SHERIFF APPEAL COURT

[2023] SAC (Crim) 12
SAC/2022/000042/AP

Sheriff Principal M W Lewis
Sheriff Principal C D Turnbull
Appeal Sheriff N A Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the Crown appeal under section 301A(5) of the Criminal Procedure (Scotland) Act 1995

by

PROCURATOR FISCAL, FALKIRK

Appellant

against

BM

Respondent

Appellant: Lord Advocate (Bain QC); Harvey AD; the Crown Agent
Respondent: Shand, advocate; Sandemans, Falkirk
Intervener (Rape Crisis Scotland): written submissions

5 April 2022

[1] The respondent appeared on summary complaint at Falkirk Sheriff Court in relation to a charge of contravening section 1 of the Domestic Abuse (Scotland) Act 2018. He pled not guilty and was admitted to bail. In this appeal, the appellant seeks to quash the decision of the summary sheriff, dated 19 January 2022, in which he pronounced an order granting commission and diligence for the recovery of documents, namely, telephone records of all

calls, texts, and messages (in which the respondent was the recipient or sender) made to and from the work and personal mobile telephones of the complainer.

[2] The purpose of the application for an order granting commission and diligence was to "demonstrate what, if any, contact was made by such (*sic*) and what contact the [complainer] made to the accused, it being asserted that [the complainer] regularly and uninvited both telephoned and messaged the [respondent] during the relevant period."

[3] At the hearing of the application, the solicitor for the respondent submitted that the application was necessary to allow access to the complainer's mobile telephone records, in order to establish that the complainer had been contacting the respondent. The solicitor for the respondent advised the court that a copy of the application had been forwarded to the complainer by letter.

[4] In the note of appeal, it was asserted that the application was opposed by the appellant on the basis that they were not the haver of the records referred to and was accordingly not in possession of the material. This was the appellant's understanding when the note of appeal was lodged. We return to this issue below (see paragraphs [36] and [37]). That position was disputed by the respondent and by the summary sheriff.

[5] The appellant appeals to this Court on four separate grounds, namely, (a) the correct procedure was not followed; (b) the application was lacking in specification; (c) the reasons for seeking recovery of the telephone records were insufficient to justify granting the order; and (d) the application (and thus the order granting it) was unnecessarily intrusive.

Submissions for the Appellant

Incorrect Procedure

[6] There were a number of defects in the procedure. No warrant for service was granted. The respondent's solicitor was appointed to intimate the application to the appellant, the complainer and the complainer's employer. There was no proof of service to show that the complainer had received the respondent's solicitor's letter. The letter of intimation provided insufficient information about the application. It did not inform the complainer of the location of the court in which the application would be heard. It did not advise her of her right to be heard on the application, of her right to apply for legal advice and assistance for that purpose, and of the possible availability of legal aid. The complainer was not given the opportunity to be heard on the application. In granting the application, the summary sheriff failed to consider appointing a commissioner to carry out an excerpting exercise of any records recovered. The procedure followed was incompetent at common law and was contrary to the requirements of Article 8 of the European Convention on Human Rights.

Lack of Specification

[7] The application lacked specification. It did not specify the mobile telephone numbers in respect of which records were sought. It did not specify who the havers of those records were. For telephone records, the haver would have been the telephone service provider, not the complainer or her employer. It did not specify dates between which the records were sought. The lack of specification meant that the summary sheriff's order was unenforceable because none of the persons referred to in the specification had such records,

knew which telephone numbers the records referred to or knew what period the specification of documents was to cover.

Insufficient Reasons

[8] The case against the respondent is that he engaged in a course of behaviour that was abusive of the complainer, his partner or ex-partner. The course of conduct libelled includes, but is not limited to, repeatedly contacting the complainer by telephone. The complainer has given a statement to the police detailing those calls, and the respondent, in his police interview, appears to have accepted that he constantly called her and sent text messages to her. The application for recovery of the complainer's telephone records failed to narrate why, in these circumstances, the production of the telephone records would be of material assistance to him. The respondent averred that the records would show what, if any, contact was made by the complainer to the respondent, but that would not assist the respondent in establishing that he did not repeatedly contact the complainer. Moreover, the application did not explain why it was necessary to obtain the complainer's records at all: nowhere in the application does the respondent explain why, when the communications were between him and the complainer, he could not have obtained those records from his own telephone or telephone provider.

