



SHERIFF APPEAL COURT

**[2026] SAC (Crim) 10
SAC/2026/135/AP**

Temporary Sheriff Principal B Mohan
Appeal Sheriff C Shead
Appeal Sheriff I Cruickshank

OPINION OF THE COURT

delivered by TEMPORARY SHERIFF PRINCIPAL B MOHAN

in

BILL OF ADVOCATION

by

PROCURATOR FISCAL EDINBURGH

Complainer

against

JAMES MacFADYEN

Respondent

**Complainer: Keenan, K.C., sol ad, advocate depute; Crown Agent
Respondent: Ogg, sol ad; Alex Lafferty Limited**

7 August 2026

[1] At a diet in Edinburgh Sheriff Court on 25 March 2026 the respondent faced trial on a charge under section 39 of the Criminal Justice and Licensing (Scotland) Act 2010 with a

domestic aggravation. Not all of the Crown witnesses were present, though the complainer was in attendance. The Procurator Fiscal depute's motion to part-hear the trial was refused. The depute's subsequent motion to adjourn the trial to a later date was also refused by the summary sheriff. In light of that decision the Crown then moved to desert the matter *pro loco et tempore*. That motion was refused and the sheriff deserted the case *simpliciter*.

[2] In this Bill the Crown challenges the sheriff's decision to desert the case *simpliciter*. That raises the question of the test to be applied to such a decision.

Background

[3] As with many summary trials, the circumstances before the sheriff on 25 March demonstrated a frustrating background. The diet was the fourth date on which the case had been allocated for trial, with sundry other callings in between.

[4] At the diet on 25 March 2026 there were more complications. The complainer and her father were present, but the two other Crown witnesses were not (one was said to be unwell, and the other – the complainer's daughter – had a college exam that day). Late in the morning, around 11.55am, other business in the court had been disposed of and the case had become the priority trial. The sheriff was presented with a further problem: the complainer had childcare difficulties and had asked to leave court by 1.00pm. The depute fiscal in court moved that the trial be part-heard; she sought a short adjournment to check if the complainer's father could resolve the childcare issues, thereby allowing the complainer at least to give her evidence into the afternoon session. The motion to part-hear the trial was opposed by the respondent.

Crown submissions

[5] The only decision of the sheriff being challenged in the Bill was that to desert the case *simpliciter*. The Advocate depute submitted that, faced with the case as the priority trial at noon, with the complainer having attended for the second time, the decision of the sheriff not to hear the complainer's evidence at least was unfortunate. If the complainer's childcare commitments could be carried out by her father, there appeared to be sufficient time to hear most, if not all, of her evidence before the court adjourned for the day. Although the sheriff refused that motion and the subsequent motion to adjourn the trial, it was accepted that these were decisions within his discretion (*Paterson v Macpherson* [2012] HCJAC 61).

Thereafter, however, the sheriff should have granted the Crown motion to desert *pro loco et tempore*, allowing the Crown the option to re-raise proceedings. Desertion *simpliciter* was not appropriate. The correct test for taking such a step required the court to assess whether any future trial would be "inevitably unfair" (*Renton & Brown*, paragraph 18-24). That applied whether the case was under solemn procedure (*HMA v Fleming* 2005 SCCR 324) or at summary level (*Laing v Miller* [2016] SAC (Crim) 6). The test had not been met in this case. There was no material before the sheriff to justify such a conclusion. The Bill should be passed.

Respondent's submissions

[6] There was no error on the part of the sheriff. The case had an unfortunate history. Although the Crown position was that the complainers had "engaged" with the process their co-operation was qualified. The female complainer had been present at the trial diet on 8 September 2025 but had to leave early due to unspecified childcare issues. None of the witnesses appeared for the trial on 15 January 2026. While they may not have received a

formal citation they were present at the court when that date was assigned. At the trial diet on 25 March there were two Crown witnesses absent and again the complainer wished to leave court early, this time by 1.00pm. The Crown witnesses were all family members. It was little surprise that the sheriff described the complainers' behaviour as unsatisfactory and that the Crown witnesses seemed to be "calling the shots". The case had been hanging over the respondent since November 2024. He had been assessed as vulnerable (a psychological report had been prepared at an early stage of the process and special measures had been granted for him). Although the first trial was adjourned on defence motion, that was granted at an intermediate diet. Regarding the trial on 25 March, it was noteworthy that at the intermediate diet on 4 March 2026 the Crown confirmed that they were ready to proceed.

