APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 27
HCA/22-273/XC

Lord Pentland
Lord Tyre
Lady Wise

OPINION OF THE COURT

delivered by LORD PENTLAND

in the Appeal under Section 65(8) of the Criminal Procedure (Scotland) Act 1995

by

RAMEL KRISTIAN BLAKE APPLEBY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Alonzi, Faculty Services Ltd; Edin for Murray Ormiston LLP, Aberdeen
Respondent: Cross (sol ad) AD; Crown

19 August 2022

Introduction

[1] In this appeal the appellant challenges a decision to extend the 12 month time bar within which his trial on indictment must commence (section 65 of the Criminal Procedure (Scotland) Act 1995). On 19 August 2022, having heard oral submissions, we refused the appeal. We now provide reasons for our decision.

[2] The appellant, along with four others, has been indicted in the High Court on two charges of being concerned in the supplying of Class A drugs: Cocaine and Diamorphine.

The offences are alleged to have been committed between November 2015 and January 2021 in respect of the supplying of Diamorphine and between January 2019 and January 2021 in respect of Cocaine, and to have occurred at various places in Aberdeen, Kent and London. In addition, the offences are alleged to have been aggravated by connections with organised crime.

History of the prosecution

[3] The appellant first appeared on petition on 8 January 2021. He was granted bail. On 30 August 2021 the reporting police officer advised the Crown that the appellant was in custody in England on remand in connection with analogous drugs charges. The Crown advised the appellant's agents of this.

[4] The indictment was served on 25 October 2021. At the preliminary hearing on 26 November 2021 the court appointed 20 June 2022 as a 13 day floating diet of trial. At the hearing the appellant's counsel advised the court that the appellant was at that time remanded in custody in England. In the course of the hearing before us the Advocate Depute explained that by the date of the preliminary hearing the appellant had pled guilty to the English charges and was awaiting sentence, the case against a co-accused not yet having been resolved.

[5] A few days before the first day of the floating trial the appellant's counsel and solicitors held a consultation by video link with the appellant during which they became aware that he had not been transferred to Scotland to enable him to attend the trial. They informed the Advocate Depute, to whom the case had been allocated and who had appeared at the preliminary hearing, of this difficulty. The Crown then attempted to arrange for the appellant to be transferred to Scotland, but this could not be done in the limited time that

was by that stage available. We shall return to the details of what exactly happened at this stage of matters.

[6] The trial diet having called on the last day of the float (24 June), it was adjourned for a few days to allow the appellant's advisers to consult further with him; short consequential extensions of time bars were granted unopposed. A further hearing took place on 27 June 2022 at which the trial was further adjourned until 13 March 2023 on the Crown's unopposed motion. The Crown also moved to extend the 12 month time bar in respect of the appellant until 17 March 2023. That motion was opposed.

The judge's decision

[7] Having been addressed on the cases of *Swift* v *HMA* 1984 JC 83 and *Early* v *HMA* 2006 SCCR 583 and, in particular, on the two stage test referred to in those authorities, the temporary High Court judge granted the Crown's motion to extend the time bar. In considering the first stage of the test, she recognised that the Crown had brought about the need for the extension due to its error in failing to arrange for the transfer of the appellant from England to Scotland for the trial.

[8] The judge identified the Crown's error as a failure to effect what she described as some form of marker or flag to remind or alert those responsible for preparation for trial of the appellant's status as a prisoner in England. A further opportunity to effect such a marker was not taken at the preliminary hearing when the appellant's status was again referred to. The judge considered that it did not assist the Crown to say that it was unaware of the prison in which the appellant was held or the likely duration of his period of remand. When pressed, the Advocate Depute had conceded that the Crown had undertaken no steps to clarify the appellant's status or to establish the prison in which he was remanded.

[9] It seemed to the judge that a consequence of failing to effect such a marker was that the Crown lost sight of the appellant's status and of the need for transfer arrangements to be effected well in advance of trial. Once alerted (again) to the appellant's continuing detention in England, there was insufficient time to make the necessary transfer arrangements. Having identified the Crown's error, the judge stated that following *Early* the court ought not to categorise the error as major or minor. She disagreed with counsel for the appellant's classification of the error as major.

