SHERIFF APPEAL COURT

[2017] SAC (Civ) 24
PER-B238-15

Sheriff Principal Lewis
Sheriff Braid
Sheriff Cubie

OPINION OF THE COURT

delivered by SHERIFF BRAID

in appeal by

TJ

Appellant

against

SB

Respondent

Appellant: Cheyne
Respondent: McAlpine

1 August 2017

Introduction

[1] This is an appeal against the decision of the sheriff at Perth, made on 20 January 2017, to make no further order in respect of her earlier finding that the respondent was in contempt of court due to her failure to obtemper a contact order. The issue before us at this stage is whether the appellant has any *locus* to pursue the appeal. A hearing on that issue took place on 23 June 2017, following a preliminary view having been expressed by the procedural Appeal Sheriff that there was no such *locus.* Both parties were represented by counsel.

[2] At the outset, may we say that we recognise that in paragraph 31 of the court's opinion in *Robertson and Gough* v *HM Advocate* 2008 JC 146, at page 155, the Lord Justice-Clerk (Gill) said:-

> "Despite indications to the contrary in certain nineteenth century authorities (*Mackenzie and Munro* v *Magistrates of Dingwall* (1839) 1 D 487, Lord Gillies, p 492; *HM Adv* v *Robertson* (1842) 1 Broun 152, Lord Justice Clerk Hope, p 160; *Paterson* v *Kilgour* (1865) 3 M 1119, Lord Deas, p 1123; *MacLeod* v *Speirs* (1884) 5 Coup 387, Lord Young, p 403), contempt of court is not a crime *per se*. It is a *sui generis* offence committed against the court itself which it is peculiarly within the province of the court to punish (*Mayer* v *HM Advocate, [2005 1JC 121]*; *HM Advocate* v *Airs*, *[1975 JC 64]*; *Petrie* v *Angus (1889*) 17 R (J) 3). A penalty imposed for contempt of court is not regarded as a sentence (Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"), s 307(1), sv "sentence")."

We have nonetheless adopted the terms "sentence" and "appeal against sentence" which terms reflect the vocabulary used in submissions and is readily understood. We do not overlook the *sui generis* nature of contempt.

[3] At the commencement of the hearing, counsel for the appellant told us that the sole ground of appeal now insisted in (ground of appeal 2(a)) is that the sheriff erred in law by concluding that the judgement of the Inner House in *SM* v *CM* [2017] CSIH1 precluded the court from imposing a custodial sentence upon the respondent. He contended that the appellant did have a *locus* to pursue that ground of appeal. Counsel for the respondent contended that he did not.

Background

[4] The following summary is derived from the sheriff's note and is not contentious. The appellant and respondent are respectively the father and mother of a child, TB, born 5 November 2006. On 14 November 2014 an order for contact was made (interponing authority to a joint minute agreed by the parties) finding the appellant entitled to contact on certain specified dates. TB was not taken for contact in accordance with that interlocutor.

Following a proof in a minute and answer procedure initiated by the appellant, the sheriff found that, having failed to obtemper the contact order since 3 May 2015 and that failure being wilful, inexcusably careless or constituting a flagrant disregard for the authority of the court and the respondent having no reasonably excuse therefor, the respondent was in contempt of court. She was duly ordained to appear at Perth Sheriff Court on 29 July 2016 in order that punishment could be pronounced upon her and a criminal justice social work report was ordered for that date. On 29 July 2016 the sheriff deferred sentence to give the respondent an opportunity to obtemper the interlocutor of 14 November 2014 and so purge the contempt. On 10 October 2016 when the case next called, the sheriff was by that time aware that the opinion of the Inner House in *SM* v *CM* (a case involving the same sheriff) was due to be issued and she considered it prudent to await guidance before deciding how to deal with the respondent. She therefore deferred sentence until 20 January 2017, which also provided a further opportunity to the respondent to purge the contempt (which she had not done by 10 October 2016 and, it would appear, has still not done). On 20 January 2017 the sheriff told parties that she considered herself bound by the opinion of the court in *SM* v *CM* and that she determined that it was appropriate to make no further order.

[5] In her note the sheriff tells us that in considering disposal she considered that she was bound by *SM* v *CM*, making particular reference to paragraphs 60 to 62 of Lord Glennie's opinion. She goes on to explain why she considered it inappropriate to impose any sentence. Having regard to the nature and extent of the respondent's contempt (which the sheriff had earlier described in the note to her interlocutor of 5 July 2016 as continuing, wilful and a flagrant disregard for the authority of the court) the sheriff did not consider admonition to be appropriate. The sheriff goes on to state, in reasoning which on one view could be described as contradictory, that she did not consider that *SM* v *CM* precluded her

from imposing a custodial sentence but that the facts in that case were so indistinguishable from those in the instant case that she was bound by *SM* v *CM*. Having again quoted from para 62 of Lord Glennie's opinion the sheriff concluded that it was inappropriate to impose a custodial sentence or a financial penalty. She therefore made no order.

