OUTER HOUSE, COURT OF SESSION

[2024] CSOH 11

P985/23

OPINION OF LADY CARMICHAEL

In the petition

THE PRESIDING CORONER OF NORTHERN IRELAND

Petitioner

against

SOLDIER F

Defender

Petitioner: Ross KC, Welsh; Balfour and Manson
Defender: Findlay KC, B Ross; BCKM

2 February 2024

Introduction

[1] The petitioner is the Presiding Coroner of Northern Ireland. He is the presiding judge in the Inquest into the deaths of Lawrence Joseph McNally, Anthony Patrick Doris and Michael James Ryan. Their deaths occurred in the context of a military operation in Coagh, County Tyrone, on 3 June 1991. The three deceased were the occupants of a vehicle on which soldiers opened fire. The vehicle continued moving and crashed into another vehicle and a wall, and burst into flames.

[2] The respondent, Soldier F, is one of the soldiers involved in the operation. His identity, like that of a number of other soldiers involved, is protected by way of a public

interest immunity certificate granted by the petitioner in the course of the inquest. All those soldiers have been given anonymity and are referred to by means of ciphers. They are referred to in the same way in this opinion.

[3] Soldier F is said to be one of the soldiers in a group that has become known to the inquest as the "arrest group". The inquest has heard evidence to the effect that Soldier H was positioned inside the Hanover House Hotel, Coagh, overlooking the lorry and car park performing a surveillance role. He told the inquest that at approximately 7.30am on 3 June 1991 he saw a Cavalier car travel into the village at speed across the Coagh Bridge, swing into the car park and come to a stop. He observed a person in the car endeavouring to aim a rifle in the direction of Soldier L and, on observing this, gave the "GO" order. The inquest has heard evidence that Soldier L dived for cover behind a wall adjoining the toilet building; that Soldiers A-D fired on the occupants of the car; and that it moved off down Main Street, crashed into a wall and then into a parked unoccupied Volkswagen car. At some point between the issuing of the "GO" order by Soldier H and the Cavalier crashing into the Volkswagen, the "arrest group" had made their way to Main Street and a number of these soldiers fired shots. The military continued to fire on the car and a number of witnesses, both soldiers and civilians, have stated that the Cavalier then burst into flames. There is no dispute that Soldier F was involved in planning the operation and no dispute that he was one of the soldiers on the ground who opened fire.

[4] This petition and complaint was presented to the Inner House under RCS 14.3(a) and remitted to the Outer House. It relates to a certificate of default issued by the High Court of Northern Ireland on 13 September 2023 under section 67(5) of the Judicature (Northern Ireland) Act 1978 following a hearing before Scoffield J. The certificate is in the following terms:

> "AND WHEREAS the service and default referred to below have been proven to the satisfaction of the Court;
>
> THE COURT NOW THEREFORE CERTIFIES that the person known as 'Soldier F' in these proceedings was served with a writ of subpoena issued under section 67 of the Judicature (Northern Ireland) Act 1978 requiring him to appear to give evidence at the coroner's court sitting at Laganside Courthouse, Belfast on 31 July 2023; and that, in default of the said requirement, Soldier F failed to so appear."

[5] Soldier F seeks dismissal of the petition on the basis that it is incompetent, and that the petitioner lacks title and interest to bring it. There is also a dispute as to the matters that are properly before me for consideration if the petition is competent. Soldier F invites me to carry out a wide-ranging fact-finding exercise in relation to matters he says are relevant to the question of whether he was in contempt of the order and what punishment if any should follow if he was in contempt. It is common ground between the parties that the certificate of default is not conclusive of whether the default constituted contempt.

History of proceedings in Northern Ireland

[6] On 5 September 2022 Soldier F applied to the inquest to be excused from giving evidence on medical grounds. He thereafter, however, provided a witness statement to the inquest dated 10 November 2022. The application came ultimately to be one for special measures.

[7] On 12 January 2023 the petitioner made a ruling on that application for special measures. Soldier F asked to be permitted to be excused from giving oral evidence, and instead to address any issues by way of written questions and answers. Other military witnesses had been given anonymity by use of ciphers, the right to give evidence by live link from outside the jurisdiction, and were to be screened from public view. Soldier F was to be afforded those measures, and the petitioner considered whether additional special measures

were necessary and proportionate. The petitioner recorded that Soldier F was an important and central witness whose evidence was directly relevant to a number of issues that must be decided by the court. In his ruling of 12 January 2023, at paragraph 6, the petitioner enumerates a number of features of Soldier F's statement which supported the view that his evidence was directly relevant to the issues for determination in the inquest.

