SJA E-NEWS

Fifty-first Issue – August 2014

SJA NEWS

The Vice-Chairman attended a meeting of the Conduct Committee of the Judicial Council on 7th July.

This meeting was called to examine again the subject of Judicial Office Holders' Involvement in Sporting Organisations. This had already been reported on by the Committee, following its consideration of the concerns expressed by the Lord President, the representations made by some organisations and individuals, and the survey carried out at the end of last year (see earlier E-News issues).

However, re-examination was necessary as its report and recommendations to the Judicial Council had not found favour. After lengthy discussion, the recommendations were modified.

OTHER NEWS

AGM AND NATIONAL TRAINING – BOGOF!

This is a reminder that the AGM will be held in Stirling to co-incide with the National Training week-end 22 and 23 November 2014 organised by the Judicial Institute.

The JI will co-host this event running alongside the AGM. The conference will conclude on Sunday, 23 November with coffee at 11.30 am and a keynote talk from a member of the criminal justice system and discussion session.

The conference offers an opportunity to meet justices from throughout Scotland and exchange judicial experiences in a work and social setting. Experienced justices will be assisting in the planning and delivery of the course. Topics will reflect contemporary and up to date topics of interest to justices. The programme will include presentations, discussions, role play and syndicate sessions.

So since you can claim expenses to go to the National Training Weekend, you can Buy One and Get One Free!

A COUPLE OF CASES OF INTEREST

Prevarication: *Bowie v PF, Paisley* [2014] HCJAC 65

Prevarication is something we have probably all seen in a trial and, although no doubt we would always consult our Legal Advisers when it occurs, it is useful to have some general idea in advance on how to deal with it.

In a trial in Paisley Sheriff Court, it was alleged that a woman had been seriously assaulted by an ex-partner who had turned up uninvited at a party (and also committed other offences).

The alleged victim gave evidence that a Ms Bowie had been present throughout. Ms Bowie had given a statement to the police at the time, and had signed every page. In that statement, she identified the alleged assailant, whom she had known for a year; said she had told him *via* Facebook before the events that she was going to the party (of which he disapproved) and had further discussion with him by this means later; said that he had come to the party swinging a meat cleaver, and that attempts to calm him down had resulted in injuries to her finger; and said that he had punched the alleged victim and later returned and smashed a window, though she had not actually witnessed this.

However, when Ms Bowie came to give evidence, while she agreed she had been at the party, she made a number of inconsistent statements. She said variously that she could not identify anyone else in court who had been there; that the signature was on the statement was hers, and that her details had been taken by the police; that she could not remember giving the statement or talking to the police; that she had made a statement; that she could recall some of the events, including how she and the alleged victim had cuts on their hands; that the police had come to the house because of fighting, but that she could not remember who was fighting and had seen nothing; and that windows had been broken, but she neither saw nor heard it happening.

In the course of this, Ms Bowie was warned by the Sheriff about committing contempt of court by prevaricating. On the following day, when the trial was to resume, it was reported by the bar officer that Ms Bowie had been telephoning the alleged victim from the witness room, though when the fiscal put that to her, she denied it.

The fiscal then withdrew the case, on the ground that the alleged victim's account was uncorroborated. The Sheriff, however, had Ms Bowie return to the witness box and, reminding her she was still on oath, asked her further questions as to whether she had telephoned the alleged victim, at which point she admitted that she had lied to the fiscal.

The Sheriff, concluding that she might be in contempt of court, had her taken into custody. After receiving advice from the duty solicitor, who made submissions on her behalf, the Sheriff found Ms Bowie in contempt of court, and she was remanded in custody for preparation of the Social Work Report. When she appeared before him for sentencing, the Sheriff imposed twelve months detention in a YOI.

Ms Bowie petitioned the High Court for exercise of the *nobile officium* (an unusual procedure by which the High Court can offer remedies where there appears a loophole in the law), presumably by quashing the contempt finding. She claimed that the Sheriff had failed to follow the guidelines in *Robertson v HMA* 2008 JC 146. These require that before a finding of contempt, the individual must be afforded legal advice and time to consult. Since she was not offered this before the Sheriff had her return to the witness box, his questioning of her contradicted her right to a fair trial, and in particular, her right against self-incrimination.

Further, under reference to *Childs v Young* 1981 SLT (Notes) 27, she argued that the Sheriff had not been entitled to make a finding of contempt, as the statement Ms Bowie had made to the police had not been competently proved, and the telephone call had had no significant effect on the outcome of the trial.

