APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 9
HCA/2022/251/XC

Lord Justice General
Lord Pentland
Lady Wise

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

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

by

PHILIP MICHAEL BARR

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Findlater; Adams Whyte
Respondent: Gillespie QC AD; the Crown Agent

28 July 2022

Introduction

[1] This is an appeal against a sheriff's decision to extend the twelve month time limit for commencing a trial under section 65(3)(b) of the Criminal Procedure (Scotland) Act 1995. Such decisions are normally fact specific and therefore unlikely to raise issues that are susceptible to appellate review. However, an issue of principle has arisen in relation to a

continued reliance by both the sheriff and the parties on *dicta* in *Swift* v *HM Advocate* 1984 JC 83 and *Early* v *HM Advocate* 2007 JC 50 coupled with an apparent disregard of the more modern approach in *HM Advocate* v *Graham* 2022 SCCR 68 and *Uruk* v *HM Advocate* 2014 SCCR 369. Greater clarity is required in order to assist first instance courts with the appropriate modern approach.

Facts

[2] The appellant was indicted to a First Diet on 29 April 2021 in the sheriff court at Edinburgh. He had earlier appeared on petition on 15 July 2020. The principal charge libelled that, between January and July 2020, he engaged in an abusive course of conduct towards his partner, KM, contrary to section 1 of the Domestic Abuse (Scotland) Act 2018. The libel details a multiplicity of threats, assaults and general coercive activity, some to injury, of a relatively serious nature. The second charge is a breach of a bail condition not to approach the complainer.

[3] The First Diet was continued administratively to 17 June 2021 and then 29 July, because of the Covid pandemic. On the latter date it was continued, on the unopposed motion of the appellant, to 26 August "to ascertain whether it was possible to resolve the case". The case was not resolved. A trial diet was fixed for 24 January 2022. The twelve month time bar under section 65 of the 1995 Act, which had been 15 January 2022 (see the Coronavirus (Scotland) Act 2020, schedule 4), was extended to 28 January. When the trial diet called on 27 January, it was adjourned, on the opposed motion of the Crown, until 23 May, on the basis that the complainer, who had been cited, had not appeared. The time bar was extended until 27 May. The sheriff was informed that the police had told the Crown that the complainer no longer lived at the address which she had provided. The police had

spoken to her on the phone. She had refused to disclose her new address and said that she would not be attending court. The procurator fiscal depute applied for, and was granted, a warrant for her arrest.

[4] When the trial diet called in May, the complainer was again absent. The Crown sought a further adjournment and another extension of the time bar. A different PFD explained that it was normal for any arrest warrant to be passed from the court to the Crown's administrative staff and thence to the police for execution. That had not happened. The warrant had not been received by the Crown. The Crown attributed this to the fault of a clerk of court. The appellant's agent advised the sheriff that he had been told by January's PFD that she had spoken to the complainer and had warned her of her potential arrest, should she not attend court. The agent had been told by the PFD that the Crown had decided not to execute the warrant, but planned to re-cite the complainer for the trial in May. The sheriff understood that she had not been cited. This was a misunderstanding (see below).

[5] The sheriff adjourned the trial to 8 August, with a continued First Diet fixed for 30 May to enable the Crown to respond to the defence agent's account of events. On that date the new PFD confirmed that the earlier PDF had been told of the complainer's intention not to come to court; hence the application for the warrant in January. Had the warrant been passed to the Crown, the new PFD said that it would have been executed.

The sheriff's decision

[6] For the FD on 30 May, the sheriff had asked to be addressed specifically on what has become known as the two stage "test" in *Swift* v *HM Advocate*. The first question was whether the Crown had shown a sufficient reason to justify an extension. The second was

whether, if they had, the court should grant an extension in all the circumstances. The gravity of any error by the Crown was one relevant factor (*Early* v *HM Advocate*). Having heard parties, the sheriff extended the time bar until 12 August. He considered that it had not been unreasonable for the Crown to have considered that the warrant would have been executed in normal course. The court had not passed the warrant to the Crown. What had occurred was an "administrative mishap", rather than an error of the Crown. The Crown had erred, however, in failing to conduct checks in advance of the trial to ensure that the police were taking active steps to execute the warrant. The error had not been either a serious or a systematic one. The first stage of the test in *Swift* had been met. The second stage was also passed having regard to the seriousness of the charges and the proximity of the trial diet. The prejudice to the appellant was counter-balanced by the public interest.

