APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 22
HCA/2024/094/XC

Lord Justice Clerk
Lord Doherty
Lord Clark

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

RICHARD MULLEN

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Paterson KC, sol adv; Paterson Bell Solicitors
Respondent: Jessop KC, sol adv, AD; the Crown Agent

2 May 2025

Introduction

[1] The appellant challenges three convictions on indictment at Perth Sheriff Court on offences under the Criminal Law (Consolidation) (Scotland) Act 1995 section 49C (1) (a), having with him offensive weapons in Perth Prison on three separate occasions: 18 October 2020, 11 February 2021 and 10 April 2021. He maintains that the circumstances of his trial in

which he was unrepresented following his dismissing his solicitor, and being unable to instruct another, were such that there has been a miscarriage of justice.

[2] Parties lodged a number of psychiatric reports in advance of the appeal but they ultimately featured as little more than background. The appellant lodged two reports from Dr Karen Bett, Locum Consultant Psychiatrist, dated 2 July 2023 and 21 April 2024, and a report by Dr Jim Craig, Psychiatrist, dated 15 January 2025 in which he referred to an earlier report of 4 June 2021 (not lodged). The Crown lodged a report of 5 November 2024 from Dr Oana Maior, Consultant Forensic Psychiatrist of the Rohallion Secure Care Clinic, Murray Royal Hospital, Perth. Neither the appellant nor the Crown adduced any of the reporting doctors to give oral evidence in the appeal.

Overview of the trial procedure

[3] The trial commenced on 7 February 2024 with a remote ballot carried out in the absence of the appellant. Mr John McLaughlin, Solicitor was instructed to represent the appellant at trial and he appeared from 8 February onwards but the appellant was not brought to court that day. He was present from 9 February when the Crown adduced six witnesses and the court then adjourned for the weekend. The appellant withdrew instructions from his solicitor on 12 February. The minute records that the appellant advised the court that he no longer wished Mr McLaughlin to represent him and that Mr McLaughlin sought, and was allowed, leave to withdraw from acting. The sheriff adjourned at 12:31pm until the following day to allow the appellant an opportunity to find alternative representation. On 13 February, the appellant still had no lawyer and the sheriff adjourned until 15 February to allow him to find alternative representation. On 15 February, the appellant still had no lawyer and the sheriff was not prepared to allow more time and

determined that the trial should proceed. At the appropriate points, the sheriff advised the appellant that he could give evidence and could address the jury. The appellant declined each opportunity. The sheriff directed the jury and, in due course, the jury convicted the appellant by majority verdict on charges 1 and 4 and unanimously on charge 3. The sheriff had acquitted the appellant of charge 2 when the Crown withdrew it at the close of its case.

The grounds of appeal and submissions for the appellant

[4] The appellant's position evolved somewhat and it is convenient to set out the approach taken by parties in this appeal before examining the background in more detail. The appellant's grounds of appeal are long and detailed. They substantially comprise a narrative of what occurred at his trial and the outcome of certain psychiatric assessments before and after trial. He appeared to found heavily on the opinions expressed by Dr Bett in her second report. In short, she doubted that the appellant was fit for trial on account of a developing paranoid psychosis and would have suffered considerable prejudice once he was unrepresented. The appellant contends that if the sheriff knew this, the trial would not have continued to a conclusion. Accordingly, he avers there has been a miscarriage of justice.

[5] In his written case and argument of 4 September 2024, the appellant clarified that the point he wished to focus in the appeal is a complaint that the sheriff ought to have deserted proceedings *pro loco et tempore* on 15 February rather than requiring the trial to continue when the appellant was unrepresented. Dr Bett's report of 21 April 2024 showed that the appellant was suffering from mental health problems during the trial. Although the sheriff did not know that, the appellant did show some bizarre behaviour. Accordingly, and particularly in light of the new information from Dr Bett, had the sheriff known of it, he would have taken a different approach.

[6] In the appeal hearing, Mr Paterson explained that there are very few solicitors available to assist an accused person in the circumstances in which the appellant found himself. Accordingly, the sheriff ought to have deserted the trial as it was the only way to ensure that justice was done. Whilst the sheriff had no medical evidence, he had noted some inappropriate behaviour from the appellant, describing it as somewhat erratic, albeit he says it was no more erratic than on other occasions when he had dealt with the appellant in these and other proceedings. Given that a prison sentence would necessarily follow conviction, the only fair course was to desert proceedings *ex proprio motu* (of his own accord).