[10] While the consequence of the error, namely the loss of a lengthy trial diet, was significant, the judge regarded the error itself as an administrative one. She acknowledged that an opportunity for the error to be detected at the preliminary hearing had been missed. She did not, however, consider that the error was indicative of a systemic problem. It was an isolated human error and as such the judge's assessment was that it was excusable and that a sufficient reason had been shown which might justify the extension.

[11] Thereafter the judge decided to exercise her discretion in favour of granting the motion. She had particular regard to the serious nature of the charges and the public interest that the appellant should be tried in relation to them. The prejudice identified was that the proceedings would remain unresolved and so would be left hanging over the appellant, who was anxious to resolve both the English and Scottish proceedings. The judge fully understood the important protection afforded by section 65 of the 1995 Act and acknowledged that the length of the extension was greater than might ordinarily be sought. That length was, however, dictated by the particular circumstances of identifying a suitable diet for a five accused trial of 2 to 3 weeks' duration in the aftermath of the Covid-19 pandemic.

The parties' submissions

[12] In challenging the judge's approach on appeal to this court, Mr Alonzi submitted that the nature of the Crown's error was more serious than the judge had considered it to be. In the aftermath of the preliminary hearing on 26 November 2021 the Crown had done absolutely nothing to arrange for the appellant's transfer so that he could stand trial. The various agencies involved in a transfer request had not been contacted. There appeared to be no system for checking in advance of the trial that the necessary steps had been taken. Counsel submitted that there had been a systemic failure on the part of the Crown. He drew our attention to the circulation list for the minute of the preliminary hearing; this showed that the minute had been sent to 11 addressees within the Crown Office and Procurator Fiscal Service. Despite this, no one had taken responsibility for arranging the appellant's transfer. A proper system would have picked up well before the trial that the appellant was still to be transferred. In the whole circumstances, the Crown's error was a grave one resulting in the loss of a 13 day trial diet and creating the need for an 8 month adjournment. Cause had not been shown for granting an extension.

[13] Mr Alonzi submitted that the Crown's systemic error meant that the first stage of the test in *Swift* and *Early* could not be satisfied. Later authorities such as *HM Advocate* v *Graham* 2022 SCCR 68 and the unpublished and currently embargoed opinion in *B* v *HM Advocate* (28 July 2022) should not be read as somehow overturning the two stage test, particularly since *Early* was decided by a court of five judges.

[14] In her submissions the Advocate Depute provided the court with a more detailed history of matters than had been supplied to the judge. She explained that the problem arose because the case preparer had mistakenly overlooked the routine step of making a diary note after the preliminary hearing recording that the appellant was in custody in

England. The purpose of making such an entry would have been to highlight that arrangements would need to be set in motion for the appellant's transfer to Scotland for the trial about 6 or 8 weeks in advance. The process of transferring prisoners from England and Wales to Scotland was one of some complexity necessitating liaison and cooperation between various agencies, including the Ministry of Justice, the Crown Prosecution Service, the National Offender Management Service, and the Scottish Prison Service, as well as the Crown Office and Procurator Fiscal Service. Where a prisoner in England was on remand and had not been sentenced there could be a reluctance on the part of the English authorities to transfer him if this would interfere with forthcoming court dates. It was accordingly important that a prisoner's up to date status should be clarified a few weeks before it was anticipated that he would require to be transferred to Scotland. There was a well-established system for prisoner transfers; detailed guidance and instructions on the process had been issued to members of the Crown Office and Procurator Fiscal Service. Arrangements could not be made until about 6 to 8 weeks ahead of the hearing for which the prisoner's transfer was required.

[15] The Advocate Depute went on to explain that as soon as the Crown had become aware in June 2022 that the appellant had not been transferred, immediate steps were put in train to try to arrange for his urgent transfer in the hope that the trial could still go ahead. The necessary approvals were obtained from the Ministry of Justice and the Crown Prosecution Service and arrangements were made for Police Scotland to convey the appellant from prison in England to Scotland instead of his being transported by the usual prisoner transfer vehicle. Unfortunately, it ultimately proved impossible for the Scottish Prison Service to identify a suitable place for the appellant as a remand prisoner in this jurisdiction in time for the floating trial diet. It would have been possible for the appellant

to have been accommodated in a suitable prison in Scotland by 6 July, but this was too late for the floating trial, albeit just within the 12 month time bar period applying to the appellant. In any event, an adjourned trial diet could not be identified until a much later date due to the pressures on the court programme arising from the pandemic.