Additional material

[7] It transpired that, prior to the trial diet in May 2022, efforts had been made to re-cite the complainer. Although the details of exactly what steps had been taken remain unclear, there must have been an initial attempt at postal citation, because the police were subsequently instructed to execute a personal citation, presumably because postal service had failed. On 19 May the police had gone to an address where the complainer was apparently living. They gave the citation to a sister-in-law of the complainer. On 24 May, the sister-in-law told the police that she had given the citation to the complainer.

[8] At the hearing of the appeal, the Advocate depute agreed with a comment from the court that, in light of the views on the arresting of complainers in *Graham* v *HM Advocate* (at para [20]), the decision to seek a warrant for the complainer's arrest at the January diet was "mystifying". The Crown Office Victims and Witness Manual provides:

> "35. Witness Warrants
>
> There may still be cases where despite the various efforts and support mechanisms outlined above, the victim refuses to attend court. It is recognised that taking warrants for such victims may be counter-productive. Therefore, careful consideration must be given to whether it is appropriate to seek a witness warrant in these cases. Each case should be considered on its own merits and it is important to ascertain if the victim has had any contact with VIA[1]. Where possible this should be done before the warrant is sought, and in all cases before the warrant is executed.
>
> Prior to taking a decision in relation to the execution of witness warrants, VIA should be asked to make contact with the victim to ascertain whether there was a reason for non attendance. VIA should also contact any specialist domestic abuse support or advocacy service with whom the victim is engaging to ensure that they have an opportunity to submit any relevant information that they may have in relation to the non attendance of the victim. Where no good reason is given for the failure to attend, then an opportunity to answer the warrant voluntarily at an arranged diet should be offered.
>
> Where, exceptionally, a decision is taken to execute a witness warrant this should be approved by a senior member of staff (Principal Depute or above)."

The extent to which the Victim Information and Advice service had had contact with the complainer, and with what effect, was not known. VIA would presumably have sent various letters to the complainer in an attempt to keep her up to date and duly informed of the progress of the case. The Crown understood that the complainer and appellant continued to be in a "relationship".

Submissions

[9] The Note of Appeal contends that the grant of the extension in May 2022 was "unreasonable". No sufficient reason had been advanced to satisfy the first stage of the test in *Swift*. That test had been affirmed in *Graham*, as had the *dicta* in *Early*. The Crown had understood that the only way of securing the complainer's attendance was by executing the warrant. They had a warrant in January but had done nothing to check what happened with it between then and the trial diet some four months later. The Crown, as an organisation,

[1] The Victim Information and Advice service

must have known that they had not received the warrant and that it had never been passed to the police for execution.

[10] The Crown submitted that the sheriff had applied the correct test. The respondent recognised that the Crown were at fault in failing to check whether the warrant had been executed, but the warrant ought not to have been applied for in the first place. More effective steps could and should have been taken to secure the complainer's engagement with the proceedings, which had fluctuated over time. There was no positive culpability of the type described in *Early*, but rather an assumption that the process, which would normally have flowed from the grant of a warrant, would have taken place. Fault also lay with the complainer in failing to attend the trial diets, to which she had been cited.

Decision

[11] The twelve month time limit on the commencement of trials in section 65 of the Criminal Procedure (Scotland) Act 1995 is, in comparison to those ancient and embedded provisions applicable to persons in custody (*ibid* s 65(4)), a relatively recent statutory innovation. It was introduced by the Criminal Justice (Scotland) Act 1980 (s 14(1)). The language of section 65(3) gives the judge or sheriff power to extend the period simply "on cause shown". Such language is not, in other contexts, normally regarded as imposing a high test, such as that applicable in a custody case (on which see *HM Advocate* v *MacTavish* 1974 JC 19), or one with more than one stage. Nevertheless, this is what has been taken from *HM Advocate* v *Swift* 1984 JC 83, in which *MacTavish* was used as an exemplar, and has been explained in *Early* v *HM Advocate* 2007 JC 50.

