SHERIFF APPEAL COURT

[2020] SAC (Crim) 4
SAC/2020/000013/AP

Sheriff Principal M Stephen QC
Sheriff Principal M Lewis
Appeal Sheriff N McFadyen

OPINION OF THE COURT

delivered by APPEAL SHERIFF NORMAN McFADYEN

in

APPEAL AGAINST SENTENCE

by

CEIRYN MEADE

Appellant

against

PROCURATOR FISCAL, DUNFERMLINE

Respondent

Appellant: Collins, sol adv; Collins and Co, Solicitors, Edinburgh for Basten Sneddon Solicitors, Dunfermline
Respondent: Edwards QC; Crown Agent

12 August 2020

Background

[1] In this case the appellant seeks to appeal, by note of appeal, the imposition of a restriction of liberty order (ROLO) by the sheriff at Dunfermline following a finding by the

sheriff that he was in contempt of court in respect of his failure to attend as a witness at a summary trial, for which he had been cited personally.

Mode of appeal in contempt of court in summary proceedings

[2] We were concerned that the appellate procedure and the disposal of the matter at first instance may have been incompetent and we arranged for the matter to be heard by three appeal sheriffs and invited the Crown to make submissions. We were at that stage unaware that Mr Collins, for the appellant had raised similar issues in a note of argument which we have now seen and we are grateful for both submissions.

[3] The Crown position essentially was that the matter should have proceeded by way of bill of suspension, although it would be open to the court to proceed as if it was dealing with a bill of suspension. Mr Collins referred us to *Lawson* v *Donnelly* [2009] HCJAC 56, 2009 SCL 1205 in which the High Court took a relaxed approach to the use of bill of suspension as opposed to bill of avocation in relation to challenge of adjournment of a summary trial. We do not consider that case has any bearing on the competency of note of appeal, which is a statutory form of appeal. Mr Collins urged us to accept that note of appeal was a competent procedure to review the ROLO imposed in this case, because a ROLO was a sentence, even though it was incompetently imposed.

[4] It seems clear to us that note of appeal is not a competent mode to review punishment for contempt of court. Contempt of court is not a criminal offence, but rather is an offence *sui generis* which may be addressed to civil and criminal courts and is punished by the relevant court, whether civil or criminal (*HM Advocate* v *Airs* 1975 JC 64 at 69). A finding of contempt is not a conviction and punishment for contempt of court is not a

sentence (*Robertson and Gough v HM Advocate* [2007] HCJAC 63 at [31], 2008 JC 146). Section 307(1) of the Criminal Procedure (Scotland) Act 1995 specifically defines sentence:

> "whether of detention or of imprisonment, [as meaning] a sentence passed in respect of a crime or offence and does not include an order for committal in default of payment of any sum of money or for contempt of court".

[5] Since the punishment of contempt of court is not a sentence and does not follow upon a conviction, it follows that it cannot be reviewed by note of appeal under section 186(1) of the 1995 Act (which allows for appeal against sentence passed on conviction: section 175(2)(b)). Bill of Suspension has been regarded as an appropriate procedure, whether to challenge a finding of contempt or its punishment *(Green* v *Smith* 1988 JC 29, *Robertson and Gough* v *HM Advocate* at [2]).

[6] We are prepared, as the Advocate Depute and Mr Collins both ultimately invited us to do, to treat the Note of Appeal effectively as a Bill of Suspension and excuse it for want of form in terms of s300A of the 1995 Act.

The finding of contempt

[7] No issue is taken with the finding of contempt in this case, although we observe that the power to punish summarily for contempt of court in respect of non-attendance by a witness requires that the witness "wilfully fails to attend after being duly cited" (Criminal Procedure (Scotland) Act 1995, section 155(1)). That requires the court to be satisfied that the witness "was wilfully defying the court or was intending disrespect to the court or was acting in any way against the court or was attempting to pervert the course of justice" *(Chappell* v *Friel* 1997 SLT 1325 at 1326 applying *Caldwell* v *Normand* 1994 SLT 489 at 490C, 1993 SCCR 624 at 625). In *Cryans* v *Robertson* 2009 SCCR 620 it was held that failure to

attend through forgetfulness was not necessarily contempt of court, although the witness had not taken adequate steps to remind herself of the date on which she was cited to appear.

