APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 26
HCA/2023/148/XC

Lord Justice General
Lord Pentland
Lady Wise

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

CROWN APPEAL UNDER SECTION 74 OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

HIS MAJESTY'S ADVOCATE

Appellant

against

SYLVIA CATHERINE MacLENNAN

Respondent

Appellant: J Keenan KC (sol adv) AD; the Crown Agent
Respondent: Mackintosh KC; Ward & Co

12 May 2023

Introduction

[1] This is a Crown Appeal against a decision by the sheriff at Inverness to "uphold" a minute complaining of unreasonable delay in terms of Article 6(1) of the European Convention and to acquit the respondent.

History

[2] The respondent and her partner were both solicitors with the Highland Law Practice in Wick. They are charged separately on the same indictment with embezzlement. The first charge, which is against the respondent's partner alone, libels embezzlement of about £105,130 from the firm between July 2008 and January 2012. The second charge is against the respondent alone. It libels embezzlement from the firm of about £7,297 in January and February 2012. It would appear that the embezzlement involves irregular withdrawals from the client account. In the respondent's case, it is not suggested that, for the most part at least, she had benefitted directly or personally from these withdrawals.

[3] Much of the history of the case is not in dispute. During 2011, the respondent was on maternity leave. She returned to work in January 2012, when her partner became unwell. He made her aware of problems with the firm's accounts. On 5 January, the firm had received a letter from the Law Society of Scotland intimating that an inspection of the firm's accounts would take place in late January.

[4] On 18 January 2012, the respondent sent a letter to the Law Society advising them that there was a deficit in the client account. She accepted that she had intromitted with the client account to the extent libelled in the charge against her. These were either personal drawings, specific payments to third parties or a transfer of some £4,600 to the firm account which was used to pay wages. The Law Society inspection was delayed until mid-February, when a judicial factor on the firm was appointed. At some point (it is not known exactly when) the JF reported the actions of both accused to the Crown Office.

[5] On 1 July 2014, the Crown Office instructed the police to investigate. Meantime, in January 2015, proceedings were raised before the Scottish Solicitors Discipline Tribunal against the respondent's partner alone. The respondent accepted a restriction on her

practising certificate pending the outcome of any investigation. In the early months of 2015, the police obtained warrants for the recovery of evidence. A number of documents were removed from the Law Society, who had in turn uplifted them from the firm's premises. On 6 July 2015, both accused were interviewed and charged. On 25 September, the police sent a report to the local procurator fiscal. From September 2015 to December 2018, the matter rested within a specialised unit in the Crown Office. It was then reallocated to a local PFD. Very little happened during this period. The case was re-reported to Crown Office.

[6] On 3 January 2019, the Crown Office instructed the procurator fiscal to indict. From then until 1 August there were discussions about where the accused could or should appear on petition. They eventually appeared on petition respectively on 1 August and 6 September and were admitted to bail. The accused were indicted to appear at a First Diet in Inverness Sheriff Court on 10 December 2019. This was discharged administratively under section 75A of the 1995 Act until 7 April 2020. There were then some 17 separate occasions on which a First Diet was postponed administratively. Two of these related to Covid and two are said to have been for the purposes of disclosure or preparation. The remaining 13 occasions were on joint section 75A applications. The sheriff records, correctly, that:

> "With the benefit of hindsight, there has been a complete lack of judicial oversight during this period. Six different sheriffs granted the minutes, without, no doubt an overview as to the extent to which time was drifting."

[7] At a continued First Diet on 13 September 2022, the sheriff noted that, amongst other minutes, the respondent had tendered a plea in bar of trial on the basis of oppression and delay under Article 6. A debate on these minutes was assigned for 4 November. Another joint section 75A application was tendered and granted for a number of reasons, with a new

debate assigned for 25 to 27 January. In advance of that debate, yet another section 75A application was made and granted, this time by another sheriff, with 25 January being preserved in order to assign a further diet. That diet too was the subject of a section 75A application, but this time it was refused, pending an oral hearing. After further allocations of first diets and subsequent section 75A applications, the case eventually called for a debate at a First Diet on 15 March 2023, more than three years after the initial calling.