[12] In *HM Advocate* v *Graham* 2022 SCCR 68, the court (LJG (Carloway), delivering the opinion of the court, at para [15] *et seq*), explained, under reference to *Uruk* v *HM Advocate*

2014 SCCR 369 (LJC (Carloway), delivering the opinion of the court at para [10]), that the *dicta* in *Swift* and *Early* must be read according to the context of, first, the criminal justice system in place at the time, in comparison to that in the current era, and, secondly, their facts.

[13] At the time of *Swift*, control of the progress of cases was almost exclusively in the hands of the Crown; an arm of the executive. The availability of court diets was, at least in part, under the control of the Scottish Courts Administration, which was then another arm of the executive. The courts' concern in the early 1980s and beyond was to ensure that the Government was funding the criminal justice system at a level which ensured that the twelve month time bar operated in practice. That was at a time when fault on the part of the Crown, in prosecuting solemn cases timeously when an accused was in custody, could of itself result in an accused tholing his assize. No doubt that may still occur in some situations. The era was one in which the adjournment of trial diets was a rarity and heavily discouraged. The numbers of solemn trials were low in comparison to today. This was all before the increase in prosecutions, first, for concern in the supply of Class A drugs, notably heroin and cocaine, and, secondly, for sexual, and especially historical sexual, offences.

[14] The situation in relation to the adjournment of trials had changed by the time of *Early*. By then the overloading of trial circuits by the Crown and the consequent churn of trial diets, had become a significant problem. The Bonomy Report (*Improving Practice*: 2002 etc.) led to the changes introduced by the Criminal Procedure (Amendment) (Scotland) Act 2004. This in turn led to the court beginning to take over what had formerly been the Crown's role in progressing cases once the indictment, citing an accused to a Preliminary Hearing in the High Court (1995 Act s 72 as substituted in 2004) or a First Diet in the sheriff court, (1995 Act s 71B inserted in 2016), had been served. The provision of funding to

accommodate trial diets remained a concern, in so far as it was controlled by the executive until the Judiciary and Courts (Scotland) Act 2008 established (s 60) the Scottish Courts Service (now the Scottish Courts and Tribunals Service) as a judicially led body corporate. Thereafter it was for that body to provide the necessary funding to accommodate trial diets, albeit within a Parliamentary approved budget. In short, the need for judicial scrutiny of executive funding and control over the progress of individual prosecutions, from the point at which the indictment was served, has changed since not only *Swift* but also *Early*.

[15] The idea that a sexual offences trial would not proceed, and the charge deserted, because of the non-appearance of a vulnerable complainer, was only beginning to be dispelled in the wake of the notorious "Glasgow Rape Case" (see *X* v *Sweeney* 1982 SCCR 161, LJG (Emslie) at 171). Since then, the measures which have been put in place to secure the testimony of vulnerable witnesses, rather than to discontinue the prosecutions prematurely, have been considerable (1995 Act, ss 271 *et seq*, as substituted/amended by the Vulnerable Witnesses (Scotland) Act 2004 and the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019).

[16] The introduction of the twelve month limit, with its provision for an extension on cause shown, must now be viewed in light of the incorporation of the reasonable time requirement in Article 6.1 of the European Convention into domestic law. Having regard to the jurisprudence on the interaction between the reasonable time requirement and the general right to a fair trial (*Spiers* v *Ruddy* 2009 SC (PC) 1), it may often be difficult to resist an application for an extension of the twelve month time bar when the trial remains due to start within what would be regarded as a reasonable time under the Convention, where a reason for an extension has been proffered and no additional prejudice to the accused is demonstrated.

[17] In relation to the particular facts in *Swift* and *Early, Swift* was a fraud case in which the Crown failed to serve the indictment upon the accused in time to hold a trial within the one year period. That was the critical feature. The court (LJG (Emslie) at 88) did not purport to lay down a test, but it did say that in such cases it should ask, first, whether a sufficient reason for an extension had been shown and, secondly, whether that extension should be granted in all the circumstances. Whether these were ever intended to be two separate questions to be applied as if encased in hermetically sealed compartments may be doubted.

