SHERIFF APPEAL COURT

[2018] SAC (Civ) 15
PER-B238-15

Sheriff Principal M M Stephen QC
Sheriff Principal M W Lewis
Appeal Sheriff N A Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M STEPHEN QC

in appeal by

T.J.

Appellant;

against

S.B.

Respondent:

Appellant: Aitken; Livingstone Brown Solicitors
Respondent: McAlpine; Hodge Solicitors LLP

30 May 2018

[1] On 5 July 2016 the sheriff at Perth made a finding that the respondent was in contempt of court due to her failure to obtemper a contact order in respect of her son 'T'. This appeal by the father of 'T' lies against the sheriff's decision on 20 January 2017 to make no further order, and thereby impose no penalty, in respect of the mother's contempt.

[2] The ground of appeal is that the sheriff erred in law by concluding that the judgment of the Inner House in *C.M.* v *S.M.* [2017] CSIH 1 precluded her from imposing a custodial sentence upon the respondent.

[3] At an earlier hearing this court considered whether the appellant has any locus to pursue an appeal against the sheriff's decision to inflict no punishment in a contempt of court in civil proceedings where the court is exercising its inherent jurisdiction to deal with a breach or breaches of its orders. Recognising that contempt of court is a *sui generis* offence committed against the court itself which it is peculiarly within the province of the court to punish (*Robertson & Gough* v *HM Advocate* 2008 JC 146), the court considered that the appellant had demonstrated the necessary locus. Further, it was recognised that this court may have an interest in intervening in the contempt issue in the exercise of its inherent jurisdiction. The court decided that the Sheriff Appeal Court, no less than the court of first instance, has an interest in upholding the authority of the court or the supremacy of the law and to take cognisance of any contempt (or alleged contempt) brought to its attention on appeal. The party 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 and that party's locus does not end on the making of the final judgment as defined in section 110 of the Courts Reform (Scotland) Act 2014. Instead he has a continuing locus to bring the matter to the attention of this court where he contends that there has been an error on the part of the sheriff. It was envisaged that this court would have a gate keeping function and may decline to take notice of any such appeal if it considered it appropriate so to do. Of course, the sole ground advanced in this appeal is that the sheriff erred in her interpretation of *C.M.* v *S.M.* (*supra*).

BACKGROUND

[4] The background history to these proceedings is conveniently summarised in this court's decision on locus (*TJ* v *SB* [2017] SAC (Civ) 24). Nevertheless, it is important to restate the salient and uncontroversial facts.

[5] The appellant is the father and the respondent the mother of a child 'T' (d.o.b. 5 November 2006). 'T' lives with his mother. Proceedings began in respect of 'T's' welfare (residence and contact) shortly after his first birthday. For reasons unknown and which are not relevant to the appeal, proceedings continued in the sheriff court for almost seven years until there was resolution by joint minute on 14 November 2014 on the eve of a proof. It is sufficient to observe that the court's interlocutor interponing authority to the joint minute granted the appellant parental rights and responsibilities as the father of 'T' and granted him contact with the child each Sunday and on alternate Wednesdays. Sunday contact took place until 26 April 2015. The appellant attended for contact throughout May 2015 however the child was not brought and no contact took place. There had been no offer to reinstate contact and the respondent did not ask the court to vary the contact order. Against that background the appellant lodged a minute bringing the court's attention to the respondent's breach of the court's order. After proof on the minute and answers the sheriff found the respondent in contempt of court. Following the finding of contempt the respondent was ordained to appear and there followed several continuations, variously recorded as a continuation or deferral of sentence, for background reports; to monitor contact and to await the decision of the Inner House in *C.M.* v *S.M.* (*supra*).

[6] The sheriff, in her note of 14 June 2017, confirms that she indicated to parties that she considered herself bound by the opinion of the Inner House delivered by Lord Glennie in *C.M.* v *S.M.* and that the similarity and circumstances following the finding of contempt

were such that she determined that it was appropriate to make no further order in respect of the respondent's contempt of court. (paragraph [14]).

