APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 1
HCA/2018/000514/XC

Lord Justice Clerk
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL UNDER SECTION 65(1)(b) OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

ALLAN McCLYMONT

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: A Ogg, Sol Adv; Paterson Bell, Edinburgh, for Sweeney Law, Greenock
Respondent: Meechan, AD; Crown Agent

7 December 2018

[1] In this appeal the appellant (hereinafter referred to as the accused) challenged a decision made by the sheriff at Paisley on 27 September 2018 to extend the 12 month time bar period provided for by section 65(1)(b) of the Criminal Procedure (Scotland) Act 1995 by a period of four months. It was contended that no sufficient

reason had been shown by the Crown to permit the grant of an extension of that period and, in the alternative, that the sheriff exercised his discretion unreasonably in granting the Crown's motion. At the conclusion of the hearing on 7 December we announced that we would refuse the appeal and that we would give our reasons in writing in due course. In order to do so it will be necessary to consider the circumstances leading up to the motion to extend being made.

History of the case

[2] The accused first appeared on petition on 5 September 2017. On a date which must have been around 20 May 2018, he was served with an indictment requiring him to attend at a first diet in Greenock Sheriff Court on 26 June 2018. There were four charges on the indictment. The first three each concerned the same complainer, a girl who was aged 14. As they came to be amended, the charges were:

> Charge 1 – a charge of sending messages over the Internet and SMS text messages of a sexual nature, including requests that the complainer send indecent pictures of herself to the accused, contrary to section 34 of the Sexual Offences (Scotland) Act 2009;
>
> Charge 2 – a charge of causing the complainer to look at sexual images of the accused's penis sent to her by him, contrary to section 33 of the same Act;
>
> Charge 3 – a charge of making arrangements for the complainer to travel with the intention of meeting her with the intention of engaging in unlawful sexual activity, contrary to the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 and;
>
> Charge 4 – a charge of possessing extreme pornographic images depicting bestiality contrary to section 51A of the Civic Government (Scotland) Act 1982.

The conduct in charges 1 to 3 was all said to have occurred between 17 and 21 August 2017. The accused was aged 41 at that time. These charges do not appear to have been materially different from those which featured on the petition.

[3] On 20 June 2018 the sheriff gave effect to an application made by joint minute in terms of section 75A of the 1995 Act to discharge the first diet and to assign a new diet for 24 July 2018. The reason for the application, as set out in the joint minute, was that it was considered that the case could be resolved without the need for trial.

[4] The expectation set out in the joint minute proved unfounded, and, as required by section 71C of the 1995 Act, the prosecutor and the accused's representative communicated with each other and jointly prepared a written record of their state of preparation. That document, duly signed by the procurator fiscal depute responsible for the case and the solicitor for the accused, was received by the court on 20 July 2018. In that joint record both the Crown and the defence stated that they were ready to proceed to trial, the Crown stated that it had complied with its disclosure obligations and the defence noted that all productions listed had been received prior to service of the indictment. It was stated that the contents of productions 1 to 10 could be agreed.

[5] At the first diet on 24 July 2018 the Crown moved section 67 notice No 1 which introduced Label 4 the complainer's mobile telephone, Label 5 Evidence Disc, Label 6 USB Memory Stick and Label 7 Evidence Disc. A trial diet was fixed for 27 August 2018. No issue concerning preparation for trial was raised by the solicitor appearing for the accused. Despite the terms of section 70A of the 1995 Act, which

provide that the accused must lodge a defence statement at least 14 days before the first diet, no such statement was ever lodged in this case.

[6] For reasons which are not clear, the presiding sheriff also fixed an adjourned first diet for 14 August 2018. At that second first diet the same sheriff presided. He noted that Mr Barr advocate, who then appeared for the accused, tendered a minute challenging the relevancy of the first charge and three minutes objecting to the admissibility of evidence, each of which was out of time and in conflict with the content of the written record of preparation which stated that there were no preliminary issues or objections to the admissibility of evidence to be taken. Mr Barr also informed the sheriff that the defence had "still not received full disclosure". This was said to be essential in order to permit preparation for trial and he moved the court to adjourn the previously assigned trial diet. The court minute notes that Mr Barr advised the sheriff that he may have to withdraw from acting if this motion was not granted. The sheriff refused the motion but fixed a further adjourned first diet. Mr Barr did not withdraw and attended every further calling of the case.