Unnecessarily Intrusive

[9] The order granted was unnecessarily intrusive and, for that reason, a disproportionate interference with the complainer's Article 8 rights. The application was not necessary, given the respondent's failure to explain why he could not obtain the same information from his own telephone or telephone provider. The orders sought and granted

went well beyond what was necessary for the proper preparation of the respondent's defence, requiring as it did all of the complainer's communications with the respondent, from two telephones and without limit of time. It was granted in terms that, had the application not been lacking in specification, would have provided all those records directly to the accused's agents, without the procedural safeguard of an excerpting exercise carried by a court-appointed commissioner. The summary sheriff failed to consider whether a less intrusive measure could have been used and failed to strike a fair balance between the respondent's right to the proper preparation of his defence and the complainer's Article 8 rights. The summary sheriff failed also to consider whether the appointment of a commissioner, and an excerpting exercise carried out by him or her, could have acted as a procedural safeguard to protect the complainer's Article 8 rights and ensure that any interference with those rights was proportionate.

Submissions for the Respondent

[10] The submission fell into three parts.

No grounds to interfere

[11] The appellant does not assert that any failure in relation to service resulted in the complainer being denied the opportunity to enter proceedings. In those circumstances, and given a lack of opposition to the application at first instance, there was no proper basis upon which this Court might interfere with the decision reached. Alternatively, any interference with the decision at first instance should be limited to restricting the time period covered by the summary sheriff's order to the period of the libel.

[12] Finality and certainty are important considerations in the law. They are crucial to the efficient running of the criminal justice system and can and do take precedence over the underlying merits of a case in many circumstances. The general rule is that the failure to object to a particular course bars that party from later seeking to appeal the judgement. Any other rule would have the potential to cause endless difficulties and would not be just. To succeed the appellant would require to satisfy the Court that the circumstances of the present case are an exception to that proposition. It is not sufficient that senior staff of the appellant took a different view on the merits to that reached by the procurator fiscal depute who exercised her judgement on the appellant's behalf at first instance.

[13] The appellant has a right to be heard in the consideration of a specification of documents lodged in a criminal case. The Crown may make observations and assist the court in reaching a fair conclusion through the provision of information and/or the making of legal submissions. The Crown may make the court aware of any opinion expressed by the complainer. The Court requires to give consideration to fundamental issues such as jurisdiction and competence and to other obvious issues in the application and specification. The Court can restrict or refuse an application if there is a proper basis for doing so, even in the absence of opposition. The Court can seek additional information from the parties to supplement the contents of the application. The Court does not have an obligation to *ex proprio motu* assess every conceivable objection to an application which it is not otherwise called upon to address.

[14] Amongst the matters the Court at first instance must satisfy itself of is that proper efforts have been made to intimate the specification of documents on any haver and that the haver has been given an opportunity to be heard on the application. If it is shown that there was a failure to comply with a relevant requirement and that failure prejudiced the haver in

their decision as to whether to enter an appearance, the respondent accepted that that would be a good ground to set aside the sheriff's decision. That, however, is not what the appellant asserts.

[15] The appellant asserts that the absence of express opposition to the application cannot cure defects in the application. The true position is that there was not an absence of express opposition, there was, in fact, expressly no opposition. The respondent did not suggest that the absence of opposition cured a defect rather it often bars a party from seeking to revisit the decision in question on appeal.

[16] The lack of any assertion by the appellant that the application did not come to the attention of the complainer prior to the calling of the case on 19 January 2022 is fatal to the appeal. In the absence of such an assertion this Court should not interfere with the decision of the summary sheriff simply because it might find there was some technical defect in service. The requirements of service are designed to ensure that the application comes to the attention of the haver. If that aim was achieved there was substantial compliance with the provision.

[17] The Court has no means to compel a haver to enter an appearance or express any views on the merits of a specification of documents. If a specification of documents has come to the attention of the haver and the haver is not known to be under any mental or physical incapacity then, in the ordinary course, a failure of the haver to enter an appearance to address the merits or to ask for an adjournment of the hearing or to otherwise put their views before the court will, in the ordinary course, justify the conclusion that the haver does not insist on any right they may have to oppose the order sought. This does not mean that the application for specification of documents must be automatically granted, the court may still require to hear submissions and satisfy itself as to the merits of the application.

[18] The respondent did not accept that any defects were such as to make the application fundamentally null or void. One of the aspects relied upon by the appellant as being a fundamental defect is a lack of specification. By comparison, it was submitted that a lack of appropriate specification in criminal charge is not the type of defect which would allow an accused who failed to take a plea to the relevancy when tendering a plea to return to the court following a conviction and assert that the proceedings were fundamentally defective and the conviction should be overturned. Likewise a lack of specification in the application was not a fundamental defect allowing the decision to be revisited on appeal.

Necessity of order

[19] On the merits of the application it was submitted that the balance of interests clearly favoured the recovery of the documentation sought. The respondent no longer had access to the telephone with his side of the communications. The order granted was therefore necessary. The charge the respondent faces covers an extended period; it asserts a lengthy period of unwelcome contact from the respondent including telephone contact. The respondent asserts that this is not true and that the telephone evidence will demonstrate that the complainer's account of events is not accurate in material respects. The telephone evidence will assist the respondent in establishing that he is not guilty.