[16] The Advocate Depute submitted that in the circumstances the judge could not be said to have erred in law, to have adopted the wrong legal test, or to have had regard to irrelevant matters. The appellant was seeking to re-argue the merits of the application. The court should not interfere with the judge's exercise of her discretion. Cause had been shown for the extension to the 12 month time-bar.

Analysis and decision

[17] In *HM Advocate* v *Graham* 2022 SCCR 68 the court (LJG (Carloway), delivering the opinion of the court, at para [15] *et seq*), explained, under reference to *Uruk* v *HM Advocate* 2014 SCCR 369 (LJC (Carloway), delivering the opinion of the court at para [10]), that the *dicta* in *Swift* and *Early* must be read according to the context of, first, the criminal justice system in place at the time, in comparison to that in the current era, and, secondly, their particular facts.

[18] In its recent judgment in *B* v *HM Advocate* (28 July 2022; currently unpublished and embargoed) the court explained that neither *Swift* nor *Early* concerned the adjournment of trial diets and consequent extensions of time to accommodate a new diet. Both involved faults in the service of the indictment or the content of the libel. The *dicta* in them should not readily be transposed into different situations. In particular, they should not be applied to cases in which, in sharp contrast to *Swift* and *Early*, the Crown had brought the case to a trial diet within the 12 month limit. The "on cause shown" test for extending the 12 month time

bar was not a high one. It must now be viewed in light of the incorporation of the reasonable time requirement in Article 6.1 ECHR into domestic law. Having regard to the jurisprudence on the interaction between the reasonable time requirement and the general right to a fair trial (*Spiers* v *Ruddy* 2009 SC (PC) 1), it may often be difficult to resist an application for an extension of the 12 month time bar when the trial remains due to start within what would be regarded as a reasonable time under the Convention, where a reason for an extension has been proffered and no additional prejudice to the accused is demonstrated.

[19] In the present case the appellant's trial was due to commence within the 12 month time bar. The circumstances are not similar to those that arose in *Swift* or *Early*. Following *Graham* and *B*, it would not be appropriate to apply a two stage test. The right approach, in a case such as this, is simply to examine the single issue of whether cause has been shown for granting an extension of the 12 month time bar. That is a question that falls to be answered by considering whether it is in the interests of justice to do so. Factors such as the wider public interest in the effective prosecution of crime, the existence of any genuine prejudice to the accused in his trial being delayed, and the importance of ensuring that the trial takes place within a reasonable time are likely to be in play. It is important not to treat a motion to extend the 12 month period as providing an opportunity to apply a sanction of disapproval to the Crown merely because a mistake has been made at some stage in the prosecution of the case.

[20] In this case a single inadvertent mistake by the case preparer in neglecting to make a diary entry resulted in the trial having to be adjourned. The Crown made substantial efforts to salvage matters, but through no fault on its part these were ultimately not successful. The

position is that the need to extend the time bar arose from one incident of human error. There was nothing in the nature of systemic failure on the part of the Crown.

[21] It would clearly not be in the public interest for the case against the appellant to be brought to a premature end on the sole basis of an administrative oversight of the type that occurred in the present case. The appellant is in custody in England awaiting sentence on drugs offences. He has never been held in custody by reason of the present prosecution. Beyond the delay in the resolution of the case against him, no other prejudice affecting the appellant was identified. Applying the modern approach to the matter, as this was authoritatively explained in *Graham* and *B*, we are satisfied that it is in the interests of justice for the 12 month time bar to be extended so that the appellant can be brought to trial at the adjourned diet in March 2023. In the whole circumstances, we are satisfied that the present case will be brought to trial within a reasonable time. It cannot be said that the judge erred in granting an extension of the 12 month time bar.

[22] For these reasons we refused the appeal.