[8] The petitioner considered the reports of two psychiatrists in relation to Soldier F, and also heard oral evidence from them. Having done so, he concluded that Soldier F should be required to give oral evidence subject to six conditions enumerated at paragraph 30 of his ruling. In short, he was to have the benefit of a number of additional special measures. The petitioner did not accede to the application that Soldier F should give evidence by way of written questions and answers.

[9] On 22 June 2023 the petitioner made a ruling on an application by Soldier F to be excused from giving evidence on the basis of fresh medical evidence. The petitioner refused the application and determined that Soldier F would give evidence in accordance with the ruling of 12 January 2023. Soldier F was scheduled to give evidence on 29 June 2023. On 26 June 2023 his solicitor wrote to the solicitor to the Coroner Service in the following terms:

> "I have taken urgent instructions over the weekend and without intending any disrespect to the Coroner Soldier F will not be attending to give evidence on Thursday.
>
> My understanding is that the Coroner will either proceed in the absence of Soldier F with the Inquest, or serve a subpoena/summons requiring his attendance. Should it assist I am instructed to accept service of a subpoena/summons, alternatively I can arrange a time when Soldier F is available to be served.
>
> I am instructed that if a subpoena/summons is served to apply to set it aside."

[10] The High Court of Northern Ireland issued a writ of subpoena, pursuant to section 67(1) of the 1978 Act on 30 June 2023. It required Soldier F to attend and give

evidence at Laganside Courthouse in Belfast on 31 July 2023. Rooney J ordered that the writ of subpoena should issue in special form for issue outside the jurisdiction. Soldier F applied to set the subpoena aside. McBride J heard the application and dismissed it on 27 July 2023. The application was grounded on Soldier F's health issues: see paragraph 4 of the judgment of Scoffield J. Soldier F did not appeal that decision. Soldier F's solicitors then wrote to the solicitor to the Coroner Service intimating that Soldier F would not attend to give evidence.

[11] As the writ of subpoena was served in Scotland, the petitioner asked the High Court of Northern Ireland to transmit a certificate of default to this court in terms of section 67(5) of the 1978 Act. Soldier F opposed that application. Scoffield J granted it on 13 September 2023.

[12] The petitioner has heard all of the evidence in the inquest save for that of Soldier F. The inquest remains open. As a result of the enactment of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 and the insertion of section 16A into the Coroners Act (Northern Ireland) 1959, the petitioner must complete the evidence in the inquest before 1 May 2024.

Competency; title and interest; *vires*; *functus officio*

[13] The first issues for determination are the competency of the petition and complaint, and the title of the petitioner to bring it. Mr Findlay submitted that the Rules of the Court of Session made no provision for a procedure to deal with the transmission of certificates under section 67(5) of the 1978 Act. The jurisdiction of this court could be invoked only on transmission by the High Court of Northern Ireland of a certificate of default. Section 67(5) conferred a power on the Court of Session, but did not make any provision for a procedure to be invoked on the application of a third party requesting the court to exercise that power.

It was for the court, and not for the petitioner, to initiate the procedure. Senior counsel made a related submission voicing concern that the petitioner had used the petition procedure to place "so much" information about the background before this court. It was not clear why this court required that information, or if it did, why it could not seek it of its own motion. He pointed out that Scoffield J had directed that the petitioner's solicitor should write to this court in order to provide it with a copy of Scoffield J's ruling, to explain the background to the proposed enforcement of the subpoena and the contact details of parties' respective representatives.

[14] Senior counsel sought to draw an analogy with contempt in criminal proceedings. No petition was required in proceedings of that sort. The court simply noticed the conduct potentially constituting contempt and would proceed to deal with it at its own hand.

[15] He submitted that the petitioner had no title or interest, and was acting *ultra vires* in bringing the application in his judicial capacity. He was *functus officio*. His real interest was in having Soldier F give oral evidence to the inquest, and that was something that the present proceedings could not achieve.

[16] I have determined to repel the first four pleas in law for Soldier F, which reflect the submissions to which I have just referred.