[18] The problem in *Early* was a failure (a clear drafting error by the Crown) to libel a *locus* in certain lewd and libidinous behaviour charges. *Early* (LJC (Gill) at para [5]) described what had been said in *Swift* as involving a two stage test. The reason why a Full Bench was convened in *Early* may not be difficult to surmise. However, the Lord Justice Clerk went on to observe (at para [20]) that:

> "Over the years various members of this court have expressed misgivings about the decision in *HM Advocate* v *Swift* and have questioned whether it is necessary or appropriate that a simple provision that the court 'may on cause shown' grant an extension should require the court to apply the rigid two-stage test that I have described. These misgivings were alluded to, but not discussed, by the court in *Ellis* v *HM Advocate* [2001 JC 115] (para 16). It was open to any of the parties in these appeals to raise the point; but the Advocate depute and counsel for the appellants in both this case and *Fleming* v *HM Advocate* [[2006] HCJAC 64] have based their submissions on the view that *HM Advocate* v *Swift* was rightly decided. In the absence of submissions to the contrary, I shall apply the *Swift* test in my consideration of this appeal."

Early did not therefore affirm *Swift*: it proceeded on a concession that a two stage test should be applied. The appeal against the extension of time in *Early* was refused.

[19] Neither *Swift* nor *Early* are about the adjournment of trial diets and consequent extensions of time to accommodate a new diet. Both involved faults in the service of the indictment or the content of the libel. The *dicta* in them should not readily be transposed

into different situations. In particular they should not be applied to cases, such as the present, in which, in sharp contrast to *Swift* and *Early*, the Crown have brought the case to a trial diet within the twelve month limit.

[20] The Crown indicted this case timeously; that is within twelve months from the first appearance on petition (1995 Act, s 65(1)(b)). Thereafter, control of the case passed to the court. The trial was fixed for January 2022 and the complainer was duly cited. The reason that the trial did not go ahead was not because of some serious, systematic fault on the part of the Crown, but because the complainer did not respond to her citation. This is not an unusual situation in this type of case.

[21] A new trial diet was fixed. The principal reason why it did not go ahead was again the absence of the complainer. It would seem that she was aware of the diet and had been given a citation for it too. It is said that the complainer's absence was the fault of the Crown, in the sense that they ought to have ensured that she was arrested under warrant of the court. This is unrealistic. It runs entirely contrary to the modern understanding of the inherent vulnerability of complainers in sexual and domestic abuse cases and the suitably cautious approach of the Crown Manual (above). It is quite inappropriate in sexual and domestic abuse cases for complainers, who may be regarded as vulnerable, to be arrested and thus kept in custody pending liberation at a court appearance, or perhaps even until the trial diet, thus adding to any trauma which they might have already sustained. The appropriate course is, at least initially, to persuade the complainer to attend the trial, no doubt by, amongst other things, putting in place vulnerable witness measures. Better still, as was made clear in *Graham* (at para [20]), steps should be taken to have the complainer's testimony taken on commission. It would certainly have been wholly unsatisfactory, in the

circumstances narrated, effectively to end the prosecution, especially without knowing the reasons for the complainer's reluctance to appear in court.

[22] In order to succeed in this appeal, the appellant requires to persuade the court that the sheriff erred in granting the extension of time; ie that the Crown had failed to show "cause". Since the fundamental reason for the trial not taking place was the absence of the critical witness, who had been duly cited, that test was met. As has been explained at some deliberate length, *Swift* and *Early* must now be understood as being from a different era. They each involved different circumstances, both in relation to the system in place at the time and on their facts. It may still be valuable to pose the two questions which were desiderated in *Swift*, but the single true question for the court, when it is being asked effectively to stop a prosecution in a solemn case because of the non-appearance of a crucial witness at a trial diet, is: where do the interests of justice lie? This will involve a balancing of the interests of the accused in being brought to trial within the statutory time limit with those of the complainer and the public in general in allowing the system of justice to determine the charges libelled on their substantive merits as opposed to on grounds that are essentially procedural in nature. If the interests of justice dictate that the time bar ought to be extended, cause to do so will have been shown.

[22] The appeal is refused.