SUBMISSIONS

[7] Counsel for the appellant accepted that the appeal was not against "sentence" as contempt of court is not a crime and any penalty imposed is not regarded as a sentence (Criminal Procedure (Scotland) Act 1995 section 307; *Robertson & Gough* v *HMA* 2008 JC 146 at para [31]). Nevertheless, by determining not to make any further order as to punishment or penalty or, indeed at all, the sheriff erred by failing in her duty to determine the issue which was live before her as to the appropriate consequences of the respondent's contempt. In making no order at all, the sheriff fails to give either adequate or consistent reasons for her decision. She does not, for example, explain that the finding of contempt in itself was sufficient to mark the court's disapproval.

[8] The sheriff categorises the contempt as a "flagrant disregard for the authority of the court" (para [8] of the sheriff's note). The sheriff allowed the respondent opportunities to purge her contempt by complying with the court's interlocutor on contact which would mitigate punishment. There was no contact in the relevant period. The sheriff therefore failed to place sufficient weight on the respondent's lack of contrition and her failure to acknowledge or ameliorate her contempt. Any mitigation related to the respondent's personal circumstances (para [12] of the note). The sheriff expressly states admonition was inappropriate having regard to the nature and extent of the respondent's contempt (note para [21]). These paragraphs read together plainly mean that the sheriff was expressing a view that admonition would be too lenient a punishment for such a flagrant breach. It follows, the appellant submitted, that the sheriff's decision then to make no order at all was inconsistent and indeed perverse.

[9] We were addressed by counsel for the appellant on *C.M.* v *S.M.* (*supra*) (a case involving the same sheriff) which decision appears to be key to the sheriff's decision making. It was contended that the sheriff had misunderstood the ratio of *C.M.* v *S.M.* in that the sheriff erred both in her appreciation of the ratio of that case and that it was binding on her. The sheriff ought to have distinguished the facts and circumstances of *C.M.* v *S.M.* from the present case. It is evident from the sheriff's comments at para [14] that she considered herself bound by *C.M.* v *S.M.* and thereby refrained from making any order at all. Having misdirected herself with regard to the import of *C.M.* v *S.M.* the sheriff not only fell into error but decided on a disposal which was, in all the circumstances, illogical. The sheriff had failed to give adequate consideration to the whole circumstances of this case due to her error in failing to distinguish the facts of this case with those in *C.M.* v *S.M.* perhaps in light of her own involvement in that case. Properly understood paragraph [60] in *C.M.* v *S.M.* is *obiter dicta*. The Inner House clearly considered that the same sheriff had erred in taking into account matters pertaining to contact arising following the finding of contempt and which were in effect "unproved". The Inner House noted that the maximum custodial sentence of three months had been imposed after repeated adjournments over a period of approximately 18 months. Lord Glennie delivering the court's opinion states at para [60]:

> "Such delay is inimical to the interests of justice. If a sentence of imprisonment is to be imposed, it should be imposed without undue delay, since the period running up to the imposition of that sentence will inevitably be fraught and stressful. For the defender to have to endure such delay only to find that she was then sentenced to the maximum sentence of imprisonment of three months is, to our minds, wholly inappropriate."

Thus the Inner House was concerned with repeated adjournments over a period of 18 months or so leading to undue delay followed by the imposition of the maximum custodial period. No such considerations arise in this case where the deferral on two

occasions was for a period of approximately six months. The sheriff was not precluded by virtue of *C.M.* v *S.M.* from imposing either a custodial or financial penalty however the sheriff wrongly fettered her discretion by interpreting *C.M.* v *S.M*. in that manner. That the sheriff felt that she could not distinguish *C.M.* v *S.M.* is clear from para [24] of her note. It is likewise clear that the sheriff considered that she had followed procedure in the present case which the Inner House had specifically disapproved of in *C.M.* v *S.M.* (see para [26] and [28] of the sheriff's note); that the sheriff did not consider it appropriate to impose a custodial sentence or a financial penalty as if she had done so she "would have been subject to the same criticism as in *C.M.* v *S.M.*, albeit the period of deferral was shorter in the present case". The extent and effect of the sheriff's error is clear from these passages.

