APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 18
HCA/2018/622/XC

Lord Justice General
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST CONVICTION

by

NATALIE McGARRY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Dean of Faculty (Jackson QC), CM Mitchell QC; Campbell & McCartney, Glasgow
Respondent: A Prentice QC AD (sol adv); the Crown Agent

19 December 2019

Introduction

[1] This is an appeal against conviction in which the appellant pled guilty, in the Sheriff Court at Glasgow, to two charges on the indictment which she faced. The Crown accepted pleas of not guilty to two further charges. The pleas were tendered on 24 April 2019. On 1 May 2019 her motion to be allowed to withdraw her pleas of guilty was refused by the

presiding sheriff and he subsequently proceeded to pass a sentence of 18 months imprisonment (discounted from 21 months for the early plea).

[2] The charges to which the appellant tendered guilty pleas were, first, a charge of embezzling £21,000 whilst treasurer of the Women for Independence organisation in the years 2013 to 2015. This was achieved by transferring funds raised into her own bank accounts, failing to transfer funds to their intended recipients and drawing cheques and depositing them in her own account. The Crown had, no doubt by arrangement, amended the charge from almost £33,000. The second was of embezzling about £4,661 as treasurer of the Glasgow Regional Association of the SNP between 2014 and 2015 by using similar methods.

[3] The ground of appeal which is advanced is that there are exceptional circumstances, that the plea was tendered under circumstances which caused prejudice to the appellant, and that the sheriff therefore erred in refusing to allow the plea to be withdrawn. Those exceptional circumstances are said to arise out of aspects of the presiding sheriff's conduct, coupled with criticisms of the quality and extent of the legal representation provided to the appellant.

[4] In order to consider the appeal, and in addition to a Report from the presiding sheriff, the court had the benefit of affidavits from the appellant, her father and a journalist, Mr James Doleman, who was present at certain of the hearings before the sheriff. The court also had written responses to the contents of the Note of Appeal from Mr Berlow, the appellant's solicitor, and from both Mr McElroy and Ms Green, Advocates, who appeared at various stages on the appellant's behalf. The court had transcripts of the proceedings before the sheriff on 21 February, 16 April, 24 April and 1 May.

Background

[5] On 22 November 2015, Women for Independence decided that the appellant, who was a Member of Parliament, should be reported to the police for embezzlement. In May 2016, the SNP in Glasgow reported the appellant to the police. She was detained and interviewed on 27 September 2016 but declined to comment. On 29 September 2016 the matter was reported to Crown Office. The appellant did not appear on petition until 21 March 2018.

Procedural history

[6] By 7 March 2018 the appellant had instructed Mr Mathew Berlow, of Berlow Rahman, Solicitors, Glasgow to act for her. Mr Berlow has been admitted as a solicitor for more than 20 years and is designed on his firm's notepaper as the "Senior Consultant" within the Criminal Department.

[7] On 20 December 2018 an indictment and a statement of uncontroversial evidence (SUE), running to 164 paragraphs, was served on the appellant. The appellant was given notice to attend a first diet on 22 January 2019.

Preparation of the appellant's case

[8] By the time the indictment was served the appellant had not discussed any aspect of the Crown's case against her with Mr Berlow, or anyone else at his firm. Although there were what came to be described as 10 volumes of productions in addition to the witness statements available in Mr Berlow's office, presumably having been disclosed by the Crown throughout the period prior to the indictment being served, none of these documents had been discussed with the appellant. Mr Berlow's response to the court disclosed only one

meeting with the appellant prior to service of the indictment, on 25 September 2018. The file note for that meeting records that the client was very agitated and upset and unable to provide instructions.

[9] On the day after the indictment was served Mr Berlow met with the appellant at his office. His file note records that the appellant advised him she could not face the case, could not properly instruct him and would probably kill herself rather than go to trial. He concluded the file note with the words: "Wasted meeting".

[10] In January 2019 sanction was obtained to instruct counsel on the appellant's behalf. She met with Mr McElroy, Advocate and Mr Berlow on 11 January. By this time the period for challenging the content of the SUE provided for by section 258(3) of the 1995 Act had expired. The consequence was that the facts specified in that statement were deemed to have been conclusively proved. As we would understand it, the content of the SUE effectively agreed the underling facts of much of the Crown case.

[11] At the consultation the appellant informed Mr McElroy that she had not read the indictment. He attempted to explain the content to her along with the content of the SUE. The appellant refused to listen or to engage. She refused to take a copy of either the indictment or the Crown forensic accountancy report away with her to read. Mr McElroy was sufficiently concerned about the appellant's state of mental health to instruct that a report as to her fitness to stand trial should be prepared.