[17] The order was transmitted by email by an official of the Northern Ireland Courts and Tribunals Service to the Deputy Principal Clerk of Session on 13 September 2023. It is correct to say that there is no procedure in the Rules of the Court of Session specifically concerned with proceedings of this sort. Counsel were not able to identify any case in which this court had been asked to proceed following the transmission of a certificate under section 67(5) of the 1978 Act.

[18] The analogy with conduct potentially constituting contempt which the court observes and acts upon in the course of existing proceedings is not exact. In situations of that sort there is an existing process within which the court is acting. There is a closer, although still not exact, analogy with the process whereby a party brings to the attention of the court a breach of an interdict by means of a minute in the existing process: see, for example, *Transocean* v *Greenpeace Ltd* 2020 SLT 825. That is a situation in which a party brings to the attention of the court conduct on the part of another party in which the court has a legitimate interest, because it has made an order, but which would not otherwise come to the notice of the court.

[19] Where a certificate has been transmitted, there is no process within which the court is acting. The conduct of the individual is not conduct that the court has observed for itself, and it has not been brought to the attention of the court within an existing process. The certificate does not tell the court about the nature of the default, or the significance or nature of the proceedings in which it occurred. These are all matters which the court would know if the potential contempt occurred in the course of proceedings before it, or would learn in a minute and answers in an existing process. Where a judge or sheriff has observed conduct in court, she may deal with contempt summarily at her own hand. Where contempt occurs outside the court, it is normally the subject of an application made by a party with an interest. If there is no subsisting process, procedure in the Court of Session is by way petition and complaint: *AB and CD* v *AT* 2015 SC 545, paragraph 3.

[20] I am satisfied that the petition and complaint procedure is appropriate in the circumstances. The court is being asked to intervene in a way which does not involve simply the determination of the rights and obligations of parties. The need for intervention of that sort is the critical feature to determine whether or not petition procedure is required,

and if it is required, it must obviously be competent: *Hooley Ltd* v *Ganges Jute Private Ltd* 2019 SC 632, paragraph 15.

[21] It is necessary to have some form of process bringing to the attention of the court the background to the default which may constitute contempt and fall to be punished. It is a safeguard for the respondent so far as fair procedure is concerned. In *AB and CD* a sheriff proceeded at her own instance in respect of a failure to respect an order she had made. She did so where the contempt did not occur in a live process, and in a situation where she had not herself seen what happened. There was no form of written application setting out the nature of the alleged contempt. The court (in dealing with a petition to the *nobile officium* seeking to have a finding of contempt quashed) expressed disapproval of the procedure the sheriff adopted, although it did not require to determine its legality: paragraphs 6, 9.

[22] The petitioner's account of the background is set out in the petition, so that the respondent can, as he has done, provide answers enabling the court to identify disputes about matters that are relevant to how the court should proceed, and to decide what further inquiry, if any, is required: *AB and CD*, paragraphs 7 and 8. There is no need for proof of facts that are judicially admitted. The court does require information about the proceedings in which the certified default occurred, and the significance of the witness in those proceedings. Those are clearly relevant to how the court might ultimately dispose of the matter.

[23] As to the title and interest of the petitioner, it is difficult to identify a party other than the petitioner, as the coroner responsible for the inquest, who would have an interest in drawing to the attention of this court Soldier F's default. Although it cannot be conclusive as to the title and interest of the petitioner in these proceedings, I note that neither the court nor Soldier F suggested in the proceedings before Scoffield J that the petitioner lacked

standing to make the application for transmission of a certificate of default. The petitioner is not *functus officio* in respect of the inquest, as the inquest remains open. While it is no doubt true that the petitioner maintains some hope that these proceedings will prompt Soldier F to give oral evidence, and true also that I cannot compel him to do so, it does not follow that the petitioner lacks title and interest to bring Soldier F's default to the attention of this court.

[24] Soldier F complains that it is outside the scope of the petitioner's powers as a coroner in Northern Ireland to act as a litigant in these proceedings. The role of the petitioner in these proceedings is to bring the matter to the attention of the court, and to assist the court regarding matters of fact and law which may bear on the question of whether contempt has occurred. He cannot, and does not seek to, say anything about what penalty, if any, the court should impose in the event of a finding of contempt. He is in a similar position to a minuter in respect of a minute for breach of interdict. It is difficult to identify a party other than the petitioner who would be appropriately placed in terms of his interest and the information he can provide to the court to assist in this way.

