
**[2018] SAC (Crim) 13**
**SAC/2018-000391/AP**

Sheriff Principal M M Stephen QC
Sheriff Principal C D Turnbull
Appeal Sheriff S Murphy QC

OPINION OF THE COURT

delivered by

SHERIFF PRINCIPAL MHAIRI M STEPHEN QC

in

BILL OF ADVOCATION

by

MARK KANE

Complainer:

against

PROCURATOR FISCAL, HAMILTON

Respondent:

**Act: Findlater; PDSO Edinburgh**
**Alt: Prentice QC; Crown Agent**

14 August 2018

[1] The complainer is charged at the instance of the respondent with a contravention of section 5(1)(a) of the Road Traffic Act 1988 in the following terms:-

> "(001) On 20 August 2017 on a road or other public place, namely McNeill Street, Larkhall, you MARK KANE, did drive a motor vehicle, namely motor car registered number BE10 XCC after consuming so much alcohol that the proportion in your breath was 95 microgrammes of alcohol in 100 millilitres of breath; which exceeded the prescribed limit, namely 22 microgrammes of alcohol in 100 millilitres of breath;
>
> CONTRARY to the Road Traffic Act 1988, section 5(1)(a)
>
> You MARK KANE did commit this offence while on bail, having been granted bail on 4 August 2017 at Glasgow and Strathkelvin Sheriff Court".

[2] This Bill advocates the decision of the sheriff in Hamilton to allow an adjournment, of a trial diet on 26 June 2018 on the respondent's motion. The court minute indicates that the adjournment was allowed due to an essential crown witness being absent. A further trial diet is assigned for 7 September 2018. The crown witness in question is a police officer. The sheriff in her report explains that there had been previous adjournments on crown motion due to difficulties in securing the officer's attendance due to reasons relating to his health. The sheriff gives the following reasons for allowing a further adjournment at para [5].

> "However, looking at the overall effects of the adjournments, I did not consider that granting a further adjournment meant that it was an inordinate time for this summary complaint to be brought to trial. The offence date was 20 August 2017, and my decision on 26 June 2018 was within a year of the date of the commission of the offence. It seemed to me that there were cogent reasons for the crown seeking to have the case further adjourned due to the ill health of Constable Pilling. I also considered that balancing the rights of prejudice to the complainer and any other parties was outweighed by the public interest in ensuring that a driver who was charged with driving with more than four times the legal limit of alcohol in his system is brought to trial."

[3] It is, however, necessary to put the procedural history in context. The complaint first called on 22 August 2017 when a trial was fixed for 29 November 2017. At that trial diet there was a defence motion to adjourn due to the accused being unwell which was granted and a further trial fixed for 24 January 2018, when there was a further defence motion to

adjourn this time opposed by the respondent. That motion was granted and a further trial fixed for 8 March 2018. By that stage it appears that the respondent was aware of concerns about the health of the police constable and the trial on 8 March 2018 became a notional trial diet. The trial was adjourned until 29 March 2018 due to difficulties with the availability of the crown witness and then adjourned again until 25 May 2018 at which point there was a further crown motion to adjourn opposed by the complainer. The adjournment was granted and a further trial fixed for 26 June 2018. The minute records: "The Court noted that this should be the last adjournment if the same witness fails to attend". When the complaint called for trial on 26 June 2018 another sheriff presided and the witness was still absent, presumably due to ill health. The sheriff granted a further adjournment and that, of course, is the decision now advocated.

[4] Counsel for the complainer argues that the sheriff's decision to adjourn was erroneous, oppressive and contrary to law. In particular, it was argued that a great deal of weight should be placed on the view expressed by the sheriff presiding on 25 May 2018 confirmed in the court minute. Little else was advanced as to the nature of the prejudice to the complainer other than delay in bringing the matter to trial and inconvenience to the complainer. We were urged to take the view that the sheriff on 26 June 2018 had erroneously failed to have regard to the decision of the presiding sheriff at the earlier diet and had failed to exercise her discretion properly when considering and balancing the competing issues of prejudice to the prosecutor, complainer and the public interest generally.

[5] In response the advocate depute argues that the sheriff correctly applied the test laid down in *Tudhope* v *Lawrie* 1979 JC 44. Where the sheriff applies the correct test, the appeal court will only interfere when the decision is one which no reasonable sheriff could have

made (*Paterson* v *McPherson* [2012] HCJAC 61). The advocate depute referred to a soul and conscience certificate in respect of the police constable dated 1 May 2018 which had been presented to the sheriff. The witness was due to return to light duties and would be fit to give evidence on 7 September 2018.

[6] The decision whether or not it is in the interest of justice to grant an adjournment of a trial diet is indeed a discretionary one for the court at first instance *(Paterson supra*). This court will only intervene in such a discretionary decision if a sheriff reached a decision which no reasonable sheriff would have reached.

[7] It is clear from the sheriff's report that she did consider the trio of interests which any court must take into account when considering whether to adjourn a trial in summary proceedings. The interests, of course, are the three elements of prejudice:- prejudice to the prosecutor; prejudice to the appellant and of course the public interest (*Skeen* v *McLaren* 1976 SLT (Notes) 14). The sheriff was advised of the reasons for the adjournment and these related to the availability of the police constable due to health reasons. The witness's evidence is required to prove the charge in the absence of agreement of that evidence. Clearly, the sheriff had regard to the nature of the charge which is a serious one aggravated, of course, by the allegation that the offence was committed whilst the complainer was subject to a bail order granted less than two weeks prior to the day of the alleged offence. On 25 May 2018 the sheriff considered that no further adjournments ought to be granted beyond that which he allowed that day. This may well be a factor which the sheriff on 26 June 2018 had to consider but as the sheriff correctly observes she was not bound by her colleague's decision as regards the finality of the adjournment process. It would be improper to suggest that the sheriff was so bound as she required to take into account all relevant factors which pertained at the time she made her decision and exercised her own

judgment. The sheriff is clearly aware of the procedural history. It cannot be argued that the decision to grant the crown adjournment in face of witness difficulties due to ill health was one which no reasonable sheriff would have reached. That is, accordingly, sufficient to deal with the bill and we decline to pass the bill.

[8] However, it is important to observe that appeal by bill of advocation in the course of summary proceedings does nothing to assist the summary nature of such proceedings. We agree that delay should be avoided but, of course, it has to be borne in mind that both parties have contributed overall to the passage of time since the complaint first called. Generally speaking advocation should not be used as a mode of common law appeal in summary proceedings other than in exceptional cases where there is likely to be a miscarriage of justice which cannot be remedied by statutory appeal at the conclusion of the case. (*AMI* v *PF Glasgow* [2014] HCJAC 9 in which Lord Carloway, as Lord Justice Clerk, observed that "*quantum valeat* a Bill of Advocation is also not a competent remedy either to review decisions made *pendente processu* other than in very special circumstances (*Muir* v *Hart* (1912) 6 Adam 601) which are not present here"). No such circumstances exist here either. Steps should be taken to ensure that this complaint proceeds to trial next month.