
**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**[2019] HCJAC 13**
**HCA/2018/15/XM**

Lord Justice General
Lord Justice Clerk
Lord Menzies

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the

PETITION TO THE *NOBILE OFFICIUM*

by

MARK MEECHAN

Petitioner

against

PROCURATOR FISCAL, AIRDRIE

Respondent

**Petitioner: Bain QC, Findlater, R Brown (sol adv); Faculty Appeals Service (for Dunipace Brown, Cumbernauld)**
**Respondent: A Prentice QC AD (sol adv); the Crown Agent**

22 January 2019

**Introduction**

[1] The contention in this petition was that there was an error in the legislation which created the Sheriff Appeal Court whereby the ability, which had previously existed in summary cases, to seek permission to appeal a compatibility issue from the High Court to

the United Kingdom Supreme Court, was accidentally omitted in relation to cases in which leave to appeal to the SAC from the verdict of a sheriff had been refused. It was maintained that this was a lacuna which required to be filled by the use of the extraordinary *nobile officium* of this court. This would be achieved by this court by granting (or not granting) permission to appeal the sift decision of the SAC, not to the High Court as the final criminal court of appeal in Scotland, but directly to the UK Supreme Court.

**Legislation**

[2] The Criminal Procedure (Scotland) Act 1995 (as amended by the Courts Reform (Scotland) Act 2014) provides:

> "175 ... (2) Any person convicted ... in summary proceedings may, with leave granted in accordance with section 180 ... of this Act, appeal ... to the Sheriff Appeal Court –
>
> (a) against such conviction ...
>
> ...
>
> 180.-(1) The decision whether to grant leave to appeal for the purposes of section 175(2)(a) ... of this Act shall be made by an Appeal Sheriff of the Sheriff Appeal Court ...
>
> ...
>
> (4) Where leave to appeal is refused under subsection (1) ... the appellant may ... apply to the Sheriff Appeal Court for leave to appeal."

The test for the grant of leave is whether there are "arguable grounds" disclosed in the papers. If these grounds are not present, leave must be refused (s 180(1)(a) and (b), (5)(a) and (b)). If leave is granted, the appeal proceeds to a hearing on the stated case, which will have been drafted by the sheriff following an application by the convicted person at the conclusion of the sheriff court proceedings (s 176).

[3] In relation to an onward (second) appeal, the 1995 Act (as so amended) provides:

> "194ZB.-(1) An appeal on a point of law may be taken to the High Court against any decision of the Sheriff Appeal Court in criminal proceedings, but only with permission of the High Court.
>
> (2) An appeal under subsection (1) may be taken by any party to the appeal in the Sheriff Appeal Court.
>
> (3) The High Court may give permission for an appeal ... only if it considers that –
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> (a) the appeal would raise an important point of principle or practice, or
>
> (b) there is some other compelling reason for the Court to hear the appeal."

An application for permission is initially determined by a single judge at the High Court (s 194ZD) but, if it is refused, the applicant can apply to the High Court (ie a quorum of three judges; s 194ZE(4)) for permission (s 194ZE(1)). If permission is granted, the appeal proceeds by way of a Note of Appeal.

[4] Every interlocutor of the High Court in disposing of an appeal relating to summary proceedings is "final and conclusive and not subject to review by any court whatsoever" (s 194ZK) unless either: (a) the case is referred to the High Court by the Scottish Criminal Cases Review Commission (1995 Act, part XA); or (b) an appeal is taken to the United Kingdom Supreme Court against the determination of any compatibility issue (s 288AA(1)). Such an appeal can only be taken with the permission of the High Court or the UK Supreme Court (s 288AA(5)). The provisions in the 1995 Act relative to compatibility issue appeals were introduced by the Scotland Act 2012. Interspersed with these provisions is express provision for the sheriff or Sheriff Appeal Court to refer any compatibility issue to the High Court (s 288ZB). The Lord Advocate or the Advocate General can require the sheriff or SAC to do so.

