APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 26
HCA/2019/6/XJ

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

BILL OF ADVOCATION

by

HER MAJESTY'S ADVOCATE

Complainer

against

DAVID CALLAGHAN

Respondent

Complainer: A Prentice QC AD (sol adv); the Crown Agent
Respondent: IM Paterson (sol adv); Tod & Mitchell, Paisley

24 July 2019

[1] The respondent has been indicted, along with a co-accused, on a charge of the murder of Owen Hassan on 7 November 2018 at Greenview Street, Pollockshaws, Glasgow. The preliminary hearing took place on 5 June 2019, when a continued preliminary hearing was fixed for 10 September and a trial diet for 19 November 2019.

[2] Meantime, on 21 May 2019, the police were told of the existence of a car, which was registered to the respondent. It had been found in a car park in Paisley. There was no insurance for the car and it was removed, on the instructions of the police, to 911 Rescue Recovery in Glasgow. On looking through the windows of the car, a bag could be seen containing clothing. The procurator fiscal at Glasgow applied to a summary sheriff for a warrant for the police to attend at the premises of the recovery company and to take possession of the car, move it to a place suitable for examination and thereafter to examine and search it for articles, weapons, clothing and other items which might be material to the investigation. It was averred in the application that one of the perpetrators of the murder, who had been identified as the respondent, had been wearing distinctive clothing. This clothing had not been recovered, nor had certain bladed weapons said to have been used in the murder. There were, it was said, reasonable grounds to believe that this evidence was material to the prosecution of the crime and could be recovered by examining the car and its contents. The application for the warrant specified that the respondent and his co-accused had been indicted to the preliminary hearing in the High Court.

[3] The sheriff accepted that it was competent, standing *Frame* v *Houston* 1991 JC 115 at 118-119, for the Crown to apply for a warrant to the sheriff, notwithstanding the existence of High Court proceedings. However, he had regard to *Holman Fenwick Willan LLP* v *Orr* 2017 JC 239 (at paras [25] and [31]) and interpreted this as meaning that, in the absence of exceptional circumstances, the appropriate procedure was for the Crown to apply to the High Court for the warrant. There was no particular urgency which would merit an immediate grant of the warrant.

[4] In this Bill of Advocation, it was submitted that the summary sheriff erred in law in refusing to consider the merits of the petition and in determining that the procedure should be by petition to the High Court. The Bill was not opposed.

[5] *Holman Fenwick Willian LLP* v *Orr* (*supra*) states (at para [25]) that an application for a warrant after the service of the indictment is an extraordinary procedure. It is not that it is extraordinary to apply to the sheriff, but the fact that there is an application at all at this stage in the proceedings. Although there may be circumstances in which the sheriff may consider that the matter ought to be dealt with by the High Court (*ibid* para [31]), in this case there were no such circumstances. Although the case had been indicted to a preliminary hearing, no procedure before the High Court had occurred. The circumstances were extraordinary in that the evidence, for which the warrant was sought, had only come to the attention of the complainer after the indictment had been served. That in itself justified an application to the sheriff as the simplest way of proceeding.

[6] This court will accordingly pass the Bill and grant the warrant.