[7] In addition to the court minute, there was available a note prepared by the sheriff who conducted this second first diet. It is difficult at this stage to understand what the complaint about disclosure was, since the written record noted that all productions had been received and notice had been given on 6 July of further Label productions by way of section 67 notice, which was received without objection at the hearing on 24 July. We have been left with the impression that this issue was not

fully explored at this case management hearing. In her submissions before us Ms Ogg was not able to explain what disclosure was outstanding at that stage.

[8] At the third first diet on 21 August 2018 a different sheriff presided. Mr Barr again appeared for the accused and informed the court that the defence had now received disclosure. No motion to adjourn the trial diet was made. The position of the outstanding minutes appears to have been uncertain and a further adjourned first diet was fixed. It is not at all obvious why this hearing was not discharged administratively, since it appears to have served no purpose.

[9] At the fourth first diet on 24 August 2018 Mr Barr again appeared. The various minutes previously tendered on behalf of the accused were withdrawn and the case was continued until the trial diet. Again, the court's time seems to have been occupied for no reason.

The trial diet

[10] After further procedure, which included a second section 67 notice being received unopposed on 31 August and an unopposed extension to the 12 month time bar period granted on 5 September, the accused's trial eventually began at Paisley Sheriff Court on 18 September 2018.

[11] At the commencement of the trial a joint minute of agreement was read in which it was agreed that Crown production number 10 was a joint report dated 11 January 2018 by Gerald Dobson and Mark McLeod, both Forensic Computer Analysts, and that the findings of the report were accurate. This document appears

to have contained information concerning some of what was discovered on an analysis of the telephones recovered from the complainer and the accused. The joint minute also set out and agreed certain of the contents of that report. In subsequent paragraphs the joint minute agreed that productions 13 & 14 comprised, respectively, SMS text messages sent from the complainer to the accused and SMS text messages sent from the accused to the complainer.

[12] On 19 September the evidence of the complainer was led. On 20 September the Crown led evidence from Mr Dobson. In the course of his examination-in-chief he was referred to production 14. He appears to have explained that there may have been more messages over and above those listed in production 14 recovered from the accused's telephone.

[13] There then developed a discussion outwith the jury's presence between Mr Barr, the procurator fiscal depute and the sheriff, as a consequence of which the trial was adjourned until 25 September for various investigations to take place. It was then adjourned again until 26 September and again until 27 September. In the afternoon of that day the sheriff heard a motion on behalf of the accused to desert the trial *simpliciter* and a competing motion from the Crown to desert *pro loco et tempore*. Having considered the matter the sheriff acceded to the Crown's motion and thereafter granted the Crown's further motion for an extension of the 12 month time bar period.

Why the case was deserted

[14] Despite being provided with a Note of Appeal comprising 9 pages of narrative purporting to explain the circumstances, a report from the presiding sheriff which runs to some 18 pages, and having heard submissions from Ms Ogg, it remains difficult to understand quite what the issue was which caused the case to be deserted.

[15] Charges 1 and 2 set out a straightforward set of circumstances in which the Crown proposed to establish that between 17 and 21 August 2017 the accused sent certain sexual messages and images to the complainer over the Internet and by SMS text message and that she was aged 14 at that time.

[16] From what we were told, and from the content of the Note of Appeal, the accused's defence appeared to be that he believed he was engaged in an exchange of communication by way of some form of a joke with a person or persons who were over the age of 16 years. The Note of Appeal explained that he had given this account to his counsel prior to the trial and had explained that images sent to him by the complainer appeared to be of someone over 16 years old, as he had also apparently said to the police at interview.

[17] Prior to the commencement of the trial counsel was aware of the content of the various Crown documentary productions. Label productions numbers 5, 6 and 7 were described as evidence discs and a USB memory stick and we understand that these items contained information which was extracted from each of the two telephones examined.

