



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2026] HCJAC 38
HCA/2024-000600/XC

Lord Justice General
Lord Doherty
Lord Armstrong

OPINION OF THE COURT

delivered by LORD PENTLAND, the LORD JUSTICE GENERAL

in

CROWN APPEAL UNDER SECTION 74(1) OF
THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

HIS MAJESTY'S ADVOCATE

Appellant

against

MICHAEL NEIL

Respondent

Appellant: Harvey, AD; the Crown Agent
Respondent: Mackintosh KC, J Mulgrew (sol adv); Russells Gibson McCaffrey

14 February 2025

Introduction

[1] This is a Crown appeal against a decision by the Sheriff at Kilmarnock that 15 charges of assault by a former teacher against pupils at Kerelaw residential school should be discontinued because there has been unreasonable delay in bringing the proceedings to

trial in breach of Article 6 ECHR. The Crown argues that the Sheriff went too far in ordering that the proceedings should be discontinued and that a less serious form of redress for the delay would be more appropriate, for example a reduction in sentence in the event of conviction.

Background

[2] The respondent was a physical education teacher at Kerelaw residential school, Stevenston, Ayrshire. He is charged on indictment with 30 offences of assault (some of which involve assault to injury) between March 1985 and March 2005 against 30 separate complainers, who were children at the time of the alleged offences. He denies all the charges, 29 of which are alleged to have occurred at the school and one on the Isle of Arran. He has entered a special defence of self-defence in respect of some of the charges.

[3] The police interviewed the respondent under caution on 3 October 2005 in relation to 11 allegations of assault by 11 different complainers. On 9 December 2005 he was interviewed under caution about 3 more allegations by a further 3 complainers. A third interview took place on 2 March 2006 regarding an allegation in respect of one more complainer.

[4] Crown counsel considered these 15 allegations and marked them for no proceedings on 30 July 2007. The Crown did not, however, renounce the right to prosecute in the future. On 8 and 29 August 2007 COPFS wrote to the respondent and his agents advising that “on the basis of the evidence presently available criminal proceedings will not be instituted against (the respondent) at the present time”.

[5] In or about 2019 the Crown reconsidered this decision after additional complainers came forward and in the light of what it described as a change in attitudes highlighted by

the Scottish Child Abuse Inquiry. The response to allegations of institutional physical abuse of children had developed since 2007 and it was now considered to be in the public interest to prosecute such offences. The respondent appeared on petition in respect of the present charges in December 2021, the case having been marked for a petition on 9 April 2020. An indictment was served on 13 March 2023.

[6] The first diet was appointed for 18 April 2023. It was adjourned on joint application. Thereafter the prosecution inched forward at a slow pace. At successive hearings throughout 2023 and in the early part of 2024 first diets were repeatedly discharged on joint application and reappointed; the time-bars were successively extended. Eventually, in April 2024, the respondent lodged a preliminary issue minute and two compatibility minutes. The preliminary issue minute challenged the relevancy of the indictment and the admissibility of certain evidence; it also raised a plea in bar of trial on the ground of oppression. There ensued further continuations and time-bar extensions throughout the summer of 2024. The Crown ultimately conceded the relevancy and evidential issues and undertook to amend the indictment. On 29 October 2024, the Sheriff heard parties in respect of the unreasonable delay and oppression issues. He repelled the plea in bar of trial in respect of oppression, but found that there had been unreasonable delay in prosecuting the charges based on allegations first made before 2007.

Compatibility Minutes

[7] The first of these deals with the respondent's right to a fair and public hearing within a reasonable time. The respondent was interviewed by the police in 2005 and 2006. He did not appear on petition until 1 December 2021. The respondent argues that the delay between the interviews and the anticipated date of trial is unreasonable.

[8] The second compatibility minute deals with the respondent's right to examine or have examined witnesses against him. The respondent argues that records held by Police Scotland, the Crown and Glasgow City Council have been lost or destroyed. His own personal papers (in seven polythene pockets) containing information relevant to the allegations were found by a member of staff in the respondent's locked cabinet at the school in November 2005. The respondent had been suspended on 1 July 2004. Police Scotland seized these papers, but they have been lost. Due to the loss or destruction of such evidence, the respondent argues that he is unable to undermine or challenge the Crown case, and that such a disadvantage cannot be cured at the trial by directions to the jury.