[12] On 17 January an application under section 75A of the 1995 Act to adjourn the first diet was presented and granted. It proceeded upon the basis that legal aid applications to instruct an accountant and to instruct a psychological assessment of the appellant were both outstanding. It was suggested that the first diet should be adjourned until 21 February 2019.

The court hearings

The First Diet

[13] The case called at its first diet on 21 February 2019. Mr McElroy appeared as counsel instructed by Mr Berlow. Both legal aid applications remained outstanding. As Mr McElroy explained in his response to the court, by this stage he had still received no instructions from the appellant as to her position. Neither had Mr Berlow.

[14] At that hearing pleas of not guilty were tendered and the sheriff was taken through the written record. The length of time for trial was discussed and a date of 23 April, to last for four to six weeks was settled on.

[15] The appellant was assessed by Dr John Marshall, the Head of Forensic Clinical Psychology Services at the State Hospital on 8 March 2019. His report was typed on 10 March.

[16] Dr Marshall noted that the appellant reported symptoms consistent with a depressive episode, generalised anxiety disorder and panic disorder. He noted that she was currently prescribed antidepressant medication and a quantity of diazepam for times of high anxiety. Dr Marshall noted that her difficulties were far more profound than the current trigger of her pending trial, as she had a long history of default extreme avoidant style of coping in relation to difficult or stressful situations. He observed that she had defaulted to this previously applied avoidant position but that this was more severe on the present occasion. He concluded that she was competent to stand trial and to instruct her legal representatives but identified a risk of suicide which he explained he would take steps to manage by communicating with her GP.

[17] Dr Marshall also noted in his report that the appellant acknowledged to him that she had not provided instructions to her defence team. He observed that she was able to assert

her innocence and her reasons for this to him and she told him that she was pleading not guilty.

[18] Mr McElroy consulted with the appellant on a further two occasions after the report from Dr Marshall was available. On 13 March he again attempted to go over the indictment and the Crown forensic accountant's report with her but she refused to do so. Despite what the appellant had apparently told Dr Marshall, Mr McElroy explains in his response that he obtained instructions from her to contact the Crown to ascertain what sort of plea would be acceptable.

[19] At a meeting on 9 April Mr McElroy attempted to explain to the appellant what the outcome of his discussions with the Crown had been. It is plain from the terms of both Mr McElroy's response and that of Mr Berlow that the appellant was again in an upset and agitated condition during the course of this meeting. In circumstances which are disputed but which do not require to be resolved, counsel and the appellant parted company at this meeting. By this stage the trial was due to commence in two weeks.

[20] The following day, 10 April 2019, Mr Berlow instructed Ms Green to act on the appellant's behalf. She was provided with the indictment, the Crown's accountancy report and the defence accountant's draft report. Ms Green was unable to conduct a trial on the date which had already been fixed due to other commitments in the High Court. This was communicated to the appellant at a consultation with Ms Green and Mr Berlow on 12 April. The circumstances in which Mr Berlow came to instruct counsel who was not in fact available to conduct a trial commencing 23 April have not been made clear.

[21] In her response to the court, Ms Green explains that the appellant provided her with information to suggest that certain of the sums founded upon by the Crown had been the subject of legitimate payments. She also identified various other lines of enquiry which

might help identify whether other sums of money said to have been embezzled were in fact used for legitimate purposes.

[22] Ms Green also informed the court that the appellant told her she accepted having committed a fraud, although contended that the sum involved was lower than that which was reflected in the indictment. She explained that the appellant authorised her to negotiate a plea with the Crown but still wished to explore other lines of enquiry concerning legitimate payments made. In these circumstances it was agreed that a motion seeking to adjourn the trial diet should be intimated. The appellant denied ever having made an admission of fraud to Ms Green.

[23] In his response Mr Berlow explained that it was only after new counsel had been instructed, and a matter of days before the case was due to call for trial, that the appellant began to engage. He stated that the appellant told him that this was because she had begun to take medication which seemed to be having an effect. According to Mr Berlow, proper meaningful instructions only began to be received at this stage as a result of the appellant's improving mental health. However, he did not repeat in his response the admission of guilt mentioned by Ms Green. He put the matter rather differently. He explained that in his view the appellant's instruction to permit Ms Green to negotiate with the Crown was "indicative of an acceptance that she was indeed guilty of some of the charge".

[24] At the conclusion of the meeting on Friday 12 April Mr Berlow informed the appellant that he would not be able to conduct her trial if she was to plead not guilty. He considered that since sanction for counsel had been granted it would be inappropriate for him to do so. He also informed her that he would be on holiday from 15 April until 22 April, the day before the trial was due to commence.