[10] Finally, counsel for the appellant addressed us on the use by the sheriff of a deferral of sentence to allow the respondent to purge her contempt. This issue arises, not from a ground of appeal, but from observations made by this court in its opinion of 1 August 2017 (para [17]). The respondent cannot completely atone for the lost contact. This type of civil contempt may be contrasted with the prevaricating witness who can atone or purge his contempt by giving evidence truthfully. The approach of the sheriff in this case is, however inconsistent with the proper meaning of "purge". It is clear that the sheriff considered that the continuation or deferral to purge was to mitigate only and would not in these circumstances lead to purging the contempt in the true sense.

[11] This court should allow the appeal; recall the sheriff's interlocutor of 20 January 2017 and remit the case to the sheriff (or another sheriff) in order that punishment may be determined in respect of the respondent's contempt.

[12] Counsel for the respondent addressed us on the respondent's current circumstances. The sheriff had been addressed as to her background and medical condition. The

respondent's mental health difficulties had been raised with the sheriff. The respondent is now pregnant and due to give birth in May. Having regard to all the circumstances of the case including the contemnor's personal circumstances it cannot be suggested that these are inconsistent with the sheriff's ultimate disposal not to impose a penalty. Contempt of court and the penalty to be imposed lies solely within the court's inherent jurisdiction and normally appeals against decisions made by the court with regard to penalty would not be entertained.

[13] The sheriff properly exercised her discretion on the question of punishment. The decision she ultimately reached to make no order was a disposal which was competent and open to her to make.

[14] The sheriff properly understood the import of *C.M.* v *S.M.* The sheriff was correct to recognise that she had adopted the same or similar procedure in this case to that which the court in *C.M.* v *S.M.* had disapproved. In material respects the present case is similar to *C.M.* v *S.M.* The sheriff recognised that she was adopting a similar approach and provides a reasoned explanation as to why she decided to impose no punishment. As the sheriff explains at paragraphs [28] and [29] she did consider imposing a penalty other than imprisonment however she had specific regard to the circumstances of the respondent in terms of her financial circumstances and mental health difficulties. Those militated against the imposition of either a custodial penalty or an alternative penalty. The sheriff did as she has a duty to do, namely to take into account all relevant facts and circumstances, including the welfare of the child. Imposing a period of imprisonment on a mother with whom the child lives should only be imposed "with reluctance and as a last resort". (see *C.M.* v *S.M.* para [62]).

[15] In this case standing the nature of the contempt it is not one that can be "purged". The Inner House in *C.M.* v *S.M.* considered the question of deferred or adjourned diets in civil contempt cases (para [60]). The practice was disapproved of. However the particular situation with which the Inner House was concerned was the repeated deferral of sentence and the undue delay which resulted. In any event a deferral of sentence either to purge or in mitigation could not take into account conduct subsequent to the contempt for the reason that such conduct had not been established or proved. Accordingly, deferring sentence to "purge" ought properly to be understood as meaning "mitigate punishment". We were referred to the Stair Memorial Encyclopaedia on contempt of court. In *Martin & Co (UK) Limited* v *Stenhouse* 2016 SLT 45 the Inner House made *obiter* comments as to the procedure to be adopted in the event of a contempt being admitted or proved in the following terms:

> "[18] If contempt is admitted or proved, the contemnor should be given an opportunity to purge the contempt (if possible), and/or to make submissions in mitigation. The appropriate disposal can then be made."

In that passage the Inner House appear to recognise that not all contempts are capable of being purged. If the contempt cannot be purged the contemnor should be given the opportunity to make submissions in mitigation prior to the court determining the penalty.

[16] The respondent's motion is that the appeal be refused. If the appeal is allowed this court should dispose of the contempt and impose no sentence which failing the matter should be remitted back to the sheriff for further consideration of the question of punishment. The court should have regard to the passage of time since finding the respondent in contempt (July 2016) and the whole facts and circumstances including the contemnor's personal circumstances which are entirely consistent with the disposal made by the sheriff.

