SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT DUNFERMLINE

[2020] SC DUNF 5

SCS/2019-54222

JUDGMENT OF SUMMARY SHERIFF JAMES MACDONALD

in the case

PROCURATOR FISCAL, DUNFERMLINE

against

LAURENCE RINTOUL OGILVIE

Accused

For the Crown: McDermid, PF Depute
For the accused: Joshi

Dunfermline, 1 August 2019

Introduction

[1] The accused appears on a summary complaint, bearing one charge, alleging a contravention of section 39(1) of the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act"). The charge avers that, between 1 January 2019 and 5 May 2019, the accused engaged in a course of conduct which caused the complainers "CN" and "ZN" fear and alarm in that he repeatedly walked and drove past the complainers' address, and stopped and stared into the windows of the complainers' house.

[2] Immediately after the charge but above the signature of the Procurator Fiscal Depute the complaint states the following:

> "And take notice that the Crown intends to lead evidence at your trial that on 13 August 2017 at Dunfermline Golf Club, you did assault CN to his severe injury".

[3] It was not disputed that the accused was subsequently convicted of the above incident.

[4] The accused tendered a preliminary plea to the competency of the above notice, which was termed a "docket" by both the solicitor for the accused and the Procurator Fiscal Depute. The matter came before me as a diet of debate in relation to that plea on 10 July 2019.

[5] It was accepted at both sides of the Bar that at least some of the issues raised in this case have not yet been determined at summary level. In light of that consideration and reinforced by the submission made to the effect that the approach taken in the present case may inform future procedure in other cases, I made avizandum and now issue this written judgment.

Submissions

[6] In a wide-ranging submission, Miss Joshi for the accused invited me to sustain the plea to the competency on the following basis:

a. That the use of dockets is regulated by statute, namely section 288BA of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). This provision could not apply to the present case as Parliament had restricted the application of the provision to sexual offences. As Parliament had enacted what is now section 288BA, there was now no scope for the operation of the common law with regard to the use of dockets.

b. That esto there remained a common law power to append a docket to a charge, this was not possible in summary procedure. Summary procedure is largely a creature of statute and accordingly should be materially distinguished from indictment procedure.

c. That the Crown approach in the present case raises concerns that it will open the floodgates to a similar approach in future cases. Correspondingly, summary trials are at risk of being unduly lengthened by evidential issues not forming part of the subject matter of the charge and so should be regarded as collateral.

d. That even if it were competent in the generality to adopt the approach taken by the Crown in the present complaint, it remains incompetent in the specific circumstances of the present case. This is so for the following reasons:

i. That doing so would elicit a previous conviction of the accused and so would contravene section 166(3) of the 1995 Act. It would be impossible in practical terms for any enquiry into the 2017 incident not to touch upon the fact that the accused had been convicted of it. In any event, the accused was entitled to the benefit of the presumption of innocence.

ii. Allowing evidence to be led of the 2017 incident would result in an unfair trial. It would in particular cause material prejudice to the accused.

iii. That it is not necessary for the purposes of proving the present charge to embark upon any enquiry into the 2017 incident. That incident should be seen as collateral and irrelevant. At best, all that was required for the Crown to do was establish in evidence that the accused was known to the complainer and that, by use of closed questions, the fact that there had been an earlier incident. A wider evidential excursion into the earlier incident would risk a later court

reaching a view on the earlier incident that differed from that made by the convicting court. Such a scenario would be contrary to the principle of finality.

[7] Miss Joshi acknowledged that what the Crown gave notice of intending to do here was to lead evidence of a crime not charged. She accepted that this was permissible in certain circumstances where it was relevant to the offence charged and fair notice of that intention had been given: *Nelson* v *HM Advocate* 1994 JC 94. She however submitted that there was a general presumption against admission of evidence relating to matters not libelled as charges.

[8] Miss Joshi further acknowledged that the High Court had recently considered the legality and fairness of dockets in the case of *HM Advocate* v *Moynihan* 2019 SCCR 61. She however invited me to distinguish *Moynihan* on its facts. That case, she submitted, was concerned with section 288BA only. It thus had no application to the situation of a non-sexual case at summary level.

[9] With regard to Miss Joshi's submission relating to the fairness of the trial and any prejudice that may be incurred to the accused, she conceded that the decision maker at sheriff court summary level is legally qualified and should be expected to put prejudice out of his or her mind and reach a true verdict. There are however, limits to that expectation. It is possible that the prejudice could be so grave that no sheriff could be expected to disregard it: *MacFadyen* v *Annan* 1992 SCCR 186.

[10] Miss Joshi further invited me to distinguish the cases of *McIntosh* v *HM Advocate* 1986 JC 169 and *Fraser* v *HM Advocate* 2014 JC 115. Neither of these, she submitted, applied to either the issue in the present case, or indeed at all to summary procedure.

