



SHERIFF APPEAL COURT

**[2017] SAC (Crim) 2
SAC/2016-000693/AP**

Sheriff Principal M M Stephen QC
Sheriff Principal C D Turnbull
Sheriff P Arthurson QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

BILL OF SUSPENSION

by

GRAHAM McMILLAN

Complainer:

against

PROCURATOR FISCAL, PAISLEY

Respondent:

**Complainer: Ogg (sol adv), Paterson Bell
Respondent: Niven Smith, AD; Crown Agent**

13 December 2016

[1] On 15 September 2016 the sheriff at Paisley granted a warrant to apprehend the complainer. In this Bill the complainer seeks suspension of that warrant which is commonly

referred to as an *initiating* or *expediency* warrant. The terms of the warrant are printed on every complaint prepared by the procurator fiscal in summary proceedings in Scotland.

[2] On 13 December 2016 we declined to hear parties on the Bill after hearing submissions on the preliminary issue whether it was competent for this court to consider and dispose of the Bill. We concluded that suspension of a warrant such as this granted by a sheriff exercising his administrative powers remains subject to the jurisdiction of the High Court of Justiciary. The character of the warrant is similar to that discussed in *McWilliam v Harvie* [2016] HCJAC 29.

[3] Accordingly, we did not consider the substantial merits of the Bill. It is not necessary to discuss the background in any detail beyond observing that in July this year the complainer had been charged by the police with a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 occurring at the family home some months earlier. He was released by the police on an undertaking to appear at Paisley Sheriff Court in August 2016. That undertaking was first of all continued by the respondent and then cancelled altogether as a decision on whether criminal proceedings were appropriate had not yet been taken. On 13 September 2016 the respondent sought an apprehension warrant on grounds of expediency in relation to an accompanying complaint libelling the same charge. That request was placed before the sheriff in chambers who granted the warrant now complained of.

[4] The procedural context to this Bill deserves comment. The Bill bears to be addressed to the High Court of Justiciary but was lodged in this court. The solicitor advocate for the complainer argued that this court had jurisdiction. The appeal sheriff who considered the Bill initially was addressed by the complainer on this preliminary jurisdiction point before granting warrant to serve on the respondent thus allowing the court to determine the

preliminary issue. However, the respondent who, before us, argued that the Bill fell outwith this court's jurisdiction, failed to raise any preliminary issue of competence or jurisdiction in his answers. Today we were fully addressed by the parties and we are obliged to them for their submissions. We propose to give our reasons for refusing the Bill as incompetent in this court.

[5] The Sheriff Appeal Court was established last year by virtue of the Courts Reform (Scotland) Act 2014 ("the 2014 Act"). This court is a creation of that enactment. Section 118 of the 2014 Act makes provision for appeals to this court in summary criminal proceedings. Its terms are as follows:

"Section 118

- (1) There are transferred to and vested in the Sheriff Appeal Court all the powers and jurisdiction of the High Court of Justiciary (whether under an enactment or otherwise) so far as relating to appeals from courts of summary criminal jurisdiction.
- (2) Sub-section (1) does not apply to the *nobile officium* of the High Court.
- (3) Schedule 3 (which modifies the Criminal Procedure (Scotland) Act 1995 in consequence of sub-section (1)) has effect."

[6] Paragraph 20 to Schedule 3 of the 2014 Act amends section 191 of the Criminal Procedure (Scotland) Act ("the 1995 Act") which is now in the following terms:

"Section 191

- (1) Notwithstanding section 184(2) of this Act, a party to a summary prosecution may, where an appeal under section 175 of this Act would be incompetent or would in the circumstances be inappropriate, appeal to the Sheriff Appeal Court, by Bill of Suspension against a conviction or, as the case may be, by Advocation against an acquittal on the ground of an alleged miscarriage of justice in the proceedings."

Read together these provisions point to this court having jurisdiction in appeals from courts of summary criminal jurisdiction including Bills of Suspension against conviction.

[7] It was argued by the complainer that the warrant in question is an expediency warrant which commences the summary prosecution. It is granted in terms of section 139(1)(b) of the 1995 Act. It is therefore part of the summary proceedings before the court and the sheriff's decision to grant the warrant may be appealed. Section 139(1)(b) is in the following terms:

"(1) On any complaint under this Part of this Act being laid before a judge of the court in which the complaint is brought, he shall have power on the motion of the prosecutor –

(b) to grant warrant to apprehend the accused where this appears to the judge expedient."

[8] For the purpose of our determination of the preliminary issue it is not necessary to consider in detail the effect of the granting of the warrant by the sheriff. Summary proceedings do not commence until the procurator fiscal either cites the accused or executes any initiating warrant. The initiating warrant will mark the commencement of proceedings providing the procurator fiscal executes the warrant without delay. Section 140 of the 1995 Act provides that that enactment will be sufficient warrant for citation of an accused. At the risk of stating the obvious the proceedings do not commence until the procurator fiscal takes steps to cite the accused.

[9] On a plain reading of section 139 when the prosecutor makes a motion in terms of section 139(1)(b) the complaint is placed before a judge of the court in which the complaint is brought. The judge who considers the prosecutor's motion does so usually in chambers exercising his administrative powers. In *Brown v Donaldson* [2007] HCJAC 40 the appeal court considered whether a justice of the peace in granting a search warrant was acting as a court of law. Lord Gill, giving the Opinion of the Court at paragraph [10], regarded the decision whether to grant a warrant as an administrative act. More recently, a similar issue

was decided in *McWilliam (supra)*. The High Court of Justiciary considered the competence of a Bill seeking to suspend a finger print warrant. In determining that such Bills remain subject to the supervisory jurisdiction of the High Court of Justiciary the court stated

(para 4):

"A bill to suspend such a warrant does not constitute an appeal from the court of summary jurisdiction. Thus, it is clear that a bill to suspend a warrant of the kind granted in the present case does not come within the ambit of section 118 of the 2014 Act and is not included in the transfer of powers to the Sheriff Appeal Court".

We consider that a bill seeking to suspend a warrant of the nature of an initiating warrant as granted by the sheriff in this case likewise does not fall within this court's powers. It does not constitute an appeal from a court of summary jurisdiction. The prosecutor's motion is placed before "*a judge of the court*" not before the court of summary jurisdiction itself. When the sheriff considers whether to refuse or grant the prosecutor's motion for a warrant he is essentially exercising his administrative powers and is not sitting as a court of summary jurisdiction. Accordingly, this court has no jurisdiction to consider the Bill.

(signed) *Mhairi M Stephen*