The eventual First Diet

[8] The respondent's partner explained that he did not object to an extension of the time bar under section 65(1)(b) of the 1995 Act, which, having been subject to numerous extensions, was due to expire at the end of March 2023. A trial was fixed for 16 October 2023 with a "pre-trial hearing" (? Continued First Diet) allocated for 2 May. The partner maintained that there had been no criminality and that the deficits in the client account had been caused by a software error. An expert would have to investigate that. All the paperwork and electronic media had been removed by the Law Society, under the instructions of the judicial factor, in February 2012. The Law Society had instructed an expert in the context of the SSDT proceedings. That expert had reported that there had been no backup when the equipment was seized. The server was now obsolete, as were the disks. The hard drive battery was swelling due to age. The way forward was to clone the disks, put them into the server and to boot up the server. Although the expert was not asked to do anything further by the Law Society, he was later instructed by the respondent's partner. In his report to him, he said that much of what had been seized was still missing. He repeated, and the Crown had been advised of this, that the disks were obsolete and the computer could no longer be booted up. The information on the computers and the software could

not be accessed. It was impossible now to establish whether fraudulent activity, human or systematic error was the reason for the client account deficits.

[9] A response from the judicial factor revealed that photographs had been taken of the items which had been removed. However, the respondent's partner maintained that he had been asking the Crown for a number of items, which had been removed from the firm's premises, without success. Pieces of computer equipment had been uplifted, but the expert had seen only two out of 15 of these. The indictment referred to 48 productions, but 170 documents had been made available to the respondent's partner. There was no hardware referred to on the list of labels. Some 4,500 posting slips had now been produced. There were other items which had been removed, but which were still not to hand. The client files had been passed to another firm and, on the instructions of the JF, destroyed.

[10] The respondent's position was different. Although she did not require to see any computer equipment, there had been paperwork which supported her position. Despite both the Law Society and the Crown being aware of the position for many years, documentation which she had sought was still not to hand. There was specific reference to certain folders which had not been made available. Without these, the respondent would not be able to put any clear and vouched picture of her defence before a jury.

[11] The Crown maintained that any delay prior to September 2015 had been outwith their control. From 2015 to 2019 there had been a lengthy delay, but it was not necessarily the case that no progress had been made. It was conceded that there must have been periods of time when little had been done, but that was, as the submission was reported by the sheriff, "in the context of a busy office, with case preparers having many cases to attend to." Notwithstanding the protracted periods involved, the Crown maintained that there had been no unreasonable delay (*HM Advocate* v *K* 2013 SCCR 549). For the plea of oppression to

succeed, it had to be demonstrated that no direction to the jury could cure any potential prejudice.

Sheriff's decision

[12] The sheriff did not consider that the test for oppression, that is whether any prejudice resulting from the delay was so grave that it could not be removed by an appropriate direction (*McFadyen* v *Annan* 1992 JC 53), had been made out. The sheriff reached the opposite decision in relation to Article 6. She addressed the question of whether a trial would inevitably be unfair, having regard to the period of time which had elapsed since the respondent had been interviewed in July 2015. She took into account the cumulative effect of a number of factors, notably that: (a) disclosure still had to be made; (b) the regulatory body had not catalogued and stored the relevant material; (c) the respondent had been subject to a restricted practising certificate for some 11 years; (d) there was a lack of explanation on the part of the Crown for several periods of delay, notably from charge to petition and from indictment to trial; (e) the case was not complex; (f) the case was not particularly serious in that it involved a relatively small sum; and (g) a significant period had lapsed since the offence itself (see *O'Neill* v *United Kingdom* 2016 SCCR 337 at para 87). Had the sheriff not sustained the Article 6 unfairness plea, she would have found it difficult to extend the time bar, given that the interests of justice did not lie in the Crown's favour.