[7] When faced with the difficulties presented on 25 March the sheriff carefully balanced the different relevant considerations before reaching his decision. He did not err in refusing the Crown motions to part-hear, adjourn or desert *pro loco et tempore*. So far as the exercise of discretion was concerned, as set out in *Paterson v Macpherson* this could only be overturned if no reasonable sheriff could have reached that decision. The proper conclusion was that the sheriff's exercise of discretion was appropriate. Had the matter been continued again the respondent faced the prospect of a fifth trial diet.

[8] In response to a question from the court Ms Ogg sought to rely on the provisions of section 152 of the Criminal Procedure (Scotland) 1995 to support the decision taken.

[9] Following the hearing we invited parties to make written submissions on the question of the test to be applied. The Crown lodged additional submissions although the respondent did not. We have taken account of the submissions of both parties including the Crown's additional submissions.

Decision

[10] In light of the submissions the first question to be addressed is whether the test articulated in *HMA v Fleming* [2005] HCJAC 27; 2005 1 JC 291 falls to be applied to the decision of the sheriff to desert *simpliciter*.

[11] The background to the decision under challenge has been noted. At the time the motion to part-hear the evidence was made (around noon) several hours of court time remained available that day. The complainer had attended to give her evidence for the second time. The Crown was confident that she was engaged in the process (she had spent part of the morning reviewing her witness statement). There were special bail conditions in place and there was no suggestion that she was not supportive of those. Although the depute in court had relayed the information that the witness requested to leave by 1.00pm due to childcare difficulties, the depute understood these difficulties were surmountable (for example by suggesting that her father – the second Crown witness present – took care of the childcare while she remained to give her evidence). Had that route been taken, it may very well have been the case that the complainer could have completed her evidence that day. While this inevitably would have led to the case being only part-heard, this is a common occurrence which could have been easily accommodated by the court. It is against that backdrop that the sheriff's decision to desert *simpliciter* requires to be reviewed.

[12] Section 152(2) of the Criminal Procedure (Scotland) Act 1995 provides:

“If at a diet of trial, the Court refuses an application by the prosecutor to adjourn the trial or to desert the diet *pro loco et tempore*, and the prosecutor is unable or unwilling to proceed with the trial, the Court shall desert the trial *simpliciter*.”

In our view that provision has no application to the circumstances of the present case. It is clear from the background referred to that the prosecutor wanted to lead evidence and was

in a position to do so. In other words, the prosecutor was not “unable or unwilling” to proceed with the trial that day. In reaching that conclusion we have had regard to the decision of the High Court in *Fay v Vannet* 1998 JC 186. In giving the opinion of the Court, the then Lord Justice Clerk (Cullen) said the following at p.188:

“It is plain that the object of subsec (2) of sec 152 is to ensure that the court deserts the diet *simpliciter* if none of the other courses of action which are mentioned in the subsection are to happen, *ie*, the trial is not to be adjourned, the diet is not to be deserted *pro loco et tempore*, and the prosecutor is unable or unwilling to proceed with the trial. It is important to note that the subsection throughout is concerned with negatives. This demonstrates that the word ‘or’ should not be understood in a disjunctive sense but as linking two courses of action, neither of which is to happen. Furthermore, the construction which we place on subsec (2) is assisted by the general provision in subsec (1) that: ‘It shall be competent at the diet of trial, at any time before the first witness is sworn, for the court, on the application of the prosecutor, to desert the diet *pro loco et tempore*.’”

[13] This, then, brings us to consider the question of desertion *simpliciter* at common law.

Renton & Brown at paragraph 18-24 states:

“A decision by the Court to desert a diet *simpliciter* rather than *pro loco et tempore* is one which is unlikely to be taken often. In deciding which form of desertion to order the Judge should direct his attention to the future, and particularly to the circumstances in which any retrial would take place, and should desert *simpliciter* only where he considers that unfairness would be inevitable at any retrial, whether or not the need to desert has arisen because of fault on the part of the Crown.”

