

R -V- GARY ANDERSON

The defendant, by way of a summons dated 23rd August 2000, faces a charge of Assault Occasioning Actual Bodily Harm, said to have been committed against Daniel Stuart Hagans on 10th April 1999. I have read the statements of Constable Anderson, Constable McCormick, Daniel Hagans, Doctor Kalia, Stephen Vince, Constable Coey, and the summary of a tape recorded interview with the defendant, all of which were attached to the summons. I made it clear to Defence Counsel, Mr Duffy, that I intended to read these statements in order to familiarise myself with the facts said to surround the alleged assault. He raised no objection.

This case first came before me on 24th October 2000, at which stage Defence Counsel made it clear he would be raising an abuse of process point relating to the delay in this case and that he would be referring to Article 6 of the European Convention on Human Rights in respect of the issue of trial within a reasonable time.

The history that I was given was that the defendant was arrested on the day of the alleged assault and interviewed the following day. Nothing further was heard by the defendant until receipt of a summons dated 23rd August 2000 commanding a first appearance before the Court on 24th October 2000. I informed Defence Counsel that I would require a skeleton argument. The case was mentioned twice in November and listed on 19th December for the officer in charge, Constable Coey, to give evidence in relation to the progress, or lack of it, in this case.

On that day Miss Brady, who appeared for the Crown, tendered Constable Coey. When asked to explain the delay he said that the file had been sent to the File Preparation Unit and that between himself and that Unit the file had been lost. He said he had obtained one statement from the alleged injured party and had interviewed the defendant before sending the file to File Preparation. He said that File Preparation had obtained all the other statements.

Constable Coey went on to say that the file had re-emerged from File Preparation as a result of an inquiry regarding the Criminal Enquiry aspect of this case. He said he had been made aware of the situation in April 2000 and that the Police Authorities had remedied the situation by retrieving the file from File Preparation.

Constable Coey was referred by Defence Counsel to the statement of Constable David Anderson who refers to speaking to a David Patterson and gives a description of blood on his

face. Counsel made it clear that it will be the defence case that Patterson carried out this assault. Constable Coey responded by referring to the statement of Stephen Vince who purported to see the assault with a glass being carried out by a person in a red shirt who did not leave his sight until Police arrived, whereupon he was pointed out to Police. Defence Counsel established that there was no evidence of a forensic nature linking the defendant to the assault and that there had been no investigation relating to the blood seen on Patterson.

In regard to the scene of the alleged assault, Defence Counsel suggested to Constable Coey that there may have been video cameras covering the door area and the dance floor where the assault took place. The Constable agreed that there would be a camera covering the inside of the door but was unsure if a camera covered the area of the dance floor. It was in this area that the assault was carried out. The Constable could not recall if Police had investigated the possibility of video evidence but agreed that it would be normal procedure. He said he could not say if he asked for a video. There was nothing in his notebook in relation to his asking for a video.

This reference to blood on Patterson's shirt and to the possibility of video evidence related to a second limb of the defence application for a stay on the ground of abuse of process. The first limb relates to a Convention point based on delay, the second limb relates to a failure to secure and retain evidence. The Court had pointed out that this reference to inactivity by Police in regard to following up blood on Patterson and the possibility of video evidence was irrelevant to the issue of delay in the issuing of the summons and that this aspect was surely a matter for the trial.

The Court asked Constable Coey to check with the owners of the premises to see if the door and /or the dance floor were covered by video and asked him to check if any of the investigating Police Officers had made any inquiries regarding the possible existence of a video.

The case was then adjourned for further evidence from Constable Coey and for submissions. I requested from Counsel that they both supply the Court with skeleton arguments in advance of the next hearing. I had been referred by Defence Counsel to two authorities – R v. Sunderland Magistrates' Court (1989) Crim. L.R 56 and R v. Birmingham (1992) Crim. L.R. 117.

On 24th October I had referred Counsel to the DPP for Northern Ireland's Application for Judicial Review 1999 N.I. 106 and on 19th December I referred Counsel to the following Scottish authorities:-

Crummock (Scotland) Ltd. v. HMA 2000SLT 677

HMC v. Little 1999	SLT1145
McNab v. HMA 2000	SLT 99
HMA v. McGlinchey 2000	SLT 995
Docherty v. HMA 2000	SLT 1312
Robb v. HMA 2000	SLT 1315
HMA v. Hynd 2000	SLT 1321
Reilly v. HMA 2000	SLT 1330

I also provided Counsel with a list of authorities printed from the Scottish Courts website under the heading 'Delay in Criminal Proceedings' and asked them to consider these.

The case was adjourned by me to 16th January 2001 to hear from Constable Coey in relation to the video point and for final submissions based on pre-submitted skeleton arguments. On that day the skeleton arguments were available but Constable Coey was not. In his absence I heard from both Counsel. I refer at this stage to the Defence additional skeleton argument and to the Crown skeleton argument.