[9] The court minutes do not explain exactly what happened in respect of the second compatibility minute. It appears that the issues raised were subsumed in and disposed of in the context of the debate on the preliminary issue minute.

Sheriff's Decision

[10] There were compelling reasons to order discontinuance of the proceedings in respect of 15 pre-2007 charges. In the case of one further charge it was sufficient to declare that there had been unreasonable delay.

[11] There had been prejudice in relation to each individual charge and *in cumulo*. This included financial prejudice to the respondent. He is now a retired teacher, ineligible for funding of his defence from the Educational Institute of Scotland (EIS). If prosecuted on all charges his trial is likely to last four weeks.

[12] The Crown had failed to ensure relevant material had been retained, including the seven polythene pockets.

[13] There was uncertainty over when the trial would begin. There are significant volumes of paperwork, which require to be considered by the Crown and disclosed to the respondent. This could take considerable time.

[14] The Crown's assertion that it had changed its mind due to differing attitudes influenced by the Scottish Child Abuse Inquiry was not sustainable as an explanation for the change in the decision to prosecute. There was no record of the reasons why a prosecution had not been brought in 2007. A policy decision ought not to affect the respondent's rights in the intervening period. The Crown's delay in bringing the charges was excessive, inordinate and unfair to the respondent.

[15] In relation to the appropriate remedy for the unreasonable delay, it was notable that six of the complainers were deceased and a further six were not able to identify the respondent or did not attend a video parade. There was a lack of CCTV and documentary evidence.

[16] No lesser remedy would be effective, just and proportionate than ordering the discontinuance of the proceedings in respect of the 15 charges.

Submissions

Crown

[17] The prosecution of all the charges is in the public interest unless it can be shown that no fair trial can take place and that discontinuation is the only suitable remedy. The Advocate Depute accepted that there had been a breach of the Article 6 reasonable time requirement in relation to 15 charges, but that was not the end of the matter. The issue was whether this breach could only be compensated for by discontinuation of the proceedings.

[18] The Crown is ready to proceed to trial. Large volumes of material have been disclosed. With the exception of the seven missing polythene pockets, only three of more than 60 calls made for disclosure remain outstanding. The three remaining calls would be addressed. The contents of the polythene pockets were likely to have been removed by the police and separately lodged, in accordance with standard police protocols. Extensive efforts had been made to locate the pockets, but these had not been successful so far; checks would be made to see if the notebooks kept by the officer who seized the pockets were available. Overall, the police had made extraordinary efforts to find everything that might be relevant.

[19] The Advocate Depute told the court that he was satisfied that the Crown had complied with its disclosure obligations.

[20] Criminal proceedings should be discontinued where there has been a violation of the reasonable time requirement only if: (i) the delay was such that a fair trial cannot take place, or (ii) there is some other compelling reason to stop the proceedings (*HM Advocate v MacLennan* 2024 SCCR 277, para [20]). Such cases are exceptional.

[21] Delay is only prejudicial if it would be oppressive to require the accused to stand trial, and where such prejudice could not be removed by adequate directions to the jury (*Beurskens v HM Advocate* 2014 SLT 965, para [9]).

[22] The test for oppression is whether, having regard to the principles of substantial justice and of a fair trial, to require an accused to face trial would be oppressive (*Stuurman v HM Advocate* 1980 JC 111, para [122]). This is dependent on the facts and circumstances of the case, including the seriousness of the charge and the public interest in ensuring that crime is prosecuted (*MacLennan*, para [19]; *Fisher v HM Advocate* 2023 JC 21; *Potts v Gibson* 2017 JC 194).

[23] The Sheriff did not consider that it would be oppressive for the respondent to be prosecuted. There is a substantial overlap between the test to be applied for oppression and whether proceedings should be discontinued on Article 6 grounds (*Fraser v Deveney* 2014 SCCR 147, para [10]; *Osborn v Parole Board* [2013] AC 1115, paras [57] and [63]). No adequate explanation is given as to why the Sheriff repelled the plea of oppression, but concluded nonetheless that discontinuation was the only remedy for the breach of the reasonable time requirement; the same considerations sounded on each.

