APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 24
HCA/2018/000045/XC

Lady Paton
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LADY PATON

in

APPEAL UNDER SECTION 65

by

GB

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: D Nicholson; Dunne Defence
Respondent: S Borthwick AD; Crown Agent

9 March 2018

[1] In this appeal, it is contended that the sheriff at Elgin (Sheriff Dickson), erred in the application of the two stage test set out in *Her Majesty's Advocate* v *Swift* 1984 JC 83.

[2] The appellant is charged with a sexual offence, namely an assault with intent to rape, committed on 27 July 2016. Considerable police investigation was required in order to

establish the identity of the alleged assailant. Ultimately the appellant appeared on petition on 26 January 2017. He was admitted to bail.

[3] Further investigations were required in order to establish whether or not the complainer, MH, required special measures when giving evidence. Dr Gary Macpherson was instructed by the Crown. He produced a report dated 1 August 2017. That report made it clear that the Crown would require to lodge a vulnerable witness notice.

[4] The indictment was served on 20 November 2017 with a first diet on 18 December 2017. We were advised today that on 6 December 2017, the appellant's counsel had a conversation with the procurator fiscal about a potential plea and about the possibility of taking evidence on commission. In relation to the potential plea, counsel had a telephone conference with the appellant on 13 December 2017. No plea was forthcoming. On 14 December 2017, the defence so advised the Crown, and also emailed a section 275 application.

[5] The first diet called on 18 December 2017. No vulnerable witness notice was lodged. As appears from the sheriff's report, there had been a simple failure of communication in the prosecutor's office. Person A thought that person B was preparing the notice but person B thought that person A was preparing the notice. As a result, the notice was not available for the first diet on 18 December 2017. The Crown therefore moved the court to continue the first diet to 23 January 2018 in order that (a) the prosecutor could consider taking MH's evidence on commission; (b) an application could be made by the defence in terms of section 275 of the Criminal Procedure (Scotland) Act 1995; and (c) a joint minute could be prepared. That motion was unopposed. The sheriff granted it.

[6] On 22 January 2018, the appellant's agents telephoned the Crown. It became clear that the vulnerable witness notice had not yet been drafted. We understand that during the

telephone call, the appellant's agents advised the Crown, for the first time, that the second aspect of the section 275 application (alleging MH's involvement in other intimate sexual relationships) was not to be insisted upon. It seems clear that both the Crown and the defence were, at that stage, preparing and shaping their cases, each on the understanding that a vulnerable witness notice was required.

[7] At the continued first diet on 23 January 2018, a vulnerable witness notice was available. The sheriff granted the notice, authorising certain special measures including the taking of MH's evidence on commission. The 12 month period was about to expire on 26 January 2018. The Crown moved the sheriff to adjourn the first diet until 26 March 2018 to allow the evidence of MH to be taken on a commission which had been fixed for the earliest date which suited all parties (ie the same date, 26 March 2018). The Crown also moved the sheriff to extend the 12 month period until 11 May 2018 in order to accommodate both the evidence on commission and the trial. These motions were opposed, but were nevertheless granted by the sheriff. It is the granting of the extension of the 12 month period which is challenged in this appeal.

[8] At the first stage of the test in *Her Majesty's Advocate* v *Swift* 1984 JC 83, the question for the sheriff is: "Has sufficient reason been shown which might justify the grant of an extension". As has been made clear in the decisions of this court, cases involving the exercise of discretion in terms of section 65 of the Criminal Procedure (Scotland) Act 1995 are very fact-sensitive. The five judge bench in *Early* v *Her Majesty's Advocate* 2006 SCCR 583 at paragraph [27] emphasised that the court must consider all the relevant circumstances before coming to a conclusion, and that the issue does not turn on the gravity or otherwise of any error which might have been made on the part of the prosecutor.

[9] In the present case, the sheriff has set out the dates, the timescales, the nature of the error in the prosecutor's office and the effect of that error. His reasoning and his conclusion at paragraph [11] of his report demonstrate that he considered and weighed up all the relevant circumstances, and that he was ultimately satisfied that "sufficient reason [had] been shown which might justify the grant of an extension".

[10] We are not persuaded that the sheriff erred in his approach, reasoning or conclusion at the first stage of the test. He was, in our opinion, entitled to reach the conclusion he did.

[11] Turning to the second stage in *Swift*, in the whole circumstances of this case, including first, the nature and gravity of the charge, secondly, the nature of the administrative error in the procurator fiscal's office and thirdly, the relatively short period of the extension, we are unable to say that the sheriff erred in the exercise of his discretion.

[12] In the result, the appeal is refused.