**The Stated Case**

[5] On 20 March 2017, at Airdrie Sheriff Court, the petitioner was convicted on a summary complaint of a contravention of section 127(1)(a) of the Communications Act 2003. The charge was that, on 11 April 2016 at an address in Coatbridge, he had sent, by means of a public electronic communications network (You Tube), a video which was grossly offensive and threatening (menacing) in nature. It was alleged that the offence was aggravated by religious prejudice and racism, contrary to, respectively, section 74 of the Criminal Justice (Scotland) Act 2003 and section 96 of the Crime and Disorder Act 1998. On 23 April 2018, the petitioner was fined £800.

[6] The sheriff prepared a stated case on the application of the petitioner. In this, the sheriff found in fact that the petitioner had created and controlled a video channel on You Tube using an alias, namely "Count Dankula". The channel said that it provided "offensive social comedy and skits that get people thrown in prison".

[7] The petitioner's girlfriend owned a dog. Sometime prior to 11 April 2016, the petitioner had spent some days training this dog to react to certain commands and other activities. He recorded the dog's reactions on that date and created a 2½ minute video entitled "M8 Yer Dugs a Nazi" using his recording of the dog spliced with archive Nazi material.

[8] The video started with the petitioner stating that his girlfriend thought that her dog was very cute and adorable, so he thought that he would turn the dog into the least cute thing he could think of; namely a Nazi. The centrepiece of the video consisted of the appellant repeating the phrase "gas the Jews" as a command to the dog, to which the dog then reacted. The video also showed the dog responding to the exclamation "Sieg Heil" (hail victory), by raising its right paw whilst watching a recording of the Nuremberg rally.

This was interspersed with flashing images of Hitler and swastikas, accompanied by strident music.

[9] Although the petitioner had maintained in his defence that he had made the video simply to annoy his girlfriend and to produce a comic effect, the sheriff found in fact that:

> "20 ... the primary purpose of the [petitioner] making the video was not to annoy [his girlfriend]: it was to make a highly offensive video for sharing on his You Tube channel for consumption by him and his subscribers; the [petitioner] willing (*sic*) for the video to be shared and viewed by anyone in the world".

This finding is not the subject of challenge in the stated case.

[10] The sheriff analysed the law under section 127 of the 2003 Act by considering the *dicta* in *DPP* v *Collins* [2006] 1 WLR 2223 (at paras 7-12 and 21-22) to the effect that whether a message was grossly offensive was a question of fact. The sheriff found in fact that the video was grossly offensive and would be found to be so by a reasonable person. The repeated use of "gas the Jews" and similar phrases had a menacing character and reasonably caused apprehension within the Jewish community. The appellant had known that the video would be likely to be regarded as grossly offensive and menacing to Jewish people, or at least recognised the risk that it would be taken as such. The offence was aggravated by both racism and religious prejudice.

[11] Prior to being addressed by the petitioner at the conclusion of the trial, the sheriff had noticed that a written argument had been lodged by the petitioner, but not yet touched upon. In it, there was an oblique reference to Article 10 of the European Convention on Human Rights (Freedom of Expression). This had asserted that the petitioner's actions were "entirely compliant" with that article and that the exceptions in Article 10(2) were not applicable. There had been no other analysis. There was no reference to any compatibility issue. At the stage of submissions, the sheriff had specifically asked parties whether they

intended to address him on freedom of expression at common law or in terms of the European Convention.

[12] Despite the sheriff's express invitation, which included mention of *M'bala M'bala* v *France*, unreported, 10 November 2015, App No. 25239/13, there was no reference in the defence address to Article 10. All that had been said by the petitioner about freedom of expression was that the court should be jealous to guard it. There was no compatibility minute, which, if such an issue were to be raised, ought to have been lodged in advance of the trial (Act of Adjournal (Criminal Procedure Rules) 1996, rules 40.3 and 40.6).