[24] In historical cases, the court is unable to predict the fairness of a trial in advance. The court cannot know the extent of the available evidential material, or its relevance and weight, in advance of the trial. In determining the inevitability of unfairness, the court must ask itself whether, in a solemn case, any potential prejudice is so grave that no direction by the trial judge could be expected to remove it. The court will also look at the extent to which the absence of contemporaneous material will foreclose lines of cross-examination, but must avoid speculation on what the material might reveal or what absent witnesses might have said (*HM Advocate v ARK* 2013 SCCR 549).

[25] The Sheriff's approach does not consider whether a jury direction could adequately address the significance of missing evidence. The core of the Crown case will rest upon the oral evidence of the 30 complainers (or the statements of deceased complainers) speaking to similar physical assaults and upon the *Moorov* doctrine. It cannot, therefore, be established at this stage that the trial as a whole will "inevitably" or "necessarily" be unfair (*ARK* at para [20]).

[26] A lesser remedy would adequately vindicate the respondent's Article 6 right (*McLennan, supra* para [21]; *Attorney General's Reference No 2 of 2001* [2004] 2 AC 72, para [25]; *Spiers v Ruddy* 2009 SC (PC) 1, para [17]).

[27] The other remedies sufficient to acknowledge a breach of the reasonable time requirement will include a reduction in sentence (*Spiers v Ruddy*, para [16]; *HM Advocate v CAM* 2013 SCCR 67, para [9]; *George v HM Advocate* 2011 SCCR 568, paras [9] and [10]). *George* arose from delay in a prosecution relating to Kerelaw school and, though no reduction was given in that case, had the court thought it appropriate to reduce the sentence to remedy the breach of the reasonable time requirement, it would have done so.

[28] At the end of the day, the question was whether there was such prejudice to the respondent arising from the unreasonable delay that the only appropriate redress was to discontinue the prosecution. The case fell well short of meeting that high threshold.

Respondent

[29] The Sheriff had not erred. His decision was one that was open to him. He applied the right test. The Crown had not complied with its disclosure obligation or met the calls made in the defence statement.

[30] There was an unreasonable delay between the interviews of the respondent by the police in respect of the discontinued charges between 3 October 2005 and 2 March 2006 and the stage when the Crown decided to reconsider prosecuting these particular charges. There would be an even longer delay by the time of the trial.

[31] The interviews are the starting point for consideration of whether there has been a breach of the reasonable time guarantee (*O'Neill v United Kingdom* 2016 SCCR 337, para [82]). The end point is the judgment determining the merits (*Neumeister v Austria* (No 1) (1979-80) 1 EHRR 91, para [19]). The proceedings are ongoing. The breach of the reasonable time guarantee must be seen as a continuing breach and the court should proceed on that basis

when considering the issues raised in the Crown appeal. On 12 February 2025 that period was 18 years, 11 months and 10 days; taken from 2 March 2006.

[32] The test to be applied when there is a continuing breach of the reasonable time guarantee is summarised in *HM Advocate v MacLennan* 2024 SCCR 277 paras [20] and [21]. When considering whether a remedy is adequate it must be assessed against the aim of the Article 6(1) reasonable time guarantee in criminal matters, that is “to ensure that accused persons do not have to lie under a charge for too long and that the charge is determined” (*Wemhoff v Germany*, (1979-80) 1 EHRR 55, para [18]; *Dyer v Watson*, 2002 SC (PC) 89, para [50]).

[33] The reasonable time requirement confers an independent, free-standing, right which may lead to a violation in two separate classes of case. These being cases with an absence of any prejudice to the fairness of the trial and those where there is prejudice to the fairness of the trial (*Dyer v Watson*, *Spier v Ruddy* 2009 SC (PC) 1, paras [16] and [17]).

[34] Cases addressing a prosecution which takes place many years after the fact and where there is no suggestion that delay has been caused by action or inaction by the prosecutor do not engage the law on the reasonable time requirement. An example is *HM Advocate v ARK* 2013 SCCR 549. In *ARK* no point was taken that action on the part of the Crown had caused an unreasonable delay which was the source of prejudice (para [3]); the principles set out in *ARK* do not apply to the Sheriff’s decision.