[25] Whatever language had been used in discussing making an approach to the Crown, it seems plain that even by the end of the consultation with Ms Green, all involved were still contemplating the possibility of a trial proceeding.

The motion to postpone

[26] On 16 April 2019, an opposed motion for postponement was heard before the sheriff. Ms Green advised the sheriff that she was not going to be available to conduct the trial because of the volume of paperwork and her unavailability in any event. For the first time, the sheriff was informed that the appellant wished to challenge certain parts of the SUE. It was acknowledged that the appellant had previously failed to engage with her solicitor, partly because of her health issues which had only resolved in February. The defence accountant's report had only become available on 7 April. The appellant had provided a line of defence and some supporting documents which the accountant had requested. Information on legitimate expenses was provided. The appellant sought access to her diary and her husband's bank statements (which had previously been made available), which were in the possession of the Crown.

[27] The motion to postpone was refused. The sheriff reasoned that Ms Green had accepted instructions in the knowledge that she could not conduct the trial. It was the appellant's responsibility to instruct her solicitor and counsel. The sheriff noted that no medical reports had been produced to demonstrate any ill health on the appellant's part and he made it clear that if Ms Green could not appear and no alternative counsel was available, then Mr Berlow should be prepared to conduct the trial himself. Mr Berlow was, of course, not present to hear or respond to these observations, as he was by then on holiday; but as

noted above he had already decided (and informed the appellant) that he would not conduct the case at trial.

23 April 2019

[28] 23 April was the date for trial which had been fixed on 21 February. On this date there was an unusual procedure which the sheriff described as a hearing without the indictment calling. Although the appellant was in the dock and was represented by Mr Berlow, the procurator fiscal was present and parties addressed the court, the proceedings were not recorded. Beyond recording that the case was continued to 24 April, the minute does not disclose any of what took place in court.

[29] In his report the sheriff tells us that he was informed that the Crown had carried out some investigations, as requested by the appellant. A concluded view on an acceptable plea would be reached as soon as the Crown had considered new matters raised by the defence. Mr Berlow informed the sheriff that counsel was appearing in the High Court and unavailable to conduct the trial. Consistent with what he had earlier told the appellant, Mr Berlow informed the sheriff that he considered the case was above his competence and he would not be in a position to conduct the trial. The sheriff considered this to be a form of holding the court to ransom (the word "blackmail" was used) but the sheriff was told that there remained a prospect that the case would be resolved. The sheriff instructed that jurors would not be brought in until 25 April to allow further discussion to take place but he made it clear that the trial was to proceed then if the matter was not resolved.

[30] In the late afternoon of 23 April Mr Berlow contacted the appellant by phone and explained that the procurator fiscal was willing to accept a plea which involved a substantial reduction of the sums referred to in the charges. The appellant's account of this discussion

was that, on her understanding of the defence accountant's report, the headline figure ought to be reduced much further than that suggested by the procurator fiscal. The appellant's account was that Mr Berlow told her that she had around 20 minutes to accept the deal and that if she did not accept the plea on offer she would require to conduct the trial herself, which he said was due to last for six weeks. The appellant's position was that at around 5.00pm, having spoken with her father, she informed Mr Berlow that she was reluctant and not well enough to stand trial, but she would accept the offer as she felt she had no other choice.

24 April

[31] On 24 April the case was due to call at 2.00pm. At around 12.00pm the appellant was sent a copy of the proposed Crown narrative. She was due to meet with Mr Berlow at 1.00pm to discuss this. The appellant informed Mr Berlow that there were various inaccuracies in the Crown narrative and expressed her concern about this. Discussions continued, both at Mr Berlow's office and at the court prior to the case calling. The appellant drew one particular invoice for a sum in excess of £2000 to the attention of Mr Berlow and insisted that, contrary to the narrative, this had been paid. In his presence she telephoned the relevant company and obtained their confirmation that it had been paid in full shortly after it was issued. Mr Berlow informed the appellant that the Crown were not prepared to countenance any further adjustment. During the course of these discussions Mr Berlow required the appellant to sign a document explaining that she was pleading guilty in the terms negotiated by him with the Crown and was doing so under no pressure from him.

[32] Mr Berlow also explained in his response that the appellant apologised to him during the course of these discussions for failing to engage with him earlier and explained

that she was only now able to concentrate on the detail of matters because she had started taking medication for depression and anxiety and her ability to concentrate had dramatically improved.