[11] For the Crown, the Procurator Fiscal Depute submitted that the purpose of the appending of the "docket" to the complaint in the present case was to allow evidence to be led of the 2017 incident itself, not to establish the fact of any conviction that flowed from it. This chapter of evidence, he submitted, is relevant because it may be relied upon to provide a basis for the complainers to have genuine fear and alarm resulting from the conduct of accused libelled. He reminded me that it is an essential element of section 39 charges that the course of conduct alleged did in fact cause the complainer fear or alarm. The purpose therefore was to show a narrative, not to re-try the accused for the 2017 incident. The Crown, emphatically, was not seeking to prove the fact of any earlier conviction.

[12] Accordingly, the proposed course of action is relevant to the matter on the complaint. It is permissible by virtue of the case of Nelson. The Crown has given fair notice as required.

[13] The Procurator Fiscal Depute added that, had the accused not been convicted of the earlier incident, an additional charge (sometimes termed an "evidential charge") could have been added to the present complaint. This issue only arose in the present case because the accused had already been convicted.

[14] It was submitted for the Crown that I should attach significant weight to the Opinion of the Court in the case of *Moynihan*. The views expressed therein ought to be regarded as having general application and should not be seen as being restricted merely to the operation of section 288BA. The Court's Opinion provided an answer to the concerns raised on the accused's behalf about the potential disclosure of a previous conviction, the impact upon the presumption of innocence, and the remedies available to the Court in the event that it finds that the accused has been prejudiced by the use of the "docket".

[15] With regard to the competency of "dockets" in summary procedure, the Procurator Fiscal Depute reminded me that, for example, dockets in terms of section 6 of the Road Traffic Offenders Act 1988 were commonplace in summary procedure. The purpose of such a statutory docket is to avoid a statutory time bar in certain circumstances. He however accepted that the authorities he relied upon, namely *Nelson*, *McIntosh*, *Fraser* and *Moynihan* all related to cases at solemn level.

[16] It was however submitted that the Opinion of the Court in *Nelson* demonstrated that it was intended to have general application to both solemn and summary cases.

Analysis and decision

Crime not charged

[17] It is settled that it is competent for the Crown to lead evidence of a crime not charged where it is relevant to proof of the crime libelled, provided that fair notice is given by the prosecutor, irrespective of whether the proceedings are solemn or summary: *Nelson*.

[18] In delivering the opinion of the Court in *Nelson*, the Lord Justice General (Hope) stated thus at 101F:

> "… the foundation of the rule is to be found in the principles of fair notice and relevancy. To take first the question of relevancy, the general rule is the Crown can lead any evidence which is relevant to the crime charged. This may include evidence relating to motive as well as to things done to commit the crime. The fact that the evidence may show or tend to show that the accused committed a crime not charged is not in itself a reason for holding the evidence to be inadmissible, so long as to do so is relevant to the crime charged in the indictment."

His Lordship continued at H:

> "In such cases, the principle of fair notice requires that the other crime ought to be charged in the complaint or indictment or at least that it should be the subject of a distinct averment."

[19] As Miss Joshi correctly summarised during in the course of her submissions, there are two parts to the test identified in *Nelson*:

a. There must be fair notice of the intent to lead evidence of a crime not charged; and

b. The evidence must be relevant to the offence charged.

[20] There are instances where it may not be possible to libel the prior incident as a charge. One of those is where – as here – the accused has already been convicted of the other crime.

[21] I was not referred in the course of submissions to *Slack* v *HM Advocate* 1995 SCCR 809. That is however a case which followed *Nelson* and also where the Opinion of the Court was also issued by the Lord Justice General (Hope). In *Slack*, the Crown inserted a preamble to the indictment. The appellant was charged with driving whilst disqualified and without insurance. In the preamble the Crown gave notice of the intent to lead evidence of the appellant having taken the vehicle in question without consent. A preliminary plea to the competency and relevancy was taken at first instance. It was argued at first instance for the Crown that leading evidence of the appellant having stolen the car was inescapable. The sheriff repelled the preliminary plea. The appellant was convicted after trial. On appeal the Solicitor General refined the argument and submitted that the charge of theft of the vehicle could not be placed on the same indictment as that libelling a charge of driving while disqualified on the basis that doing so would disclose a previous conviction.

[22] The Court in *Slack* applied the principle established in *Nelson*. It however had the benefit of being able, retrospectively, to assess the evidence led of the crime averred in the preamble. It ultimately concluded that this evidence was unnecessary to the establishment of the crime libelled on the indictment. It was accordingly held to be unfair to the appellant

for the Crown to proceed in the manner it did (814A). Further, the leading of unnecessary evidence had been prejudicial to the appellant (814D). The Court accordingly quashed the conviction.

