SHERIFF APPEAL COURT

[2016] SAC (Crim) 25
SAC/2016/000477/AP

Sheriff Principal M M Stephen QC
Sheriff Principal M Lewis
Sheriff S Murphy QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

APPEAL UNDER SECTION 174 OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

DONNIE DANIEL POTTS

Appellant:

against

PROCURATOR FISCAL, HAMILTON

Respondent:

Appellant: Ogg (sol adv); Callaghan McKeown & Co
Respondent: Borthwick, AD; Crown Agent

9 August 2016

[1] The appellant is charged by the respondent on summary complaint in the following terms:

> "(001) On 11 April 2013 you DONNIE DANIEL POTTS did break into the house owned by RL at [an address in] Bellshill and steal £50,000 in cash or thereby"

[2] He appeals the decision of the sheriff at Hamilton on 30 June 2016 to repel his plea in bar of trial that the respondent's prosecution of him on this charge firstly is oppressive and unfair and, secondly, amounts to an abuse of process. The sheriff also refused the appellant's minute in terms of section 288ZA(2) of the Criminal Procedure (Scotland) Act 1995(the "1995 Act") to the effect that the respondent's continued prosecution of him on this charge breached his right to a fair trial within a reasonable time in terms of Article 6(1) of the European Convention on Human Rights. He also appeals that decision.

Background

[3] The charge is that of housebreaking and theft of £50,000 from the house of a 74 year old man (in the opinion of the appeal court the complainer is said to be 80). The evidence to be led in support of the charge is in the main (i) scientific evidence of DNA found on a crowbar, (ii) telephone records which place the appellant in the area at the relevant time and (iii) bank records which indicate that the appellant had deposited cash amounting to more than £15,000 at different bank branches. The transactions are noteworthy and would make the respondent's case against the appellant more compelling as a proportion of the banknotes were by then out of circulation and the elderly complainer had been a hoarder of money. The respondent's administration had been dilatory about obtaining a warrant for the bank records and their structure and system for dealing with case preparation and warrants was subsequently described as a "bizarre arrangement".

Procedural History

[4] The appellant appeared on petition at Hamilton Sheriff Court on 1 August 2013. He was released on bail pending service of an indictment which duly happened on 29 March 2014 when a first diet was assigned for 2 May 2014 with trial on 19 May 2014. The first diet and trial diet were subsequently adjourned on joint motion until 8 August and 25 August

2014 respectively. After two more adjournments further diets were assigned for 29 May and 15 June 2015 with the time bar extended to 21 June 2015. On 18 June 2015, prior to the expiry of the time bar, the respondent sought a further adjournment to allow steps to be taken to execute a warrant in respect of the bank records. The sheriff granted the respondent's motion and adjourned the trial to 21 September 2015 with a first diet on 4 September 2015. The sheriff also extended the time bar to 2 October 2015. That decision was appealed successfully to the High Court of Justiciary on 21 August 2015, [2015] HCJAC 124. The appeal court was critical of the Crown in respect of their administrative system; conduct of the case and preparation for trial. The appeal court considered that the information provided to the sheriff by the respondents was incomplete and misleading. The appellant's counsel had prepared a more detailed timeline of events which was accepted by the advocate depute. That timeline is now lodged in this appeal and no exception is taken to it. The appeal court were of the opinion that the Crown had failed to advance sufficient reason to justify the extension and allowed the appeal.

[5] Subsequently, in January 2016, the respondent served a summary complaint in identical terms to the charge on the indictment. At the first calling of the complaint on 23 February 2016 two minutes were lodged on behalf of the appellant. The case was continued to a diet of debate on 31 March which did not take place due to lack of court time. The second debate hearing could not proceed on 11 May as the appellant was not present. These appeals are taken against the sheriff's decision of 30 June 2016 to refuse the minutes.

Submissions

[6] The solicitor advocate for the appellant advanced arguments firstly in support of the appellant's contention that the sheriff erred in repelling his pleas in bar of trial that the respondent's continued prosecution of him on summary complaint amounted to oppression