Crown submissions

[7] Ongoing trials should only be deserted *pro loco et tempore* in exceptional circumstances and as a last resort: *Parracho (Paulo)* v *HM Advocate* 2011 SCCR 257 at para [9]; *HM Advocate* v *RV* 2017 SCCR 7 at para [12]. For the court to desert a trial on account of an accused being unwell, it required to be satisfied of unfitness for trial: *HM Advocate* v *Brown and Foss* 1966 SLT 341.

[8] There was no such justification before the sheriff and no basis to demonstrate the appellant was unfit for trial. Neither the appellant nor his solicitor suggested it, nor was any evidence placed before the court in support of it. Dr Bett assessed the appellant in advance of trial. She expressed no concerns that he was unfit for trial. The trial was fair, the appellant having the benefit of professional legal representation throughout the Crown case before he chose to dismiss his solicitor. The appellant had the opportunity to explain any concerns about the evidence and to give evidence. He had the opportunity to address the jury. The sheriff adjourned on a number of occasions to allow the appellant to obtain alternative legal advice. The sheriff's decision not to desert the trial was correct. It was not

open to the appellant to assert, post-conviction, that a different result should have followed without identifying some erroneous basis for the approach taken in the first place: *James Fearn* v *HM Advocate* (unreported).

[9] Neither Dr Bett, Dr Maior nor Dr Craig provided an unequivocal and uncontroverted statement that the appellant was unfit for trial in February 2024. The sheriff, who observed the appellant and his behaviour at trial, was in the best position to consider whether any unfairness occurred. There has been no miscarriage of justice.

The trial - evidence and procedure

[10] In the absence of any evidence to deny or excuse his possession of the respective articles the Crown case on each charge was simple and strong.

- On charge 1, two officers searched the appellant's cell of which he was the sole occupant. They found an improvised knife "in plain sight" and showed it to the appellant who shrugged and said nothing.
- On charge 3, two other officers saw a sharpened plastic item fall from the appellant in an area between two of the prison wings. One officer was physically present when it happened and the other spoke to CCTV footage showing it happen. A joint minute established the provenance of the CCTV footage. The jury saw it for themselves.
- On charge 4, two further officers were present during a search of the appellant's cell that uncovered a razor blade with an improvised handle, under his mattress.

[11] As set out at para [3] above, after he parted company with his solicitor, the sheriff allowed the appellant two and a half court days to find alternative representation. The

minute for 15 February 2024 records that the appellant had not managed to find a solicitor who could represent him. The sheriff declined to allow the appellant more time.

[12] Following the Crown case closing with a joint minute on 15 February 2024, the sheriff reminded the appellant that he could give evidence but the appellant declined to do so. The appellant said he would not give evidence. After the prosecutor addressed the jury, the sheriff asked the appellant if he wished to address the jury. The appellant said he would not address the jury. When the sheriff asked if he would welcome an adjournment to consider his position further, the appellant repeated that he would not address the jury.

Psychiatric Reports

Dr Bett

2 July 2023

[13] Dr Bett reported on 2 July 2023 after examining the appellant in prison on 29 June 2023. He was uncooperative, provided little information and refused her permission to access his to medical records. He was orientated in time, place and person. There was no evidence of cognitive impairment or confusion and he appeared to have average intelligence. His speech was normal and there was no flight of ideas. His mood was neither elevated nor depressed and he did not express grandiose or nihilistic content. He did not trust Dr Bett or his solicitor. Whilst he displayed intense paranoia, he was not responding to unseen stimuli. Whilst Dr Bett suspected he had a mental disorder, and it could be personality disorder or a mild paranoid illness, she could not reach any conclusion in the circumstances. He appeared to understand the charges on the indictment and he explained that he wished to plead not guilty. She considered the criteria in section 53F of the Criminal

Procedure (Scotland) Act 1995 and concluded he was fit for trial. He may exhibit paranoia at trial and voice suspicions about those involved and this could be due to underlying illness.