[13] Notwithstanding the absence of any submissions on either Article 7 or 10 during the course of the trial, the petitioner sought to introduce two matters in his application for a stated case. These came to be reflected in two of the questions posed in the final version of the case prepared by the sheriff, *viz*.:

> "6. Did the prosecution and conviction of the [petitioner] unlawfully interfere with the [petitioner's] rights under articles 7 and 10 ECHR, that being said to be a compatibility issue as defined in section 288ZA of the [the Criminal Procedure (Scotland) Act 1995 ]?
>
> 7 Is section 127(1) of the Communications Act 2003 incompatible with articles 7 and 10 ECHR, that being said to be a compatibility issue as defined in section 288ZA of the 1995 Act?"

**The sifts**

[14] On 5 July 2018, leave to appeal to the Sheriff Appeal Court (1995 Act, ss 175(2) and 180(1)) was refused by a single Appeal Sheriff (first sift) as being unarguable, with each of the elements raised in the stated case being classified as "wholly misconceived". Of relevance for the purposes of this petition, the Appeal Sheriff reasoned:

> "6. The article 10 argument was never advanced before the sheriff and is not elucidated in any way in the ground beyond bare assertion.

> 7 The same is true of the incompatibility point. It is trite to observe that there is ample Convention authority to support the proposition that the right to freedom of expression may be lawfully limited".

[15] The petitioner applied to the Sheriff Appeal Court (second sift; 1995 Act, s 180(4)) enclosing an opinion of counsel, who appear to have been instructed for the first time. In relation to question 6, reference was made to *M'bala M'bala* v *France* (*supra*); the very case to which the petitioner's attention had been specifically drawn by the sheriff, but about which no submissions had been made. Contrary to the express and unchallenged finding in fact of the sheriff, counsel expressed the opinion that the video could "clearly" be understood as a joke. Under reference to *Künstler* v *Austria* [2007] ECDR 7 (180), counsel again expressed the view that, in their opinion, the video could be understood as having been made for comedic effect.

[16] In relation to question 7, counsel referred to the observations in *SW* v *United Kingdom* (1995) 21 EHRR 363, that there could be no derogation from the guarantee enshrined in Article 7. The combination of the adjective "grossly" in section 127(1)(a) of the 2003 Act, and the possibility of what might be caught by the prohibition changing over time, left the legislation without the "reasonable foreseeability" that was required. Outlawing communications which were grossly offensive was unlikely to be seen as "necessary in a democratic society" (*Handyside* v *United Kingdom* (1976) 1 EHRR 737. The offence in section 127(1) "clearly" breached the principle of legal certainty.

[17] On 26 July 2018 the Sheriff Appeal Court refused leave to appeal. In respect of questions 6 and 7, the SAC reasoned:

> "The issue of interference with article 7/10 rights was dealt with in *Collins* by Lord Bingham at para 14 of his speech. The further short answer to the point in the present case is that the sheriff did not accept the appellant's contention that his primary purpose was a comedic one. On the contrary, he found in fact ... that the

> appellant's primary purpose in making the video was not to annoy his girlfriend but to make a highly offensive video for sharing on his You Tube channel. Accordingly the question of interference with any supposed expression of satire or comedy simply does not arise. As regards incompatibility, it was accepted by the House of Lords in *Collins* that 'grossly offensive' has a long lineage which has never before given rise to any stateable challenge. Questions 6 and 7 are unarguable".

**Submissions**

***The petitioner***

[18] The petition proceeded upon a proposition that the exercise of the *nobile officium* in favour of the petitioner was necessary to provide him with a remedy in "extraordinary and unforeseen circumstances", for the purposes of preventing injustice and to provide for the proper administration of justice. It was accepted that there was no statutory right of appeal from the second sift decision of the Sheriff Appeal Court to the UK Supreme Court. It was accepted also that it was incompetent for the petitioner to appeal from the second sift decision of the SAC to the High Court (*Mackay* v *Murphy* 2016 SC (SAC) 1 at para [10]) as the petitioner had never been a party to an appeal before the SAC (see the second sift decision in *Graham* v *HM Advocate*, unreported, High Court, 22 December 2017). An appeal lay to the UK Supreme Court only against a determination by a court of two or more judges of the High Court. The petitioner nevertheless requested that this court either grant, or refuse to grant, leave to appeal from the SAC sift decision to the UK Supreme Court.