and, or alternatively, an abuse of process. The delay in bringing the charge to trial was of such concern and gravity that the delay alone was sufficient to allow the court to uphold the plea due to oppression without there being any necessity for the appellant to show prejudice of the sort that would deny him a fair trial. The question whether the appellant could receive a fair trial had in effect been subsumed by the other circumstances which pointed to the continued prosecution being oppressive rendering the question of a fair trial almost irrelevant. We were referred to *HMA* v *Reekie* 1993 SCCR 460, a decision by the sheriff in Hamilton to uphold a plea in bar of trial on the ground of oppression due to repeated failings on the part of the Crown to trace and cite witnesses. The test which the court should apply is that established in *Stuurman* v *HMA* 1980 JC 111 with the result that the court could intervene where no prejudice is established by the appellant. Ms Ogg accepted that there was no prejudice to the appellant receiving a fair trial by virtue of lost witnesses or fading memories but fell just short of conceding that there was no real prejudice to a fair trial. The appellant had had the charge hanging over him for an unduly lengthy period and that was sufficient to find his continued prosecution oppressive. Further, under reference to *Brown* v *HMA* 2002 SLT 809, a case involving police entrapment, it was argued that the circumstances of this case amount to an abuse of process entitling the court to bring proceedings to an end irrespective of whether the appellant could receive a fair trial. The decision of the respondent to proceed by summary complaint, deliberately and effectively circumventing the decision of the appeal court of the High Court of Justiciary in the solemn proceedings, points to an abuse of process. Abuse of process falls into a separate category distinct from oppression. The *dicta* of Lords Philip and Clarke in *Brown* spoke of the court's function to recognise and address an abuse of state power by invoking, if necessary, its inherent power

to prevent any abuse of its process by discontinuing the proceedings. Accordingly, the plea should be upheld and the complaint deserted.

[7] The sheriff also erred in refusing the appellant's compatibility minute. The actings of the respondent in prosecuting the minute are unlawful and in breach of the appellant's Article 6 right to have the charge against him determined within a reasonable time. Applying the test set out in *Dyer* v *Watson* 2002 SCCR 119 the right to a hearing within a reasonable time had been breached by virtue of the delay which was significant and would cause this court and any court real concern. There was no particular complexity to the charge; there had been nothing at all adverse in the conduct of the appellant and the court accordingly required to focus on the manner in which the case had been dealt with by the prosecuting authorities. The decision of the appeal court of the High Court of Justiciary is critical of the respondent's systems and preparation and in light of the delay, there is no requirement on the appellant to show prejudice. There has been a breach of the reasonable time requirement and the court should discontinue the proceedings. The sheriff erred in relying on the decision in *Spiers* v *Ruddy* 2008 SCCR 131. The respondent had delayed bringing summary proceedings for a period of six months between August 2015 and February 2016 when the complaint first called in Hamilton Sheriff Court. There is therefore a continuing breach of the appellant's right to a trial within a reasonable time. The sheriff erred in concluding that the appellant had benefited from the appeal court's decision which brought to an end the solemn proceedings and would now face a lower penalty if convicted of the charge. The sheriff erred in paragraph 22 of his note when he stated: *"[22] It seemed to me that the delay had now ended. It was no longer continuing. There was no need to dismiss the summary proceedings, which were competently brought."* The prejudice suffered by the appellant in having these proceedings hanging over him outweighed the seriousness of the

charge. The delay caused by the prosecution made this a clear breach of the appellant's Article 6 rights which could not be remedied or cured by an acknowledgement that his rights had been violated nor by a reduction in any sentence he may receive if convicted. The only proper remedy is the discontinuation of proceedings.

[8] The advocate depute supported the sheriff's reasoning. Both appeals should be refused. He acknowledged the crown failings in its preparation of the solemn proceedings for trial. The decision to proceed by summary complaint was a highly unusual and exceptional decision arrived at after careful consideration of the specific circumstances of the case following the appeal court's decision on the extension of the time bar. The advocate depute explained that the decision of the court was delivered by brief *ex tempore* on 21 August 2015 with fuller reasons given in the Opinion of the Court dated 12 October 2015 and issued to parties shortly thereafter. The court's opinion was then referred by the respondent to crown counsel who made the decision to proceed by summary complaint. These instructions were given on 20 January 2016 and the complaint served the following day. The complaint first called in court in Hamilton on 23 February 2016. A debate was scheduled in respect of the appellant's compatibility minute and pleas in bar of trial. That debate required to be discharged due to lack of court time. A second debate was discharged due to the accused not being present as he was in custody. The debate proceeded on 23 June. The sheriff gave a decision the following week and issued his report. The Crown are ready to proceed and have been fully prepared following the warrant for the bank records executed on 8 July 2015. A trial had now been fixed for 19 October 2016. All documentation has been disclosed to the appellant's agent.