21 April 2024

[14] Dr Bett examined the appellant again following his conviction and he was now more forthcoming. He provided more information, notably an adverse childhood experience when, aged 15, he found his mother dead. He reported some family history of mental disorder. He struggled academically at school but performed manual work prior to 2016. He has no history of contact with psychiatric services in the community or in hospital. In prison, he has had antipsychotic medication and an antidepressant but declined to discuss them.

[15] Dr Bett found the appellant to be orientated in time, place and person. He presented as someone of borderline intelligence. There was no evidence of cognitive impairment or confusion. He clearly struggled with focus and was significantly distracted. He reported auditory hallucinations but was unable to describe what they involved. He said he could hear voices external to him but could not describe where they came from. Although psychosis typically involves internal voices, Dr Bett suspected this could be psychosis. The voices had told him to harm himself. He expressed delusions about TV programmes containing messages and instructions for him. He presented as being suspicious of others and prison officers reported that he often displayed quite severe paranoia. There was no evidence of mood disorder.

[16] Dr Bett was unable to reach a conclusive diagnosis but considered that he presented with marked symptoms of mental disorder that appeared psychotic in nature. Dr Bett summarises Mr McLaughlin's description in his affidavit of the appellant's conduct at trial

and afterwards in some detail. She treats it as her primary source of information regarding his mental state at the trial and infers from the whole evidence available to her that: "he had active psychotic symptoms during the trial and that these were the primary reason for the decisions he made about the manner in which he conducted his defence." She proposes, "a potential diagnosis of borderline intelligence/mild learning disability and some form of psychotic illness."

[17] The appellant's decision to withdraw instructions from his solicitor and not to participate in the trial were both due to the more acute symptoms of a paranoid psychosis. He could not follow the process of the trial to the extent that he understood when he was supposed to give evidence because of the more "low-level background symptoms" of psychosis that seem to be constantly present. This was different to how she found him in 2023. He had no memory or understanding of why he decided to withdraw instructions from his solicitor at trial. Accordingly, she considered it likely that an episode of illness was the cause of what happened. He felt he was never able to give his explanation at trial. She inferred it was part of a developing paranoid psychosis, basing this on the appellant's account and what she takes from his solicitor's affidavit. The appellant's symptoms were no longer acute when she saw him on 19 April 2024.

[18] This was someone who needed representation given his particular difficulties. She doubts whether she would have considered him fit for trial had she examined him at the time of his trial. She concluded her report by stating:

> "The combined effect of the symptoms outlined would have rendered him incapable of meeting the criteria for effective participation in the hearing and by extension this would have precluded him from assuming responsibility for the conduct of his own defence. However my opinion is based on the difference in assessments, Mr Mullen's description of his mental state, and his solicitor's information. I have no contemporaneous psychiatric assessment to refer to."

Dr Craig

[19] Dr Craig examined the appellant on 14 January 2025. His history included prescription of amisulpride (an antipsychotic) and mirtazapine (an antidepressant) for schizoaffective disorder in 2014. Another psychiatrist reported in 2018 that the appellant would take drugs such as cannabis, amphetamine, cocaine and ecstasy before offending. Dr Craig notes some details of the appellant's father and other relatives having some indications of mental illness but does not explain whether the origin of this information is the appellant (as appears) or some other source.

[20] Dr Craig concluded that the appellant has long-term mental health problems of schizoaffective disorder and PTSD. His stress and paranoia intensified during the trial such that he perceived his solicitor to be a part of a system working against him. He does not offer an explicit view on the question of the appellant's fitness for trial.

Dr Maior

[21] Dr Maior, consultant psychiatrist, examined the appellant on 31 October 2024. The appellant understood the charges and their meaning. He could distinguish the meaning and implications of pleas of guilty and not guilty. He would be able to follow court proceedings. He understood the role and function of his solicitor. When she met him, there was no suggestion he would be unfit for trial. He gave her an account of his understanding at the time of his trial and she could find no information in records to suggest he had mental health difficulties around February 2024. His own description of his presentation at the time of trial raised no suggestion that he was influenced by mental disorder to any significant degree. In terms of section 53F, he was not unfit for trial.