Appellant's submissions

[6] Counsel for the appellant argued that the sheriff erred in the approach she took on 20 January 2017, in particular by considering that she was bound by *SM* in its totality. Her error lay in failing to make *any* determination following the establishment of contempt. The issue for this court ultimately would be whether the sheriff was correct in taking the view that the various factors referred to by Lord Glennie in paragraphs 60 to 62 of the court's opinion in *SM* necessarily rendered it inappropriate to impose any penalty. While it was for the court to ensure that its orders were observed and to mete out any penalty, the appellant nonetheless had an interest, viz (1) to bring any alleged contempt to the attention of the court and (2) to become part of the triumvirate of parties who were interested in upholding the dignity of the court. The court would not take steps *ex proprio motu* to see that its determinations were obtempered. Only the appellant could bring that matter to the court's attention for the benefit of not only his own interests but for the benefit of the wider interests. Counsel for the appellant went on to draw our attention to a number of respects in which *SM* could be distinguished from the present case. For present purposes it is unnecessary to set these out in detail, it being sufficient to note that it is arguable that there were features in *SM* which were not present here. It was also pertinent to observe that the court's observations regarding sentence in *SM* were strictly obiter. The issue in the present case was whether the appellant had a *locus*. He was after all the minuter and had a *locus* to

bring the case before the court at first instance. If he had a *locus* at all, was he entitled to continue to suggest on appeal that there should have been a penalty? In counsel's submission, he should be so entitled.

Submissions for the respondent

[7] Counsel for the respondent invited us to hold that there was no *locus* and to dismiss the appeal at this stage. The provisional view taken by the procedural Appeal Sheriff was the correct one. On a correct view this was an appeal against sentence. There was no *locus* to pursue any such appeal. The appellant was not entitled to be heard on the question of sentence – although the appellant did address the sheriff in relation to sentence. It could not properly be taken from *SM* v *CM* that the court had accepted in that case that there was any right on the part of the minuter to be heard in relation to sentence. While the minute in the present case (in accordance with usual practice) included, in the crave, a crave for punishment, it should not do so. Punishment was exclusively within the province of the court. The sheriff had taken a decision which was to make no order and this was properly to be regarded as an appeal against sentence. There was no statutory right to bring such an appeal. The sheriff had applied her mind to the relevant factors and had concluded that it was simply not appropriate to impose a custodial sentence or financial penalty – see para 26 of her note.

Discussion

[8] The starting point is to consider the competency of an appeal. Section 47 of the Courts Reform (Scotland) Act 2014 provides that the Sheriff Appeal Court has jurisdiction and competence to hear and determine appeals to such extent as provided by or under the

2014 Act or any other enactment. Section 110(1) of that Act provides that an appeal may be taken to the Sheriff Appeal Court against a decision of a sheriff which constitutes a final judgment in civil proceedings (subject to any provision of the 2014 Act or any other enactment which restricts or excludes the right of appeal from a Sheriff to the Sheriff Appeal Court: subsection (6)). By virtue of section 136, "civil proceedings" includes

> "…(b) proceedings for contempt of court where the contempt (i) arises in or in connection, with civil proceedings, or (ii) relates to an order made in civil proceedings";

and "final judgment" means

> "a decision which, by itself, or taken along with previous decisions, disposes of the subject matter of the proceedings…".

[9] Applying those provisions to this case, it is not in dispute that the minute and answers procedure constituted civil proceedings, nor that the sheriff's interlocutor of 20 January 2017 was a final judgment in those proceedings. There is no provision in either the 2014 Act, nor any other enactment, which restricts the right of appeal to this court. It is undisputable, therefore that the appellant, being a party to the minute and answers procedure, can *competently* bring an appeal to this court.

[10] The more particular question which arises for determination by this court at this stage, following the finding of contempt, is whether he has any *locus* so to do.

[11] Much discussion took place at the hearing before us and in the notes of argument as to whether (and the respondent's submissions were largely predicated on the basis that) this was truly an appeal against sentence and if so whether the appellant had any *locus* to pursue such an appeal. Counsel for the appellant at one stage stated that he did not, before later seeking to withdraw that concession as having perhaps been too hastily made. However, whether the appellant has any *locus* to address the court on the precise punishment to be

imposed upon a contemnor is not an issue which we require to decide at this stage. Indeed we do not consider it helpful to consider the issue before us by attempting to categorise the appeal as either being, or not being, an appeal against sentence. The fact of the matter is that the sheriff did not impose any sentence and it is more helpful to focus on the actual interlocutor which she pronounced which was to make no order. We see no reason in principle why such an interlocutor should not be subject to review in the same manner as any other interlocutor of the court if it can be shown that in deciding to make no order the sheriff erred in some regard and, in so doing, wrongly fettered her discretion. We consider that to attempt to categorise the appeal as either being or not being an appeal against sentence is to fall into the same trap which the court fell into in *SM* to minute the custodial sentence as if it had been a sentence imposed in criminal proceedings, which it was not. Lord Glennie pointed out at paragraph 70 of the court's opinion that the court minutes bear the procurator fiscal's reference and referred to the defender as the "the accused", which he stated was *inter alia* inappropriate for a case where a person has been sentenced to imprisonment for civil contempt.