[35] The category of cases in which it may be unfair to try an accused includes cases of bad faith, unlawfulness and executive manipulation (*AG’s Reference (No 2 of 2001)* [2004] 2 AC 72, para 25).

[36] The loss or destruction of materials set out in the defence statement was caused by the Crown’s failure to act to ensure their preservation. That was a breach of professional

duty to take proper steps to prevent an infringement of the reasonable time guarantee (*Martin v Tauranga District Court* [1995] 2 NZLR 419, page 431). That does not meet the threshold of “bad faith, unlawfulness and misconduct” needed for oppression, but does make it unfair that the proceedings against the respondent should continue (*AG’s Reference (No 2 of 2001)*, para 25).

[37] The Crown had not addressed why there was a breach of the reasonable time guarantee. The fact remained that important evidence such as the unit logs (recording violent incidents) and the respondent’s own papers (in the polythene packets) were no longer available. The court could not be confident that a trial would take place in the near future. The Crown’s actions and inactions were at the root of the breach of the reasonable time guarantee. The Crown should have instructed that the polythene pockets had to be preserved. There was no more than a bare *ipse dixit* that a trial could proceed expeditiously on the discontinued charges.

[38] The effect of the reasonable time guarantee is that the Crown are placed under a duty to protect the fair trial rights of the accused in the future and to take steps to preserve evidence. This is particularly important where they know that there are substantial numbers of documents and productions which should be preserved, where prosecutions are continuing in respect of other accused named by the complainers and where charges aver that some of offences took place “acting with others”. The consequences of failures of professional duty by the Crown to preserve this evidence and protect those rights must, in the absence of any supervision of these decisions by the Court, fall on the Crown, as it now has in respect of the discontinued charges.

[39] The references in the August 2007 letters to the then available evidence meant that the Crown had restricted its right to prosecute in the future to circumstances in which there

was new evidence. The reliance on a change of attitude highlighted by the Scottish Child Abuse Inquiry amounted to no more than a change of mind. The fact that additional complainers had come forward required the Crown to bear in mind its reasons why the previous evidence was considered insufficient when it came to deciding whether the new evidence justified a change of mind. The reference in the letters to the existing evidence meant that the Crown realised its importance and they should therefore have preserved it so that it could be compared with any new evidence.

[40] The plea in bar of trial in respect of oppression (as described in modern terms in *HM Advocate v Withey* 2017 JC 249, paras [37] – [41]) is a means by which Scots law can ensure that a trial which would amount to a breach of Article 6 fair trial rights does not take place; it does not involve the application of the same test which applies for Article 6 as a whole and the reasonable time guarantee in particular. They are different tests. Specifically, oppression can only prevent a trial in circumstances where it might be thought that directions could not remove unfairness in cases of acts of the Crown that amount to an affront to justice or undermine public confidence in the criminal justice system and bring it into disrepute. This requirement for misconduct is a high test; what happened here was not misconduct, but a failure of professional duty by the Crown to preserve evidence so as to make possible a fair trial in the absence of any prejudice and to preserve evidence of the reasons for its own decisions.

Analysis and decision

[41] In *HM Advocate v MacLennan* 2024 SCCR 277, at para [20] this court reiterated that where there has been unreasonable delay in breach of Article 6 ECHR the remedy of

sustaining a plea in bar as a consequence is only appropriate where the delay is such that a fair trial can no longer take place or there is some other reason to stop the proceedings.

[42] The court is not persuaded that this high test is satisfied in the circumstances of the present case. It is in the public interest that the case is allowed to proceed to trial on all the charges. Any challenge to the fairness of the trial can only be properly and fairly addressed in the light of the conduct and outcome of the trial.

[43] In most cases it will not be possible for the court to attempt to predict the fairness of a trial in advance (*HM Advocate v ARK* 2013 SCCR 555; *Fraser v Deveney* 2014 SCCR 147, para [11]). There are too many uncertainties and imponderable factors involved in such an exercise; it would entail impermissible speculation. The court cannot confidently forecast the nature and extent of the available evidence or its relevance and weight. These are questions that can only properly be evaluated at the trial.

