APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 24
HCA/2021/000011/XC

Lord Justice Clerk
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD PENTLAND

in

BILL OF ADVOCATION

by

JAMES RUSSELL

Complainer

against

HER MAJESTY'S ADVOCATE

Respondent

Complainer: C M Mitchell QC; Collins & Co, Edinburgh for Virgil Crawford, Stirling
Respondent: A Prentice, QC, sol adv, AD; Crown Agent

24 March 2021

Introduction

[1] This Bill of Advocation challenges a decision made by the sheriff at Falkirk on 22 December 2020 to refuse to determine the complainer's application for review of an earlier ruling not to allow him bail. The sheriff regarded the application as incompetent because the Sheriff Appeal Court ("the SAC") had previously refused appeals brought by

the complainer against decisions not to grant him bail in the present proceedings. The Bill raises a question as to which there appears to be some uncertainty in practice. The issue is whether the determination of a bail appeal by the SAC has the effect that any future applications for review of bail can only competently be entertained by that court rather than by the sheriff at first instance.

Factual background

[2] On 6 May 2020 the complainer appeared at Falkirk Sheriff Court on a petition alleging contraventions of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 and section 49(1) of the Criminal Law Consolidation (Scotland) Act 1995. He was committed for further examination and remanded in custody, an application for bail having been refused. At a further appearance on 13 May he was committed until liberated in due course of law. As he was entitled to do under section 23(4) of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"), the complainer renewed his application for bail. The application was refused. The complainer appealed against that decision to the SAC (see section 32 of the 1995 Act). On 21 May his appeal was refused.

[3] Subsequently an indictment was served on the complainer with a first diet fixed for 1 September 2020. On that date the complainer made an oral application for review of bail in terms of section 30 of the 1995 Act. The basis of the application was that there had been a material change in circumstances in view of his continued remand in custody and the inability of the court to appoint a trial diet. The application was refused. The first diet was continued to 6 October 2020.

[4] On 6 October 2020, the complainer made a further oral application for review of bail; this was essentially on the same grounds as the one made (and refused) on 1 September.

The sheriff refused to consider the application; he took the view that it would be incompetent for him to do so because the SAC had already determined the question of bail in May. At the hearing the first diet was again continued, this time until 22 December 2020. Following the hearing on 6 October, the complainer appealed to the SAC against the sheriff's refusal to allow him bail. The SAC on 2 November 2020 refused the bail appeal.

[5] On 22 December 2020 the case called before the sheriff at Falkirk. The First Diet was once again adjourned, this time until 2 February 2021. The complainer applied for the refusal of bail to be reviewed. The minute states that the sheriff *ex proprio motu* refused to make a determination regarding the application for bail "being of the view that it has previously been decided by the (SAC)".

[6] The complainer now submits to this court that contrary to the view taken by the sheriff his application for review of bail on 22 December 2020 was competent and the sheriff should have addressed it on its merits.

Section 30 of the 1995 Act

[7] Since the terms of this provision are at the heart of the case it will assist if we set out the pertinent parts of it. Section 30 of the 1995 Act provides *inter alia* as follows:

> (1) This section applies where a court has refused to admit a person to bail or, where a court has so admitted a person, the person has failed to accept the conditions imposed or that a sum required to be deposited under section 24(6) of this Act has not been so deposited.
>
> …

> (2) A court shall, on the application of any person mentioned in subsection (1) … have power to review (in favour of the person) its decision as to bail, or **its** decision as to the conditions imposed, if—
>
> (a) the circumstances of the person have changed materially; or
>
> (b) the person puts before the court material information which was not available to **it** when **its** decision was made. (Emphasis added).