[33] The discussions between the appellant and Mr Berlow continued up until the point at which the case was called (at around 3.00pm). As they were making their way to the court room Mr Berlow informed the appellant that he could not tender a plea of guilty on her behalf as he considered that she was pleading guilty as a plea of convenience and was not accepting her guilt.

[34] Moments later, when the case called, the sheriff was informed by Mr Berlow that he was withdrawing from acting. After a somewhat fraught discussion between the sheriff and Mr Berlow the sheriff stated that the trial would start the next day if the matter was not resolved. He allowed Mr Berlow to leave and addressed the appellant. He confirmed with her that she only learned Mr Berlow was intending to withdraw as she entered the court room. The sheriff asked the appellant whether she was in a position to tender pleas to the indictment or whether she wished a short time to consider her position. The appellant answered that she wished to consider her position. The sheriff told her that the court would adjourn for 10 minutes to allow her to gather herself and decide what pleas she was tendering but told her to be under no illusion that the court was in a position to start the trial.

[35] When the court reconvened the appellant pled guilty. The sheriff asked her if she wanted the charges read over to her but she said that she understood the charges. He asked her if she was sure that she wanted to tender these pleas that day. She said that she was. Each of charges (1) and (2) was read out and the appellant pled guilty to each charge separately. She pled not guilty to charges (3) and (4). The pleas were accepted by the

Crown, who produced a written narrative of the circumstances. The sheriff asked the appellant if she took issue with anything in the narrative. She said that she did but that "we are where we are".

[36] A further 25 minute adjournment followed to allow the appellant to discuss matters with the Crown. At the end of that discussion, the Crown expressed the view that they considered that it would be better if the appellant were legally represented, but that the narrative had largely represented the Crown's position throughout. The diet was adjourned until 1 May to allow the appellant to secure new representation.

1 May

[37] On 1 May, a third counsel, Mr Macleod, appeared and sought leave to withdraw the pleas of guilty. The motion addressed the test in *Healy* v *HM Advocate* 1990 SCCR 110 of whether there was a "real error or misconception or circumstances clearly prejudicial". It was said that the appellant had never accepted that she had committed the offences. There had been no proper discussion of the statement of uncontroversial evidence. It was only when she was given her accountant's report on 4 April 2019 that she was told what funds were not accounted for. There had been a breakdown in her relationship with Mr McElroy. The appellant had thought, from the sheriff's use of "blackmail" that he disapproved of her actions. She considered that she had no alternative but to plead guilty.

[38] The sheriff was told that Mr Berlow had informed the appellant at 4.30pm on 23 April what the "deal" was and that if she did not take it then she would be representing herself. She had received the Crown narrative only on the afternoon of 24 April, when she identified a number of inaccuracies. The appellant had mental health issues and problems with anxiety. She had a one year old child.

[39] The Crown opposed the motion. The narrative had been sent to Mr Berlow several weeks prior to the trial and discussions had been ongoing since then. Ms Green had had "clear instructions" from the appellant and had stated that there was a real prospect of a resolution of the case.

[40] The sheriff refused the motion to withdraw the pleas of guilty. He considered that the test had not been met. There had been no medical evidence to support the withdrawal. Up until the tendering of the pleas, the appellant had been legally represented. She had told the sheriff that she had understood the charges and had been adamant that she wanted to plead guilty. She had been given sufficient opportunity to consider her position. She was fully aware of what she was doing when tendering the pleas. The pleas had not been tendered under any error or misconception. There were no prejudicial circumstances.

Submissions on appeal

The appellant

[41] On behalf of the appellant, the Dean of Faculty submitted that when the whole history of the case was taken into account it could be seen that exceptional circumstances were present by the time the case came to call in court on 24 April and that those circumstances caused prejudice to the appellant. The exceptional circumstances arose as a consequence of what he described as Mr Berlow's inexplicable behaviour coupled with the determination which the sheriff exhibited to commence the proceedings.

[42] An important background context was the appellant's history of mental health difficulties relating to anxiety and stress which predated the service of the indictment. In the period after first appearance on petition she had been breastfeeding her baby child and had declined to take medication. Once medication commenced in the early part of 2019 the

medical records produced vouched that she benefited and was more emotionally regulated. Her admitted lack of engagement up until that time had to be seen in the proper context of mental health difficulties. The sheriff was never fully made aware of these issues.

