APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 6
HCA/2020/000336/XC

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

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

by

CS

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg, Sol Adv; McCusker, McElroy & Gallanagh
Respondent: A Edwards, QC, AD; Crown Agent

29 January 2021

[1] The appellant has been indicted on a charge that on 2 March 2019, at a public place in Paisley, without reasonable excuse or lawful authority, he had with him an article which had a blade or a sharp point, namely a knife, contrary to section 49(1) of the Criminal Law (Consolidation) (Scotland) Act 1995. The indictment also includes a charge of failing to

comply with a special condition of bail, contrary to section 27(1)(b) of the Criminal Procedure (Scotland) Act 1995.

[2] In this appeal he challenges the decision of the Sheriff dated 30 October 2020 to extend the period of 12 months specified in section 65(1) of the 1995 Act from 8 November 2020 to 7 February 2021.

Procedural history

[3] The relevant history of the case is as follows. The appellant appeared on petition on 4 March 2019 and again on 12 March, when he was fully committed and granted bail. He was indicted to a first diet on 10 January 2020, at which he pled not guilty, and the diet was adjourned, on his motion, for the purpose of obtaining medical records and for further investigations to be made.

[4] At the continued first diet on 31 January 2020 a trial diet was appointed. That diet called on 27 February and was adjourned to 4 May 2020, on the appellant's motion, on the basis that an essential defence witness was unfit to attend.

[5] By the date of the adjourned trial diet the country had been affected by the Covid-19 pandemic. In accordance with the direction issued by the Sheriff Principal of North Strathclyde dated 8 April 2020, the diet fixed for 4 May was discharged with a new diet fixed for 31 July 2020, which was in turn adjourned with a further diet fixed for 23 October and again adjourned with a new diet fixed for 15 January 2021.

[6] The original 12 month time bar provided for by section 65(1)(b) of the 1995 Act was due to expire on 4 March 2020. On 28 February 2020, on the unopposed motion of the Crown, that period was extended to 8 May 2020. By virtue of the "suspension period"

inserted into section 65 of the 1995 Act by The Coronavirus (Scotland) Act 2020 the expiry date for the 12 month time bar period in the appellant's case became 8 November 2020.

The contested application

[7] On 30 October 2020 the sheriff heard submissions on the Crown's motion to further extend the time bar period by three months. The application was moved on the basis that the extension was necessary due to the Covid-19 pandemic. The procurator fiscal explained that on the instruction of the Lord Justice General jury trials had ceased in Scotland on 17 March 2020 but had recently recommenced. It was anticipated that Sheriff Court jury trials would recommence at Paisley in January 2021. The circumstances caused by the pandemic were said to constitute a sufficient reason to justify the extension and, there being no fault on the part of the Crown, the court ought to exercise its discretion in favour of granting the motion.

[8] Before the sheriff the appellant accepted that there could be no criticism of the Crown in relation to the procedural history. It was contended that there had been fault on the part of the Scottish Courts and Tribunals Service and on the part of the Sheriff Principal. Section 27 of the Courts Reform (Scotland) Act 2014 imposed a duty on the Sheriff Principal to ensure the efficient disposal of business in the Sheriff Court and to make such arrangements as are necessary or expedient for the purpose of carrying out that responsibility. The six month "suspension period" enacted by Parliament provided a timeframe within which the Scottish Courts and Tribunals Service and the Sheriff Principal required to find appropriate means and facilities to enable jury trials to proceed. Since Parliament had fixed a suspension period of six months, suitable arrangements required to be put in place within that timeframe. Arrangements had been made to allow High Court

trials to recommence within that period but there were no known arrangements, published proposals or identified dates for the commencement of jury trials within the Sheriffdom of North Strathclyde. There was fault on the part of the "strand of the state with responsibility for enabling the Crown to carry out its function". The result was that the appellant was denied a trial within a reasonable period and the application ought to be refused.

[9] The sheriff noted that the recommendations of the restarting trials working group had led to High Court trials commencing as of 28 September 2020. A working group to plan the restart of Sheriff Court jury trials had been in place since the beginning of October, leading to venues being confirmed to permit jury trials to take place in the Sheriffdoms of Glasgow and Strathclyde and Lothian and Borders. He understood that it was hoped to conclude contracts in respect of venues for North Strathclyde for a planned restart of solemn trials in January 2021. He noted that the court programme for Paisley Sheriff Court included provision for a sheriff and jury court as from 11 January 2021. In these circumstances the sheriff considered that the submissions to the effect that there had been fault on the part of the Sheriff Principal, or on the part of the Scottish Courts and Tribunals Service, were without foundation. The sheriff accepted that the reason for the application to extend the time period was the impact of the Covid-19 pandemic and that this was a sufficient reason to justify the extension.

