APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 5
HCA/2021/14/XM

Lord Justice General
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

the Petition to the *nobile officium*

by

CRAIG MURRAY

Petitioner

against

HER MAJESTY'S ADVOCATE

Respondent

Petitioner: Dean of Faculty (Dunlop QC), C Findlater; Halliday Campbell WS
Respondent: A Prentice QC (sol adv) AD; the Crown Agent

20 January 2022

Introduction

[1] The petitioner was found to be in contempt of court and sentenced to 8 months imprisonment. The decisions were made by a High Court bench of three judges. The petitioner attempted to appeal the decision to the United Kingdom Supreme Court. Permission was refused by both the High Court and the UK Supreme Court. The petitioner

now wishes to challenge the original finding of contempt and the sentence by a petition to the *nobile officium*. The issue is whether it is competent to do so, in whole or in part.

Facts and Procedure

[2] In January 2019 the former First Minister, Alex Salmond, was placed on a petition charging him with a number of sexual offences, including attempted rape. He was subsequently indicted. His trial commenced on 9 March 2020 and concluded 11 days later. He was acquitted of all charges. On the second day of the trial the judge, the Lord Justice Clerk, issued an order:

> "At common law and in terms of section 11 of the Contempt of Court Act 1981, preventing the publication of the names and identity and any information likely to disclose the identity of the complainers in the case …".

[3] Meantime, the petitioner had published a number of articles relating to the criminal proceedings. These appeared on his website, on which he describes himself as a "Historian, Former Ambassador and human rights activist". He is not an accredited journalist. In his article of 23 August 2019, headed "The Alex Salmond fit-up", he suggested that the trial had been in some way engineered by those in Government and/or their closest advisers. On 18 January 2020, under the heading "Yes Minister Fan Fiction", he published a spoof script of the television programme *Yes Minister*. This again suggested that the prosecution had been organised by those at the heart of Government and suggested that they had persuaded certain women, who were close to those in Government, to act as complainers. There was specific reference to a politician, identified by a nickname, and his wife, being involved. There were "three or four more women very close to" a Government Minister, who had also been involved.

[4] On 11 March 2020, soon after the trial had commenced, a further article appeared. This referred to one of the complainer's position in Government and her part in a particular circle. There was reference to her nomination to a named parliamentary constituency. On 18 March, another article appeared, which referred to a specific physical characteristic of a complainer. It mentioned that one of the complainers had been on specified journeys with Mr Salmond.

[5] The respondent presented a petition and complaint which averred contempt of court by the petitioner, including a breach of the court order. This was heard by a bench of three judges, chaired by the Lord Justice Clerk. On 25 March 2021, the court found the petitioner guilty of contempt by breaching the court order in respect of these, amongst other, publications. On 11 May 2021, the petitioner was sentenced to 8 months imprisonment.

[6] The petitioner did not seek to present a petition to the *nobile officium* at that time by way of an appeal against the court's decision. Rather, permission was sought to appeal to the UK Supreme Court, in terms of section 288AA of the Criminal Procedure (Scotland) Act 1995 on the grounds that the court had determined three compatibility issues. The first was a contravention of Article 6 of the European Convention, in that the finding of contempt went beyond the averments in the petition and complaint. The second was an infringement of Article 10, in that the offence of contempt was not sufficiently precise and foreseeable. The third was that the sentence was disproportionate and thus another breach of Article 10. On 8 June 2021, the court refused permission on the basis that no arguable point of law arose.

[7] The petitioner applied for permission to the UK Supreme Court. This was refused on 29 July 2021 "because the application does not raise an arguable point of law of general public importance". It is of importance to observe that, although the issue may have been

canvassed in submissions before the High Court, the applications were not opposed on the basis that it was inappropriate, although not incompetent, for the Supreme Court to entertain an appeal because such an appeal was available by way of a petition to the *nobile officium* of the nature now under consideration.

The petition

[8] The petitioner has lodged a petition to the *nobile officium* which challenges the court's finding of contempt on five grounds relating to the merits. These are, first, that the court erred in applying a test of strict liability to the offence. Secondly, the court had acted unfairly in disbelieving the content of the petitioner's affidavits, which sets out his position that he had not intended to breach the court order. Thirdly, the court erred in considering that it was sufficient that the articles would have been likely to have allowed only a section of the public to identify the complainers, rather than the public at large. Fourthly, the test which the court had applied was incompatible with Article 10 of the European Convention because it was insufficiently precise. Fifthly, the court had acted unfairly at common law, and contrary to Article 6 of the Convention, because the finding of contempt went beyond the terms of the petition and complaint. Additional grounds, again founding on an alleged breach of Article 10, challenged the sentence of imprisonment.

