JOHN MITCHELL v. PROCURATOR FISCAL, GLASGOW [1999] ScotHC 106 (11th May, 1999)

APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Sutherland **498/98**

Lord Milligan

Lord Cowie

OPINION OF THE COURT

delivered by

THE HONOURABLE LORD SUTHERLAND

in

STATED CASE

by

JOHN MITCHELL

Appellant

against

PROCURATOR FISCAL, GLASGOW

Respondent

Appellant, Brown, Balfour & Manson

Respondent, Cathcart, A.D.

11 May 1999

This is the appeal by John Mitchell who was convicted on two charges of contravening section 4(3)(a) of the Misuse of Drugs Act 1971. An essential part of the Crown case was evidence from a forensic scientists' report produced under section 280 of the 1995 Act identifying the substance obtained by the police as being heroin. That report, although dated 25 April 1996, was not served on the appellant until 13 February 1997. The procedure in this case, which is accurately described by the sheriff as not making edifying reading, was as follows. The alleged offence was committed in February 1996. The appellant appeared on a complaint in August 1996 and there was an adjournment to a trial diet of 26 November 1996 with an interim diet on 5 November. On 5 November the diet was continued to the trial diet. On 26 November 1996 the Court on the motion of the prosecutor adjourned the diet for trial due to an essential Crown witness being absent until 3 February 1997 at 10am. There is also contained in that minute the fact that "the accused being asked to confirm the plea previously tendered pled not

guilty" to the various charges. Thereafter there were several further adjournments all minuted as being adjournments of a diet of trial until 27 November 1997 when the trial itself and the leading of evidence actually took place. At that stage objection was taken to the production of the forensic scientists' report on the ground that it had not been served not less than 14 days before the original trial diet on 26 November 1996. The submission was that the trial had commenced on 26 November 1996 when the appellant was called upon to plead and that all other trial diets were simply adjournments of that original trial. The Crown submitted that the trial did not commence until the first witness was sworn, and that did not take place until 27 November 1997. The crucial issue in this case therefore is when does a summary trial commence. If it commenced when the accused was called upon to plead at a trial diet and has pled not guilty, then the Crown are too late. If it does not commence until the first witness is sworn then the notice was served timeously. In Renton & Brown, Criminal Procedure, paragraph 21-05 the following is said:

> "Whether or not the decision in *Handley* v *Pirie* that a trial 'commences' before the first witness is sworn still represents the law depends upon its *ratio*. If its *ratio* is that the commencement of a trial depends upon the stage at which the prosecutor may move to desert *pro loco et tempore*, then it was superseded by section 18(2) of the 1980 Act and a trial commences when the first witness is sworn. But if its *ratio* is independent of the prosecutor's right to desert *pro loco et tempore*, and if that right just happens to terminate prior to the 1980 Act when the trial commenced, it is still law. This unsatisfactory situation is the result of the legislation which on the one hand specifically declared that for the purpose of the 40 day rule a trial starts when the first witness is sworn, and on the other entitles the prosecutor in any case to desert *pro loco et tempore* up to the swearing of the first witness, but contains no general provision defining the commencement of a trial".

As was said in that passage the issue really is what was the ratio in *Handley* v *Pirie* 1976 J.C.65. The relevant passage appears at page 70 where the Lord Justice General said this:

> "But for the argument presented by the Advocate Depute we would have little hesitation in holding that when the diet of trial to which the complainer had been summoned had been called, and when he had renewed his plea of not guilty before the competent Court there to try him, his trial had begun and it was no longer open to the prosecutor, even if he then persuaded the Court to adjourn the diet, to take advantage of the provision of section 10(1) and (4) of the Act".