[10] In considering whether to exercise his discretion in favour of granting the extension the sheriff took account of the unprecedented nature of the pandemic and the challenges involved in securing arrangements for solemn trials to take place in a manner which gave due regard to the protection of the health and welfare of all involved. He took account of the serious nature of the charge and the procedural history of the case. Taking account of all

of the information available to him the sheriff concluded that he should exercise his discretion by granting the application.

Submissions on appeal

[11] On the appellant's behalf, Ms Ogg challenged the sheriff's decision on the basis of the written submissions which she prepared and lodged in advance of the hearing and on her supplementary oral submissions presented at the appeal hearing.

[12] Ms Ogg acknowledged that the sheriff was correct to refer to the circumstances of the coronavirus pandemic as unprecedented. He was correct to say that the pandemic had presented significant challenges to the administration of justice, in particular in conducting jury trials, but she argued that the sheriff did not have adequate information available to him as to the re-commencement of trials in Paisley so as to permit him to conclude that there was a sufficient reason for an extension.

[13] There was also what was termed "the issue" of whether the recommencement of solemn cases had been dealt with expeditiously. In this regard Ms Ogg drew attention to the various announcements which had been made between 17 March and 27 October 2020 by the Scottish Courts and Tribunals Service concerning the steps which were being taken to recommence solemn trials. She accepted that by 30 October proposals to resume solemn trials had been identified in respect of certain Sheriffdoms but pointed out that it was not until 17 November that an announcement was made that plans were in place to recommence sheriff and jury trials at Paisley Sheriff Court from 11 January 2021. In the absence of further information as to when solemn trials would recommence in Paisley there had been insufficient information available to the sheriff on 30 October to entitle him to conclude that the first stage test set out in the case of *Swift v HM Advocate* 1984 JC 83 had been met.

[14] It was also argued that the sheriff had exercised his discretion unreasonably in granting the extension for the reason specified. The case of *Warnes* v *HM Advocate* 2001 JC 110 was referred to as providing support for the submission that there was an obligation on the Scottish Executive and the Sheriff Principal to organise the legal system so as to allow the courts and all other components in the system to bring cases to trial within the time limits set down. As part of this submission, Ms Ogg argued that the sheriff ought to have taken account of the fact that whilst a section 49 contravention was a serious matter the case was not complex. The evidence was within short compass. There was a public interest in the prosecution of crime and bringing offenders to justice but also in that being done expeditiously to save court time and money.

Crown

[15] The advocate depute submitted that the complaints made were without foundation. The progress towards the recommencement of sheriff and jury trials in the Sheriffdom of North Strathclyde was ongoing as at the date of the hearing before the sheriff and shortly thereafter, on 17 November 2020, the Scottish Courts and Tribunals Service published a document outlining the plans to recommence jury trials in that Sheriffdom. The principal complaint identified before the sheriff had been the absence of any such public statement. Since there had now been such a statement the point relied on had no merit.

[16] In any event the sheriff was correct to conclude that the public health emergency and resultant disruption to the administration of justice was a sufficient reason to justify the extension and took all relevant considerations into account in determining the exercise of his discretion. The decision taken was appropriate and could not be criticised.

Discussion

[17] On appeal the argument suggesting fault was not repeated in the same terms as it had been before the sheriff. However, the court understood this to be what was meant by the oblique reference to the "issue" of whether the recommencement of solemn cases had been dealt with expeditiously and by the submissions referring to the case of *Warnes*. As reflected in the references to the announcements made by the Scottish Courts and Tribunals Service, it was well known that a working group was set up in May 2020 to consider the practicalities of restarting solemn cases. The terms of reference for that group were:

> "To facilitate the recommencement of solemn trials, and in particular:
> - to consider options and make recommendations on the feasibility of commencing jury trials in some form whilst maintaining social distancing during the Covid-19 pandemic, *with initial focus on the High Court of Justiciary*
> - to identify the conditions that need to be present to enable such trials to proceed, including the conditions necessary to enable all participants to engage with the process
> - to consider what technological support might assist the process
> - to consider the constraints and practicalities within the current legislative framework, and whether any further legislative change might be required to facilitate the restart
> - to assess the capacity of the court estate with appropriate measures in place, and the likely volume of cases that might be progressed"

[18] That working group had the full support of the Law Society of Scotland and the Faculty of Advocates, with representatives of both branches of the profession serving as members of the group. It is obvious from the breadth of the terms of reference that the work of the group would take time to be completed. As was acknowledged, the progress of the group was communicated to the public and the legal profession through the regular announcements published by the Scottish Courts and Tribunals Service.