[18] At the second first diet on 14 August counsel advised the sheriff that he had been informed by the procurator fiscal that the material for charges 1 and 2 was not available as it had been deleted. He subsequently made various attempts to examine the content of the label productions. From documentary productions 10, 13 and 14 counsel was aware of the content of some of the messages which the Crown intended to demonstrate had been exchanged between the complainer and the accused. No images sent between the accused and the complainer were included in any of these documentary productions. At the commencement of the trial it was understood that there were no productions containing images available to the Crown to be relied upon.

[19] As is obvious from what is said in the Note of Appeal, the accused was in a position to advise his defence team as to what messages or images he had sent and received. If the accused had been of the view that there was an exchange of communication of any nature which would be of assistance to his defence, and which was not contained within the Crown documentary or label productions, he ought to have been able to bring this to the attention of his representatives. No enquiry looking for specific images as described by the accused seems to have been advanced on his behalf with the Crown or with the forensic computer analysts who examined the mobile telephones. No request was made to permit either of the telephones to be examined by a defence expert and although Mr Barr complained about various difficulties which he was confronted with in attempting to examine the label productions, his remedy in this regard would have been to apply to the

court for permission to inspect them in whatever circumstances he wished. Any difficulty in examining a production of which the defence had been give notice was not a disclosure issue – see *HM Advocate* v *AM* [2016]2016 SCCR 227.

[20] As noted above, despite having raised various difficulties at the second first diet, when he appeared again at the third first diet, on 21 August, Mr Barr advised the court that he had received full disclosure, consistent with the position earlier set out on the accused's behalf in the joint written record of preparation. It must be assumed then that the material identified in the documentary productions was consistent with what the accused understood would be available for extraction from his or the complainer's telephone.

[21] Furthermore, it is relevant to consider the terms of section 70A of the 1995 Act. That section provides that the accused must lodge a defence statement at least 14 days before the first diet. Subsection (9) explains what the content of that statement is and provides that it requires to set out:

(a) the nature of the accused's defence, including any particular defences on which the accused intends to rely,

(b) any matters of fact on which the accused takes issue with the prosecution and the reasons for doing so,

(c) particulars of the matters of fact on which the accused intends to rely for the purposes of the accused's defence,

(d) any point of law which the accused wishes to take and any authority on which the accused intends to rely for that purpose,

(e) by reference to the accused's defence, the nature of any information that the accused requires the prosecutor to disclose, and

(f) the reasons why the accused considers that disclosure by the prosecutor of any such information is necessary.

(22) Section 124 of the Criminal Justice and Licensing (Scotland) Act 2010 provides that once a prosecutor has received a copy of the defence statement he must:

(a) review all of the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and

(b) disclose to the accused any information to which section 121 (3) applies.

The purpose of this provision is to permit the Crown to comply with its disclosure obligation in a manner informed by the nature of the accused's defence and in light of any request for disclosure specified in the defence statement.

[23] No explanation has been provided for the failure to comply with the terms of section 70A and it is a matter which appears to have gone unnoticed at each of the callings of the case in the Sheriff Court and in particular when the issue of the import of Mr Dobson's evidence arose.

[24] What appears to have happened when Mr Dobson indicated that there may have been more messages extracted from the accused's telephone than were listed in production 14 was that objection was taken on the basis that there had been a lack of disclosure. The fact that all information recovered from the accused's telephone was not included in the report prepared for court purposes does not of itself equate to a

breach of the Crown's duty of disclosure. The scope of that duty is set out in section 121 of the Criminal Justice and Licensing (Scotland) Act 2010. It is telling that no reference to the terms of that section appears to have been made in the debate before the sheriff and it is not referred to in either the Note of Appeal or the sheriff's report.

[25] Subsection (3) of section 121 provides that the prosecutor requires to disclose to the accused information of which he is aware if:

(a) the information would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused,

(b) the information would materially strengthened the accused's case, or

(c) the information is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused

No information was put before the sheriff on 20 September to suggest that any of these obligations had been engaged and not complied with. Despite that, an enquiry was then launched by the Crown to reinvestigate the content of each of the two telephones lodged without any direction being given to the investigators by the defence as to what they were interested in or why they thought such information would fall within the duty imposed by section 121.

