SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

[2018] SC ABE 45

SCS/2018-011747

JUDGMENT OF SHERIFF PHILIP MANN

in the cause

PROCURATOR FISCAL, ABERDEEN

against

JASON KILLMAN and OLIVER HILARY PICKERING

Aberdeen, 26 July 2018

Introduction

[1] In this case the accused together faced a single charge of assault alleged to have occurred on 10 March 2017. They each took a plea in bar of trial on the grounds of oppression. The oppression was said to arise from the fact that at a trial diet on 28 November 2017 the crown had taken a deliberate decision not to call an earlier complaint containing a single charge in identical terms against the same accused, with the result that the instance in respect of that complaint fell at midnight on that date; yet the crown had raised the complaint to which exception was now taken.

[2] I heard a debate on these pleas on 25 July 2018. Mr McAllister, Solicitor, Aberdeen, represented the first accused. Mr Longino, Solicitor, Aberdeen, represented the second accused. It was agreed that he would speak first. The crown was represented by Miss McDonald, Procurator Fiscal depute.

[3] Having heard parties in debate, I upheld the plea taken by each accused.

The procedural history of the first complaint

[4] After sundry procedure, which is not relevant to the issue in this case, a trial diet was fixed in respect of both accused for 13 September 2017. On that date the trial diet was adjourned to 28 November 2017 on the unopposed motion of the crown in respect that three essential crown witnesses had failed to attend. On 28 November 2017 the crown again had witness difficulties and elected not to call the complaint with the result mentioned in paragraph [1].

The circumstances in which the complaint was not called on 28 November 2017

[5] Mr Longino, with whom Mr McAllister concurred, advised me that on 28 November 2017 both accused were in attendance and were ready to proceed to trial. Certain crown witnesses had failed to attend. The defence agents had expressed the view to the procurator fiscal depute (not Miss McDonald) that these witnesses were not essential to the crown case and that there was nothing to stop the trial proceeding, at least to the point of being part heard. Nonetheless, the procurator fiscal depute had elected simply to not call the complaint. The procurator fiscal was heard to remark that the decision to not call the complaint was taken because it was feared that if the crown made motions to discharge the trial diet, which failing for the crown to be allowed to desert the complaint *pro loco et tempore,* such motions would, or might, be refused by the court. Miss McDonald took no exception to Mr Longino's narration of these facts.

The debate

[6] Mr Longino narrated the procedural history. He maintained that the actings of the crown in deliberately not calling the first complaint for trial in the circumstances narrated and by then raising the second complaint amounted to oppression. The crown had proceeded in bad faith. They had prevented both accused from making representations to the court and had prevented the court from exercising its supervisory role and making a decision. The second named accused had suffered prejudice as a result and would continue to suffer prejudice if the crown were allowed to continue to prosecute on the complaint to which exception was now taken. This was because he had a desire to apply for entry into the armed forces who had a policy not to consider individuals who had outstanding criminal cases against them.

[7] Mr McAllister associated himself with Mr Longino's submissions. He referred to the case of *HMA* v *Withey* 2017 JC 249 and, in particular, to paragraph [39] where the Lord Justice General (Carloway) in delivering the opinion of the court on the issue of oppression said, after quoting with approval a passage from the judgment of the Lord Justice General (Emslie) in the case of *Stuurman* v *HM Advocate* 1980 JC 111:

> "The law does not recognise a distinction between cases where a fair trial cannot take place and those where the holding of a trial would be, as it is put in other jurisdictions, an affront to justice….. A contention that the acts of the Crown have amounted to an affront to justice, or will undermine public confidence in the criminal justice system and bring it into disrepute, are to be considered in the context of an argument that these acts prevent a fair trial from being held. A submission that, as a result of the Crown's acts, justice cannot be seen to be done will also be considered in that context….. All are aspects of fairness of trial as that concept is understood at common law. A trial which is an affront to justice, or in which justice cannot be seen to be done, will not be a fair one."

Mr McAllister maintained that a trial on the complaint to which exception was being taken would be an affront to justice and would, indeed, be one in which justice could not be seen to be done. The plea of oppression should be upheld.

