A Requiem for the Twelve-Month Time-Bar

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Fred Mackintosh KC considers the effect of the recently published decisions of the High Court of Justiciary in Barr v HM Advocate [2022] HCJAC 9 and BS v HM Advocate [2023] HCJAC 5

The High Court has now published two decisions made on the summer of 2022 in respect of appeals against extensions of the twelve-month time bar under section 65 of the Criminal Procedure (Scotland) Act 1995. Perhaps now is the time to note the passing of almost all remaining substance of that twelve-month rule and wonder whether there are really any practical statutory protections against delay in solemn trials that safeguard or advance the rights of the citizen against the State.

Section 65(1) of the 1995 Act seems clear. An accused person shall not be tried on indictment for any offence unless the trial is commenced within the period of twelve months of the first appearance of the accused on petition. This aspiration has been a feature of Scotland's criminal courts since 1980 and at times the speed of Scottish trials compared to that in the rest of the UK has been remarkable.

Of course, the rule is not quite as simple as it seems. Section 65(3) provides that the Sheriff or Judge may extend that twelve-month period "on cause shown". Experience has shown that can be a relatively easy requirement for the prosecutor to meet, but these two decisions are likely to make it even easier to get an extension and to continue to prosecute an accused person even though that twelve-month deadline cannot be met.

It should be noted that since the start of the pandemic the twelve-month period has been extended to take account of the disruption, but whether the period is twelve-months or eighteen the same principles apply to attempts to extend the time-bar to allow a prosecution to proceed.

When the twelve-month rule was introduced in the House of Lords more than forty years ago as part of the then Criminal Justice (Scotland) Bill the then Minister of State explained that "large parts of the Bill are intended to safeguard or advance the rights of the citizen against the State" and that the new section would make "provision to tighten the existing procedure for the prevention of delay in trials". The value of that protection appears to have weakened.

In the new decision of *Barr v HM Advocate* the Lord Justice-General reminds us that the criminal justice system has changed a lot since the twelve-month rule was introduced in 1980. In particular, the court highlights that back then, before the Bonomy Review, the progress of cases on indictment was almost exclusively in the hands of the Crown; an arm of the executive; whilst now once an indictment has been served the Court has taken over the role of progressing cases. In the past, his Lordship explains, the Court provided scrutiny of the lack of resources to accommodate trial diets, but now it is the Court that provides those resources within a parliamentary approved budget. At the same time the Court observes that "it may be difficult to resist an application for an extension to the twelve-month time bar when the trial remains due to start within what would be regarded as a reasonable time under the European Convention of Human Rights". Experience suggests that if it is realistic to imagine a trial happening within two or three years, then extensions will be sought and will be granted.

In both *Barr v HM Advocate* and *BS v HM Advocate* the Court is very clear these modern cases are very different from the previously leading decisions of *Swift v HM Advocate* 1984 JC 84 and *Early v HM Advocate* 2007 JC 50 and in particular where the cause of any delay can be placed at the feet, not of the prosecutor, or even the court, but at some particular failure by a vulnerable witness to attend at the trial diet even when there might be said to have been a lack of effective action and support by the police and prosecutor designed to enable that witness to attend. Now the only question to be considered is where the interest of justice lies.

It is of course worth remembering that whilst the European Convention of Human Rights is concerned about trial within a reasonable time it also provides for the state to protect vulnerable people from criminal acts that interference with their life, bodily and sexual autonomy, and property. Where the indictment is for a serious matter then the Convention does not require the prosecution to end when it won't take an unreasonable time to have a trial and the interests of complainers and the wider public need to be considered.

The disappointment is that in passing what became section 65(1) Parliament (and the Thomson Committee that first proposed the twelve-month time-bar) seemed to have a more ambitious objective in mind; to actually start the trials of persons accused on indictment within twelve months. Back then starting a trial meant empanelling a jury and calling the first witness. The advantages to such an ambition are clear. The memories of all involved would be fresher, accused persons would not have to remain in a state of doubt about their fate and complainers, victims and witnesses would be able to give their evidence and move on with their lives.

If all the twelve-month rule is to mean that the Crown must serve an indictment or hold a first diet within eleven months so that the Court can become seized of the case then it is no-longer a "time-bar" in any sense and the sad reality is that where the accused is not held on remand the Crown will continue to meet that deadline with just weeks or days to spare and there will remain precious little time for that trial to start on time.

It seems unlikely that the demise of the twelve-month time-bar as the meaningful protection of the rights of the citizen against the State in the way imagined by those who introduced it will be widely mourned, but if we want to get to back to a point where prosecution is prompt and delivered faster than the minimum standard set down in the Convention then the Scottish Ministers and our Parliament will need to come up with resources. I fear that the latest dilution of the effect of section 65(1) won't help to keep the pressure on those parts of the state to make the necessary investment.