Submissions

Appellant

[13] Although the appellant accepted that there had been correspondence in which the respondent had sought certain material, in failing to lodge a defence statement which would

have made it clear what was outstanding, she had not complied with her statutory obligations (*McCarthy* v *HM Advocate* 2021 SCCR 6 at para [22]). She had not made an application for disclosure. It was not possible to rely on Article 6 as a primary ground of complaint. The common law of fairness or oppression should first be resorted to (*Fraser* v *Deveney* 2014 SCCR 147 at para [10]). The oppression and compatibility pleas were essentially the same. The sheriff had been correct in determining that oppression had not been made out. She had not explained the basis upon which she had repelled the plea of oppression, yet sustained that in the compatibility minute. She had not explained how the trial could be unfair if the relevant documents were now located. The Law Society was not a prosecuting authority (see *Coia* v *HM Advocate* 2009 SCCR 1 at para [48]). The fact that the respondent had been made subject to a restricted practising certificate did not mean that she could not obtain a fair trial. That was a matter which could be taken into account in any sentence.

[14] The appellant accepted that the proceedings had commenced for the purposes of Article 6 when the respondent was charged by the police in July 2015 (*Eckle* v *Germany* (1983) 5 EHHR 1). It was conceded that there had been periods of inactivity from then until the petition warrant issued in March 2019. There had been no delay between the appearance on petition and the indictment. Both the Crown and the court had had a responsibility to progress matters once the First Diet had been allocated. However, it was conceded, correctly, that there had been a breach of the reasonable time requirement. That being so, the question was what remedy could and should be afforded to the respondent. Sustaining a plea in bar of trial was only appropriate where the delay was such that a fair trial could no longer take place or there was some other compelling reason such as bad faith, unlawfulness or executive manipulation (*Potts* v *Gibson* at para [21]). If a breach had occurred, the

appropriate remedy may be a reduction in sentence or a declarator that the right had been infringed. The appellant moved the court to quash the sheriff's decision on the compatibility minute and to grant an extension of the time bar in section 65(1) of the 1995 Act. It was in the interests of justice that the prosecution should continue (*Barr* v *HM Advocate* 2023 SLT 324 at para [16]).

Respondent

[15] The respondent maintained that the appellant's reliance on a failure to lodge a defence statement was misplaced. As far back as the section 75A Minute of 5 December 2019, substantially the same information, as would have been required in a defence statement, had been provided to the Crown and the court. There had been repeated attempts by the respondent for disclosure, notably in letters or emails throughout 2020 and 2021. No substantial replies have been received.

[16] On Article 6, this was not a particularly complex case. The issues were clear, as far back as 2012. The respondent had been on a restricted practising certificate for over eight years. The matter had been reported to the Crown Office by the judicial factor, but it had been two years before the Crown had instructed the police to investigate and a further year before the respondent had been interviewed by the police. In applying the criteria in *O'Neill* v *United Kingdom* (at paras 86-87), the case had all the features of an unreasonable delay breach. There was: the lack of complexity; prolonged uncertainty; the relatively minor nature of the offence; and a lack of responsibility on the part of the respondent for any delay. There were significant gaps in the progress of the case. Some seven years had passed between the judicial factor's report and the placing of the respondent on petition. The respondent's partner had already complained to the European Court of Human Rights

about the delay in serving an indictment in 2018. This application had been sisted. His name had been struck off the roll of solicitors in 2015.

[17] In determining whether discontinuance of the proceedings was an available remedy, regard had to be made to *Spiers* v *Ruddy* 2009 SC (PC) 1 at para [17], approving *A-G's Reference (No. 2 of 2001)* [2004] 2 AC 72 at paras 24, 25 and 29. It was not appropriate to dismiss proceedings unless there could no longer be a fair hearing or it would otherwise be unfair to try the accused. The circumstances fell into the latter category.

[18] Even if the court were to sustain the appellant's argument on delay, no extension of time ought to be granted. The test was whether it was in the interests of justice that the case proceed (*Barr* v *HM Advocate* at para [16]).