[26] Further information was then provided to the sheriff in stages over the next few days. He was first told that the entire extraction of material from the relevant telephones was stored on a server. Although label number 7 was a disc containing what was said to be full extraction he was informed that there were in fact images of

an indecent nature found on the complainer's mobile telephone which had not been copied onto that disc.

[27] A further report, referred to as a Joint Cybercrime Report, concerning the material recovered from the complainer's telephone was then prepared. That report identified 38 SMS text messages sent between the complainer and the accused on 19 or 20 August 2017 which had not previously been mentioned. It also identified the presence of indecent images comprising two videos and three stills which did not include the face of the individual concerned but which were located among other self-taken images in which the individual was similarly dressed and were therefore assessed to depict the owner of the device. The report indicated that the videos had no creation date and that none of the images were found to have been sent to or received by any other individual. Although these video and still images were referred to by description in the report they were not reproduced or exhibited to the defence or to the sheriff.

[28] Before the sheriff it was submitted that the 38 previously unseen text messages ought to have been disclosed. No explanation for this assertion seems to have been given to the sheriff. Nor does he seem to have examined the content of these messages to ascertain whether they might fall within the first or second limb of the duty set out in section 121. Since the Crown had not been aware of them they did not fall within the third limb. The advocate depute informed us that many of these were very short, comprising a single word or a few words. In the Note of Appeal these text messages are referred to in paragraph 18(s) where the contention

that they should have been disclosed is repeated. No vouching of this contention is provided and Ms Ogg was unable to explain the basis upon which they would have engaged the Crown's duty of disclosure.

[29] Before the sheriff it was submitted that the indecent images recovered from the complainer's telephone ought to have been disclosed. Had they been it would have enabled the accused's solicitor to instruct a paediatrician to examine the images. Why this would have rendered the images disclosable, or what would be done with any such report, was not explained. In the Note of Appeal it was contended in paragraph 18(t) that the images ought to have been disclosed as they:

> "May include those sent to the accused and should have been disclosed so that an assessment might have been made as to whether these were images sent to the accused and whether they were supportive of his position that they depicted someone who was 16/17/18 years of age in order that appropriate advice could be given to him as regards his defence."

[30] The speculative nature of this suggestion was explored with Ms Ogg. She was unable to explain to us what images the accused claimed had been sent to him or what he said had become of them. She was unable to explain why any images which were sent to (or by) the accused would not still be available for inspection on his phone. The proposition in the Note of Appeal was advanced without the relevant material having been seen and without any description of what the accused claimed had been sent to him being outlined. Ms Ogg confirmed that no application for a ruling on disclosure in terms of section 128 of the 2010 Act had been made. Such a motion would of course have been dependent upon a defence statement having been lodged.

[31] In addition, a further report concerning the accused's own telephone, referred to as an extraction report, was provided to the sheriff. This report identified the presence of 660 SMS text messages. Of these, 120 already featured in production 14 and a further 5 messages sent between the accused and the complainer were identified which did not.

[32] Before the sheriff it was submitted that the 5 new messages recovered from the accused's own telephone should have been disclosed. No explanation for this assertion seems to have been given to the sheriff. Nor does he seem to have examined the content of these messages to ascertain whether they might fall within the first or second limb of the duty set out in section 121. Since the Crown had not been aware of them they did not fall within the third limb. In the note of appeal these text messages are referred to in paragraph 18(r) where the contention that they should have been disclosed is repeated. No vouching of this contention is provided and Ms Ogg was unable to explain the basis upon which they would have engaged the Crown's duty of disclosure.

[33] By the afternoon of 27 September when the sheriff was advised of the outcome of the enquiries and of the defence position, Mr Barr informed him that he would "require" an adjournment to consult with the accused and that he had not been given what he called "disclosure" of the indecent images referred to. The sheriff having already indicated that he would not grant a further adjournment, a motion to desert *simpliciter* was made by Mr Barr. The procurator fiscal limited her submission to the contention that the case should be deserted *pro loco et tempore*.

