APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 45
HCA/2021/5/XJ

Lord Justice General
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

BILL OF SUSPENSION

by

BRIAN DOCHERTY

Complainer

against

HER MAJESTY'S ADVOCATE

Respondent

Complainer: A Ogg (sol adv); Paterson Bell (for Tod & Mitchell, Paisley)
Respondent: A Prentice QC (sol adv) AD; the Crown Agent

19 October 2021

Procedure

[1] On 29 November 2020 Mr Docherty was charged by the police with assault to severe injury. He was released on an undertaking (Criminal Justice (Scotland) Act 2016, s 25) to attend Dunoon sheriff court on 10 December. He did so, only to be told that his undertaking had been "cancelled" and his case would not call on that day.

[2] On 22 July 2021, the procurator fiscal sought, and was granted, a petition warrant from the sheriff at Dunoon authorising, *inter alia*, Mr Docherty's arrest on the charge. The sheriff was not advised of the prior procedure. He signed the petition warrant. On Saturday, 7 August, Mr Docherty was arrested and detained at a police office. On Monday, 9 August, he appeared at Greenock sheriff court. He was committed for further examination and released on bail. He has not yet been indicted.

[3] The Bill seeks suspension of the petition warrant on the basis that it was oppressive for the PF to seek a warrant for the petitioner's arrest without telling the sheriff about the prior procedure. If that had been done, it is said that the sheriff would have granted the warrant only on the condition that Mr Docherty would initially be invited to attend court voluntarily. In his report, the sheriff refutes this. He would not have anticipated being told why a warrant was necessary. Solemn procedure could only be commenced by petition warrant. There was no statutory basis for attaching a condition. Even if he had been told of the previous procedure, that would not have prompted him to make further enquiries or to refuse to grant the warrant.

Submissions

[4] It was submitted on Mr Docherty's behalf that, if an accused person was to be deprived of his liberty, the Crown required to make "full disclosure" of all material considerations, including the previous procedure. Although warrants were often granted on the basis of what was said on their face (Hume: *Commentaries* ii 77), they could be refused if no explanation for their necessity was provided (Renton & Brown: *Criminal Procedure* (6th ed) para 503), the information given to the sheriff was misleading (*McDonagh* v *Pattison*

2007 SCCR 482) or the circumstances amounted to oppression (*CH* v *Donnelly* 2013 SCCR 160).

[5] Although not referred to in the Bill, the submissions added that, while Article 6 of the European Convention on Human Rights did not apply to the administrative act of granting a warrant, Article 5 did. It provided that the deprivation of a person's liberty had to be in accordance with a procedure prescribed by law. There was no procedure prescribed for the consideration of petition warrants. There was no method whereby the sheriff could be satisfied that there was a reasonable suspicion that Mr Docherty had committed the offence alleged (*Fox* v *United Kingdom* (1990) 13 EHRR 157 at para 32). This was in contrast to the situation in which a person was brought to court and remanded in custody; prior to which a custody statement was served. There was no basis for concluding that Mr Docherty would not attend court voluntarily when requested to do so. In a further departure from the ground in the Bill, it was said that the sheriff's conduct, in the absence of sufficient information, was also oppressive.

[6] The Advocate depute replied that the court should only entertain the point raised in the Bill and not one that encompassed Article 5. The petition had contained all the information that was required in respect of both the accused and the offence. There was no basis upon which the sheriff could have refused to grant the warrant or granted it subject to any condition. A petition warrant under section 34 of the 1995 Act was not sought because of any concern about non-attendance, but as the only competent means of commencing solemn proceedings short of serving an indictment. Information about whether Mr Docherty had previously been released on an undertaking was irrelevant. *CH* v *Donnelly* and *McDonagh* v *Pattison* were both distinguishable on their facts and because they involved summary proceedings, which could be initiated by postal citation. A warrant would only be

granted in such proceedings if the sheriff considered it expedient to do so (1995 Act, s 139(1)(b)).

Decision

[7] As in *Lin* v *HM Advocate* 2014 SCCR 109 (LJC (Carloway) at para [16]) it is not, in the context of this Bill, necessary to indulge in an essay on the history and origins of pre-committal procedure. It is nevertheless important to recognise the limited function of a petition warrant within that procedure. The function of the petition warrant is simply to obtain judicial authority to bring an accused before the court on the charges libelled by the procurator fiscal. It is not intended to be an authorisation to deprive the accused of his liberty for any significant period. Historically, if the accused were arrested on the warrant, he would be brought before the sheriff "with all convenient speed" (Alison: *Practice* 129 (para 9)) or "with the least possible delay" (Renton & Brown: *Criminal Procedure* (1st ed) 37 (para 7)). The arresting officer required to "carry him as quickly as he can before a magistrate", although he might have to detain him overnight because of the lateness of the hour. In days of yore an examination might have taken place on a Sunday (Renton & Brown *ibid*).