Sheriff's report

[8] In his helpful report to this court the sheriff confirmed that he refused to consider the motion for review of bail on 22 December 2020 because he considered it to be incompetent. He explained that it is regularly submitted by agents for an accused that even where an appeal on the question of bail has been determined by a superior court, an inferior court could, where there has been a material change in circumstances, revisit the question of bail. The sheriff considered that as it could only be the superior court which could be aware of the circumstances at the time of its decision, and having made a decision based on those circumstances, it was for the superior court only to determine if there has been a material change in circumstances. He observed that there appeared to be a divergence of practice within the shrieval judiciary on whether or not to consider applications for bail where an appeal on an earlier decision on bail had already been considered by a superior court.

[9] The sheriff referred to the following passage in *Renton and Brown's Criminal Procedure* (6th ed. para 10.20.1) :

> "These provisions (i.e. section 30) are without prejudice to the right of appeal to the appropriate appeal court on bail, but once an appeal has been disposed of a lower court will not entertain an application for review which must be made to the appeal court"

[10] The sheriff drew attention to what was said on the issue by sheriff C H Johnston QC in *HM Advocate* v *Jones* 1964 SLT (Sh Ct) 50 at 51:

> "There can be no doubt that the determination of the High Court on an appeal from a decision of this court is a decision in the general sense … but I do not find warrant in … (section 37(2) of the Criminal Justice (Scotland) Act 1963 - the predecessor of section 30 of the 1995 Act) for the view that a judge in an inferior court has power to review either the amount of bail fixed by the Supreme Court, or, as in this case where a material change of circumstances has taken place, the ultimate determination as to the allowance or refusal of bail. Such a course would offend against all established practice, and could be pursued only upon the clearest legislative warrant. This is absent".

[11] The sheriff considered himself to be bound by the judgment of Lord Cameron in *Ward* v *HM Advocate* 1972 SLT Notes 22 which, in the sheriff's view, could be read in one of two ways. The first possible interpretation was that where the appeal court had not interfered with the decision of the inferior court, the appeal court had not made a decision in the general sense and the inferior court's decision stood. In that case it was for the inferior court to review its own decision. The second possible interpretation was that the appeal court, in refusing the appeal, had made a decision in the general sense, and that decision could only be reviewed by the appeal court.

[12] The sheriff's view was that the second interpretation was more in line with *Jones* which involved an appeal to the appeal court in respect of a decision to refuse bail in the inferior court. The sheriff's decision having been upheld by the appeal court, it was found that any subsequent review was a review of a decision in the general sense of the appeal court. The sheriff added that he was not aware of *Ward* having any received any judicial treatment which altered the clear view expressed in *Jones*.

Submissions for the complainer

[13] The principal submission for the complainer was that the lower court retained the power to consider applications for review of bail even though there had been an appeal at some stage to the SAC. If that proposition was thought to be too wide, then the lower court had power to consider any application for a review of bail unless the outcome of a bail appeal had been that the SAC itself decided to allow bail.

[14] The role of the SAC was to consider whether the sheriff had erred in the exercise of his discretion in refusing bail. Where an appeal was refused the SAC simply confirmed that there was no error in the sheriff's decision; it did not consider the matter afresh. The court that refused bail for the purposes of section 30 of the 1995 Act was the Sheriff Court. As such, the application made to the sheriff on 22 December 2020 had been competent and should have been addressed on its merits.

[15] In dealing with an appeal by an accused person, the SAC will either refuse the appeal, thereby affirming the decision of the sheriff (in which case it normally states that there was no error in the sheriff's decision) or it will grant the appeal and admit an accused to bail. In granting such an appeal the SAC was considering matters on the basis of the same factual background as the sheriff. It was not considering new circumstances or information. It was considering the same information presented to the sheriff and generally referred to in the report provided by the sheriff in the course of the appeal process. The SAC was not considering any new facts nor was it considering a change of circumstances.

[16] The 1995 Act does not stipulate that reviews of bail can only be undertaken by a superior court in circumstances where a superior court has considered it. Section 30 refers to "a court" as opposed to "the court".