[43] Mr Berlow had never properly taken the appellant's instructions, or discussed the case with her. The relationship between the appellant and Mr McElroy quickly broke down and it must have been obvious to Mr Berlow that he would require to instruct another advocate to represent the appellant. The fact that he instructed an advocate who was unavailable to conduct the trial which had already been fixed was inexplicable. Although the appellant did permit each of Mr McElroy and Ms Green to discuss matters with the Crown, this was done on a tentative basis and it was the appellant's position that she had never acknowledged guilt. The basis of the Crown's case had not even been discussed with her.

[44] After the hearing on 16 April it was clear that the appellant did not have the benefit of counsel for the forthcoming trial. Although Mr Berlow was on holiday at that time telephone contact had been made with him after the hearing. Mr Berlow took no steps to ensure alternative representation for the appellant and, despite the sheriff's observations at this hearing, had made it plain to the appellant that he would not be conducting a trial for her.

[45] On 23 April the appellant was presented with an ultimatum. She could accept the plea which Mr Berlow had discussed with the procurator fiscal or reject it in the knowledge that Mr Berlow would not be prepared to conduct a trial for her and that she had no other representation. The appellant was in no position to represent herself. Ms Green had submitted to the sheriff at the 16 April hearing that no responsible counsel would be in a

position at that late stage to prepare for trial on the date fixed. The appellant could hardly be in any better position. She felt that she had no choice but to accede to the ultimatum.

[46] Having been provided with the Crown narrative, agreed to by Mr Berlow, the appellant was immediately able to identify inaccuracies. This being brought to his attention Mr Berlow's reaction was that, having previously not been prepared to conduct a trial for the appellant, he was now not prepared to tendered plea of guilty for her either. If Mr Berlow was unhappy about the basis upon which the appellant wished him to tender a plea of guilty the expectation would be that he would advise the appellant he would have to plead not guilty for her. Mr Berlow did not give this advice because he had no intention of conducting the trial.

[47] The appellant was left in an intolerable position. With minutes to go she found herself with no legal representation at all. Mr Berlow did not advise her that she could plead not guilty herself. He did not suggest that he would ask for an adjournment in order to permit the appellant to seek other representation and he did not tell the appellant that she could ask the sheriff for this opportunity herself.

[48] Within the context of these circumstances, the Dean of Faculty also criticised the sheriff's interaction with the appellant. As disclosed by the transcript, the sheriff told the appellant that she could have 10 minutes to consider her position but made it perfectly plain that the trial was going to commence the next day come what may. The sheriff did not ask the appellant if she wished to instruct other legal representatives. His comments made it plain that this would not be countenanced. The Dean submitted that this left the appellant in an impossible position. She had no choice. She had never admitted guilt and had identified what she considered were demonstrable inaccuracies in the narrative. Despite this, she had no legal representation and a trial which a specialist criminal practitioner

solicitor of 20 plus years experience considered was beyond his competence was to start the next day. What, he asked rhetorically, was she expected to do?

[49] The Dean of Faculty submitted that the extent to which the appellant was overcome by the circumstances could be seen in the fact that when the case reconvened the appellant informed the sheriff that she was pleading guilty to more than had been agreed to with the Crown. Attention was also drawn to the terms of an affidavit lodged on the appellant's behalf from Mr James Doleman, a freelance reporter. Mr Doleman had been present in court on both 23 and 24 April. His evidence was that the appellant was very distressed and crying during the entire time she was in the dock on 23 April. He explained that on 24 April, after Mr Berlow withdrew and when the appellant was addressed by the sheriff, she was extremely distressed and crying as she stood in the dock. After the case was recalled and the sheriff canvassed the pleas with her he explained that she continued to cry and shake in the dock.

[50] In all these circumstances it was submitted that the pleas had been tendered in exceptional circumstances which prejudiced the accused to the extent that it could be said a miscarriage of justice had occurred

The Crown

[51] The advocate depute accepted that it was competent for an appellant to appeal against conviction following a guilty plea on the ground that a miscarriage of justice had occurred. The principal of finality was important though and it would not be in the interests of justice if individuals were allowed lightly or easily to withdraw pleas of guilty. The court required to be satisfied that there were exceptional circumstances justifying that, such as met

the test set out in the case of *Healy* v *HM Advocate* as later approved of in the case of *Pickett* v *HM Advocate* 2007 SCCR 389.

[52] The advocate depute conceded that the comments made by the sheriff on 24 April to the effect that the case would be starting the next day, and that the appellant had 10 minutes to consider her position, when looked at in isolation, could be said to cause a difficulty. He acknowledged that an unrepresented accused would be left in a very difficult situation in dealing with a case such as the present in those circumstances. Whilst he accepted that all of what took place on 24 April was not conducive to fairness, the advocate depute submitted that the effect of this was diminished when one looked at the whole history of the case in light of the instructions which had been given by the appellant.