DISCUSSION

[17] This appeal arises from civil proceedings relating to the welfare of the child 'T'. The contempt goes to the root of the issue between the parties namely, contact between 'T' and his father. The respondent's failure to comply with the court's order allowing contact between 'T' and his father represents a flagrant disregard for the authority of the court (sheriff's judgment 5 July 2016). As such, it challenges the supremacy of the law.

[18] It lies within the court's inherent jurisdiction to recognise and punish contempt of court. Contempt of court is considered to be an offence *sui generis* rather than a crime. Any punishment or penalty imposed is not a sentence as such. The appellant has no locus or entitlement to argue that the punishment imposed by the court is either too lenient or too severe.

[19] The nature and forms of contempt of court were considered in *HM Advocate* v *Airs* 1975 JC 64 and more recently in *Robertson & Gough* (*supra*). In *HM Advocate* v *Airs*, Lord Emslie makes this authoritative statement on contempt of court:

> "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."

[20] Contempt of court by disobeying court orders, as here, may be contrasted with contempt of court which arises in court; is committed *in facie curiae* and is directed at the administration of justice. The most obvious examples are prevarication by a witness or behaviour which is insulting to the judge or affronts the dignity of the court. This type of contempt is obvious to the court and need not be brought to the court's attention. By

contrast in the situation which arises in this appeal the court relies on one or more of the parties to bring any disobedience of court orders, and therefore potential contempt, to the attention of the court. It is then for the court to determine whether there has been a contempt and what to do about it.

[21] Accordingly, an appeal, such as this, brought by a minuter which challenges the sheriff's disposal of the contempt, must be regarded as rare and exceptional. In this appeal the finding of contempt is not challenged. The appellant is the party who brought the breaches of the court order relating to contact to the court's attention. As has been observed (*Robertson & Gough supra*) in cases involving civil contempt, such as this is, punishment is primarily for coercive reasons with the purpose being to achieve compliance with the court's order in the interests of the child. This is especially so when the court's order proceeds upon the parties' agreed position as to residence and contact, there having been no subsequent application to vary that order.

[22] Accepting, and emphasising, that this is not an appeal against sentence, this court when exercising its gate keeping function considered "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".

[23] In this appeal the appellant complains that the sheriff acted inconsistently and erred both in her interpretation of and reliance on *C.M.* v *S.M.* (*supra*). Her error led the sheriff to conclude that it was inappropriate for her to impose a custodial sentence. The sheriff had failed to adequately consider alternative sentencing options having rejected admonition which, by implication would be too lenient a disposal standing the extent and nature of the

contempt. The sheriff's decision then to make no order is one that no reasonable sheriff having regard to the whole facts and circumstances of the case would have made.

[24] The Inner House decision in *C.M.* v *S.M.* is central to the sheriff's reasoning. It is concerned with contempt of court by disobeying a court order as to contact in a family case. *C.M.* v *S.M.* is an appeal by the contemnor mother which challenged both the finding of contempt and sentence. It is principally concerned with practice and procedure in contempt proceedings. The Inner House quashed the finding of contempt with the result that the sentence of three months' imprisonment (the maximum available to the sheriff) fell away. However, even if the finding of contempt had been allowed to stand the court would have quashed the prison sentence. In so deciding the court expressed concern over the procedure adopted not only in determining the penalty to be imposed for contempt but also the procedure adopted by the sheriff in hearing both the contact and contempt proceedings together or in parallel. That, in itself, gave rise to the risk that a substantial injustice might be done to the mother. The contact and contempt proceedings are separate and raise quite distinct issues. There was also a question of defective representation. None of these issues arise in this appeal where the finding of contempt is not challenged. On the matter of sentence or penalty the Inner House considered that the imposition of three months' imprisonment was excessive. Had the finding of contempt not been vitiated by the procedure adopted, the court gave two principal reasons for quashing the sentence. The first involves a matter of substance. The sheriff took account of matters which are not relevant to sentence, namely, the appellant's continuing disregard for the court's authority and orders. Referring to these matters the court at paragraph [61] observed:

> "None of this is relevant to the question of sentencing. The sentence passed by the court should be a sentence in respect of the instances of contempt found to have been established and should not take into account subsequent conduct

> which did not form part of the allegations in the Minute for contempt and had not been proved to the requisite high standard. If complaint was to be made of that conduct it should have been by a separate Minute."