[23] *Slack* is an example of the use of additional averments in the indictment beyond the wording of the charges themselves as envisaged in *Nelson*. Neither *McIntosh* nor *Fraser* is an example of the use of additional averments, or indeed what may now be regarded as a "docket".

[24] In *McIntosh*, the fair notice required for the purposes of *Nelson* was contained in a charge that had been deleted from the indictment at an earlier stage in the proceedings. That was held to have given sufficient fair notice to the accused of the intention to lead evidence of what, by the time of the trial, was a crime not charged.

[25] In *Fraser*, the issue arose from evidence from a witness who mentioned that the appellant had been involved in a "previous incident where he was imprisoned." It was accepted on behalf of the appellant that this evidence had been given spontaneously and not through any fault of the prosecutor. There was no "docket" appended to the indictment. The Court nevertheless considered the general principle established in *Nelson*. At paragraph 50 of the opinion of the Court, the Lord Justice-Clerk (Carloway) held thus:

> "The problem which arises in this case stems from the interrelation between that general approach to evidence of past similar conduct and two further rules that might operate in conflict with it. The first is that evidence of a crime not charged on the indictment is generally inadmissible on the ground of lack of fair notice (*Nelson v HM Advocate*). The earlier assault could not have been, and was not, libelled against the appellant because, even by the time of the first trial, the appellant had been convicted of that offence and repeating the charge in a subsequent libel would have offended the rule against double jeopardy. This might conceivably have been circumvented by a simple narrative, rather than a charge, appended to the indictment. However the second rule is the statutory prohibition on the disclosure of previous convictions prior to the verdict of the jury. Again, it might have been possible to avoid breaching this prohibition by not mentioning the fact of conviction."

[26] What the Court was considering in *Fraser* was whether there had been a miscarriage of justice caused by the witness saying what she did. In doing so, the Court considered the principle set out in *Nelson*. The passage I quote above is accordingly *obiter.* It emphasises however that, in a case such as the present where it is impossible to libel the previous incident as a charge, it is competent to add averments short of a further charge. As the Procurator Fiscal Depute emphasised in his submissions, the importance of the *Fraser* case is that it post-dates the inclusion of what is now section 288BA into the 1995 Act. Accordingly, in my judgment there can be no doubt that the enactment of section 288BA did not disable the application of the common law. I will return to the statutory provision in the section below.

[27] None of the authorities referred to above specifies a form which any additional averment or "simple narrative" should take. It seems to me that it is unimportant whether same is found within a preamble (*Slack*), an addendum (the present case), or a note apart. The crucial requirement is that the averment is included, so as to give the accused fair notice.

"Dockets" under the 1995 Act

[28] The word "docket" appears only in the 1995 Act in section 288BA.

[29] Section 288BA(3) requires that a docket for the purposes of that section be in the form of a "note apart" from the offence charged. On any fair reading of that provision, no attempt was made by Parliament to limit the application of the common law. Indeed, section 288BA has an entirely separate purpose from the issue addressed in *Nelson*, namely the establishment of a course of conduct.

[30] I have already observed above that the line of authority established in *Nelson* has continued beyond the enactment of section 288BA.

[31] The use of such a statutory docket was considered in *Moynihan*. That case is not in point. The Crown submission in the present case was that I should nevertheless regard the views expressed by the Court in that case as applicable.

[32] In delivering the Opinion of the Court, the Lord Justice-Clerk (Dorrian) at paragraph 9 described the use of dockets as a matter of modern practice. The Court however equiparated the use of a docket with the inclusion of a narrative as required in the case of *Nelson*. The word "docket" appears to have no special legal meaning, and instead is merely a term of practice.

[33] The Court in *Moynihan* was faced with a prior incident which had resulted in the conviction of the accused. There is accordingly a similarity between that and the present case. The Crown in *Moynihan* added a docket to the indictment. At first instance, the preliminary hearing judge had ruled that the Crown could not use the docket because section 288BA was not intended to prove facts that had already resulted in conviction. At paragraph 14, the Lord Justice-Clerk rejected this approach, on the basis that the judge at first instance had wrongly assumed that the jury would be made aware of the fact of the earlier conviction. The Crown instead merely wished to lead evidence of the facts of the earlier incident. This again is consistent with the stated intention of the Crown in the present case.

[34] The Court went on to emphasise at paragraph 16 that the presumption of innocence had no bearing upon the content of a docket under section 288BA. Instead the presumption applied to the crime libelled on the indictment. There is no "burden of proof" in relation to the facts contained in the docket.