[8] Because the petition warrant had such a limited purpose, there was no requirement on the part of the sheriff, at the stage of presenting the warrant, to do other than ensure that the warrant was in proper form; ie that it sufficiently described: the informer (the PF); the accused; and the charge. The sheriff's function at the stage of granting the warrant is only to check its legality. The time for examining the information and deciding whether the accused should be committed and granted bail, would only arise when the accused appeared before the sheriff. That remains the position. The sheriff and the accused are provided with a

custody statement for this purpose by the PF containing a summary of the evidence against the accused.

[9] A petition warrant has other important purposes. It marks the start of a prosecution, which has consequences in relation to time bar, since the accused must be brought to trial within 12 months of his first appearance (1995 Act, s 65(1)(b)). It enables the procurator fiscal to instruct the search of the accused and his address. It permits the citation of witnesses for precognition and requires witnesses to produce any items relevant to a potential prosecution. Since the appearance on petition commences the prosecution, the accused will enjoy the important rights safeguarded by Article 6 thereafter.

[10] There is, of course, no requirement that an accused be arrested on a petition warrant before he appears in court. He may attend court voluntarily, by arrangement, and be given a copy of the petition at that stage or earlier. The sheriff still requires to sign the warrant at the time of the appearance, even if the accused is present. That is frequently done. The warrant on the petition is needed to commence the proceedings.

[11] When a sheriff is presented with a petition in advance of any appearance, he or she will almost always grant the warrant; it being sufficient that the application is made by the public prosecutor, who is under an obligation not to seek a warrant in the absence of some evidential basis for doing so. The sheriff does not enquire into whether the arrest element should be executed; that being a matter for the judgement of the procurator fiscal. The sheriff, and in many cases the PF, will not know, at the stage of granting the warrant, whether that will be needed. The fact of an earlier appearance on an undertaking is not determinative of that issue. The warrant specifically states that the accused should be detained only "if necessary". The sheriff is entitled to proceed on the footing that the PF, as the public prosecutor, will exercise the powers granted by the warrant in a responsible

manner. The situation would be different if a sheriff was misled into granting a warrant for arrest in a summary case in which section 139(1)(b) of the 1995 Act comes into play (*McDonagh* v *Pattison* 2007 SCCR 482). This empowers the sheriff to grant warrant for arrest where it appears expedient so to do.

[12] The court has considered *CH* v *Donnelly* 2013 SCCR 160. It is clear from the material provided to the court that *CH* concerned a petition warrant, although the court appears to have proceeded on the basis that summary proceedings were in contemplation (see para [5]). Whether that is so or not, *CH* involved circumstances which potentially barred any prosecution and a request by the PF for a warrant without informing the accused's agent, with whom the PF was already communicating, that this would occur. That is a different situation.

[13] In these circumstances, the legal basis for suspending the warrant in the Bill is not made out. The court will refuse to pass the Bill accordingly. If the PF did instruct the detention of Mr Docherty when it was not necessary to do so, that could potentially constitute oppressive conduct. The instruction would not invalidate the warrant, although it may give rise to other remedies.

[14] In the absence of averments relative to Article 5 in the Bill, the court declines to address its possible application. The matter is not properly focused in this process and the Crown have not had a proper opportunity to respond. Article 5.1(c) permits the arrest or detention of a person for the purposes of bringing him before a court on reasonable suspicion of having committed an offence. In this case, although in submissions it was said that the issue of such a suspicion was not considered by the sheriff, it was not suggested that such a suspicion did not exist or that it had not been considered by the PF. If there is to be a contention that, contrary to the practice that has been in place for at least two centuries, the

sheriff should examine the information in advance of the accused's first appearance in court, properly focused averments and full submissions on the European jurisprudence will be required. Similarly, if it is to be suggested that, for Article 5 purposes, there requires to be consideration by a judicial authority or the PF on whether an accused needs to be arrested in order to bring him to court promptly, that too will require a far greater examination of the European jurisprudence than has been provided to the court hitherto. A question may also arise of whether accused persons are in modern practice actually being brought "promptly" before a judge after arrest in circumstances where, as here, the appearance is two or three days later. That too may be a question for another day.