[22] Dr Maior's report follows a conventional and rigorous approach to psychiatric assessment. She was aware that he currently received psychotropic medications in the form of amisulpride and mirtazapine. She examined his background history and past psychiatric history from records. She had actually met him in prison in 2020 when drugs led him to reporting paranoid thoughts and hearing voices. She considered him to have a severe personality disorder with a marked tendency to abuse alcohol and drugs. She reports:

> "There has been no further psychiatric contact since I last saw Mr Mullen with the exception of psychological input.
>
> Mr Mullen has not had any admissions to psychiatric hospitals.
>
> At present Mr Mullen does not have a formal psychiatric diagnosis formulated. Following assessments by psychiatrists the opinion was that he had a severe drink and drug problem and that some of the anxiety may relate to substance misuse."

She sets out her mental state examination in a coherent and logical manner. She concluded that he was not unfit for trial in February 2024 and he remains fit. He does not have a mental illness in addition to his personality disorder.

[23] Concerning the charges in this appeal, the appellant told Dr Maior that he made the weapons to protect himself from other prisoners. (For what it is worth, we note that that was an admission of guilt of the charges: *Grieve* v *Macleod* 1967 JC32; *Donnelly* v *HM Advocate* 2009 SCCR 512 at para [7].)

The sheriff's comment on the grounds of appeal

[24] The sheriff, who had had a number of dealings with the appellant over a number of years, on considering Dr Bett's report for the appeal, was doubtful of her conclusion that the appellant was displaying acute symptoms of a paranoid psychosis during the trial. At all times the appellant had appeared to understand the trial process and ultimately decided to

refuse to engage with it. Whilst the appellant's behaviour was, at times, erratic it was not so problematic as to raise concerns. The appellant seemed to understand the possible impact of proceeding without legal representation together with the consequences of not giving evidence on his own behalf, subject to his right to remain silent. The appellant refused to give evidence or address the jury on the basis that he felt that the jury had already made up their minds. The sheriff saw no indication that the appellant was displaying any symptoms of mental disorder during the trial.

Affidavits

The appellant

[25] The appellant says that he told Mr McLaughlin his explanation of the charges but does not expand on it. He confirms making his own choice to reject a possible plea agreement in discussion with Mr McLaughlin on 8 February 2024. He describes being annoyed by late transport on 9 February. He was suspicious of CCTV as he thought it should show that he did not drop a weapon as alleged on charge 3. He found it difficult to focus on the evidence and thought everyone was against him. He was annoyed that he would not give evidence until 12 February and thought it was unfair. He became convinced over the weekend in prison that everyone was against him and trying to get him convicted, including his solicitor and that he had to get another lawyer, "to help me lead the evidence that would show that I was innocent." He does not say what that evidence was. He became more irritated when prison transport to court was late and on arrival told his solicitor he needed another lawyer. He adds that if he mentioned evidence he meant other angles of the CCTV footage on charge 3. By the time of 15 February 2024, he had not found another solicitor, he did not want to give evidence or speak to the jury as he thought it was all

pointless. It was already determined, he was going to be convicted and imprisoned. He adds that he disputes some of the content of the report by Dr Maior.

John McLaughlin, Solicitor

[26] Mr McLauglin is 70 and highly experienced in criminal defence work. He met with the appellant on 21 December 2021 and took his instructions in this case including an explanation of his proposed defence but does not say what it was. In March 2023, the appellant contacted Mr McLaughlin to say that he no longer wished to instruct him. In May 2023, the appellant's father prevailed on Mr McLaughlin to accept the appellant's instructions, which he did. The appellant wanted certain lines of defence instructed and they made sense. Since the appellant advised him that he was receiving psychological treatment and anti-psychotic medicine, Mr McLaughlin instructed Dr Bett to assess the appellant's fitness for trial and also whether he had a defence of lacking criminal responsibility. Dr Bett reported in the negative and the appellant did not wish to be examined by her again.