[17] A court considering whether there was a material change in circumstance could do so by simply ascertaining the reasons minuted for the original decision, the alleged change

of circumstances relied upon and when the change of circumstances arose. In the event, for example, of a prosecution being further postponed as it had had to be in the present case, it would be obvious that this was a material change in circumstances. The SAC in resolving an appeal essentially confirmed that the decision of the sheriff was correct and ought not be interfered with. It affirmed the decision of the sheriff rather than reaching its own substantive decision.

[18] When an application is made for a review of bail, after a material change of circumstances, the lower court is not being asked to review a decision of the superior court; rather it is being asked to exercise its own power to consider the grant of bail in respect of the circumstances then presented to it.

[19] It is unnecessary, unduly burdensome and not cost-effective to require all persons who have appealed against a bail refusal, or who seek a variation of conditions imposed on bail, to apply to the superior court where it could be shown to the lower court that there was a material change in circumstances. If that was not the case then it would mean that even incidental matters such as applications for variation of bail, such as a change of address, or a change of hours of curfew to accommodate employment, would require to go to the appeal court in both summary and solemn matters.

Submissions for the Crown

[20] In its answers to the Bill the Crown submitted that the order of the sheriff on 22 December 2020 was not wrongous or oppressive and as such the Bill should be refused.

[21] The sheriff did not err in reaching the decision that it was not competent for him to consider bail on 22 December 2020. The SAC had previously refused bail on 21 May 2020 and again on 2 November 2020. Bail having been considered and refused by the SAC, it was

not competent for the sheriff to review that decision. Any further bail review required to be considered by the SAC.

[22] The existing law did not support any inference that where a bail appeal has been refused the sheriff can subsequently review the decision of the relevant appeal court. *Jones* and *Ward* both vouched the proposition that a decision to refuse a bail appeal constitutes a "decision" on bail for the purposes of any review under section 30. The circumstances of the present case were similar to those in *Jones* where an accused appealed to the High Court against a refusal of bail and his appeal was refused. The sheriff-substitute correctly held that it was incompetent for him to review that decision and any review had to be undertaken by the High Court. The Court in *Ward* confirmed that the decision in *Jones* had been correct.

[23] Notwithstanding what was said in the Crown's written submissions, in his oral argument the advocate depute acknowledged that there would be practical disadvantages in interpreting section 30 of the 1995 Act so as to mean that in any case where there had been an unsuccessful bail appeal by an accused person the court of first instance was disabled from considering an application for a review of bail where there had been a material change of circumstances or where new information had become available. He invited us to give guidance on the point.

Analysis and decision

[24] In *Ward* there had been an earlier unsuccessful Crown appeal against the allowance of bail. When the accused later appealed against the amount of monetary bail fixed by the lower court Lord Cameron held that the question of the amount of bail was still within the

purview of the court which initially fixed the amount of the bail and whose decision in that respect had not so far been subjected to review. His Lordship continued as follows:

> "As the High Court dealt only with one particular point then, the case stands thus: the appellant was admitted to bail by the competent court: its decision in so doing was upheld on appeal and the initial statutory power of review of the amount of bail fixed by that court was not affected, as no determination on that point was made by the High Court. It therefore appears to me that it is still open to the court which originally fixed the amount of bail to exercise the power of review in that regard which is specifically provided for by section 37(2) of the Act of 1963 and consequently that this appeal is incompetent as being premature."

[25] Lord Cameron went on to observe that *Jones* was a somewhat unusual case. There the sheriff-substitute, far from being invited to review his own decision, was being invited to review a decision of the High Court. The issue in *Jones* was in effect whether the sheriff-substitute had power to reverse a decision on appeal from a sheriff-substitute. His Lordship considered that the sheriff-substitute in *Jones* had been correct to hold that such a review by him was incompetent.