[9] The court appointed a hearing on the competency of the petition.

Submissions

Petitioner

[10] The petitioner maintained that the use of the *nobile officium* was a competent means of challenging a finding of contempt (*Robertson and Gough* v *HM Advocate* 2008 JC 146 at

para [1]; *Mayer* v *HM Advocate* 2005 JC 121 at para [49]). The three judge court had been sitting as one of first instance and therefore an appeal by using such a petition was competent (*Express Newspapers, Petitioners* 1999 JC 176 at 179). The fact that the petitioner had sought permission to appeal to the UK Supreme Court was not a bar. An appeal was available to the Supreme Court in terms of section 288AA of the Criminal Procedure (Scotland) Act 1995, but only in respect of compatibility issues. The petition raised arguments of a broader nature. The Supreme Court would only hear points which were of general public importance. Thus an appellant may have a good ground of appeal, but it would not be entertained on the basis that it was not of such importance. It was important that a person found in contempt had a right of appeal (*HM Attorney General* v *Crosland* [2021] UKSC 58 at paras 33-34).

Respondent

[11] It was accepted that a petition to the *nobile officium* was a competent mode of challenging a finding of contempt and any punishment imposed (*Robertson and Gough; Mayer*; *Express Newspapers*). The fourth and fifth grounds of appeal, and part of the appeal relating to sentence, all formed part of the applications for permission to appeal to the UK Supreme Court. Since there was an appeal available on these grounds, a petition to the *nobile officium* was not competent. These grounds raised questions of whether the respondent had acted in a manner which was incompatible with a Convention right. There was a process, which was governed by statute, by which any such compatibility issues could be the subject of an appeal. That process had been used by the petitioner and that process had been concluded. The petition was therefore not competent on these grounds.

Decision

[12] It is not disputed that a petition to the *nobile officium* of the High Court is, as a generality, open to a person who seeks to challenge a finding of contempt made by a High Court bench of three judges sitting as a court of first instance (*Express Newspapers, Petitioners* 1999 JC 176, LJG (Rodger), delivering the opinion of the Full Bench at 180). The anomaly which arises is that, where a bench of three is involved, there is a parallel right of appeal, where a compatibility issue arises, under section 288AA of the Criminal Procedure (Scotland) Act 1995. Although that section was introduced by the Scotland Act 2012 (s 36(6)), its origins are in the devolution regime of the Scotland Act 1998 (s 98, Schedule 6 para 13(a)). Yet the existence of that parallel right has the potential to eliminate the use of a petition to the *nobile officium* to raise a compatibility ground because such a petition is only available where "no other remedy or procedure is provided by law" (*Anderson* v *HM Advocate* 1974 SLT 239, LJG (Emslie), delivering the opinion of the court, at 240). In strict theory, a person found in contempt, who wished to raise some grounds which invoked the Convention and some which did not, would face the prospect of having to use two modes of appeal. The court would not be prepared to sanction such a situation.

[13] In a case such as the present, where there are mixed Convention and non-Convention grounds, it would be impractical for the court to hear a petition which is restricted to non-Convention compliance issues. If it were otherwise, there would be no effective appeal route within the High Court. Conversely an appeal to the UK Supreme Court would be restricted to Convention compliance grounds and the same basic problem would recur. In these circumstances, for the petitioner to have a remedy provided for by law, it is essential that the petitioner is able to present his appeal on all grounds to the High Court by using the petition procedure. Had he done this, rather than seeking permission to appeal to the UK

Supreme Court, no problem would have arisen. His appeal would have been progressed, with the prospect of an onward appeal to the Supreme Court in due course.

[14] The problem now is what is to be made of the UK Supreme Court's refusal of permission. Had the Supreme Court refused permission to appeal because of a lack of arguable grounds *simpliciter*, the court would have been bound to take cognisance of this by declining to hear any argument based on non-compliance with the Convention. However, the Supreme Court has not done this. Rather, the refusal is based upon the lack of arguable grounds of general public importance. That leaves open the prospect of there being arguable grounds, but not ones of public importance. The court is bound to hear those in the petition procedure along with any purely common law contentions. On this basis, the petition is competent and will proceed to a hearing on all grounds.

[15] It remains to be said, first, that it is unfortunate that the UK Supreme Court were not asked to consider whether it was appropriate for that court to entertain an appeal, when the option of an appeal within the High Court, using the petition procedure, remained open. Secondly, there is no formal leave procedure in a petition process. In that respect, it differs from the normal sift procedures in a criminal appeal. It does, however, remain open to the administrative judge to refuse to sanction a warrant for service of a petition, or any part of it, if it is thought that the grounds within it, or any of them, are manifestly without merit.