[9] The appellant had failed to identify any prejudice far less substantial prejudice which would prevent a fair trial taking place. The case against the appellant was circumstantial

and the charge was a serious one. The appellant had accepted that there was no particular prejudice due to witnesses' memory fading or witnesses disappearing. To succeed in a plea in bar of trial on the ground of oppression prejudice must be shown and the appropriate test was that set out by the Lord Justice Clerk in *McFadyen* v *Annan* 1992 JC 53. The bench in *McFadyen* v *Annan* considered *Stuurman* and adopted the reasoning of the Lord Justice General in that case. The appellant's argument that the prejudice arises in having proceedings "hanging over" him is not relevant to the plea in bar of trial. The case of *Brown* v *HMA* [*supra*] involved police entrapment and the opinions expressed were obiter. In continuing to prosecute on summary complaint the Crown has not attempted to circumvent the decision of the appeal court because firstly, it is competent to raise summary proceedings and secondly, it is appropriate, in the circumstances of this case, to take this unusual step due to the gravity of charge. The decision of the appeal court of the High Court of Justiciary is limited to the solemn proceedings and the protection offered by section 65 of the 1995 Act does not apply to summary proceedings.

[10] The advocate depute adopted the sheriff's reasoning in refusing the compatibility minute. It is accepted that there has been a breach of the reasonable time guarantee contained in Article 6. The sheriff has declined to bring proceedings to an end and in so doing exercised his discretion reasonably. The sheriff considered *Spiers* v *Ruddy* [*supra*] and concluded that the breach or delay was at an end. He was correct to do so. There has now been complete disclosure and a trial is fixed for October. In face of a breach of an accused's Article 6 right the remedy lies with the domestic court. There has been public acknowledgement of the breach. There is no continuing breach, the crown having done all it could to minimise further delay. The advocate depute relied upon the opinion of Lord Bingham of Cornhill in *Ruddy* when he considered whether criminal proceedings required to

be stayed on the grounds that there had been a violation of the reasonable time requirement in Article 6 in circumstances where the accused cannot demonstrate any prejudice arising from the delay. The appellant fulfils neither category and accordingly the sheriff was correct not to dismiss the proceedings.

DECISION

First Appeal

[11] The test to be applied where the plea in bar of trial alleges oppression is the same whether the oppression arises from delay or for another reason such as pre-trial publicity as arose in *Stuurman* v *HMA* [*supra*]. That test, as set out in *McFadyen* v *Annan* [*supra*] is whether the delay or lapse of time has prejudiced the prospects of a fair trial. The Lord Justice Clerk sets out the test in the following passage (page 60):-

> *"However, the real question which the court has to consider in all cases where delay is alleged is whether the delay has prejudiced the prospects of a fair trial. This involves the court asking itself whether the risk of prejudice from the delay is so grave that no direction by the trial judge could be expected to remove it. In the case of summary procedure the question must be whether the risk of prejudice from the delay is so grave that the sheriff or justice could not be expected to put that prejudice out of his mind and reach a fair verdict. I would again stress that cases where such a plea in bar of trial will be upheld will be rare and exceptional cases. The test to be applied where oppression is alleged to be the result of delay is the same as that which falls to be applied in cases where oppression is alleged to be the result of pre-trial publicity or any other cause."*

The bench in *McFadyen* reviewed certain authorities where delay was advanced as the reason why the prosecution should be dismissed by the court – *HMA* v *Stewart* 1980 JC 103; *HMA* v *Leslie* 1985 JC 1 and *Tudhope* v *McCarthy* 1985 JC 48. The court overruled *Tudhope* and applied the test in *Stuurman* in particular the *dicta* of the Lord Justice General (Emslie) who articulated the test in the following terms at page 122:

> *"The test which fell to be applied and which was applied in disposing of the plea in bar is not in doubt. As the authorities show, the High Court of Justiciary has power to intervene to prevent the Lord Advocate from proceeding upon a particular indictment but this power will be exercised only in special circumstances which are*

> *likely to be rare. The special circumstances must indeed be such as to satisfy the court that, having regard to the principles of substantial justice and a fair trial, to require an accused to face trial would be oppressive. Each case will depend on its own merits, and where the alleged oppression is said to arise from events alleged to be prejudicial to the prospects of fair trial, the question for the court is whether the risk of prejudice is so grave that no direction of the trial judge, however careful, could reasonably be expected to remove it.*"

It was submitted on the appellant's behalf that this passage indicated that there were categories of cases in which oppression might arise from events which did not cause prejudice to the prospects of a fair trial, and that the present matter was one such case. We do not accept that argument. The issue in the present case is delay and the test in such a case is to be found in *McFadyen v Annan* [*supra*].