[19] The petition, subsequent written Case and Argument and oral submissions detailed the petitioner's contentions in relation to the scope of the *nobile officium*, under reference to *Anderson* v *HM Advocate* 1974 SLT 239 (at 240). The power could only be exercised where there were extraordinary or unforeseen circumstances and there was no other remedy or procedure provided by law (see also *Wylie* v *HM Advocate* 1966 SLT 149; *Express Newspapers, Petitioners* 1999 JC 176 at 179-180).

[20] It was explained that, before the inception of the Sheriff Appeal Court, second sift decisions, which had been taken by the High Court, could be appealed to the UK Supreme Court (*Cadder* v *HM Advocate* 2011 SC (UKSC) 13 at paras 11-12). These included sift decision in summary cases. Section 194ZK of the 1995 Act made specific reference to decisions of the High Court in summary cases being subject to section 288AA; thus permitting the possibility of an appeal to the UK Supreme Court. The petitioner maintained that he was now prevented from appealing to the High Court by the statutory appellate structure and also to the UK Supreme Court because of the terms of section 288AA, which had remained unchanged despite the creation of the SAC.

[21] There was no policy reason why a compatibility issue in a summary prosecution should be treated differently from those arising in prosecutions on indictment. Although reference had been made in the Policy Memorandum to the Courts Reform (Scotland) Bill (at para 128) to the need to reduce the number of criminal appeals to the High Court, there had been no discussion of the consequence of a refusal of leave to appeal by the Sheriff Appeal Court at the time. There was therefore "an unanticipated and unintended lacuna". A clear intent to maintain the UK Supreme Court's primacy in summary criminal matters was shown in the Explanatory Notes to the 2014 Bill (para 204). Although refusals of leave to appeal by the SAC do not appear to have been within the scope of the consultation on the provisions dealing with compatibility issues introduced by the Scotland Act 2012 (Review of sections 34 to 37 of the Scotland Act 2012, Compatibility Issues Consultation, January 2018, para 5.2), the report had been in favour of maintaining the UK Supreme Court's constitutional jurisdiction in the manner in which it had been exercised in *Cadder* in relation to the SAC (*ibid*, Report, September 2018, para 4.5).

[22] On 17 January 2019, in advance of the hearing set for 22 January, the court had intimated to parties, and to a potential intervenor (Index on Censorship), that it intended to hear argument solely on the issue of the competency of the petition. The petition had proceeded on an understanding that competency would be an issue. The competency of using the *nobile officium* in the circumstances averred had been raised in the respondent's Answers, which had been tendered on 8 January 2019. The court's management decision prompted the tendering of a Compatibility Issue minute which asserted that, if the court determined that the petition was incompetent, that in itself would amount to a contravention of section 6(1) of the Human Rights Act 1998 as it would be denying the petitioner "an effective remedy in respect of a Convention incompatible action". Reference was made in a supplementary written Case and Argument, which was also tendered, to *Brown* v *Stott* 2001 SC (PC) 43 at 70, *Kudla* v *Poland* (2002) 35 EHRR 11 at para [157], *Kiarie* v *Home Secretary* [2017] 1 WLR 2380 at para 49 and *Mackay* v *United Kingdom* (2011) 53 EHRR 19.