[34] The sheriff appears to have decided that desertion was appropriate upon the basis that further examination of the telephones had identified additional material of which neither the Crown nor the defence had been aware. He seems to have accepted the defence submissions to the effect that they would require time to carry out further enquiries in relation to this material. Why that should be so was not obvious to us. By the end of the period of reinvestigation the entire content of each telephone had been identified and everything, with the exception of the newly identified indecent images, had been made available to the defence. It was not suggested at any stage that any of the newly identified material contradicted or undermined the evidence already given by the complainer. The entire focus was on what had not been provided to the defence. No consideration was given to what steps had been taken by way of preparation by the defence, or why they had not taken any steps to secure recovery for themselves if they had reason to believe it would be of assistance. Most obviously though, no consideration was given to whether any of this newly identified material did in fact engage any of the obligations of disclosure incumbent upon the Crown. Had consideration been given to this crucial question it would have become immediately obvious that the defence had failed to comply with their own statutory obligations designed to facilitate disclosure by lodging a defence statement.

The motion for extension

[35] The Crown's motion to extend the 12 month period was based upon the

premise that the trial had been deserted because information had not been received by them from the reporting authorities. It was submitted that the Crown had acted in good faith and as soon as the correct position came to light they had sought to assist as much as possible.

[36] The defence contention was that the case had come to be deserted because of a systemic failure on the part of the Crown. The Crown had failed to make appropriate enquiries of the correct individuals. Proper information had not been provided as to what enquiries the Crown had made, of whom and when. The fact that the Crown were refusing to permit the defence to see the newly identified images amounted to further fault. The court ought to have regard to the whole circumstances which might include prejudice to the accused in a future trial and the time bar ought not to be extended.

Submissions on appeal

[37] At the appeal hearing Ms Ogg repeated the submission that there had been a form of systemic failure on the part of the Crown. There was no proper system for controlling how information stored by the reporting agency was disclosed, either to the defence or to the Crown. The Crown did not have a system in place to ensure that any information they sought from the reporting agency, or from the computer analysts, was reliable. Without a proper system to meet these needs the Crown were not in a position to satisfy their duties of disclosure.

[38] The underlying contention advanced in support of these criticisms was that all material extracted by the forensic computer analysts from each telephone ought to have been made available to the defence and, that not having happened, the Crown were at fault. In these circumstances the first stage of the test in *HM Advocate* v *Swift* 1984 JC 85, that there required to be a sufficient reason advanced to entitle the sheriff to justify an extension of the time bar period, had not been met.

[39] In regard to the exercise of the sheriff's discretion, it was submitted that he had approached the matter incorrectly by failing to ascertain with sufficient certainty what enquiries the Crown had conducted. He ought to have concluded that the Crown's attitude in declining to permit access to the indecent images was unreasonable and that this was a further example of fault. The sheriff ought to have given more weight to the interests of the accused and he failed to attach sufficient weight to the submission that the accused might come to be prejudiced in any future trial by the Crown making use of the newly identified material.

[40] On behalf of the Crown, the advocate depute submitted that non-compliance with the requirements of section 70A of the 1995 Act was of central significance. He drew attention to the requirement to lodge such a statement at least 14 days before the first diet, the separate requirement to intimate 7 days before the trial diet the fact that there has been no material change in circumstances in relation to the accused's defence, or, where there has been such a change, to lodge a new defence statement. He observed that the accused was contending that there was a systemic failure by

the Crown but that failure by the defence to comply with its own obligations in terms of the disclosure regime may be ignored.

[41] The advocate depute submitted that the narrative in the Note of Appeal contending that there had been a failure in the Crown's duty of disclosure was not vouched. It had not been determined before the sheriff that relevant material had not been disclosed. The relevance of the still and video images newly identified was still not obvious. The contention that the defence could instruct an expert report from a paediatrician was misplaced. There would be no relevance to any such evidence. Neither before the sheriff nor before this Court had it been demonstrated that there had been a failure by the Crown in its duty to disclose relevant material.

[42] The advocate depute submitted that it was now a moot point whether the case should have been deserted rather than continued but that the sheriff had been anxious about the passage of time and it might reasonably have been thought at the time that the question of whether any relevant material had not been disclosed had not yet been fully resolved.