Scope of inquiry and relevancy of the respondent's pleadings

[25] Section 67(5) of the 1978 Act provides:

> "If any person served with a writ issued under this section does not appear as required by the writ, the High Court, on proof to the satisfaction of the court of the service of the writ and of the default, may transmit a certificate of the default under the seal of the court or under the hand of a judge of the court, if the service was in Scotland to the Court of Session in Edinburgh … and the court to which the certificate is so sent shall thereupon proceed against and punish the person so having made the default in like manner as if that person had neglected or refused to appear in obedience to process issued out of that court."

Submissions

[26] It was common ground that default did not fall to be equated with contempt. This court required to proceed as it would with an individual who had failed to obtemper a citation emanating from it. It therefore required to determine whether the default, namely the failure to appear to give evidence, constituted contempt of court. If it made a finding of contempt, it required then to determine what punishment if any it should impose. I accept that analysis. It is clear from the use of the word "shall" that this court must "proceed against" the individual. The court's hands are not tied in relation to the question of whether a contempt has occurred by the decision of the court in Northern Ireland to transmit a certificate of default.

[27] I was provided with a number of authorities in relation to contempt of court, vouching propositions which I did not understand to be controversial. No question of punishment could arise unless and until there were a finding of contempt: *HM Advocate* v *Bell* 1936 JC 89. Contempt of court is constituted by conduct that denotes wilful defiance of, or disrespect towards, the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law itself: *Robertson & Gough* v *HM Advocate* 2008 JC 63. What amounted to contempt depended on all the relevant facts and circumstances; a failure was not automatically a contempt: *AB and CD*, at paragraph 29.

[28] Ms Ross submitted that it was theoretically possible that a default in relation to which a court had transmitted a certificate did not also constitute a contempt. In practice it was unlikely that that would occur. Section 67(5) provided the transmitting court with a discretion as to whether to transmit, even where it was satisfied that the writ had been served, and satisfied as to the default. It was possible to envisage a situation in which the witness disclosed circumstances incompatible with or substantially undermining the notion

that the default constituted contempt only at the stage of the application for transmission of a certificate. It would be open to the court to take that information into account in determining whether to transmit a certificate. It would be unlikely to waste the time of the receiving court in a case where information of that sort was available.

[29] She submitted that the admitted default in this case, read with the terms in which agents for Soldier F communicated his refusal to attend, demonstrated wilful contempt on his part, and that it would be open to me to find contempt proved on that basis without further inquiry. What had happened here was plainly a deliberate refusal to comply with an order of the court. Some of the averments for Soldier F were potentially relevant to penalty, about which she would advance no submission, but others were irrelevant because they sought to re-litigate matters already determined by the courts in Northern Ireland.

[30] Soldier F makes averments in answer 9 about his age and the state of his physical and mental health. He says that he suffers from post-traumatic stress disorder as a result of many traumatic incidents in the course of his service. He is afraid of being targeted as a result of his service in Northern Ireland, and his fears have been exacerbated by the prospect of giving evidence in person by live link. In answer 10 he makes extensive averments about the merits of the psychiatric evidence that was before the petitioner when he made the ruling about special measures. The final averment in answer 10 is that the petitioner erred in refusing the application for special measures (in respect of the application to use written questions and answers), and ought instead to have granted it. The content of answer 11 is similar, but directed at the decision of the petitioner to refuse the application to excuse Soldier F from giving evidence. In answer 18.3-4 he avers that he was unable to attend to give oral evidence to the inquest by reason of medical unfitness due to mental disorder.

[31] In submissions, Mr Findlay maintained it was open to me to hear evidence supporting the proposition that Soldier F was not fit to give evidence as at the day when he was required to do so by the subpoena. If I accepted evidence to that effect there could be no question of holding that Soldier F had been in contempt. It was entirely a matter for this court, and it did not matter that the result might be that I made findings as to Soldier F's fitness to give evidence which ran counter to those of the petitioner. If I were to limit the scope of inquiry on that matter, I would risk denying Soldier F a fair hearing. There had never been a finding as to Soldier F's fitness to give evidence as at 31 July 2023. In the course of discussion I asked senior counsel whether he was in a position positively to aver that there had been any change in Soldier F's medical condition between 27 July 2023 when McBride J dismissed the application, made on medical grounds, to set aside the subpoena, and 31 July 2023 when Soldier F was in default. He responded that he was not.