I do not propose to rehearse the arguments summarised in the skeleton arguments. Mr Duffy agreed with the Court that the period of time relevant to this issue of delay is from the date of arrest to the date of the issue of the summons – ie a period of 16 months. Any delay caused by this abuse of process application would cause its own problems but wouldn't be a relevant consideration. In relation to the first limb of Mr Duffy's argument he submitted, and the Court accepts, based on the Scottish authorities, that the Defence do not have to establish that they will be prejudiced by any delay. In relation to the second limb of Mr Duffy's argument relating to the failure to secure and retain evidence, Mr Duffy accepted that the Defence do have to demonstrate prejudice. The Court observed that this would be difficult to assess in the abstract and that the trial process would demonstrate the presence or absence of prejudice which could then be dealt with in the context of the trial. The Court referred to Archbold 4 – 64 and was in turn referred to Corker and Young 'Abuse of Process and Fairness in Criminal Proceedings', Chapter 8 :25. There followed a discussion relating to the presence or absence of video evidence (then unresolved) and the issue of the inactivity of the Police relating to the blood on Patterson's face and his failure to account for it. The Court made clear that if, during any trial, the Crown haven't ruled out that the blood on Patterson's shirt was that of the injured party, then that possibility would remain, and that any inferences from that possibility would be drawn in favour of the Defence.

Because of Constable Coey's absence the issue of the potential video evidence was left unresolved. The Case was listed for 23 January 2001 to hear from the Constable in relation to his investigations at the scene of the alleged assault. On that day the Constable gave evidence that he had spoken to the manageress of the premises who indicated she recalled

the incident. She referred him to an incident book which revealed that no video had been requested by Police and that videos are re-used after a week. The Constable then stated that he had not asked if the area of the alleged assault was covered by a video camera, at which stage he was sent off to telephone the manageress. The Constable then gave evidence, as a result of that phone call, that there were video cameras over each bar and one at the rear of the dance floor above a fire exit but that none of them would cover the area where the incident is alleged to have taken place – ie in the vicinity of steps leading to an internal door which leads onto a 20-metre corridor which, in turn, leads to the external door. Apparently there is a video camera on the outside of the internal doors facing down the corridor towards the external doors.

Defence Counsel established that this camera would show the defendant and others being put out by the doormen, albeit pointing in the direction they were moving. I don't consider that the presence or absence of video evidence is of any great significance and certainly isn't sufficient to play any part in this abuse of process application.

As far as Police inactivity in relation to the blood on Patterson's face is concerned, I have already indicated how the Court would approach this in the context of a trial. I consider that it is in this context that this issue will have to be addressed. I can indicate that I consider Constable Anderson's failure to follow up the issue of Patterson's appearance and his, Patterson's, failure to account for the blood on his face, as being of great potential significance. I repeat that any reasonable inferences to be drawn from this failure will be drawn in favour of the Defence. If every similar instance of Police inactivity were to result in a stay on the basis of abuse of process the Court would be swamped with such applications.

In relation, therefore, to Mr Duffy's second limb headed 'The failure to secure and retain evidence', I refuse this application for a stay.

Turning to the first limb of the Defence argument headed 'Breach of Article 6(i) of the European Convention on Human Rights', I have considered the Scottish authorities referred to in both Counsels' skeleton arguments. I have also considered Archbold Paras 4 – 50, 4 – 67a and Para 16 – 73. The leading case in this jurisdiction on applications of this nature in the Magistrates' Court is the DPP for Northern Ireland's Application for Judicial Review 1999 N.I. 106 but I acknowledge Mr Duffy's observation that this case was decided before the Human Rights Act came into force. Therein lies the central difficulty in this case. The Court of Appeal, both in England and Northern Ireland, have repeatedly emphasised how sparingly the Magistrates' Court should exercise its jurisdiction to order a stay of criminal proceedings on the basis of abuse of process. The question that now has to be resolved is how that general approach to abuse of process applications, usually relating to the issue of delay, is affected by the Human Rights Act and by the European and Scottish authorities relating to

Article 6 of the European Convention. I have tried to set out the issues in some detail in anticipation of that question ultimately being resolved elsewhere. I also refer to *Howarth v. U.K.*, mentioned in *Archbold News*; *The Times* October 10 2000.

If is, of course, highly undesirable, to say the least, that a summons be “lost” for 12 months and that an accused person be left “too long in a state of uncertainty about his fate”. However, it is not for this Court to punish the prosecution for their inefficiency. I refer to the opinion of Lord Bonamy in *HMA v. James Hynd*, where he said, “Such delay plainly calls for an explanation. If the explanation is satisfactory, then the delay will be of little, if any, significance in determining the question whether the case has been brought to trial within a reasonable time. On the other hand, even if in the overall context of the whole period between charge and trial the period of delay is very significant, the absence of a satisfactory explanation will not necessarily be fatal to the Crown’s right to prosecute. It is easy to conceive of a case being overlooked in circumstances which can be explained but for which the explanation is unsatisfactory, but where, on re-discovery of the case, the prosecutor takes urgent steps to bring the accused before the Court on petition and thereafter to bring him to trial more speedily than would otherwise have been the case in ordinary course. In such a case the Court might well determine that the accused was brought to trial within a reasonable time in spite of the unnecessary delay for which there was no satisfactory explanation.”

That passage, in my view, sums up this case. I am told that the file was received by the DPP on 21st July 2000 and that the direction to prosecute issued on 1st August 2000 with specific instructions from the Directing Officer that it was imperative for the matter to be listed and heard as soon as possible. It seems to me that the Crown have made efforts to retrieve the situation.

In reaching my decision I am influenced by the passage I have quoted from *HMA v. Hynd* and I continue to be influenced by the case of the DPP’s Application, fully aware that it pre-dates the Human Rights Act. It may be a question for another Court whether I am correct in this approach.

This Application for a stay of these proceedings on the basis of abuse of process is refused.

M HAMILL
Resident Magistrate
24 January 2001