[12] We next consider the nature of proceedings for contempt. Contempt of court is an offence *sui generis*: Macphail, Sheriff Court Practice (3rd edition) para 2.18; *Robertson and Gough, supra*. As was stated in *HM Advocate* v *Airs* 1975 JC 64 at 69: -

> "it is the name given to conduct which challenges or affronts the authority of the court or the supremacy of the law itself, whether it takes place in or in connection with civil or criminal proceedings. The offence of contempt of Court is an offence *sui generis* and, where it occurs, it is peculiarly within the province of the Court itself, civil or criminal as the case may be, to punish it under its power which arises from the inherent and necessary jurisdiction to take effective action to vindicate its authority and preserve the due and impartial administration of justice…"

Contempt which consists of a failure to obtemper an order of the court can (in general) be dealt with *only* if the contempt is brought to the court's attention by the party in whose

favour the order was made: the court has no power to initiate proceedings *ex proprio motu* – *AB and CD* v *AT* 2015 SC 545. Finally, since the power to punish contempt arises from the court's inherent jurisdiction and is exercised in order to protect the administration of justice, it is for the court to determine the circumstances in which it will permit the jurisdiction to be invoked. The court has an inherent part to decline to take notice of any alleged contempt: *Sovereign Dimensional Survey Limited* v *Cooper* 2009 SC 382.

[13] From the foregoing principles, it seems to us that the following propositions can be stated:-

(1) the person in whose favour an order has been made has a *locus* to bring any alleged breach thereof to the attention of the court which made the order;

(2) this court no less than the court at first instance, has an interest in upholding the authority of the court or the supremacy of law; and to take cognisance of any contempts (or alleged contempt) brought to its attention on appeal.

(3) the minuter's *locus* to initiate proceedings does not end upon the making of the final judgment as defined in the 2014 Act. He has a continuing *locus* to bring the matter to the attention of the Sheriff Appeal Court, where he contends that there has been an error of some sort, on the part of the sheriff.

(4) the Sheriff Appeal Court may decline to take notice of any such appeal if it considers it appropriate so to do.

[14] It follows that there may well be instances where a minuter does have *locus* to pursue an appeal against a sheriff's determination in minute and answer proceedings for contempt, at whatever stage in the proceedings that error is said to have occurred. The hypothetical situation was put at the hearing of a sheriff not imposing a custodial sentence in pursuance of a stated blanket policy never to imprison a mother no matter how flagrant the breach.

Such an approach, whereby a sheriff had wrongly fettered his discretion, could clearly be seen to be erroneous, and inimical to the administration of justice and the supremacy of law and in our view the minuter in such a case would have a *locus* to pursue such an appeal. Indeed, were there no such *locus* it is hard to see how the Sheriff Appeal Court could ever intervene, since the contemnor in such cases would be unlikely to appeal.

[15] At the other extreme a minuter might seek to argue simply that a punishment which had been imposed was insufficiently severe. Absent any obvious error in the sheriff's approach or assertion that no reasonable sheriff could have made the order which the sheriff did, we find it difficult to envisage that in such a case any purpose could be served by this court taking notice of such an appeal and in such cases we anticipate that this court would hold that there was no *locus*.

[16] We envisage, therefore, that this court has a gate keeping role to play, by exploring at the outset of an appeal whether it does or does not wish to take notice of the alleged contempt. If not the appeal would be dismissed without further procedure, otherwise it should be allowed to proceed.

[17] In the present case the appellant argues that the sheriff erred in her approach. Without saying more at this stage, pending a full hearing of the appeal, we are prepared to acknowledge that there is, at least at first blush, a certain tension between the sheriff's decision not to admonish, apparently because the contempt was so flagrant, on the one hand, and the decision to make no order whatsoever on the other. We also consider that there is scope for argument on a matter not dealt with in *SM* v *CM*, which is the distinction to be drawn, if any, between a deferral of sentence on the one hand and an opportunity to purge contempt which is said to be continuing, on the other (particularly since, as we have pointed out in paragraph 2, a punishment imposed for contempt is not truly a sentence at

all). While we do consider that there will be few cases, following final determination, where an appeal by a minuter will be entertained by this court, we consider that the instant case is one in which the appellant has demonstrated the necessary *locus* and in which this court may have an interest in intervening in the contempt issue in the exercise of its inherent jurisdiction.

[18] We have therefore decided that we should allow the appeal to proceed.