[53] It was clear that the appellant had authorised her representatives to negotiate a plea of guilty. Discussions had taken place over a lengthy period of time and those had met with some success. The terms of the narrative had been adjusted as had the figures specified in the charges. Two of the charges themselves were to be the subject of not guilty pleas. It was therefore important not to look at the events of 24 April in isolation.

[54] The advocate depute also submitted that the court should be satisfied that there was at least a substantial defence to the charges which remained. This would be necessary in order for the appellant to meet the miscarriage of justice test. In the present case he submitted that it was not in the interests of justice that the pleas which were tendered on a proper basis could be undone.

[55] If the court was satisfied that there had been a miscarriage of justice, then the Crown sought authority in terms of sections 118 and 119 of the Criminal Procedure (Scotland) Act 1995 to bring a fresh prosecution.

Discussion

[56] The introduction of the statutory scheme for disclosure, in Part 6 of the Criminal Justice (Scotland) Act 2010, was designed to put the arrangements for pre-indictment disclosure by the Crown which had been in practice up until then onto a formal basis. The purpose of so doing was to permit solicitors acting for accused persons to engage in pre-indictment preparation.

[57] The requirement for such preparation is underpinned by the terms of the Criminal Courts Practice Note No 3 of 2015 Sheriff Court Solemn Procedure, by section 71C of the Criminal Procedure (Scotland) Act 1995 and by Chapter 9 of the Act of Adjournal (Criminal Procedure Rules) 1996, which govern procedure at first diets in the Sheriff Court and include the requirement to complete a joint written record of the parties state of preparation.

[58] As long ago as 2007, in the case of *HM Advocate* v *Forrester* 2007 SCCR 216, Lord Bracadale highlighted the importance of the use to be made by the defence of early Crown disclosure and emphasised that the preliminary diet in the High Court was to be seen as the endpoint of preparation rather than the start point. His observations have been approved of on many occasions and now apply with equal force to the conduct of, and preparation for, first diets in the Sheriff Court.

[59] In the present case there is no suggestion of any deficiency in the Crown's approach to its disclosure obligations. It is plain from aspects of Mr Berlow's response that he had been provided with statements and productions well prior to service of the indictment. None of these materials had been discussed with the appellant. No steps at all seem to have been taken in the period between disclosure and indictment to prepare the case, either by informing the appellant of the evidence which she faced, or by carrying out investigations in the expectation of ingathering material with which to answer the allegations. In this state of

affairs we cannot see how it can be said that the appellant's solicitor complied with his ordinary professional obligations to the appellant and to the court. We recognise that the appellant was unwilling to engage with Mr Berlow at the one pre-indictment meeting referred to in the file notes which he mentions. It may be that there were medical reasons which went to explain this but it cannot be acceptable for a solicitor acting in a case which is expected to last for weeks of court time to allow matters to drift to the extent that no instructions at all are obtained from the client. The very least which would be required would be to take steps to ascertain whether or not there was any medical reason which prevented the client from engaging, in order that the question of ability to stand trial could be investigated and presented to the court if necessary.

[60] In the present case both Mr Berlow and Mr McElroy made it plain in their responses that they had no instructions at all from the appellant by the date of the first diet. Mr McElroy had appreciated the need in this situation to instruct a report on her fitness for trial but that had not been received by 21 February. It is difficult to understand how the appellant's combined legal representatives came to tender pleas of not guilty on her behalf in the absence of any instructions. Furthermore, at that diet the court was taken through the terms of the joint written record with Mr McElroy explaining that there was no objection to the admissibility of evidence, no applications or notices, no special defences, no notice of witnesses or productions and it was confirmed that the statement of uncontroversial evidence was not being challenged. As recorded at page 20 of the transcript of that hearing, Mr McElroy gave a deliberate, distinct and very obvious hint to the sheriff that the case would likely resolve by way of plea. This at a time when those who acted for the appellant had no instructions and had unresolved concerns about her fitness for trial.

[61] In light of the expected length of the trial in this case the sheriff who presided at the first diet had been specifically allocated to deal with all aspects of the case. A block of time had been allocated in the court's diary and the sheriff was understandably anxious that good use should be made of this time. His approach to the first diet was no doubt influenced by an assumption that preparation had been undertaken well in advance in light of the obligations referred to above. The lack of challenge to the very lengthy SUE would no doubt have contributed to this assessment.