[8] In this case, the sheriff has not explained why he rejected the explanation that the appellant had forgotten his citation. Again, we acknowledge that no challenge has been made to the finding of contempt, but it is difficult for an appellate court to address the suitability of punishment where the sheriff imposing the punishment does not address the facts of the contempt, beyond mentioning the appellant's explanation.

Competency of the penalty imposed

[9] In this case both parties were agreed that there is a more fundamental difficulty with the sheriff's disposal (to use a neutral term) and we accept that it was incompetent. The language of conviction and sentence is used in the sheriff's report and it seems clear that he was, to some extent at least, treating this as a matter of sentence where he had at his disposal all of his sentencing powers.

[10] As we have observed, punishment of contempt is not a sentence. The penalties for contempt of court in general are found in section 15 of the Contempt of Court Act 1981, but in respect of the wilful failure of a witness to attend summary proceedings they are set out in section 155(1), which provides that a person found in contempt of court in respect of wilful failure to attend after being duly cited is "liable to be summarily punished forthwith for such contempt by a fine not exceeding level 3 on the standard scale or by imprisonment for any period not exceeding 21 days." There is no provision for alternative forms of punishment, including alternatives to imprisonment.

[11] A ROLO is imposed under section 245A of the 1995 Act and can only be imposed "instead of imposing on him a sentence of, or including, imprisonment or any other form of

detention". Unless the court is empowered to impose a sentence of imprisonment it cannot impose a ROLO. Since the punishment of contempt is not a sentence, a ROLO is not a competent penalty. The court is limited to a very short term of imprisonment or a level 3 fine. In England and Wales community orders have similarly been held not to be available for the punishment of contempt: *Regina* v *Palmer* [1992] 1 WLR 568, *Secretary of State for Defence* v *Percy* [1999] 1 All ER 732.

Procedure and practice in failure of a witness to appear

[12] In this case the sheriff proceeded immediately to "sentence" on the day the appellant was brought before the court on the warrant which had been granted in respect of his non-appearance and his reasons for doing so seem, to some extent, to have been tied up with his sentencing the appellant on another matter.

[13] The more common and safer approach to cases of this nature is to defer punishment for contempt (where a finding of contempt is made) to the date of the adjourned trial, or indeed to continue consideration of the question of contempt to that diet, which will give the appellant the opportunity to purge his contempt at least to some extent. That will often have a bearing on whether the court finds it necessary to make a finding of contempt and/or to inflict punishment and on the level of any such punishment, within the modest statutory powers. The power of the court to remand a recalcitrant witness until the conclusion of the diet at which he is to give evidence (under section 156A(1)(a) of the 1995 Act) may be a more significant one than the power to punish for contempt of court, at least in summary criminal procedure.

[14] Where a witness who has failed to attend does not admit the contempt, in particular when first brought before the court, the court should be cautious about proceeding

immediately to a finding of contempt unless the explanation afforded is manifestly absurd and it should bear in mind the guidance in *Robertson and Gough* and Chapter 29B of the Criminal Procedure Rules which, although concerned with contempt in the face of the court, provide useful points of reference in cases where the facts are disputed. In any event, it is important that there is a full minute of the proceedings, including the finding of contempt and the reasons for that finding and the sheriff should ensure that these reasons are minuted, not the least because there is no "charge" in a case of contempt of this nature and the procedure, as here, may be very summary indeed. There was no adequate minute in this case. The importance of proper minuting has been stressed by the High Court: *Strathern* v *Harvie* [2015] HCJAC 107, 2016 SLT 70, 2016 SCCR 22.

Disposal of the appeal

[15] We are satisfied that the ROLO in this case was not competently imposed and we shall quash that order. In the particular circumstances of this case we do not find it necessary to make any further order.