[43] The circumstances in which the trial came to be deserted arose because of the point in time when the issue was investigated, namely the trial. Had the defence conducted whatever investigations had been warranted by the accused's instructions, either by precognition of the authors of the report or by the instruction of their own examination of the telephones, the matter would have been focused at a far earlier stage and would have been capable of resolution prior to the jury being empanelled. It was the failure to follow the statutory procedure concerning defence

statements which prompted the enquiries to take place during the trial. The sheriff eventually decided that these enquiries should not remain pending whilst the jury was still sitting. Having decided to desert the diet *pro loco et tempore* in these circumstances the sheriff was correct to have concluded that a sufficient reason had been advanced such as would entitle him to grant an extension and the exercise of his discretion had been appropriate.

Discussion

[44] It seems to us that when the complaint about failure to disclose was made both the procurator fiscal and the sheriff lost sight of what the relevant issue was. The procurator fiscal's immediate response appears to have been to carry out further enquiry, rather than to focus on the question of why the defence would be entitled to require disclosure of the Crown at that stage. The same theme which permeated Ms Ogg's submissions to us appears to have dominated the submission made to the sheriff, namely that the Crown were obliged to disclose to the defence anything which had been recovered from either mobile telephone. Such a proposition has no valid foundation.

[45] In the present case there would, no doubt, have been information available from the complainer's telephone concerning the contact details of her friends and family. There might well also have been information available about text or other messages sent by her to such individuals, or for that matter information about the fact of telephone calls to them. There is no basis upon which it could be contended

that any of this information would be disclosable in terms of the duty imposed by section 121. In the same way, information would no doubt have been available from the accused's own telephone concerning contact with acquaintances of his. It could not be contended that information of this sort engaged the Crown's disclosure obligation. Of course, if the accused had reason to think that anything in particular which was stored on his own telephone, or on the complainer's telephone, would be of advantage to his defence then he would be entitled to seek access to that information in order to make use of it.

[46] In the present case, neither before the sheriff nor before us, was any attempt made to distinguish between material which fell within the scope of section 121 of the 2010 Act and other material recovered. The distinction between the accused's statutory right to disclosure and a general interest in ascertaining the results of the Crown's entire enquiry was not recognised. The failure to comply with the obligation to lodge a defence statement was treated as if it was of no moment in relation to the Crown's obligations and no explanation for the failure to lodge this document was available.

[47] We are not persuaded that there was any good reason for the trial to have been interrupted at the stage which it was. Nor are we persuaded that it ought to have been deserted once all of the further enquiries had been completed. In our opinion, the advocate depute was correct in submitting that there had not been demonstrated a failure on the part of the Crown to disclose relevant material. By the commencement of the leading of evidence, and given the history of pre-trial

procedure, the onus was on the defence to vouch the way in which any of the Crown's duties of disclosure were engaged and had not been complied with. It seems to us that were was no attempt to do this. Ms Ogg's difficulty in explaining how the disclosure obligations were engaged in relation to the matters identified in paragraph 18(r), (s) and (t) served to confirm this impression. The result, it seems to us, was a confused debate which was initiated by the defence on a misconceived basis.

[48] Once the events of the pre-trial period and of the trial itself are seen in their proper light, it becomes obvious that, the decision to desert having been made, the only correct result would be to extend the 12 month time bar period. The defence wished to have more time to prepare in light of the enquiries which their complaint had initiated. The sheriff decided that he was not going to grant any further adjournment of the case because of the time which had already passed since evidence was last led. The defence accordingly moved to desert. The sheriff decided to accommodate the defence, albeit perhaps inappropriately. The Crown were not shown to have been at fault. On the other hand the defence plainly were, although the sheriff overlooked this fact. The sheriff was entitled to conclude that his decision to desert the trial was capable of constituting a sufficient reason to permit an extension of the time bar period to be granted. He cannot be faulted for having exercised his discretion in favour of granting that extension.

Other issues

[49] In addition to non-compliance with the statutory provisions by the defence, a number of other issues of concern have been highlighted by the circumstances of this case.