[12] In our opinion, when considering a plea in bar of trial where oppression is alleged due to delay, the court must consider that delay and the cause of that delay as relevant factors when addressing the real test whether the risk of prejudice from the delay is so grave that the sheriff could not be expected to put that prejudice out of his mind and reach a fair verdict on the evidence. In this appeal, the main argument on prejudice focused on the undisputed fact that the appellant has had this charge hanging over him for three years. Nevertheless, it became clear that the evidence to be led in order to prove the charge against the appellant would be largely circumstantial and be founded mainly on scientific and other documentary evidence. The appellant was unable to appoint to any material prejudice to the trial and the fairness of the trial. This can be contrasted with *HMA* v *Reekie* (*supra*) where there was clear prejudice to the defence resulting from the crown failing to trace and cite witnesses who were also crucial witnesses for the defence. Accordingly, in our opinion, the lack of prejudice to the fairness of the trial and the gravity of the charge outweighs the other relevant factors such as the appellant's blameless conduct as regards both the solemn and

summary proceedings and the delay in having the charge against him determined. The test in *McFadyen* v *Annan* is not met.

[13] The second argument in support of the common law appeal raises the issue whether delay in proceedings associated with the respondent's decision to bring this charge on summary proceedings after the proceedings on indictment had been brought to an end by the decision of the Appeal Court, amounts to an abuse of process. In *Brown* v *HMA* [*supra*] the appellants raised on appeal the issue of police entrapment. The court refused the appeal as the issue was never properly before the jury and, in any event, the judge had given appropriate directions on the question of fairness. The passages to which we were referred are essentially *obiter* opinion as to entrapment constituting a misuse of state power and an abuse of the court process. The English decision in *R* v *Loosley* [2001] 1WLR 2060 was considered in *Brown* and the opinions expressed are those with which we would readily agree. Any court has an inherent power to prevent an abuse of its process and procedures. However, *Brown* is of no assistance in this appeal which addresses oppression. A plea in bar of trial on the ground of oppression is the proper vehicle for the appellant to bring to the attention of the court his complaints in respect of the conduct of the respondents. As has been noted a plea in bar of trial based on oppression is capable of dealing with a wide range of factors. A plea in bar of trial is a plea which seeks to invoke the court's inherent power to stop or prevent a case proceeding to trial where it be oppressive and unfair to the accused. The court in *McFadyen* v *Annan* considered the appropriate plea noting that the plea had been stated in a variety of ways including, as a plea in bar of trial; a plea of *mora* and a plea to the competency. The appropriate course is a plea in bar of trial. Accordingly, in the circumstances of this case, the plea of abuse of process is a plea which is neither separate nor

distinct from the plea of oppression and we refuse the appeal in so far as directed against the sheriff's refusal of the plea in bar of trial.

Second Appeal

[14] The appellant's minute in terms of section 288 ZA(2) of the 1995 Act raises a compatibility point that the appellant's right to trial "*within a reasonable time*" has been violated and that the proceedings against him ought to be discontinued. Clearly that is a reference to the appellant's Article 6 rights under the European Convention of Human Rights. Article 6(1) contains three distinct guarantees. It provides "that in determination of…… any criminal charge against him, everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal". That delay has occurred in this case due to the administrative failings of the respondent is beyond dispute. The advocate depute has acknowledged that there has been a breach of the reasonable time guarantee and has done so publicly in this court and also before the appeal court last year. The appeal court were rightly critical of the respondent's conduct of the solemn proceedings. Once a breach has occurred the question of remedy is one for the domestic courts. In this case the sheriff declined to bring these proceedings to an end and in so doing states:

> *"[22] It seemed to me that the delay had now ended. It was no longer continuing. There was no need to dismiss the summary proceedings, which were competently brought.*
>
> *[23] When it comes to the consequence of the past violation, if any, the appellant will be able to argue, in the event of conviction, for some remedy such as lower sentence as the appropriate judicial response to the delay in the commencement of these proceedings. However, at this stage, in my view, there was no continuing violation of the Article 6 right and therefore the compatibility minute also fell to be refused*."

In reaching this decision the sheriff considered Article 6 and the decision of the Privy Council in *Spiers* v *Ruddy* [*supra*].