**The Crown**

[23] The advocate depute explained that the circumstances in which an appeal to the UK Supreme Court was available in respect of the determination of a compatibility issue was specifically defined in statute. An appeal was only available in the circumstances described in section 288AA(1) of the 1995 Act, namely where there had been a determination of an issue by two or more judges of the High Court. The matters, which were relied upon by the petitioner as compatibility issues, had not been determined by a court of two or more judges of the High Court. As such, it was not competent to grant leave (see *Follen* v *HM Advocate*

2001 SC (PC) 105 at para [9]). There was no lacuna calling for the exercise of the *nobile officium*. It was not competent to grant leave in any event.

[24] The sheriff had raised the issue as to whether article 10 rights had been engaged, but the petitioner had not advanced any argument in that regard. The petitioner had not lodged a compatibility minute in advance of the trial, under rule 40.3, or thereafter, under rule 40.6.

[25] The Sheriff Appeal Court had been established as part of a statutory scheme designed to ensure that summary cases were dealt with more efficiently and would proceed to the High Court only where that was properly justified (Policy Memorandum for the Civil Courts (Scotland) Bill paras 120-136). Section 194ZK of the 1995 Act was concerned with the finality of proceedings in the High Court in disposing of appeals relating to summary proceedings. It did not imply that the UK Supreme Court had any *locus* in respect of summary proceedings, other than that statutorily provided for. The 2014 Act effected a deliberate reform of the arrangements for dealing with summary appeals. Where a compatibility issue arose in summary proceedings, it was open to the sheriff to refer that to the High Court. Alternatively, the issue could otherwise be appealed to the SAC and might thereafter be referred by that court to the High Court. The SAC had exercised its statutory power available to it to refuse leave to appeal in accordance with the scheme. There was no lacuna.

[26] It was neither necessary nor appropriate for the High Court to address the issues which had been determined by the Sheriff Appeal Court. The proposed appeal raised matters which could not properly form part of a compatibility appeal to the UK Supreme Court. The relevant finding in fact had not been challenged. On question 6, whether the sheriff had been entitled to make his findings in fact did not raise a compatibility issue. The test for the offence in section 127 was whether the communication was grossly offensive.

The sheriff found as a fact that it was offensive and had not been intended as a joke. On question 7, whether section 127 of the 2003 Act was incompatible with Article 7 was not a compatibility issue.

**Decision**

[27] The *nobile officium* of the High Court of Justiciary is a general power of superintendence which is available to deal with circumstances which are "extraordinary or unforeseen and where no other remedy is provided for by law" (*Anderson* v *HM Advocate* 1974 SLT 239, LJG (Emslie) at 240). It cannot be invoked to create a form of, or route to an, appeal just because no appeal is otherwise provided for (see eg *Cochrane* v *HM Advocate* 2006 JC 134). It cannot be used to create a different appellate structure, where, as here, there is already one provided, but the convicted person has simply not met the criteria (arguability) for leave to appeal. There is no appeal from the sheriff to the Sheriff Appeal Court other than that provided by statute. This requires leave of the SAC at first or second sift. There is no appeal from sift decisions of the SAC to the High Court, since there has been no appeal to the SAC to which a person has been a party in terms of the legislation (Criminal Procedure (Scotland) Act 1995, s 194ZB(2)). If it were otherwise, the purpose of the legislation, which is to ensure that appeals are dealt with at an appropriate level and in a proportionate way, would be defeated.

[28] There is no lacuna in the legislative scheme. Parliaments are presumed to know the existing state of the law (*Rookes* v *Barnard* [1964] AC 1129, Lord Reid at 1174). It was clear at the time of the Courts Reform (Scotland) Act 2014 that an appeal to the UK Supreme Court in respect of compatibility issues (and formerly devolution issues) could only be taken where there had been a decision on such an issue by two or more judges of the High Court

(Scotland Act 1998, Sch 6 para 13(a)). This matter had only recently been explored, amidst some controversy, in *Cadder* v *HM Advocate* 2011 SC (UKSC) 13. *Cadder* had been preceded by *McDonald* v *HM Advocate* 2008 SC (PC) 1 and *Follen* v *HM Advocate* 2001 SC (PC) 105).