[44] At the trial there will be many safeguards for the accused: the presumption of innocence; the burden of proof on the Crown; the high standard of proof; the need for corroboration; the opportunity to challenge the Crown's evidence; the right to lead defence evidence; the right to address the jury; and the directions of the trial judge. Any adequate assessment of the trial's fairness requires to take into account the practical effect of all these protections viewed in the context of everything that transpires at the trial. This is an intrinsically practical exercise, which can only be conducted on a holistic basis. The manner in which these various safeguards operate in the context of the evidence led at the trial will be critical to any assessment of the trial's overall fairness.

[45] The Sheriff erred in his assessment of matters. In the analysis set out in the appendix to his report reference is made to various aspects of the evidence, such as the absence of CCTV recordings of events in the school gym and documents called for by the respondent,

which have not been made available. (We understand that the analysis was in fact prepared on behalf of the respondent.) We proceed on the basis that the Crown has now substantially complied with the requests for the disclosure of evidence and that all the calls have been or will be responded to. More importantly, however, it is not possible to assess in advance what the effect of the absence of certain material may be on the fairness of the trial. We do not accept that the absence of CCTV recordings will necessarily result in material prejudice to the respondent in mounting a defence to the charges; the same applies to documentary evidence. The absence of certain evidence, which might have been available in other circumstances, is a factor that can be relied on by the respondent as part of his defence. It may make it more difficult for the Crown to prove its case. The Sheriff might consider it appropriate to direct the jury that they should bear in mind the absence of independent documentary or other contemporaneous material relating to events recalled by the complainers. It is frequently and unavoidably a feature of historical prosecutions that some such evidence has become unavailable. The absence of such material does not necessarily render the trial unfair. The Sheriff says that in respect of some of the charges the respondent will not be able to cross-examine the complainer. This assertion is difficult to understand. There is no doubt that the respondent will have the right to cross-examine all the complainers. It is possible that some lines of cross-examination may be limited, but it would be speculative to hold that this will necessarily render the trial unfair.

[46] As for the other points relied on by the Sheriff, we do not consider that the fact that the respondent is a retired teacher or that he will face a trial estimated to last four weeks are relevant in the context of an assessment of the fairness of the trial. Nor is the fact that had he been prosecuted at an early stage he would have had EIS funding. There is no suggestion that the respondent will not be legally represented at the trial.

[47] We see no reason not to accept the assurance by the Crown that it is ready to proceed to trial.

[48] The Sheriff says that the Crown should not be able to change its mind due to a change in prosecution policy, having not protected the respondent's rights in the intervening period. This is misconceived. The clear purpose and import of the letters sent to the respondent and his agents in August 2007 was to reserve the Crown's right to prosecute in the future should it consider that it had become appropriate so to do. The suggestion that the Crown has not protected the respondent's rights in the period since then is not justified. While it is possible that some evidence may have become unavailable due to the passage of time or for other reasons, the Crown has disclosed a vast quantity of material to the respondent. The possible significance of evidence that has become, for whatever reason, unavailable involves speculation at this stage of the prosecution. We are not persuaded that the Crown failed in any of its professional duties. The decision not to prosecute in 2007 would have been taken on the basis that the police would retain all the relevant evidence. There is no reason to suppose that the police failed to follow the applicable protocols in relation to any of the evidence, including the polythene pockets.

[49] The Sheriff held that it was not oppressive to prosecute the respondent on the pre-2007 charges. This conclusion cannot be reconciled with his decision to discontinue the proceedings insofar as they concerned those charges. There is a substantial overlap between the plea of oppression and the Article 6 reasonable time safeguard. The rejection of the oppression plea necessarily implies that a fair trial can take place. That being so, on the material before the sheriff we are not persuaded that there was any other basis for holding that breach of the reasonable time guarantee must result in the proceedings being brought to an end.

[50] We shall allow the appeal and extend the 12-month time-bar in respect of the 15 charges until 4 March 2025, this being the date to which the time-bar has already been extended for the other charges on the indictment.