Further still, she argued that, in any case, the period of custody imposed was excessive, given her lack of a criminal record, youth, and stable background, and a positive Social Work Report.

Considering the matter, the High Court decided that the Sheriff's procedure of getting Ms Bowie back in the witness box was irregular, but had had little effect overall. Her admitted lie to the fiscal was a minor element, as the contempt finding applied to her earlier prevarication about the presence of the accused at the party and what he had done. Finding this prevarication to be a contempt was "almost inevitable", and it was a classic case of the judge being best placed to deal with such matters occurring in front of him. *Childs* could be distinguished as it did not relate to a signed statement.

As to sentence, the prevarication had brought to an end a trial for offences involving a weapon, so was serious and, once again, the presiding sheriff is in the best position to assess that seriousness and its possible effect on the future conduct of trials. The Social Work Report certainly indicated that Ms Bowie had

not been involved in the criminal justice system, and had a stable and supportive family. However, given the seriousness of the contempt and its consequences, the sentence was not excessive. Exercise of the *nobiler officium* was refused.

The full report is at https://www.scotcourts.gov.uk/search-judgments/judgment?id=ad358ea6-8980-69d2-b500-ff0000d74aa7.

"Due diligence" defence in sale of alcohol cases: *Feeney v PF Paisley* [2014] HCJAC84

Under-age alcohol sale cases come our way, and this is one of them. It deals with a particular defence, which was appealed, but in which the High Court "extend[ed] sympathy to the justice" in having to deal with it.

A 16-year old shop assistant sold alcohol to another 16 year old, who was making a "test purchase". The shop-keeper was convicted of two offences, under sections 103 and 107 of the Licensing (Scotland) Act 2005, respectively. The former offence is "knowingly allow[ing] alcohol to be sold to a child or young person", the latter is ""knowingly allow[ing] alcohol to be sold … by a child or young person".

The shop-keeper had told the shop assistant that if someone wanted to purchase cigarettes or alcohol, she should ask for proof of age, and go and get the shop-owner. Also, when alcohol was scanned though the till, it automatically operated buttons asking about the purchaser's age and proof of age.

The shop assistant, in evidence, acknowledged all of this, but had, in effect, simply ignored the instructions on this occasion.

There was no evidence of previous offences, and the shop-keeper (who represented himself) gave evidence as to the checking systems and instructions, and to the fact that this was an isolated occasion.

It appears that the justice trying the case decided that there should have been more "robust" system, and convicted.

However, on appeal, the High Court noted that this was an isolated incident, that the shop-keeper had been unaware of it at the time, and had a system in place to prevent under-age alcohol sales. Also, it drew attention to section 141A of the 2005 Act (added by the Criminal Justice and Licensing (Scotland) Act 2010, section 195), which creates a defence that the accused "did not know the offence was being committed" and had "exercised all due diligence to prevent the offence being committed".

It noted that the justice's attention had not been drawn to this defence and "extend[ed] sympathy to the justice for several reasons". These reasons were: the complexity of the legislation; the party litigant who did not refer to section 141A; apparent failure of the Crown to draw attention to that section; and that the Legal Adviser appeared not to have drawn attention to it, either.

However, the High Court continued, the defence exists, and evidence led in the trail indicated that it had been made out. The Crown had tried to distinguish *Epic Group Scotland v Shanks* 2014 SCCR 230 on the ground that in the present case there had been a failure in training and supervision. However, it did not appear that there had been, and so the "due diligence" defence was made out, and the conviction quashed.

The full report is at https://www.scotcourts.gov.uk/search-judgments/judgment?id=0b369aa6-8980-69d2-b500-ff0000d74aa7.

SOME PROMOTIONS

Rather remarkably, half the Sheriffs-Principal fall to be replaced shortly, upon their retiral.

The new holders of the office will be as follows:

> **North Strathclyde: Duncan Law Murray** (a solicitor and part-time sheriff, and former President of the Law Society of Scotland)
>
> **South Strathclyde, Dumfries &Galloway: Sheriff Ian Ralph Abercrombie QC** (an advocate and former member of the Institute of Chartered Accountants of Scotland's disciplinary committee and the Scottish Law Commission's advisory group)
>
> **Tayside, Central & Fife: Sheriff Marysia Lewis** (also a solicitor, formerly in both private and local authority practice, but now a full-time sheriff).

In addition, there is a new appointment to the **Inner House** (in other words, the appeal court). That is **Lord Malcolm**, who was appointed to the Court of Session in 2007, and has been a member of the Judicial Appointments Board, and Chairman of the Judicial Institute. He is, of course, a Dundee graduate.

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E-News Editor
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