[20] The respondent accepted that Article 8 was engaged by a request for the telephone records. However, in the context of this case, the degree of infringement is significantly less than where an accused's representatives seek to obtain otherwise confidential medical records covering information that was not otherwise at issue in the trial and information that would not otherwise be known to the accused. The respondent submitted that the

engagement of the complainer's Article 8 rights through the obtaining of telephone records was limited.

Width of order

[21] It was accepted on behalf of the respondent that it would have been more proper to have limited the call in the application to cover contact that took place during the dates of the libel specified on the complaint against the respondent. To that extent it was accepted that the order granted by the court was wider than was necessary.

[22] The appointment of a commissioner was an option open to the summary sheriff, which he chose not to exercise. That was a matter which fell within the summary sheriff's discretion. A commissioner would be more appropriate in circumstances where it was necessary to peruse significant amounts of material to identify what did and did not fall within the call. That did not apply here. Asking a commissioner to go through messages was unnecessary and arguably a greater infringement of the complainer's Article 8 rights, as it would have involved a further party having access to the material.

Submissions for the Intervener

[23] Written submissions were lodged on behalf of the intervener. For the purposes of this opinion it is unnecessary to rehearse these, given that the matters which are germane to the determination of this case had been fully addressed by the appellant. The Court is grateful to the intervener for the submissions made.

Decision

[24] Section 301A of the Criminal Procedure (Scotland) Act 1995 provides *inter alia* that it is competent for the sheriff court to make, in connection with summary proceedings, an order granting commission and diligence for the recovery of documents. An application may not be made in connection with summary proceedings until the accused has answered the complaint. The decision of the sheriff may be appealed to this Court. The prosecutor is entitled to be heard in any application and in any consequent appeal, even if they are not a party to the application or appeal.

[25] There is no difference between the procedure to be followed for the recovery of sensitive personal records (such as medical or counselling records) and the recovery of a complainer's mobile telephone records. The correct procedure is to make an application for an order granting commission and diligence for the recovery of the documents in question. The application should be accompanied by an appropriate specification of documents setting out the records which the applicant seeks to recover. Whilst nothing turns on this, in the present case the application was not accompanied by a specification of documents; the documents sought were set out as part of the application itself. The specification of documents ought to have been a separate document.

[26] Before this Court, it was a matter of agreement that the complainer's rights under Article 8 of the European Convention on Human Rights were engaged by the application to recover her telephone records. The Court was referred to a line of European authority to the effect that telephone calls and mobile telephone data fall within the scope of Article 8 and, thus, any attempt to recover those calls or data related to them will engage Article 8. In respect of personal and office telephones, see *Halford* v *the United Kingdom* (1997) 24 EHRR 523 at paras [44] and [52]; and, in respect of the recovery of mobile telephone data, see

Saber v *Norway*, [2020] ECHR 912 at para [48]. In *Saber* the parties agreed that the search of the applicant's smart telephone (and/or the mirror image copy of it) entailed an interference with his right to respect for his correspondence under the first paragraph of Article 8 of the Convention, however, the Court observed that this position could not be called into question, citing in support of that observation *Laurent* v *France* [2018] ECHR 430.

[27] Article 8 requires that a complainer (or other witness) whose sensitive or mobile telephone records are sought to be recovered has the right to be heard. Support for this can be found, in relation to medical records, in *WF* v *Scottish Ministers* 2016 SLT 359 at paras [38], [39] and [42]; and, in relation to the recovery of a mobile telephone, in *AR* v *HM Advocate* [2019] HCJ 81 at paras [10] and [11]. In the context of the recovery of mobile telephone records, we gratefully adopt the reasoning in those cases. The complainer had the right to be heard in relation to the proposed order for commission and diligence for the recovery of the records in question.

[28] When an application is presented, the Court must consider whether to grant a warrant for service on the Crown, any havers, and any interested parties such the complainer or other witness whose Article 8 rights may be engaged. In the present case, on 6 September 2021, a diet of trial had been adjourned on defence motion, the minute recording that the defence were not prepared for trial. A new trial diet was assigned for 28 January 2022, with an intermediate diet on 10 January 2022. The application which gave rise to the present appeal was lodged on 24 September 2021. It appears not to have been considered by the Court until the intermediate diet on 10 January 2022, more than 3 months later. On Monday 10 January 2022 the then presiding summary sheriff appointed the respondent to intimate the specification of documents upon the appellant, the complainer; and the complainer's employer. The summary sheriff fixed a continued intermediate diet for

the following Wednesday, 19 January 2022 and appointed that date as a hearing in relation to the application also.