The second criticism concerns repeated adjournments or deferments leading to more than 18 months elapsing between the finding of contempt and sentence. The Inner House considered that it was "*wholly inappropriate*" that the contemnor had to endure such a delay only to receive the maximum sentence of imprisonment. (paragraph [60])

[25] We consider there is force in the argument that the sheriff placed too much reliance on *C.M.* v *S.M.* In so doing there was a clear risk that the sheriff might have had insufficient regard to the facts and circumstances of this case. It appears to us that there are a number of areas where this case can be distinguished from *C.M.* v *S.M.*:- (i) This case involves contact being agreed by way of joint minute and the appellant's parental rights and responsibilities also flow from that agreement. The respondent's defiance of the court order has to be seen in the context of the contact order being a consensual one which the parties agreed and asked the court to make. Arguably, in this case, the respondent's contempt may be regarded as more egregious in the absence of any attempt by her to vary that order:- (ii) The specific issue relating to the procedural route adopted by the sheriff in making the finding of contempt is completely absent here as are any issues relating to the duty of the solicitor and defective representation:- (iii) In this case the delay between the finding of contempt and disposal was approximately six months. Once the background report was obtained only two continuations followed. The timescale in this case cannot be categorised as unduly lengthy. However, we recognise that there is an apparent inconsistency between the sheriff's decision not to admonish due to the contempt being so flagrant and the ultimate decision to make no order.

[26] However, it does not necessarily follow that the sheriff's decision to make no order is thereby vitiated. It is for the court itself to determine whether to punish conduct which defies its orders or challenges the rule of law. It is part of the sheriff's duty in the exercise of her inherent jurisdiction to have regard to the facts and circumstances of the case and decide what to do about any contempt of court. We are, of course, mindful that contempt of court by failing to obtemper court orders in the area of family law is a recurring and vexed area. However, as the power to punish for contempt lies only in the hands of the court, an appeal such as this is unusual. In this appeal it is contended that the sheriff failed in her duty to determine the matter of punishment which was live before her and failed to adequately consider the facts and circumstances of the case. As we have observed, the sheriff may have been unduly concerned about following the same or similar procedure which attracted criticism in *C.M.* v *S.M.* [see para [28] of the sheriff's note). However, in the following paragraph it is plain to us that the sheriff had regard not only to other sentencing options but in particular the respondent's personal circumstances and mental health problems which she had been informed of on 20 January 2017. The sheriff took into account the child's circumstances and the effect of the separation of the mother and 'T' which imprisonment would bring about. That has been described as a special consideration and relevant factor in determining sentence or penalty (*M.* v *S.* 2011 SLT 918). These factors, in our opinion, constitute sufficient reasons to explain the sheriff's decision to make no order. In these circumstances we reject the proposition that the sheriff failed to have regard to the circumstances of the case. She gave considerable weight to the personal circumstances of the contemnor and the child as she required to do. That she failed to give what the appellant describes as sufficient weight to the nature of the contempt is nothing to the point given that it is in the court's sole jurisdiction to determine what, if any, penalty to impose

following a finding of contempt. The disposal of the case is one which is competent and open to the sheriff to make. That is sufficient to deal with the appeal which falls to be refused.