[29] In *Follen*, no devolution issue had been argued before, and hence determined by, the High Court. The Privy Council reasoned that therefore it had no jurisdiction to entertain an issue, upon which there had been no determination. In *McDonald*, the situation was different. The appellants had, in the course of an appeal to the High Court for which leave had been granted, applied for an order to recover "material which ought to have been disclosed" by the Crown. They had lodged devolution minutes. The High Court, sitting in its appellate capacity, refused (2008 SLT 144) the applications. It also "refused to allow the devolution minutes to be received". The Privy Council held that it retained jurisdiction because, amongst other things, a decision of the High Court not to hear and determine a devolution issue was itself a determination of that issue (Lord Hope at para [16]) and, in any event, the High Court had expressed a view on the merits of the issue.

[30] *Cadder* v *HM Advocate* (*supra*) followed the same line of reasoning. The description of the High Court procedure in *Cadder* by the UK Supreme Court (at para [11]) is that it involved an appeal to the High Court which had "never reached the stage of a full hearing". The case was dealt with by the sift procedure:

> "But there is no doubt that this resulted in the refusal of the appeal and that for the reasons that were explained in *McDonald* ... it amounted to the determination of a devolution issue ...".

On one view, there never was an appeal to the High Court in *Cadder,* because leave to appeal had been refused in the first place. Nevertheless, *Cadder* must be taken as establishing that an appeal lies to the UK Supreme Court from second sift decisions of the High Court to refuse leave to appeal if the High Court has thereby determined a compatibility issue. The

same reasoning would apply to a decision of two or more judges of the High Court which refused leave to appeal on a compatibility question from the SAC to the High Court.

[31] The 2014 Act followed upon the recommendations of the Scottish Civil Courts (Gill) Review which, as the name suggests, was primarily concerned with civil proceedings. At the core of the reforms was the idea that cases ought to be resolved at an appropriate level in the judicial hierarchy (see Lord Gill's Introduction at i). One problem, which then existed in civil business, was unrestricted access to the "highest court in the land" (the Court of Session) to pursue low value civil claims. The Review therefore suggested the creation of the new intermediate Sheriff Appeal Court beyond which no civil appeals could progress without leave of the SAC or the Court of Session. The Review also recognised the impact of criminal business on the civil system. For this reason, it trespassed into the criminal justice system by proposing that the SAC should absorb not only all civil appeals from the sheriff court but also summary criminal appeals. In accordance with its central tenet of resolution of cases at an appropriate level in the hierarchy, second appeals from the SAC to the High Court of Justiciary in summary cases would require leave from the High Court.

[32] These recommendations were accepted by the Government and became section 113 of the 2014 Act for civil cases and, for criminal cases, through section 119, section 194ZB of the Criminal Procedure (Scotland) Act 1995. An appeal under the latter section can only progress if leave has been given by the High Court at the instance of a party to an appeal which has proceeded in the SAC. The decision of the High Court is final, subject to the compatibility (1995 Act, s 288AA) and devolution issue (Scotland Act 1998, Sch 6 para 13(a)) regimes which come into play, but only if two or more judges of the High Court have determined such an issue.

[33] The scheme of the 2014 Act is to prevent summary criminal cases proceeding, first, to the Sheriff Appeal Court unless they meet the sifting procedure test in the SAC and, secondly, to the High Court unless the second appeals test is met. This case fell at the first of these hurdles. No lacuna exists. There are and were no extraordinary or unforeseen circumstances. The petitioner had an appropriate and effective remedy in the form of a proportionate appeal route through the stated case procedure. Any problem, which he may think that he has, does not stem from a deficiency or lacuna in the legislation or because of the absence of remedy, but because his appeal by stated case did not, according to the SAC, meet the test of arguability. No appeal thus proceeded. That is an entirely normal circumstance in many effective appellate systems. It is often thought necessary to have a system of leave to enable justice to be done "within a reasonable time" in all appeals.