Leaving the matter there, it seems perfectly clear that the general view, quite independently of any question of desertion *pro loco et tempore*, was that the trial commenced as soon as the accused had pled not guilty. The argument of the Crown to which reference was made was that the Crown could desert *pro loco et tempore* after the accused had been called upon to plead but before evidence was led. The Lord Justice General goes on to say:

> "Such strength as the argument has rests upon the supposed analogy of jury trial, but we are unable to agree that it is a sound one. In solemn procedure when the diet of trial is called, when the accused has been called upon to plead and has pled not guilty, and the jury has been empanelled and sworn, the accused is then in a position of a man who has elected to put the Crown to the proof of guilt before a Court competent to try him. In summary proceedings when the diet of trial has been called and the accused has pled not guilty he is then in the same position as the accused on indictment when the jury has been sworn for he is then upon his plea of not guilty before the Court competent to try him having by his plea elected to put the Crown to the proof of guilt. This is the true analogy and there is no substance in the 'thought' that in summary proceedings the analogy is only perfected by the beginning of the Crown evidence *in causa* In our opinion therefore if a prosecutor wishes to move to desert the diet *pro loco et tempore* in summary proceedings, or to protect his right to rely later on a section 10(1) certificate which has not by then been served, he must make the appropriate motion at the diet of trial before the accused has been called upon to plead".

In our view it is quite clear that the ratio of *Handley* was that the proper analogy is with solemn procedure whereby as soon as the panel is remitted to the knowledge of an assize by the jury having been sworn, the trial commences and there never has been any question of waiting for the first witness to be called. In the same way in a summary case where the accused has been called upon to plead at a trial diet and has pled not guilty, he has put himself in the hands of the Court and therefore the trial has commenced. The fact that the ratio of *Handley* has got nothing really to do with the matter of deserting the diet *pro loco et tempore* is made quite clear in the last sentence we quoted from the Lord Justice General's opinion. In our view therefore it is clear that *Handley* is still good law.

The sheriff in the present case has accepted that if the decision in *Handley* is still good law, then it was binding upon him and he proceeded in error. His reasons for saying that *Handley* is no longer an accurate statement of law appear to be threefold. In the first place he concluded that to the extent that *Handley* was dealing with the narrow issue of a point at which the prosecutor may move to desert *pro loco et tempore* it has been superseded by section 152(1) of the 1995 Act. As we have already indicated it is not our view that that was the basis of the decision in *Handley* and therefore this is not a valid point. The second point the sheriff takes is that the analogy with the position of an accused on indictment is no longer appropriate because section 129 of the 1975 Act was amended by schedule 1, paragraph 7 of the Criminal Justice (Scotland) Act 1980 and the effect of this amendment was to enable jurors to be substituted after the original jury was sworn but before any evidence was led. The sheriff says that one result of that amendment was that the leading of the first witness was treated as the commencement of the trial in solemn procedure. While there is no doubt that the appropriate section does say that jurors may be substituted after the original jury has been sworn but before any evidence was led, it does not in the least follow that the trial has not by that time commenced. What Parliament is doing is enabling a substitute juror to be sworn, despite the fact that the trial has commenced, and we are quite unable to draw the conclusion from this particular piece of legislation that the whole basis which has always been understood that solemn trial commences as soon as the jury is sworn has in some way been changed. Finally, the sheriff founds upon section 147(4) of the 1995 Act which relates to time limits. He says that identical provisions as between solemn and summary procedure for the ascertainment of time limits had been introduced and trials under both procedures are now treated as commenced when the first witness is sworn. What is important however in our view is that section 147(4) commences with the words "for the purposes of this section". It is therefore a very limited provision and it is only for the purposes of time limits that trials are to be deemed to be commenced when the first witness is sworn. It need hardly be said that if the Crown position is correct and that in fact no summary trial commences until the first witness is sworn, then the whole of this particular subsection would be totally unnecessary and otiose. Accordingly in our view nothing in any of the more recently introduced legislation has altered the ratio of *Handley,* although certain exceptions have now been introduced by Parliament to the effect of the rule that the trial commences as soon as the accused has been called upon to plead. For these reasons we consider the sheriff was in error in saying that *Handley* v *Pirie* was no longer to be regarded as a true statement of the law on this aspect. We shall therefore answer both questions in the affirmative and hold that the report was not timeously served on the basis that a summary trial commences when at a trial diet at which the accused person is called upon to plead he tenders a plea.