SHERIFF APPEAL COURT

[2023] SAC (Crim) 4
SAC/2023/000122/AP
SAC/2023/000123/AP

Sheriff Principal N A Ross
Appeal Sheriff H K Small
Appeal Sheriff D Hamilton

OPINION OF THE COURT

delivered by Sheriff Principal N A Ross

in

the appeals

by

PROCURATOR FISCAL, PETERHEAD

Appellant

against

BRANDON DOUGLAS

Respondent

and

PROCURATOR FISCAL, PETERHEAD

Appellant

against

JOHN POW

Respondent

Appellant: Ewing, KC, sol ad, advocate depute; Crown Agent
Respondents: Jane, sol ad; Iain Jane & Co, Peterhead

25 April 2023

[1] These appeals are Crown appeals against the sheriff's decisions following debate under section 174 of the Criminal Procedure (Scotland) Act 1995. In each case the sheriff purported to sustain a defence plea in bar of trial, based on oppression by the Crown. In each case the respondent is charged with a contravention of section 41AZ of the Prisons (Scotland) Act 1989, by possessing an unauthorised sim card within prison. Each respondent submitted that it was oppressive of the Crown to prosecute him, because they had already received disciplinary punishment for the same acts.

[2] The disciplinary punishments were administered by the prison authorities. The respondent Douglas was disciplined by 7 days loss of recreation, 7 days loss of earnings and 7 days loss of access to personal cash. The respondent Pow was disciplined by 14 days (suspended) loss of earnings, 14 days (suspended) loss of recreation, and 14 days (suspended) loss of access to personal cash.

[3] The basis for the sheriff's decision in each case was oppression. The sheriff referred to her own unreported decision in an earlier case of *James*, where she came to the same conclusion. In *James* she did not agree with the Crown submission that it was necessary to prosecute contraventions of section 41AZ in order to avoid unauthorised use of sim cards in prison. The basis for the sheriff's reasoning in *James*, imported into the present cases without further analysis, was "It seems to me that there can be no doubt that the charge dealt with by the disciplinary hearing in prison is part of the criminal law". The sheriff applied that reasoning, without further enlarging upon it, in the present cases.

The grounds of appeal

[4] The Crown submitted in the present appeals that the prosecution was not oppressive or incompetent. First, the remedy for being prosecuted twice is regulated by the Double Jeopardy (Scotland) Act 2011. Second, the common law pleas of tholed assize or res judicata do not apply as between criminal and administrative processes; third, the prison rules specifically permit both imposition of punishment and a referral to the police; fourth, the ECHR jurisprudence has no application to these cases; fifth, the test for oppression is not met.

[5] For the respondents, the same argument was made as made to the sheriff. We did not find it informative, and almost no analysis of the law was attempted. The respondents submitted that prosecution on the basis of the same *species facti* would be oppressive, and therefore the court should sustain the plea in bar of trial. The appeal was taken on the basis that the client had complained that double punishment was unfair. The respondents submitted that oppression could be claimed without the need to rely on the Double Jeopardy (Scotland) Act 2011. It was always open to a court to dismiss a prosecution where the Crown had acted oppressively (*McFadyen* v *Annan* 1992 JC 53). The respondents might be punished twice for the same crime. A plea of oppression was advanced in bar of trial, as no other mechanism appeared to be available. The respondents submitted that this was a case of oppression, and not of tholed assize, or res judicata, or ECHR compliance, or double jeopardy.

Grounds of decision

[6] In our view Sheriff Cowan's approach was erroneous and unsupported by authority.

[7] The sheriff did not conduct any analysis of the principles which apply to oppression, or double jeopardy. She recorded that the plea to the competency was one of oppression, although a plea of oppression is a plea in bar of trial and not of competency (see *Renton & Brown, Criminal Procedure* (6th Edition) paragraph 9-21). The sheriff imported into her brief note the reasoning in an earlier case decided by her, namely *James* v *PF Peterhead* (unreported, 16 January 2023), making cross-reference necessary. In the present note, she explained that, notwithstanding repeated references within *James* to ECHR authorities, she had not decided that case on the basis of ECHR law.

[8] In *James*, the accused was sanctioned by 14 days loss of privileges, including being confined to his cell, losing entitlement to recreation, and losing access to the canteen for the purposes of purchasing extra items. The sheriff there noted that the punishments are set out in rule 114 of the Prison Rules, and that before any punishment is imposed, the allegation is referred to an independent adjudicator to establish the facts. If guilt is established, the matter is referred to the prison governor for punishment. The sheriff's reasoning in *James* is sparing. She found that the charge dealt with by the disciplinary hearing in prison amounted to a criminal charge. The sheriff rejected as irrelevant the Crown submission that the 2011 Prison Rules were compliant with the ECHR, following the cases of *Engel and others* v *Netherlands* 1976 ECHR Series A no 22 paragraph 84, and *Ezeh and Conners* v *UK* 2003 ECHR, and noted that ECHR compliance was not the issue.

