



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 17
HCA/2021/2/XM

Lord Justice General
Lord Woolman
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

CROWN PETITION TO THE NOBILE OFFICIUM

by

PROCURATOR FISCAL, KILMARNOCK

Appellant

against

STEPHEN MOTRONI

Respondent

Appellant: A Prentice (sol adv) AD; the Crown Agent
Respondent: CM Mitchell QC, C Findlater; Livingstone Brown, Glasgow

3 March 2021

[1] The respondent was the subject of a summary complaint at the Sheriff Court in Kilmarnock which libelled two charges of lewd, indecent and libidinous practices and behaviour towards two persons respectively in the years from 1992 to 2001 and 1992 to 1999. Although some of the libel specified locations in Ayrshire, it also contained addresses in Italy. No objection to the jurisdiction of the court was tabled in terms of section 144(4) of the Criminal Procedure (Scotland) Act 1995. Had this been done, and were it to have been

sustained, an appeal would have been permitted (1995 Act, s 174(1)). Otherwise, the case would proceed, as this one did, to trial on the entire complaint.

[2] At the conclusion of several days of evidence in September, October and November 2020, the summary sheriff raised *ex proprio motu* the issue of jurisdiction in relation to the Italian locations. He continued the trial for submissions on jurisdiction to 26 November. Thereafter, the sheriff held that he did not have jurisdiction on the Italian elements. He deserted the complaint in so far as it related to them (*Lauchlan and O'Neill* 2015 JC 75 LJC (Carloway) at para [30]). He then acquitted the respondent of the remaining elements of the charges.

[3] The procurator fiscal applied for a stated case (s 176(1) of the 1995 Act). This sought to address the question of jurisdiction. Although it could have been more clearly expressed, it also challenges the acquittal of the respondent. The sheriff declined to state a case on the basis that it was his decision on jurisdiction that was under challenge and, since that decision did not amount to an acquittal, an appeal by stated case was incompetent (see s 175(3)(a)). Any appeal would have to be by the Bill of Advocation.

[4] Advocation, as a means of appeal in summary cases, was available to correct errors which occurred during the criminal process. It was not a means of reviewing the merits of a verdict or of ordinary decisions taken in the course of a trial (*Macleod v Levitt* 1969 JC 16 LJG (Clyde) at 18, citing Trotter: *Summary Jurisdiction* at 68). As a generality, with the coming of appeals by way of stated case, advocation became “very rare” and “out of date” (*ibid*).

Despite a spirited revival in connection with decisions on delay (eg *HM Advocate v ARK* 2013 SCCR 549), it has now been abolished (s 191B) in relation to pre verdict determinations. That is because of the advent of appeals, with leave, from preliminary decisions (s 174(1)). The sheriff’s decision in this case ought to have been taken at the preliminary stage. It could not

then have been the subject of a Bill of Advocation, but it could have been appealed by the Crown without leave (s 174(1A), equating desertion with dismissal).

[5] The problem which arises in this case is that the decision of the summary sheriff was a belated one which was taken at a trial diet. As such, although the question of jurisdiction was determined in advance of any verdict, the conclusion of the trial was an acquittal. Challenging the decision on jurisdiction on its own would serve no useful purpose; the respondent would remain acquitted. The only competent mode of proceeding is by way of a challenge to the acquittal. Advocation remains a competent means of challenging an acquittal (s 191(1)) on the grounds of a miscarriage of justice, but only where an appeal by stated case is incompetent or inappropriate.

[6] The application for a stated case makes it tolerably clear that the PF is seeking to challenge the acquittal, which, it is contended, was caused, at least in part, by the sheriff's decision on jurisdiction. The normal mode of challenge to an acquittal after trial is by way of an application for a stated case. That allows the sheriff to set out the findings in fact, the reasons for the decision on jurisdiction and the basis for the acquittal. The Sheriff Appeal Court can then determine all matters, including any which are raised at adjustment in relation to the sheriff's reasoning for the acquittal, in the one appeal process. That is what should occur here.

[7] The court therefore ordains the sheriff to state a case accordingly.