[62] The one crucial piece of information which he was not given was that despite the period of time which had elapsed since the appellant appeared on petition, she had not had a single constructive discussion with her solicitors, or provided them with any indication of what her intention was concerning the proceedings. Had the sheriff been given proper insight into the absence of preparation, and the reasons therefore, he would have been far better informed as to how to engage in ongoing trial management and would have had a proper understanding of the extent of the appellant's mental health issues. Even after the report from Dr Marshall was obtained the sheriff was never properly advised as to its contents or of Dr Marshall's concerns. In the court's view, the seeds of the difficulties which subsequently ensued in this case were sown in the manner in which the first diet hearing was conducted.

[63] We consider that there is force in the criticisms advanced by the Dean of Faculty as to the arrangements which were made for the appellant's ongoing representation after she had parted company with Mr McElroy. It is common enough in the preparation of cases for the representatives of accused persons to canvass the possibility of resolution by way of plea with the Crown. All representatives know however that it is not within their gift to bind their clients, regardless of how beneficial an offer of plea may seem to be. The accused

person is always entitled to decline to accept an offer made by the Crown and practitioners will know that plea negotiations regularly come to nothing. No representative can insist that a guilty plea is tendered or that an offer of a reduced plea made by the Crown is accepted. Nor can any representative impose a condition that they will only continue to act for a client if a guilty plea is tendered. Even an accused person who has admitted his guilt to his representatives is still entitled, if he so instructs, to have not guilty pleas tendered on his behalf and to require his representatives to put the Crown to the proof of its case.

[64] In the present case it is accepted that the appellant authorised Ms Green to engage in discussions on her behalf with the Crown. At the same time, Ms Green makes it plain that the appellant provided information concerning payments which had been made and further lines of enquiry which she considered would otherwise answer some of the allegations made.

[65] It was perfectly obvious by the end of Ms Green's consultation on 12 April that the case might yet proceed to trial. The appellant had told Dr Marshall only a few weeks earlier that she was intending to plead not guilty. Mr Berlow accepts telling the appellant at the 12 April meeting that he would not be able to conduct a trial if she was to plead not guilty. That communication conveys perfectly clearly his understanding of the appellant's ongoing uncertainty as to how to proceed. What it does not address is how he, or anyone else, was going to be in a position to prepare to conduct a lengthy trial in such a short period. The three charges of financial irregularity which featured contain a number of allegations as to distinct and different conduct on the appellant's behalf. Even by mid-April there do not appear to have been any discussions with the appellant to determine which precise acts she accepted and which she did not. This of itself makes it rather difficult to understand how effective plea negotiation was to take place with the Crown.

[66] In the circumstances which prevailed, it was Mr Berlow's clear obligation to ensure that representation was available on a fully informed basis to be able to conduct the trial which the sheriff had stated would commence at or about its scheduled date. Mr Berlow took no steps to arrange for alternative representation on it being made plain to him that Ms Green was not in a position to conduct the trial.

[67] Even as late as the hearing of 23 April, parties were still informing the sheriff of the "prospect" of the trial being resolved by way of plea. It is inherent in what was said that this was not guaranteed. It was equally clear from what the sheriff said that day that, in the absence of a plea, the trial would commence on 25 April.

[68] By the late afternoon of 23 April Mr Berlow had learned from the procurator fiscal what his position would be concerning the pleas which would be accepted by the Crown in order to resolve the case. He accepts, of course, informing the appellant of the Crown's position by telephone that evening. He does not accept telling her that she should accept the plea on offer, far less does he accept telling her that she would have to conduct the trial herself if she did not accept it. The difficulty with this, however, is that the appellant's account is consistent with what Mr Berlow accepts he told her on 12 April and with what he told the sheriff during the course of the hearing on that very day, 23 April. A further difficulty is that Mr Berlow does not explain what he did plan to do if the appellant was not prepared to accept the plea on offer from the Crown.

[69] Mr Berlow appears to accept that the appellant is right in saying that on 24 April she demonstrated to him an aspect of the Crown narrative which was incorrect, reflecting a substantial figure. The circumstances which then transpired of him withdrawing from acting as he and the appellant were about to enter the courtroom were entirely unsatisfactory. There is a degree of dispute between Mr Berlow and the appellant as to

precisely what advice he gave her, if any, at that very late stage. On any view anything which he said to her by way of explaining her options would have been rushed and delivered in an inappropriately pressured environment. What is clear is that the sheriff was not given a full history of what had happened and he was not asked to give further time for Mr Berlow to discuss matters with the appellant. He was not told about the discrepancy which had been identified, nor of the Crown's response to this.