[32] Mr Findlay emphasised the need for an inquiry into all the facts and circumstances relevant to whether Soldier F was in contempt. Soldier F had been willing to provide written answers to written questions. He had provided a statement. Mr Findlay queried why he was required for cross-examination at all, given what he characterised as the limited questions for the inquest in terms of rule 15 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963.

Decision

[33] The respondent's averments after the words "*quoad ultra* denied" in each of answer 10 and answer 11 are irrelevant, and I will exclude them from probation. The petitioner's decisions about special measures and his refusal to excuse Soldier F are valid decisions unless and until successfully challenged in a court of competent jurisdiction. It is

not for me to find that he erred in making them. Soldier F's averments explicitly invite me to do so. He invites me to look at the evidence that was before the petitioner and to reach different conclusions. What underlies his position is that the decisions that he should give evidence were wrong, and that he should therefore not be found in contempt for failing to appear to give evidence. He does not accept the decisions as valid decisions, although as a matter of law they are.

[34] The averments that Soldier F was medically unfit to give evidence at the time that he was required to (31 July 2023) are not relevant, and I will not permit inquiry directed to that matter. Soldier F disagreed and continues to disagree with the petitioner's refusal on 22 June 2023 to excuse him from giving evidence. After that ruling, two judges of the High Court of Northern Ireland considered the matter. The first issued the subpoena *ad testificandum*. The second, McBride J, considered an application, founded on Soldier F's health issues, to set aside the subpoena. The question of whether he ought to be required to give evidence was determined at that point by a competent judicial authority before whom Soldier F had the opportunity to put material relating to his state of health. He took that opportunity. McBride J refused the application. Soldier F does not aver that anything regarding his health altered between 27 July 2023 when McBride J dealt with his application and 31 July 2023 when he was in default. Although there are no averments that her decision was made in error, it is implicit in Soldier F's position that he will invite me to reach a conclusion that is inconsistent with his having been subject to a valid order of court that he should be required to give evidence. To do so would be inconsistent with the respect that this court must afford to the orders made by courts of competent jurisdiction in other parts of the United Kingdom. It would be inconsistent with established notions of comity.

[35] There is no unfairness in refusing to permit inquiry on this matter, because Soldier F has had the question of whether he should be required to give evidence considered on a number of occasions in the proceedings in Northern Ireland. He has not challenged the decisions of the petitioner, or appealed against the decision of McBride J.

[36] In addition to the pleadings in answers 10 and 11 which I have excluded from probation, there are averments to the effect that he was unfit to give evidence at the material time in answer 18.3-4. Those averments are mixed with averments that are potentially relevant at least to questions of penalty, and it follows that only parts of those answers should be excluded from probation. I will exclude the following.

Answer 18.3

- on page 13, lines 5-6: "of the requisite nature and quality to justify excusal"
- on page 13, lines 9-10: "such that he was unable to give oral evidence at the inquest"
- on page 13 lines 15-16: "Accordingly the respondent was unable to attend to give oral evidence to the inquest by reason of medical unfitness due to mental disorder".

The averments that follow are of doubtful relevancy to the extent that they say that certain circumstances "remain" the case, and that Soldier F "remains" unfit, which necessarily implies that he was unfit at the material time. To the extent that they give notice of a contention that he would not be able to purge any contempt by giving evidence now, they are potentially relevant to mitigation in the event of a finding of contempt, and I will admit them to probation on that basis.

Answer 18.4

- The first six sentences

- On the final line of page 13, and first two lines of page 14, from "In any event a finding of contempt" to "Accordingly".

Further procedure

[37] Parties agreed in the course of the hearing that I should deliver my decision on the respondent's preliminary pleas, and on the relevancy of those parts of the respondent's answers to which I have just referred, and that I should not at this stage move directly to considering whether to make a finding of contempt.

[38] Parties will now have a short period on which to reflect in the light of this decision, in particular on the question of the scope of further inquiry, what evidence if any will be led, and in what form, and how the hearing may be conducted. For obvious reasons Soldier F has not been personally present, and it is necessary to afford time for those advising him to consult with him in appropriate conditions of security in relation to the outcome of the proceedings so far.