[9] From *James* we note that the sheriff decided that case on the basis that "It is a fundamental principle of Scottish Criminal law that…a person should not be subject twice to criminal proceedings and, if found guilty, punished twice for the same crime". She identified that the question for her to resolve in *James* was "whether the accused is in that

position as a result of the Crown's decision to prosecute although disciplinary proceedings have already been taken and a punishment imposed".

[10] Accordingly, the sheriff decided *James* on the basis of double jeopardy. She stated that recent changes in the law of double jeopardy did not apply in the present circumstances, but without identifying what changes, or why they did not apply. It is left unexplained.

[11] In the present cases, although the debate had been sought on the issue of competency, the sheriff sustained the appeal on the basis of oppression, but in respect that the appellant had suffered double jeopardy. The sheriff did not embark on any discussion of the test for either oppression, or double jeopardy. She did not cite authority for the principle of oppression, or its interrelationship, if any, with a plea based on double jeopardy.

[12] We have found almost no assistance in the sheriff's report which asserts, but fails to analyse or compare or explain, the different issues which arise. We find her reasoning, and the respondents' arguments presented on appeal, to be too lacking in substance to allow us to embark on any comprehensive discussion of the principles which are said to apply. We are not able, in the absence of analysis or proper citation of authority, to embark on a discussion of the law. It is sufficient, and indeed all we can do, to note the submissions and note the following features of the appeal:

[13] First, the matter of double jeopardy has been the subject of legislation in the form of the Double Jeopardy (Scotland) Act 2011. The sheriff rejects that statute as applying, but without explaining why. It is notable that section 1 of that Act provides that it is incompetent to charge a person with an offence where they have already been convicted or acquitted of that offence on complaint or on indictment. There has been no such earlier complaint or indictment in the present cases. Section 7 allows for a plea in bar of trial, but

also only in relation to having been tried for, and convicted or acquitted of, an offence. There is no provision that disciplinary proceedings, such as those in the present appeals, are capable of founding a plea either to the competency or in bar of trial. The present challenge seeks the protection of the Double Jeopardy (Scotland) Act 2011 while not meeting its requirements. We are not told why the sheriff regarded this as lawful. The sheriff's reasoning is deficient in that respect.

[14] Second, *James* must be doubted, on the basis that the sheriff now asserts that she did not decide that case on the basis of ECHR law, despite repeated reference to ECHR cases in that case. We note in passing that the references to punishment in the cases cited were to custodial sentences, not minor disciplinary sanctions such as the present cases. We are not told why the sheriff invoked ECHR case law for some purposes but not for others (see paragraph 8 of the present reports). The sheriff's reasoning is deficient in that respect.

[15] Third, the sheriff's decision appears to overlook the express provisions of the statutory instrument which forms the basis of the prison rules, and under which these appellants were disciplined. The statutory instrument, namely The Prison and Young Offenders Institutions (Scotland) Rules 2011/331, at paragraph 62A, expressly permits (see rule 62A(14)) both a charge of breach of discipline, and a report to be made to the police under section 41ZA of the Act. Accordingly, the plea by the respondents conflicts with an express legal provision. The respondents seek to take a plea of oppression in order, not to challenge the actings of the Crown, but to challenge the underlying statutory instrument. The plea amounts to asking the court to find that the statutory instrument is unenforceable. It appears to be a novel application of the plea of oppression. The matter was unanalysed, indeed unrecognised, by the sheriff, and was not sufficiently analysed in submissions on

appeal, for us to accept that this approach is competent. The sheriff's reasoning is deficient in that respect.

[16] Fourth, we do not accept that this plea is properly based in oppression. As cases such as *McFadyen* v *Annan* and *Stuurman* v *HMA* 1980 JC 111 make clear, a plea of oppression is apposite where complaint is made about the actings of the Crown. Oppression is present only when the risk of prejudice to the accused is so grave that no direction of the trial judge could reasonably be expected to remove it. That formulation does not support the sheriff's decision. The present challenge is not based on actings, but seeks to challenge the substantive law. It is also difficult to characterise the minor discipline imposed in these cases as grave, or prejudicial. As we have observed, the sheriff carried out no analysis of the proper limits of a plea of oppression.

[17] Fifth, we agree with the Crown submission that it is not automatically oppressive to bring proceedings merely because the offender has already suffered detriment. Everyday examples include where the offender has lost employment as a result of an alleged offence, or has been disciplined, has had social security benefits withdrawn, has had assets frozen under proceeds of crime proceedings, has been the subject of interdict, or has had contact with family curtailed. Further, we have already noted that the sanctions were relatively minor, certainly well short of the deprivation of liberty referred to in the ECHR cases referred to by the sheriff. We doubt whether such minor disciplinary sanctions would found a plea to the competency or in bar of trial in any event.

[18] The appeals are granted in both cases, on the basis of the deficiencies of the sheriff's reasoning for sustaining the plea. The decision is quashed, and the cases will be remitted to a different sheriff to proceed as accords.