[15] We were referred to two important decisions of the Judicial Committee of the Privy Council on Devolution (Compatibility) Minutes on the grounds of unreasonable delay *Dyer* v *Watson* (*supra*) and *Spiers* v *Ruddy* (*supra*). In *Dyer* the court considered the factors to be taken into account in determining whether any delay is unreasonable. In *Spiers* the court considered in what circumstances and whether criminal proceedings may be stayed (or brought to an end) where there has been a violation of the reasonable time requirement in Article 6(1) ECHR but in circumstances where the accused cannot demonstrate any prejudice arising from delay. In *Dyer* it was held that the court must consider whether the period of time gives real cause for concern and if it does the court must look at the facts and circumstances particularly the complexity of the case; conduct of accused and the manner in which the case has been dealt with by the administrative or judicial authorities. Here, it is accepted that the failings of the respondent have led to a violation of the appellant's Article 6 right due to delay. The case is not particularly complex but is serious and the conduct of the appellant cannot be criticised. *Spiers* addresses the questions which were left over from the decision in *Dyer*, namely the appropriate remedy and in particular whether dismissal was the only appropriate remedy. Lord Bingham in *Spiers* adopted his conclusion in the Attorney General's reference (No 2 of 2001) in the following passage at para 8:- "*Criminal proceedings may be stayed on the ground that there has been a violation of the reasonable time requirement in an Article 6(1) of the Convention only if (a) a fair hearing is no longer possible, or (b) it is for any compelling reason unfair to try the defendant*". The question which the court addressed in *Spiers* accords with the circumstances of the present appeal. Lord Bingham, having considered the Strasbourg jurisprudence, concludes at para 16:- "it gives rise to a breach which can be cured even where it cannot be prevented, by expedition, reduction of sentence or compensation provided always that the breach where it occurs is publicly

acknowledged and addressed". As we have noted the sheriff held that the delay had now ended. In such circumstances termination of proceedings is not inevitable as Lord Bingham recognised in *Spiers* at paragraph 17:

> *"Once it is accepted that a breach of the reasonable time requirement does not give rise to a continuing breach, it ineluctably follows that the Lord Advocate does not act incompatibly with a person's Convention right by continuing to prosecute him after such a breach has occurred."*

In the same case Lord Hope of Craighead recognised (at paragraph 21) that the court had a discretion to choose the remedy for the unlawful act which it considered to be just and appropriate. Lord Rodger of Earlsferry (at paragraph 26) stated that expediting proceedings could prevent the continuation of any violation of the reasonable time requirement: where there was no continuing breach on the part of the prosecutor, section 57(2) of the Scotland Act 1998 did not apply. Accordingly, it was not inevitable that proceedings should be brought to an end and it was for the court to determine the appropriate remedy for the violation of the reasonable time requirement contained within Article 6. As we have indicated the remedy is for the Scottish Courts. Lord Rodger of Earlsferry develops the question of whether there is a continuing breach or violation and concludes that "If the prosecutor speeds up he is no longer violating Article 6(1)". Expediting proceedings will avoid the continuation of any violation.

[16] Against that background we have analysed the actings of the respondent in so far as we have been informed by the advocate depute. We have concerns about the apparent delay between the decision of the appeal court in August last year and service of the complaint in January this year. We were informed that the full written decision of the appeal court was issued on 12 October 2015 and that subsequently the case was sent to crown counsel for advice. We accept that it is proper for the crown to consider the full

reasoning of the appeal court before they reached a view on what has been described as the highly unusual and exceptional step of bringing summary proceedings after an indictment had fallen. Allowing for this being an exceptional case a period of three months might be considered pedestrian in the context of the antecedent delay and the concept of "speeding up". We were however assured that the complaint was served within 24 hours of instructions being received to proceed by way of complaint. The procedure since the complaint called in court in February 2016 is unremarkable and a trial is now fixed for 19 October 2016. We are mindful that the debate was discharged on two occasions before it eventually proceeded in June of this year. The reasons for the discharge do not point to any carelessness on the part of the respondent. Against that background we are told that the respondent has made full disclosure and is ready to proceed to trial in October. In these circumstances we consider that the sheriff was correct to conclude that the period of unreasonable delay had apparently ended. We also bear in mind that in criminal cases Article 6 applies to the "determination" of a criminal charge and the obligation is to ensure that the proceedings are completed within a reasonable time. This case does not involve the appellant being detained in custody. He has been on bail since the outset. As was observed in *Dyer* the principal purpose of Article 6(1) is not only to prevent delay but also to prevent an accused being left too long in a state of uncertainty about his fate. This is the "hanging over him" argument. Strasbourg jurisprudence takes account of that factor. Having regard to all factors it does not appear to us that there is an obvious continuing breach now that the trial has been fixed and the respondent has given assurances to the court that he is prepared for trial. That is, of course, no guarantee that the trial will take place but nevertheless it is incumbent on the respondent to proceed to trial expeditiously. We are satisfied that the appellant can have a fair trial and much attaches to the importance of this matter proceeding

to trial on the date fixed in order that the appellant may have the charge against him determined. In these circumstances and in the absence of a continuing violation we propose to refuse the appeal in respect of the compatibility minute.

(signed) *Mhairi M Stephen*