[35] The view expressed in *Moynihan* with regard to the operation of the presumption of innocence to matters referred to in a docket where there has previously been a conviction is

consistent with the view expressed by the European Convention on Human Rights jurisprudence. In *Sekanina* v *Austria* (1994) 17 EHRR 221, at paragraphs 40 and 46 of the Commission's findings, it was highlighted that the presumption of innocence set out in Article 6(2) of the European Convention on Human Rights exists until the accused is presumed innocent "until proved guilty according to law". Therefore, the presumption was enjoyed in the earlier proceedings only up to the point of conviction.

[36] At paragraph 17 of *Moynihan*, the Court emphasised that the accused was not being tried a second time for the matters referred to in the docket. The accused is only being tried in relation to the charge on the indictment. The court added that a jury finding the docket evidence less than reliable or credible is of no significance to the original conviction. Similar observations were further expressed in paragraph 18.

[37] It is quite clear from paragraphs 17 and 18 of Moynihan that the Court had in mind a determination by a jury where there had been a previous trial. I have reservations as to how readily applicable this view may be to summary procedure where the decision maker requires to issue reasoned decisions, and must make findings in fact and law. I do not however require to reach a concluded view on this issue in light of my ultimate disposal.

[38] Paragraph 21 of the Opinion in *Moynihan* expects that the trial judge should tailor directions to the jury regarding how the evidence in a docket should be treated. Contrary to the Crown submission in this case, *Moynihan* offers no guidance as to what the trial judge should do to address any issue of prejudice to the accused.

[39] I agree with Miss Joshi that the approach to be adopted on the issue of prejudice is that set out in *MacFadyen* which I will return to below.

[40] Section 288BA of the 1995 Act cannot in any event apply in the present case as it is concerned only with sexual offences.

Application to the present case

Competency and the "floodgates" argument

[41] As I have identified above, as a general rule the addition of what may be termed a "docket" is already permissible at common law in summary procedure. There is accordingly no arguable basis for any suggestion that the Crown approach in framing the complaint in the present case opens the "floodgates" to a similar approach to be adopted in other cases. What the Crown seeks to do in the present case is not of itself novel.

[42] The issue in the present cases arises only because the accused has already been convicted of the 2017 incident. If it were otherwise, that earlier incident would form a charge in the present proceedings. If the Crown wishes to make reference to the 2017 incident, it must therefore use an averment, whether a "docket" or otherwise.

[43] The Crown may have elected to add an averment to the charge to the effect that the accused had previously evinced malice or ill-will towards a complainer. The approach taken however is considerably more specific. It leaves the accused under no doubt that the Crown will attempt to demonstrate that there is a nexus between the present charge and the 2017 incident.

[44] In the present case, the proposed evidence is intended by the Crown to provide a basis for one of the complainers to justify his likely evidence of real fear and alarm said to result from the conduct libelled. The Crown says that the complainers had good reason to be afraid of the accused because he seriously assaulted one of them in 2017. The Crown's intention is clear and allows me to evaluate the proposed approach in advance of the trial.

[45] Section 39(1) of the 2010 Act is concerned with a course of conduct on the part of an accused person that amounts to stalking. In terms of sub-section (2), it is essential that the course of conduct causes actual fear or alarm to the complainer.

[46] The Crown approach is therefore misconceived. The 2017 incident does not form part of the course of conduct alleged in this case. What is required by section 39(2) is that the course of conduct, not an extraneous incident, caused fear and alarm to the complainer. Accordingly, it is not relevant to the charge on the complaint that there was a prior incident some two years previously. The 2017 incident is collateral and so is inadmissible.

Fairness and the risk of prejudice

[47] It was submitted for the accused that the approach of the Crown in the present case results in prejudice to the accused. The Crown has sought to add an allegation which is considerably more serious than that which forms the subject of the charge.

[48] It is perhaps useful at this point to return to the case of *Slack*. In that case, as in the present, the additional allegation short of a charge was unnecessary to prove the charge libelled. The Court held that the approach of the use of what might now be regarded as a "docket" and the evidence led in support of it had been both unfair and prejudicial to the accused. That was held to have been fatal to the conviction.

[49] In my judgment, it is unfair on the accused in the present case to permit evidence to be led of a collateral incident which is unnecessary to the proof of the charge libelled. That is all the more so where the previous incident is of significantly greater gravity in comparison with the matter the Crown is actually seeking to prove.

[50] Separately, I take the view that the addition of a serious prior allegation is undoubtedly prejudicial to the accused. In light of the gravity of the earlier allegation, and the Crown's stated intent to rely upon it as a basis to explain and indeed amplify the fear and alarm said to have been caused to the complainers, I do not see how the Court

reasonably can put this prejudice out of its mind and reach a fair verdict. I accordingly consider that the test set out in *MacFadyen* has been met in this case.

Disposal

[51] For the foregoing reasons, I sustain the preliminary plea.