



SHERIFF APPEAL COURT

**[2024] SAC (Crim) 9
SAC/2024/000138/AP**

Sheriff Principal A Y Anwar
Sheriff Principal S F Murphy KC
Appeal Sheriff B A Mohan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL A Y ANWAR

in

Bill of Suspension

by

THOMAS KITSON

Complainer

against

PROCURATOR FISCAL, STIRLING

Respondent

**Complainer: MacFarlane (sol ad); Collins & Co (for Dalling Solicitors, Stirling)
Respondent: Glancy KC, AD; Crown Agent**

20 August 2024

Introduction

[1] On 13 June 2022 at Stirling Sheriff Court, the complainer pled guilty to the following charges:

“(001) On 24th April 2020 at 114 Hilton Cowie, Stirling, you THOMAS ROBERT KITSON did produce a controlled drug, namely Cannabis a Class B drug specified in Part II of Schedule 2 to the Misuse of Drugs Act 1971 in contravention of Section 4(1) of said Act;

CONTRARY to the Misuse of Drugs Act 1971, Section 4(2)(a)

(002) Between 19th April 2020 and 22nd April 2020, both dates inclusive at 114 Hilton Cowie, Stirling, you THOMAS ROBERT KITSON were concerned in the supplying of a controlled drug, namely Cannabis a Class B drug specified in Part II of Schedule 2 to the Misuse of Drugs Act 1971 to another or others in contravention of Section 4(1) of the aftermentioned Act;

CONTRARY to the Misuse of Drugs Act 1971, Section 4(3)(b)''

[2] Sentence was deferred to obtain a Criminal Justice Social Work Report and a Restriction of Liberty Assessment. Thereafter sentence was deferred on five occasions due to either reports not being available or the complainer failing to attend for sentence. A warrant to apprehend the accused was granted on 30 November 2022. He appeared in answer to the warrant on 27 February 2023 when the sentencing diet was again adjourned for reports. He was ultimately sentenced to a 12 month Restriction of Liberty Order ("ROLO") on 29 March 2023 requiring him to remain within his home address between the hours of 4.00pm and 4.00am, as a direct alternative to a custodial sentence.

[3] That disposal was appealed to this court. On 28 June 2023 the complainer's appeal against sentence was granted. The ROLO was quashed and this court imposed a new ROLO requiring the complainer to stay at his home address between the hours of 7.00pm and 7.00am until 29 March 2024.

[4] Several breach reports were submitted to Stirling Sheriff Court alleging repeated failures to comply with the ROLO between October 2023 and January 2024. The complainer denied these breaches. He failed to appear at a hearing to answer the breach. A warrant to apprehend him was granted. He appeared from custody on 26 January 2024 and a proof diet was assigned. The complainer was remanded in custody.

[5] On 20 February 2024, the complainer's agent invited the court to revoke the ROLO. He explained that concerns had been raised regarding the psychiatric condition of the

complainer. He was described as presenting bizarrely in prison and was not engaging with treatment there. The sheriff revoked the ROLO and instead made an Assessment Order in terms of section 52D of the Criminal Procedure (Scotland) Act 1995. Sentence was deferred until conclusion of the Assessment Order. The complainer was transferred to Forth Valley Royal Hospital for the purposes of the Assessment Order.

[6] On 19 March 2024 the case called again in Stirling Sheriff Court. A psychiatric report confirmed that the complainer did not have a mental disorder and did not require ongoing treatment. His previous behaviour was described as being related to drug induced psychosis and was resolved without treatment. The ROLO having been revoked, the sheriff imposed a sentence of three months' imprisonment reduced from a headline figure of six months.

Submissions for the complainer

[7] The solicitor advocate for the complainer moved the court to quash the order of the sheriff on 19 March 2024 and to make no further order. Any breach of the ROLO ought to have been placed before this court, not Stirling Sheriff Court, given that this court had allowed the complainer's appeal against sentence and issued a new ROLO on 28 June 2023. The process in the sheriff court was, therefore, incompetent.

[8] The complainer had been in custody for 84 days until he was granted interim liberation on 19 April 2024. In view of the time already served, the complainer's position was that no further order should be issued.

[9] It was accepted that the ROLO was revoked further to a motion by the complainer on 20 February 2024; however, notwithstanding that, the position remained that the process in the sheriff court was incompetent.

Submissions for the Crown

[10] The advocate depute accepted that, in terms of sections 245F of the Criminal Procedure (Scotland) Act 1995, only the court that imposed the ROLO could determine any breach of it. The breaches made by the complainer ought to have been reported to this court. That being so, the advocate depute submitted that the revocation of the ROLO by the sheriff and the following procedure amounted to a fundamental nullity.

Legislation

[11] The following provisions of the Criminal Procedure (Scotland) Act 1995 were referred to:

"245E. – Variation of restriction of liberty order

- (1) Where a restriction of liberty order is in force either the offender or any person responsible for monitoring his compliance with the order –
- a) may except in the case to which paragraph (b) applies, apply to the court which made the order; or
 - b) where a copy of the order was, under section 245A(5)(a)(ii) or this Act or subsection (7)(a) below, sent to the clerk of a different court, apply to that different court (or, if there has been more than one such sending, the different court to which such a copy has most recently been so sent) for a review of it.

245F. – Breach of restriction of liberty order

- (1) If at any time when a restriction of liberty order is in force it appears –
- a) except in a case to which paragraph (b) below applies, to the court which made the order or
 - b) where a copy of the order was, under section 245A(5)(a)(ii) or 245E(7)(a) of this Act, sent to the clerk of a different court, to that different court (or, if there has been more than one such sending, the different court to which such a copy has most recently been so sent),
- that the offender has failed to comply with any of the requirements of the order the court in question may issue a citation requiring the offender to appear before it at such time as may be specified in the citation or, if it appears to that court to be appropriate, it may issue a warrant for the arrest of the offender.

....

(2) If it is proved to the satisfaction of that court that the offender has failed without reasonable excuse to comply with any of the requirements of the order it may by order—

- (a) without prejudice to the continuance in force of the order, impose a fine not exceeding level 3 on the standard scale;
- (b) vary the restriction of liberty order; or
- (c) revoke that order.”

Decision

[12] The question in this appeal is whether the sheriff at first instance can competently entertain breach proceedings in respect of a ROLO imposed by the Sheriff Appeal Court (“SAC”) following a prior appeal. The short answer to that question is: no.

[13] The import of section 245F(1) is clear; if at any time when the ROLO is in force, it appears “to the court which made the order” that the offender has failed to comply with any of the requirements of the ROLO, “the court in question” may require that the offender be brought before the court by citation or by arrest. Sections 245A(5)(a)(ii) or 245E(7)(a) do not apply to the present case; they apply where the offender resides or proposes to reside in a place outwith the jurisdiction of the court which made the ROLO. Where, upon determination of an appeal, the SAC imposes a ROLO, it is “the court which made the order”; that accords with the ordinary and natural meaning of the language in section 245F(1). It follows that in those circumstances, only the SAC may cite the offender or issue a warrant for his apprehension where it appears to it that the offender has failed to comply with any of the requirements of the ROLO. We note that the complainer’s solicitor invited the sheriff to revoke the ROLO imposed on 29 March 2023, however, the proceedings before the sheriff were incompetent; the ROLO imposed by the SAC could not be revoked by the sheriff.

[14] We shall pass the Bill. We were not invited to address the complainer's alleged breaches of the requirements of the ROLO. We note that the complainer has been denied his liberty for a period of 84 days; that is a matter to which this court will have regard, should the alleged breaches of the ROLO be reported to this court.