[34] If it were to be successfully argued that a lacuna did exist, it would not have been because of a failure to provide for a compatibility issue appeal from the Sheriff Appeal Court's second sift direct to the UK Supreme Court. That would by-pass the High Court of Justiciary as the final court of criminal appeal in Scotland and thus be regarded as constitutionally inept. It would have had to have been in failing to provide that, in compatibility issue cases, notwithstanding that the SAC had refused leave to appeal at second sift, the High Court could nevertheless appropriate an appeal, which had failed at the SAC sift stage, to itself. If it refused to do so, that would, on this argument, amount to a determination of a compatibility issue which could open up a channel for a third appeal to the UK Supreme Court. That is not what is contended in the petition. If it were, the same result would follow. There is no legislative lacuna; simply a deliberate absence of an appeal route in a summary case when leave to appeal to the SAC has been refused.

[35] The halting of appeals in summary cases at the stage of the sift in the Sheriff Appeal Court is a prudent use of judicial time, especially given the volume of summary prosecution. This ought not to pose a practical problem or one of any constitutional significance. Decisions of sheriffs do not constitute binding precedent. If a compatibility issue does arise in a summary prosecution, and the accused raises it in accordance with the Criminal Procedure Rules (rules 40.3 and 40.6), which was not done in this case, either the respondent or the Advocate General may require the sheriff to refer the issue for determination by the High Court, or even the UK Supreme Court (1995 Act, s 288ZB). The accused may ask the court to do so (*ibid*), although again this petitioner did not do so. Alternatively, if no reference were sought and the issue was determined by the sheriff against the accused, if the point was an arguable one, the statutory scheme requires the SAC to grant leave to appeal. Once that is done, the additional appellate structures open up.

[36] If the appellant fails either when seeking leave to appeal to the High Court (1995 Act, s 194ZB; *Cadder* v *HM Advocate* (*supra*)) or on the merits, the option of seeking permission to appeal to the UK Supreme Court becomes an option. If, however, the challenge is against the failure to grant permission to appeal to the High Court, it has to be born in mind that, in terms of the statute, the second appeals test applies, at least to the High Court. An absolute right to seek leave to appeal to either the High Court or the UK Supreme Court, when a summary case has been sifted out of the system by the Sheriff Appeal Court, is neither necessary nor, in terms of the policy behind the Courts Reform (Scotland) Act 2014 as described in the Civil Courts Review, desirable.

[37] The court has noticed the terms of the Report on the Review of sections 34 to 37 of the Scotland Act 2012, which do not involve appeals to the Sheriff Appeal Court. It is tolerably clear (see Consultation para 5.2) that the conclusion (Report para 4.5) ought to have

referred to decisions of the High Court to refuse leave to appeal to it from the SAC, as well as its own sift decisions, and not to SAC sift decisions over which the High Court has no statutory locus, as the SAC correctly determined in *Mackay* v *Murphy* 2016 SC (SAC) 1 at para [10]. Even then, however, the disappointed applicant may seek a reference to the High Court by the Scottish Criminal Cases Review Commission on the grounds of a miscarriage of justice.

[38] In summary, the test for the application of the *nobile officium* has not been met. There are no extraordinary or unforeseen circumstances. An appellate route from summary decisions of the sheriff already exists in statute. The petitioner's attempt to appeal has failed because he did not meet the statutory criteria. This court has no power to grant leave to appeal from a sift decision of the Sheriff Appeal Court to itself. To do so would be to act in defiance of the statutory scheme. It has no power to grant leave to appeal from a sift decision of the SAC direct to the UK Supreme Court. To do so would be not only in defiance of the statutory scheme but constitutionally inept, given the High Court of Justiciary's role as the final court of criminal appeal in Scotland. There is no lacuna in the statutory provision, but an appeal structure specifically designed to deal with cases at an appropriate and proportionate level. The petition is both incompetent and irrelevant. Its prayer must be refused.