[26] From this it would appear that Lord Cameron proceeded on the footing that, as a matter of principle, a lower court could not review a substantive decision made by a higher court. We respectfully agree. However, the *ratio decidendi* of *Ward* was that the lower court could review the amount of bail notwithstanding the fact that there had been an unsuccessful Crown appeal against the allowance of bail. This was because there had been no substantive decision made by the higher court on that particular matter; thus the operative decision on that aspect remained the ruling of the lower court. Again, we respectfully agree. Insofar as Lord Cameron's further remarks appear to endorse the conclusions of the sheriff-substitute in *Jones*, we consider that the remarks were *obiter dicta*. To that extent, we respectfully have to differ.

[27] In our opinion, the question in the present case is governed by the terms of section 30 of the 1995 Act. Read together, sub-sections (1) and (2) make clear that "a court" has power to review "its decision" *inter alia* to refuse bail if the accused person's circumstances have changed or the person puts before the court material information which was not available "to it" when "its decision" was made. In circumstances where (such as in the present case) the lower court has refused bail and the accused person has unsuccessfully appealed against that refusal, we consider that the decision to refuse bail is and remains the decision of the lower court. It follows that the lower court has and continues to have the power to review its original refusal of bail, even though there has been an unsuccessful appeal brought against the refusal of bail by the accused person. This seems to us to be the ordinary and natural meaning of the language used in sub-sections (1) and (2) of section 30 of the 1995 Act. Looking at the matter through a slightly different lens, there is no decision by the appellate court to refuse bail; instead there is a decision by the appellate court to refuse an appeal against the refusal of bail. The original decision by the lower court to refuse bail has been affirmed by the appellate court; it continues to stand and is amenable to review under section 30 in the lower court.

[28] This makes practical sense and appears to us to be faithful to the statutory scheme. Otherwise, the mere fact of an unsuccessful defence appeal would mean that the appellate court remained seised for the entire subsistence of the proceedings of all matters relative to bail so that, for example, an application for a change of bail address or for a modification of curfew conditions would have to be brought before the appellate court. So would an application for a review of bail where a trial was adjourned mid-stream through no fault of the accused. All this would be cumbersome, unduly expensive, and liable to create avoidable delay and ultimately injustice.

[29] Where, on the other hand, the appellate court has sustained a defence appeal it has thereby substituted for the first instance decision its own allowance of bail. In such circumstances we consider that there has been a decision by the appellate court of the type covered by sub-sections (1) and (2) of section 30 with the consequence that subsequent applications for review of the appellate decision to allow bail, for example by varying the conditions of bail set by the appellate court, would fall to be considered by the appellate court rather than by the court of first instance. In such circumstances there has been a substantive new decision by the appellate court rather than a mere affirmation of the original decision made by the lower court.

[30] We note that the approach we favour is consistent with what is stated in paragraph 4.1.5 of the Criminal e-Bench Book published online by the Judicial Institute for Scotland. The paragraph says this:

> "Care must also be taken where a bail review is sought following an earlier appeal against the sheriff's decision on bail. Where the appeal did not succeed (and the sheriff's original decision was upheld) the sheriff can, of course, determine any subsequent application to review the original order. However, where an appeal against the sheriff's original decision succeeded, the order admitting the accused to bail, or remanding him in custody, is an order of the Sheriff Appeal Court and cannot, therefore, be reviewed by the sheriff. In that situation any application for review should be made to the Sheriff Appeal Court."

[31] It follows that we consider the reasoning and decision of the sheriff-substitute in *Jones* to have been misconceived. To the extent that Lord Cameron in *Ward* approved the decision in *Jones* we are unable to agree with his Lordship's view. The statement in paragraph 1.20.1 of *Renton and Brown's Criminal Procedure* is inaccurate in stating that "once an appeal has been disposed of" a lower court will not entertain an application for review which must be made the appeal court. The position is more nuanced than that; it is correctly set out in the passage we have cited from the Criminal e-Bench Book.

[32] It follows also that the reasoning and decision of the sheriff on 22 December 2020 in refusing to entertain the complainer's application for a review of bail was erroneous. The application was competent and should have been addressed on its merits. We shall accordingly pass the Bill and remit to the sheriff to proceed as accords.