[19] It was obvious from those announcements, which Ms Ogg sought to rely upon, that substantial efforts had been made during the months between May and October 2020 to recommence solemn trials across Scotland. It was also obvious that the ability to recommence any solemn trials had been achieved as a consequence of substantial effort, a determined and radical approach to finding a solution and the application of very substantial resources. The solutions decided upon were not capable of being implemented immediately, even when identified as viable options. Appropriate investigations as to venue suitability required to be undertaken and commercial arrangements entered into. It was made clear that solutions were being implemented on a step-by-step basis. Following the success of the arrangements put in place for the High Court a working group was set up in October 2020 to focus on the arrangements for restarting solemn cases in the Sheriff Court. Prior to the hearing before the sheriff in the present case venues had been identified to permit trials to commence in the Sheriffdoms of Glasgow and Strathkelvin and Edinburgh and Borders. It was anticipated that the solution identified would provide for the recommencement of trials in Paisley in January 2021, as was confirmed by the subsequent publication.

[20] Given this background, the submissions suggesting fault were presented in an insubstantial and unvouched manner. Ms Ogg conducted no analysis of the steps which had been undertaken and offered no suggestion as to alternative methods of progressing solemn criminal case work which might reasonably have been adopted. No comparison with what steps had been taken in other national jurisdictions was undertaken. The observations in the case of *Warnes* simply have no application to the present circumstances.

[21] The efficient administration of justice is always a matter of legitimate public interest. The current pandemic has resulted in disruption for witnesses, victims of crime and persons

accused of crime. It is obvious that such disruption may lead to public concern about the ability of the justice system to progress cases and continue to provide an essential service. That is why the Scottish Courts and Tribunals Service has engaged in regular communication with the public and the legal profession to explain the steps which are being taken. It is also no doubt why such substantial levels of resources have been invested.

[22] Public criticism, such as advanced in this case, of the steps taken to recommence trials for serious criminal offences is capable of undermining public confidence in the administration of justice in such difficult times. There is therefore plainly a professional obligation on legal representatives to justify submissions made publicly which criticise those responsible for the administration of justice. In the present case no effort was even made to do so. The contention that no sufficient reason for the granting of an extension had been identified was not only without merit, it was entirely devoid of any meaningful content. The contention advanced constituted nothing more than an unjustified and unsupported criticism of an inappropriate nature.

[23] The court is satisfied that the sheriff was correct to conclude that a sufficient reason had been identified which would entitle him to grant an extension.

[24] The question of the exercise of the sheriff's discretion opens up further troubling aspects of this case. Ms Ogg was right to observe that there was a public interest in the prosecution of crime and bringing offenders to justice and of that being done expeditiously to save court time and money. The question is why has that not happened in the present case?

[25] The two charges on the present indictment are of the most straightforward sort. The only productions listed are a knife and a rucksack. There are only four Crown witnesses listed, all of whom are police officers. Unsurprisingly, the Crown were in a position to

commence this straightforward case within the statutory time period provided for by section 65 of the 1995 Act.

[26] The minute for the first diet on 10 January 2020 records that the defence statement and written record were tendered late at the bar and were allowed to be received on that date. The written record explains that there are no lists of witnesses or productions on behalf of the defence and that the defence were ready for trial. The defence statement sets out that the accused denied both offences and had a reasonable excuse in relation to charge 2. Despite the terms of the written record, the minute then records that the first diet was adjourned on defence motion for further investigations and to obtain medical records.

[27] At the continued first diet on 31 January a list of defence witnesses was lodged, although late, and a trial diet was fixed for 24 February 2020. On the face of matters the appellant had a period of 10 months between his first appearance on petition and the date of the first diet to prepare his case. Ms Ogg was unable to provide the court with any explanation as to why it was necessary to seek a further continuation at the first diet or to provide any explanation as to why a list of witnesses was only tendered out of time at the continued first diet.

[28] When the case called for trial on 27 February 2020 another list of witnesses on behalf of the defence was tendered, again late, and the sheriff was then moved to adjourn the diet of trial until 4 May, on the basis that an essential defence witness was unavailable. Ms Ogg was unable to inform the court who this witness was, what the nature of her evidence was and whether any steps had been taken to attempt to agree her evidence or to introduce it by other means. Given the limited extent of the evidence to be led by the Crown and what would appear from the defence statement to be the narrow scope of the appellant's defence, it is difficult to understand why it had not been possible to fully prepare for and conduct the

case before the difficulties caused by the current pandemic arose. Ms Ogg was not able to resolve this difficulty for the court.

[29] Some of these matters were taken account of by the sheriff in determining the exercise of his discretion. The written submissions on behalf of the appellant seek to criticise the way in which he did so. They assert that there was good reason for the first trial diet to be adjourned and contend that the effect of the previous history of the case was outweighed by the subsequent events. Despite inviting the court to take account of these submissions Ms Ogg was unable to provide the court with any of the relevant supporting information, as explained above.

[30] In the whole circumstances the court is satisfied that the sheriff exercised his discretion in a flawless manner and that the criticisms of his decision were unwarranted and without substance. The sheriff correctly concluded that a sufficient reason had been identified such as would permit him to grant the extension sought and exercised his discretion appropriately in deciding to do so. He applied the correct tests as described in the cases of *HM Advocate* v *Swift* and *HM Advocate* v *Early* 2007 JC 50. The appeal is accordingly refused.