complainer personally had been sent or what efforts to do so had been made. The Crown knew that a problem existed when TS had been cited. Further contact with her could have been attempted or a warrant for her arrest could have been obtained. In starting another trial, the PFD knew that he would have to seek a further extension. The reasons for the trial not proceeding could have been avoided.

Decision

[15] In *Uruk* v *HM Advocate* 2014 SCCR 369 the court (LJC (Carloway) at para [10] *et seq*) was at pains to emphasise that much of the *dicta* on extension of time for the commencement of trials had been in cases which had been decided before both the re-organisation of the courts' administration in the Judiciary and Courts (Scotland) Act 2008 and the Bonomy Report reforms which were incorporated into the 1995 Act by the Criminal Procedure

(Amendment) Act 2004. In that era, the fixing of trial diets was in the hands of the Crown, whereas today, it is in those of the court itself.

[16] The court in *Uruk* also sought (at para [15]) to stress that many of the cases are fact sensitive, albeit that they were generally intended to ensure that the Crown had sufficient systems in place to ensure that an accused person was brought to trial within the required period. Doing so was, and is, an important protection for accused persons. In *HM Advocate* v *Swift* 1984 SCCR 216 the problem was that the Crown had failed to serve the indictment on the accused; hence the case could not proceed to trial at all. In *Early* v *HM Advocate* 2007 JC 50 the Crown had failed to specify the locus in the charges on the indictment. Neither case is similar to that of the respondent. He had been served with an indictment libelling relevant charges. In *Early* the Lord Justice Clerk (Gill) did set out what he described (at para [5]) as the two stage test derived from *Swift*, *viz*: first, has the Crown shown a reason that might be sufficient to justify an extension; and, secondly, should the extension be granted having regard to all the circumstances.

[17] The reason for the respondent's trial not going ahead as scheduled was a simple one. A complainer, who was an essential witness for both charges, had failed to attend court having been duly personally cited to do so. The Crown had attempted to serve her by post once a trial diet had been allocated. This failed, possibly because, at least in part, she had moved address. She may have been avoiding citation thereafter, in that if she had received the letters, she had not forwarded any new address or a contact number to Victim Information and Advice. It may be that the Crown should have discovered her reluctance to attend by taking greater steps than repeatedly writing to the complainer and receiving no reply. In a perfect system, that might have occurred and the Crown could have taken earlier steps to encourage the complainer to attend court. As matters stood, it was only on 16 July

that the complainer was located by the police and apparently told them of her intention not to attend court.

[18] Once the PFD had become aware of the situation on 20 July, at the start of the sitting, a number of different courses could have been taken. He could have started the trial and proceeded with the other witnesses pending further efforts being made to persuade TS to come to court. Those might have borne fruit and no problem would have arisen. The risk was that, if the complainer could not be found or persuaded, he would probably have had to at least seek to desert *pro loco et tempore* in circumstances in which the other complainer had given her evidence. There could be no guarantee that such desertion would have been permitted by the court. The PFD could have asked the sheriff to adjourn the trial at that (or a later) stage in the sitting on the basis of non-appearance of the complainer. The fact that he thought that he could not demonstrate that citation had taken place may have persuaded him not to do so, even if there was no question of seeking a warrant to arrest the complainer. The third option, which was the one he took, was basically to do nothing about the problem immediately, proceed with the other priority trial and seek to adjourn the trial diet at the end of the sitting. That was a high risk strategy and one which, mainly because of the paucity of the information which he was able to provide to the sheriff late on the Friday afternoon, ultimately failed. Even then, the sheriff having refused the motion, the PFD could have attempted to commence the trial, no doubt causing disruption to other scheduled business, if in anticipation of an unfavourable decision, a jury ballot had been possible. Presumably it was not.

[19] Nevertheless, the Crown had not failed to cite the witness. She ought to have attended court. The facts which are now known reveal that although, with hindsight, the Crown might have got to grips with the situation earlier, their failure to do so cannot

reasonably be described as a fault of such magnitude as results in the cause of the trial not proceeding being attributed to the Crown rather than the complainer. Sufficient reason has been shown as might justify the grant of an extension. Looking thereafter at all the circumstances, there had already been a significant delay in proceeding to trial because of the lockdown created by the COVID pandemic. The Crown were seeking only a short extension of 6 weeks or thereby. Refusing an extension would affect not only the prosecution in relation to the alleged offences against TS but also those involving the other complainer. Recognising the importance of the provisions in relation to the prevention of delays in trials, the interests of justice required that a short adjournment be granted. The court will therefore allow the appeal, extend the 12 month time period and remit the case to a continued First Diet.

Postscript

[20] This case highlights the problems which can, and not infrequently do, occur at the stage of a trial diet in cases where the complainer may be vulnerable for one reason or another and hence reluctant to attend court. The execution of a warrant to arrest a complainer in a sexual offences case should not be regarded as a satisfactory solution. The situation which arose here would have been avoided if steps had been taken to take the evidence of the complainer on commission (1995 Act, ss 271(1), 271A(1), 271H(1) and 271I). Doing so would have flushed out any problems with the attendance of the complainer. If the commission had produced evidence implicating the respondent, the trial could then

have proceeded. If it did not, no doubt the Crown would have been obliged to take other steps in advance of the trial diet. It may be that such steps can now be taken.