[14] The passage is based on the decision in *HMA v Fleming* [2005] HCJAC 27; 2005 1 JC 291. During the course of a trial on indictment it became apparent that proceedings had been relayed in sound and vision to a remote viewing room within the court building. The transmission was uninterrupted throughout the day. Thus, as well as court proceedings, any in-court communications between accused and lawyers were transmitted when the court was not in session. A concern was raised that police officers who had yet to give evidence may have attended in the viewing room and may have observed or heard communications between the accused and their lawyers. The trial judge deserted the trial

simpliciter. On appeal his decision was overturned and replaced with an order to desert *pro loco et tempore*. The then Lord Justice Clerk (Gill) observed at para [34] of the decision:

“But when the trial Judge has to decide whether to desert *pro loco et tempore* or to desert *simpliciter*, he has to direct his attention to the future and particularly to the circumstances in which any retrial will take place. Counsel for the first respondent has submitted that the test is whether at a retrial a fair trial could be guaranteed. I do not agree. In my view the test is whether at a retrial an unfair trial would be inevitable.”

He added (at para [36]) that without firm evidence on the point the trial judge had no basis on which to conclude that the integrity of the proceedings had been fatally compromised.

[15] That approach has been applied to summary proceedings: *Laing v Miller* [2016] SAC (Crim) 6, is an example. In that case a decision to desert *simpliciter* was made because CCTV was unavailable and would not be at any future trial diet. The Sheriff Appeal Court noted that the Crown had other evidence which was available to prove the Crown case, so the decision to desert *simpliciter* was not appropriate.

[16] In this case no authorities were cited to the sheriff about which form of desertion would be appropriate. However, it appears that the sheriff did apply himself to the test in *Fleming*. In his report at [34] he records his conclusion that any future trial would be “inevitably unfair”.

[17] We have concluded that the sheriff was correct to apply the test derived from the decision in *Fleming*. We can identify no cogent reason for applying different tests as between summary and solemn proceedings. In each case the effect is the same: it is not open to the Crown to re-raise proceedings.

[18] Accordingly the remaining question is whether the sheriff was entitled to reach that conclusion. The sheriff’s reasons are encapsulated at [34]. Against the background of the unfortunate procedural history of the case the sheriff decided that it would be unfair to the

respondent to allow the matter to proceed, particularly as he had been judged to be a vulnerable witness. He also took into account that the passage of time would affect the quality of the evidence at any future trial.

[19] It is not clear on what basis the sheriff formed the latter view nor, apart from the strain that a further delay in the resolution of proceedings would cause, why it would be unfair to the respondent to allow the matter to proceed.

[20] In our view those factors are insufficient in combination to yield the conclusion that any future trial would inevitably be unfair.

[21] This assessment was not a discretionary matter in the sense discussed in *Paterson v McPherson* [2012] HCJAC 61. Rather it called for an evaluation of the circumstances to see if the test was met. Properly understood this is a question of law and is susceptible to appeal on that basis.

[22] To that extent the approach is same as the one taken when considering a plea in bar of trial based on oppression (*HMA v McGill* 1997 SLT 1156). Similar considerations apply to deciding whether a future trial would inevitably be unfair as apply in cases where oppression is being considered.

[23] The respondent had opposed the motion to part-hear the trial for reasons which related to the history of the case, and in particular the absence of two of the Crown witnesses, not to any difficulty in the trial proceeding that day. But part-hearing the trial on 25 March would have ensured – from the defence point of view – that the case against the respondent was heading towards a conclusion, not merely being continued yet again.

[24] In short, the delays which had beset this trial were due to a number of factors: the defence solicitor being unavailable (first trial diet), childcare problems of the complainer requiring her to leave by 2.00pm (second trial diet), failure by the Crown to cite witnesses

(third trial diet) and the sheriff's refusal to part-hear (fourth trial diet). These cannot all be characterised as problems lying at the door of unco-operative Crown witnesses. We cannot therefore accept that, in the circumstances of this case, any future trial would be "inevitably unfair". The respondent will be entitled to all the usual protections at any future trial diet. He will be able to challenge the evidence of the Crown witnesses and make submissions to the court in relation to the assessment of that evidence. There was no material before the sheriff to demonstrate that such an exercise would be unduly hampered by the delay which has already ensued. There was no suggestion of missing evidence or other forensic disadvantage which might impact the fairness of the trial. In short, there was no proper basis on which to reach the conclusion that a future trial would be inevitably unfair and thus on which to desert the complaint *simpliciter*.

[25] Accordingly we will pass the Bill, recall the decision to desert *simpliciter* and remit the case to the sheriff to proceed as accords.