[8] Miss McDonald sought to persuade me that there was no oppression in this case. Under reference to the case of *Stuurman* she maintained that each case has to be determined on its own specific facts. In this case the crown had done nothing wrong. The crown had a duty to prosecute crime and was the master of the instance. It could lawfully decide whether or not a case should be called. There had been no inordinate delay in the re-raising of the proceedings and so no prejudice to either accused could have occurred on that account. Miss McDonald also referred to the case of *Withey*, in particular paragraph [49] thereof where the Lord Justice General said:

> "Whether a fair trial is possible will depend upon the particular facts and circumstances. These will include not only the nature of the Crown's conduct but also such matters as the seriousness of the charge and the public interest in ensuring that crime is detected and prosecuted."

Miss McDonald maintained that the conduct of the crown complained of in this case was as nothing compared to the conduct complained of in *Withey*. On that basis I should hold that there was no oppression and should repel the defence pleas.

[9] In a brief response both Mr Longino and Mr McAllister pointed to the sentence immediately after the passage in *Withey* referred to by Miss McDonald:

> "What may be regarded as amounting to oppression in the context of a minor summary complaint will not necessarily be the same when dealing with serious crime prosecuted on indictment."

That clearly indicated that the test for oppression arising from conduct of the crown was much less stringent in a summary case than in a solemn case. They urged me to sustain their respective pleas.

Decision

[10] I accept that each case must be decided on its own particular circumstances. I accept that the crown is the master of the instance. I accept that it is for the crown to decide whether or not a case should be called at a trial, or any other, diet. I agree that what the crown did in deciding to not call the case on 28 November 2017 was neither incompetent nor unlawful nor even objectionable. What I do not accept, in the circumstances of this case, is that the falling of the instance at midnight on 28 November 2018 should, as in the case of *Clark* v *Valentine* 1992 SLT 1103[1], be treated as a desertion of the complaint *pro loco et tempore* which, in effect, was what the crown contended for.

[11] Our system of criminal justice is an adversarial system. Parties join battle under the supervision of the court. The parties had joined battle in this case and the complaint had come to a second trial diet at which, like the first diet, the crown had witness difficulties which in its view meant that it was not in a position to proceed to trial. Meantime, both accused had attended, as they had the first trial diet, and were in a position to proceed to trial. In my view, they were entitled to expect that the trial would proceed on that day unless the court sanctioned some other course of action. They did not have the right to have the case called so that the court could consider what course of action would be appropriate in the circumstances. They did not have the right to absent themselves from the trial diet without question and without repercussion. I am completely satisfied that an impartial

[1] This was a case which I came across after the debate. It involved a situation where a complaint containing two charges was called but, due to inadvertence, no further procedure was minuted in respect of the second charge, which (according to the report on the case) resulted in the instance in respect of the second charge falling. It was held that the falling of the instance in these circumstances was equivalent to desertion *pro loco et tempore.* Given that the circumstances were quite different from the circumstances of this case and given that, in any event, I had already given my judgment in open court, I did not think it appropriate to bring the case to the attention of parties. I mention it simply for the sake of completeness. It provides a distinguishable comparator.

observer with knowledge of our criminal justice system would think it only fair that in these circumstances the crown, if it wished to preserve its right to prosecute, should have sought the sanction of the court to adjourn the trial diet or to desert the complaint *pro loco et tempore.*

[12] Of course, the crown was perfectly entitled to not call the case for whatever reason it chose. I cannot criticise it for taking that decision. But, it chose to do so to avoid what it considered to be a risk that the prosecution would be brought to an end by the court refusing any motions that it might seek to make. In the circumstances of this case I think that that would have been seen by the impartial observer as a clear and public renunciation of the crown's right to prosecute. Any accused person is entitled to expect, and he would be supported in this by the impartial observer, that battle will be joined on a level playing field.

[13] The charge in this case involves an allegation of a kick to the complainer's head. It cannot be described as minor. There is prejudice to the second accused arising from any delay in prosecution but, in my view, not such yet as to lead to the result that a trial would be unfair. Nonetheless, in the circumstances of this case I am satisfied that to allow the prosecution on the current complaint to carry on would amount to an affront to justice. A trial on this complaint would not be a fair one. To do other than uphold the defence pleas in this case would contravene the principle that justice must not only be done but must also be seen to be done.