Decision

Oppression

[19] The issue of oppression was not revisited directly on appeal. It is, however, useful to repeat the test for oppression before going on to consider unfairness under Article 6 of the Convention. "Whether oppression can be established depends on the particular facts and circumstances, including the Crown's conduct, the seriousness of the charge and the public interest in ensuring that crime is prosecuted" (*Fisher* v *HM Advocate* 2023 JC 21, LJG (Carloway), delivering the opinion of the court, at para [28], following *Potts* v *Gibson* 2017 JC 194, LJG (Carloway), delivering the opinion of the court at para [16]). The court has the power to stop a prosecution in the event of oppression, but the circumstances in which such a power would be exercised have to be "special"; *viz.* "whether the risk of prejudice is so grave that no direction of the trial judge, however careful, could reasonably be expected to remove it" (*Stuurman* v *HM Advocate* 1980 JC 111, LJG (Emslie) , delivering the opinion of the

Full Bench, at 122, followed in *HM Advocate* v *Withey* 2017 JC 249, LJG (Carloway), delivering the opinion of the court, at para [38]). The sheriff recorded that, in the respondent's case, the Crown "may now have located the various items of paperwork said to be required". It was on that basis that the sheriff repelled the plea. Otherwise, she reasoned, the case may, for the reasons given in relation to Article 6, have been categorised as oppressive.

Article 6

[20] It was correctly conceded that there has been a breach of the reasonable time requirement under Article 6(1). The respondent was interviewed and charged by the police in July 2015; almost eight years ago. However, the remedy of sustaining a plea in bar as a consequence is only appropriate where the delay is such that a fair trial can no longer take place or there is some other compelling reason to stop the proceedings (*Potts* v *Gibson* at para [21] following *HM Advocate* v *CAM* 2013 SCCR 67, Lady Paton, delivering the opinion of the court, at para [7] citing *A-G's Ref (No 2 of 2001)* [2004] 2 AC 72, Lord Bingham at para 29).

[21] In *A-G's Ref (No 2 of 2001*), Lord Bingham explained (at para 24) that where there has been a breach of the reasonable time requirement:

> " …there must be afforded such remedy as may ([Human Rights Act 1988] section 8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend upon the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable… It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or

> dismissed if any lesser remedy will be just and proportionate in all the circumstances.
>
> 25 The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawfulness and executive manipulation…. But… the category may not be confined to such cases. …There may well be cases … where the delay is of such an order, or where a prosecutor's breach of professional duty is such… as to make it unfair that the proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if a lesser remedy would adequately vindicate the defendant's Convention right."

This approach was affirmed as applicable in Scotland in *Spiers* v *Ruddy* 2009 SC (PC) 1 (Lord Bingham at para [17]).

[22] Applying this approach, the court does not consider that any lesser remedy than sustaining a plea in bar of trial would be effective, just and proportionate to provide an adequate remedy to the respondent for the breach of the reasonable time requirement. Without repeating unnecessarily the various factors which the sheriff took into account, the significant feature in this case is the exceptional and unjustifiable delay, which was essentially caused by the Crown, between the first report of the case sometime in 2014 and the present day; some eight or nine years. As at present, the court has little confidence that the scheduled trial in October 2023 will proceed, whether the respondent is restored as an accused or not. There appear to be significant evidential problems in the case against the respondent's partner involving the state of the computer equipment and the available paperwork. If the case cannot proceed against the respondent's partner, it is difficult to envisage it proceeding only against the respondent when her partner would almost inevitably be called by her as a witness. In this state of grossly excessive delay and future uncertainty it is appropriate to stop the current proceedings by sustaining the plea in bar. The respondent is not acquitted but the prosecution against her is discontinued accordingly.

Time Bar

[23] The original 12 month time bar in terms of section 65 of the 1995 Act would have expired in September 2020, or rather March 2021 following Covid; two and a half years ago. That expiry has to be seen in the context of a case which first came to the attention of the COPFS in July 2014 (nine years ago) and again in September 2015. The test is whether it is in the interests of justice that the case should proceed (*Barr* v *HM Advocate* 2023 SLT 324, LJG (Carloway), delivering the opinion of the court, at para [16]). The factors taken into account in relation to Article 6 remain relevant. Balancing all of these, had the court not sustained the plea in bar on the basis of Article 6, it would have held that it is not in the interests of justice to allow this prosecution to continue into what is still an uncertain future.