[27] On 1 August 2017 this court when delivering its opinion on locus to appeal considered that there was scope for argument on "*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*". This issue raises matters of both substance and procedure. Interpreted narrowly, to "purge" contempt means to make complete atonement. We were referred to an English case *Harris* v *Harris* [2001] EWCA Civ 1645 which considered a narrow question of competency in an application to purge contempt, the contemnor having served part of his prison sentence imposed for the contempt. Due to the narrow ambit of the decision and the existence in that jurisdiction of a legal process of purging contempt which does not exist in Scots law we did not find that case to be of assistance. However, we accept that considered strictly to "purge" is a binary concept; either the contempt can be cured or not. Contempts of court committed in court (*in facie curiae*) and directed at the administration of justice are capable of being atoned for or purged. The most common type of contempt of this sort is prevarication which is of a nature that is capable of being cured, often under threat of punishment, if the witness proceeds to give evidence freely and truthfully. Other forms of contempt which arise in front of a judge which constitute an affront to the court or the administration of justice are likewise capable of being purged by apology or, for example, in the case of Mr Gough, (*Robertson* v *Gough supra*) the naked rambler, by presenting in court dressed in a manner which respected the dignity and decorum required in the courtroom. On the other hand, we accept that in a case such as this, involving disobedience to court orders in respect of contact with a child, it is strictly

speaking, impossible for there to be atonement for past contact lost due to defiance of the court order. The sheriff in her note refers to the deferrals of sentence on 24 August and 10 October 2016 being for the purpose of giving the respondent the opportunity to obtemper the court's interlocutor as to contact and so purge the contempt. It appears to us that in so doing the sheriff is giving the contemnor an opportunity to mitigate any penalty by using punishment, or the threat of punishment, in its coercive sense namely to bring about a change in attitude to contact. We see nothing objectionable in that procedure even though the respondent cannot purge her contempt in the strict sense. Indeed, we consider the court ought to allow the contemnor an opportunity to reflect on their behaviour with a view to purging or, as the case may be, mitigating their contempt. The sheriff clearly intended that the purpose of the deferral of sentence was to bring about compliance with the court's order as to contact which would in turn also mitigate the contempt. It is however, clear from *C.M.* v *S.M.* that the court must not take into account ongoing unproven allegations of continuing contempt of court orders when determining the penalty to impose for past contempt. However, that is not to say that the court cannot take into account aggravating features of the contemnor's behaviour as well as mitigating features during a period of deferment.

[28] *C.M.* v *S.M.* properly understood does not disapprove of the practice of a continuation or deferral of sentence prior to the punishment being determined. Instead, the court was correct to be concerned about repeated deferrals or continuation which led to undue delay. In *Robertson* v *Gough* (*supra*) and *Martin & Co (UK) Limited* v *Stenhouse (supra*) the court considered that following a finding of contempt the proper course is for the court to give the contemnor an opportunity to apologise and purge the contempt (if possible) and also to make representations in mitigation. A continuation also provides an opportunity for the contemnor to reflect on both his or her behaviour and the court's power to punish. As

punishment or threat of punishment in cases of civil contempt is said to be coercive the court is entitled to use its powers or the threat of their use to enforce compliance with its order. The court has a duty to uphold its own orders. The drawing of the Damoclesian weapon from its scabbard may well be appropriate and effective provided it is wielded with care both with regard to its effect and duration. However, if the contemnor is impenitent the court should proceed to deal with what penalty, if any, to impose without delay.

[29] Finally, concerns relating to procedure and irregular forms of interlocutor arise in this case as they did in *C.M.* v *S.M.* (see para [70]). Any punishment or penalty imposed for contempt is not a sentence. When a finding of contempt of court is made in civil proceedings there is no reason to invoke procedure which derives from the summary criminal jurisdiction, even allowing for the preparation of a criminal justice social work report or background report. When the court is exercising its power to punish contempt it is upholding the authority of the court and the rule of law. It is therefore a matter of some gravity and it is necessary that any court orders made in the contempt process are considered and signed as interlocutors of the sheriff who must be satisfied that the order accurately reflects the decision of the court. When civil proceedings metamorphose into a form of fictitious criminal procedure the court's decision appears as a minute signed by the clerk of court, recording the sheriff's decision. However, the concept that the proceedings become criminal or quasi criminal is both wrong in principle and in practice. We agree with the observations of the Inner House in *C.M.*v *S.M.* (para [70]) on this point. This is not a mere technicality but involves a substantial procedural issue. In civil contempt proceedings interlocutors should proceed at the hand of the sheriff who is exercising the court's power to punish for disobedience to its orders.

[30] We will refuse the appeal and make a finding of no expenses due to or by either party.