[70] The transcript makes it plain that Mr Berlow did not ask the sheriff for an opportunity to allow the appellant to seek separate legal advice. The sheriff did not offer the appellant such an opportunity. For the sheriff to tell the appellant that he would give her 10 minutes to consider her position, on the eve of a lengthy trial when her solicitor had just withdrawn from acting and when she was in an upset condition, was inappropriate. We do not wish to appear too critical of the sheriff however, as he was suddenly put in a difficult situation without any warning and without ever having been given an informed understanding of the appellant's circumstances. Nor, of course, did he have any understanding of the limited extent to which there had been any proper professional engagement with the appellant in the preparation of her case.

[71] We were not addressed to any extent on the nature of the appellant's defence. The Dean of Faculty informed us that it was complex. Nevertheless, we were prepared to proceed upon the basis that a miscarriage of justice might be said to have occurred even if it was not shown that the appellant had an arguable complete defence to the charges. We accept that, subject to the relevant tests being met, a miscarriage of justice might be said to have occurred if the appellant pled guilty to sums in excess of those which she accepted responsibility for with the result that the custody threshold was passed.

[72] In the case of *Healy* v *HM Advocate* 1990 SCCR 110 in giving the opinion of the court the Lord Justice-Clerk (Ross) accepted the proposition that before the court would allow a plea of guilty to be withdrawn it would require to be satisfied that there were exceptional circumstances justifying such a course. It would have to be shown that the plea had been tendered under some real error or misconception or in circumstances which were clearly prejudicial to the appellant. In *Gallagher* v *HM Advocate* 2010 JC 240 the appeal proceeded on the basis that the appellant's solicitor told her that she should accept a negotiated plea of guilty and that if she did not do so she would have to represent herself. The appellant's position in that case was that she pled guilty as she felt she had no choice. Although there was a conflict as to precisely what the factual situation was as between the appellant and her solicitor, the Lord Justice-Clerk (Gill) in giving the opinion of the court at paragraph [10] said:

> "In my opinion, we should decide this appeal by considering the general question whether the circumstances in which the plea was tendered were demonstrably prejudicial to the appellant (*Healy* v *HM Advocate*, Lord Justice-Clark Ross, p118). In my opinion, they were."

Despite the factual conflicts present in the case of *Gallagher*, the Lord Justice-Clerk was able to identify five indisputable points which permitted the court to conclude that the appeal should be allowed. In the present case there are conflicts between the position of the appellant and that of Mr Berlow. Here ten points are indisputable:

1. Without ever discussing the case with the appellant the terms of the 164 paragraph SUE were not challenged and became established.

2. At no stage did Mr Barlow explain the detail of the Crown's case to the appellant.

3. At no stage did Mr Berlow take an account from the appellant of the factual matters specified in the indictment

which she accepted.

4. The appellant had a history of mental health difficulties which predated service of the indictment and included anxiety and depression. Unbeknown to the sheriff she had taken a panic attack in the aftermath of the hearing on 16 April and special arrangements had been made for her to be taken from the court.

5. From at least 9 April 2019 onwards there was no counsel instructed to appear on behalf of the appellant at the trial diet. Notwithstanding this (and point 5 above), Mr Berlow took no steps to obtain alternative legal representation for the appellant should the matter proceed to trial.

6. From at least 12 April onwards Mr Berlow had made it plain to the appellant that he was not prepared to conduct a trial for her.

7. On the evening of 23 April 2019 the appellant was informed of the plea which the Crown would accept from her the following day.

8. If the appellant chose not to accept that plea she would have had to represent herself at the trial which the sheriff had emphasised would start on 25 April.

9. On 24 April the appellant was left with no representation at all only moments before the case called.

10. The appellant was required to inform the sheriff of her position within a space of only a few minutes, with no opportunity for any other legal advice, in highly pressurised circumstances and at a time when she was visibly upset and distressed.

Decision

[73] In our opinion these combined points show that the pleas were tendered by the appellant in circumstances which were clearly prejudicial to her. We are satisfied that a miscarriage of justice has occurred and that the appeal should be granted. We shall also

grant authority to the Crown in terms of section 118 of the Criminal Procedure (Scotland) Act 1995 to bring a fresh prosecution.

Postscript

[74] The court has noted what took place on 23 April when there was a "hearing without the indictment calling". Parties addressed the court at this hearing, which was not recorded and about which almost nothing was minuted. It is quite inappropriate to have what appears to be regarded as informal hearings in solemn proceedings. Any oral exchanges between the parties and the sheriff should take place at a hearing after the case has been formally called. Where, as here, the calling is at what ought to have been regarded as the trial diet, the proceedings ought to have been recorded (1995 Act, s 93).