[50] In his report the sheriff informed us that the balloting of the jury did not commence until mid-afternoon on 18 September. The explanation was that the Crown wished to commence the case with the reading of a joint minute but it had not yet been typed. This is incomprehensible and unacceptable. Section 257 of the 1995 Act imposes a duty on the parties to seek agreement of evidence. That duty applies, in relation to proceedings on indictment, from the date of service of the indictment until the swearing of the jury. The joint written record completed on 20 July noted that agreement had been discussed and was available. Where compliance with the duty under section 257 has resulted in agreement prior to the first diet then a joint minute should be prepared with a view to signature at that diet. In any other circumstances joint minutes ought to be prepared outwith court hours.

[51] In any event, there is no reason why the balloting of the jury should have been delayed while the joint minute was being typed. On the assumption that the case was ready to be called at 10am it seems to have taken something in the region of four to five hours to have the document typed. An explanation of sorts, which is not worthy of being repeated here, was given to the sheriff. The document prepared runs to 2½ pages and contains 9 short paragraphs typed in double spacing. The document would have taken no more than half an hour to handwrite. If it is correct

that a large number of members of the public were kept waiting until the middle of the afternoon because of the absence of this document that constitutes an unacceptable waste of their time. This sort of unnecessary delay undermines the court's reputation and standing in the mind of the public and ought not to be repeated.

[52] The fact that the defence had failed to lodge a statement as required by the statutory provisions appears to have gone unnoticed by the four different sheriffs who presided over the case at different stages. In particular, it is difficult to understand how either the first or second of the first diets could have passed without discussion of the content of the defence statement. At each of these two hearings the presiding sheriff was engaged in a case management exercise designed to ensure proper pre-trial preparation and it was at the second of these that the first complaint of lack of disclosure was made. Consideration of the defence statement is a central component in the exercise to be conducted at any first diet where contested issues are raised. This is made plain in the Criminal Courts Practice Note No 3 of 2015 Sheriff Court Solemn Procedure, which has a specific paragraph dealing with Disclosure and Defence Statements in which it is stated that:

> "The defence will be expected to have intimated to the Crown in writing, and in precise terms, in advance of the First Diet any alleged deficiencies in disclosure."

[53] At that second first diet on 14 August 2018 the court minute notes that counsel for the accused moved the court to adjourn the previously assigned trial diet

to allow for preparation time and advised if this was not allowed he may have to withdraw from acting for the accused. It is, in our view, entirely inappropriate for a defence representative to issue a threat of this sort as part of an attempt to secure the outcome of his choosing.

[54] The evidence of the witness Dobson began in the afternoon of Thursday 20 September. The case was adjourned until Tuesday 25 September, the Monday being a local holiday. The case was then adjourned again until Wednesday 26 and again until Thursday 27. The decision to desert was made in the late afternoon of that day. A week had therefore passed without any evidence being led. The jurors were in attendance each day, although we assume not for all of each day. It is highly unsatisfactory to adjourn a trial for such a lengthy period, particularly a trial which ought to have been of short duration. When any issue arises during a trial which requires an adjournment for consideration the time allowed for this should be as short as possible and consideration should always be given to the potential inconvenience to jurors and the potential disruption to the course of justice. A distinction requires to be made between cases where a short adjournment may be necessary to address an issue arising during the trial, in circumstances where it will still be possible for the trial to continue; and those where the issue is such that a longer period is required, meaning that the trial will require to be postponed. It is the duty of the presiding judge or sheriff to ensure that he is provided with sufficient detail to enable him to determine the appropriate procedure and to ensure that any proposed adjournment is appropriate and is granted for no longer than is necessary.

[55] In the report from the sheriff he explains that on Wednesday 26 September he was informed by the Crown that they had arranged to have the label productions uplifted from the court and taken to have the contents re-examined. In the case of *William Turner Davies Petitioner* 1973 SLT (Notes) 36 as endorsed in *Livingston v HM Advocate 1992* SLT 481 the court stated that:

> "Where an indictment is served, the productions referred to therein are lodged with the sheriff clerk who has a duty to retain them in his custody and make them available at the trial. At that stage, the only body with the authority to allow the productions to be inspected and examined is the court, and the proper procedure is to make an application to the court thereanent. It is then for the court to decide whether the application should be granted or refused."

It is important that practitioners and judges remember that control over productions (and responsibility for their care) remains with the court. The productions are not under the control of the party lodging them and neither party has the right to remove productions without the express authority of the court.