[27] The appellant was annoyed by delays during the trial and was unhappy that there would be a gap from Friday 9 February to Monday 12 February between the jury hearing from prosecution witnesses and the appellant's evidence. The appellant agreed that no prosecution witnesses were to be called in his defence and that he would give evidence on Monday 12 February. On the Monday, the appellant was unhappy that transport was late and said he thought Mr McLaughlin had been colluding with the Crown in that regard and had not asked the correct questions of Crown witnesses. Mr McLaughlin concluded that he could no longer represent the appellant and would need to advise the court accordingly which he did. He was surprised at this turn of events. He learned that the appellant had left

a voice message on the evening of 13 February to thank Mr McLaughlin for his efforts to help him in the trial. After the appellant was convicted, he telephoned Mr McLaughlin to apologise and explain that he had felt that Mr McLaughlin had been conspiring against him but now knew this was wrong. The appellant said he could not process properly at the time of the trial and did not recall what the sheriff said to him. He felt it was hopeless, he would just be convicted and sentenced. He felt blank when asked if he wished to give evidence and did not know what to say. He felt "the decision" (presumably that he would be convicted) had already been made. The appellant agreed in due course to be re-assessed by Dr Bett, leading to Mr McLaughlin preparing grounds of appeal.

Decision

[28] A trial should be deserted at the instance of the court only when it has become abundantly clear that the circumstances warrant such action; *HM Advocate* v *RV* at para [9]. The appellant was represented during the Crown case and his solicitor cross-examined witnesses accordingly. His very experienced solicitor raised no concerns during the trial about the appellant's fitness. The sheriff had previous experience of dealing with the appellant and did not find his behaviour to be unusual for him or such as to raise concerns about his fitness for trial. The appellant dispensed with his solicitor's services. The appellant was allowed time to try to find further representation but eventually, after several days during a short trial, the sheriff was not prepared to allow further time. The sheriff was scrupulous to ensure that the appellant knew that he could give evidence and he chose not to. The sheriff offered the appellant the opportunity to address the jury and he chose not to.

[29] The sheriff provided the jury with oral and written directions at the start of the trial on, amongst others:

- the presumption of innocence;
- the burden of proof lying only on the prosecution;
- the standard of proof required of the prosecution being proof beyond reasonable doubt; and,
- that there was no burden of proof on the appellant who did not have to adduce evidence and nothing could be taken from it if he did not.

In his closing directions, the sheriff reminded the jury of those directions, encouraged them to read them again and repeatedly told the jury that the absence of evidence from the appellant did not assist the prosecution on whom the onus of proof on each charge continued to lie.

[30] However ill-advised the appellant's actions were, there was no proper basis for the sheriff to desert the trial of his own accord. In any event, it was a matter for his discretionary judgement and we cannot criticise his exercise of it. The appellant's trial was fair and there was no miscarriage of justice. The appeal is refused.

[31] We observe that the appellant did not ultimately maintain that he was unfit for trial. Had he done so he would have had to meet the criteria in section 53F of the 1995 Act which, so far as relevant, provides:

> "(1) A person is unfit for trial if it is established on the balance of probabilities that the person is incapable, by reason of a mental or physical condition, of participating effectively in a trial.
> (2) In determining whether a person is unfit for trial the court is to have regard to—
> (a) the ability of the person to—
> (i) understand the nature of the charge,
> (ii) understand the requirement to tender a plea to the charge and the effect of such a plea,
> (iii) understand the purpose of, and follow the course of, the trial,
> (iv) understand the evidence that may be given against the person,
> (v) instruct and otherwise communicate with the person's legal representative, and

(b) any other factor which the court considers relevant."

Accordingly, as at common law, there is an onus on the appellant to rebut the presumption of sound mind, in this case fitness for trial, on the balance of probabilities.

[32] None of the psychiatrists were adduced to testify in the appeal. The position is strikingly different to *Murphy* v *HM Advocate* 2017 SLT 143 where this court concluded that the appellant had been unfit at trial. In *Murphy*, three psychiatrists gave evidence in the appeal and all agreed that Mr Murphy was probably unfit at the time of his trial. In this case, there is a clear assessment before us in a report by Dr Maior that the appellant was fit for trial. The onus would be on the appellant to establish that he had been unfit for trial. He did not discharge that onus. Discharging it would have involved satisfying the court that the opinion expressed in Dr Bett's second report should be accepted and the opinion given in Dr Maior's report should be rejected. However, here there was no attempt to identify a proper basis for the court following such a course. It is rarely likely to be possible for the court to prefer one expert's opinion to another expert's contrary opinion without hearing at least some expert evidence, which the court may assess.