[29] Two observations fall to be made in relation to the procedure which was followed. First, the period of time which passed between the application being lodged and it being considered by the Court is extraordinary. No explanation was offered in this regard. It is equally concerning that, having lodged the application, those representing the respondent appear to have taken no steps to enquire when it might be heard. Second, assigning a hearing in relation to the application for only nine days after the first order was granted was wholly inappropriate. The date was no doubt assigned in light of the impending trial diet, however, that simply brings back in to focus the lengthy period of inactivity in relation to the application. The proper procedure is as outlined by Lord Tyre in *AR* v *HM Advocate* at para [11], that is for the Court to grant warrant for service of the application and the specification of documents on the Crown, the havers and any interested parties, and to fix a date for a hearing in early course for the application to be heard and for the Crown, any haver, or any interested party to contest the making of an order, should they wish to do so. Sufficient time must be allowed to enable any haver or interested party to obtain legal representation at such a hearing.

[30] An order for intimation having been made on Monday 10 January 2022, intimation upon the complainer was not made by those representing the respondent until Friday 14 January 2022. On that date a letter was sent to the complainer, care of her employer. It comprised only two sentences. The first referred to an enclosed intimation copy specification and the interlocutor of Court. The second advised the complainer that the matter would call on 19 January 2022 at 10am. No further information was given.

[31] Intimation was sent by the solicitor for the respondent on a Friday to business premises. No explanation was offered as to why it took four days to intimate the application. The intimation was received by the complainer's employer on either 17 or 18 January 2022. It was brought to the complainer's attention on the date of receipt – at the earliest two days before the case was due to call. Sufficient time was not afforded to the complainer. Moreover, the intimation given was wholly inadequate. The sheriff court within which the application was to call should have been identified. The complainer should have been informed of her right to be heard on the application and of her right to obtain legal advice and assistance. The complainer should also have been informed of her possible entitlement legal aid for that purpose.

[32] In cases of this nature, the address of the complainer will regularly be unknown to the accused and to those acting on his or her behalf. In this case intimation was made to the only address known to the respondent. In petitions for the recovery of documents before the High Court of Justiciary intimation is given by the staff of the Scottish Courts and Tribunals Service ("SCTS"). An example of such a letter of intimation was provided to the Court for the purposes of this appeal. We are of the view that the practice followed in cases before the High Court of Justiciary should be replicated in cases before the sheriff courts. Intimation of applications for the recovery of documents before the sheriff court should be given by SCTS staff. The appropriate addresses for intimation, insofar as these are not known to the applicant, should be provided to SCTS staff by the Crown. We would urge SCTS to facilitate this as a matter of urgency.

[33] A person whose rights are potentially affected by the making of an order must have the opportunity of being heard before the documents are made available to the party seeking their recovery (see *WF* at para [44]). At the hearing of the application on 19 January 2022, the

Court required to hear all parties upon it, or at least be satisfied that third parties, such as the complainer, had received due notice of the application but did not wish to be heard on it.

[34] The summary sheriff reports that the solicitor for the respondent moved the Court to grant the application and to continue the case to the trial diet previously assigned. He advised the summary sheriff that the specification of documents and the hearing of 19 January 2022 had been intimated by way of a letter from his firm to each of the Crown, the complainer, and the complainer's employer. The procurator fiscal depute's response was that the Crown did not see the need for the specification of documents but did not oppose it. As to whether the Court should grant the specification of documents, the procurator fiscal depute advised the summary sheriff that the Crown was in "the Court's hands". Given the position of the Crown, the summary sheriff was, quite properly, concerned to know whether the specification of documents and the details of the hearing on the respondent's application had been properly intimated. The solicitor for the respondent advised the summary sheriff that it had. He had a copy of the letters sent to each in his file. The solicitor for the respondent submitted that there was no requirement for him to lodge executions of service or similar. On this procedural point, the procurator fiscal depute could not assist the Court. The summary sheriff proceeded to grant the application.

[35] From the terms of the summary sheriff's report, we can but conclude that he was satisfied that the complainer had received due notice of the application but did not wish to be heard upon it. As the summary sheriff reports having a good recollection of the hearing and taking careful notes, we suspect that he was not, in fact, shown the letter intimating the hearing to the complainer or made aware of when (and where) intimation had been made. Had these matters (as set out in paras [29] and [30] above) been drawn to his attention we anticipate that he would have reached a quite different conclusion.

[36] The position advanced by the solicitor for the respondent, that there was no requirement for him to lodge executions of service or similar, is incorrect. Where, as in this case, the Court orders intimation of an application, it is incumbent upon the party intimating to satisfy the Court that intimation has, in fact, been made. Simply saying that you have intimated is not sufficient. The requirement for an execution of service or equivalent is all the more obvious from the circumstances of this case in which the intimation given was inadequate and was made far too late. Executions of service ought to have been lodged with the Court prior to the hearing on 19 January 2022.

[37] Before turning to the application itself, it is appropriate that we make certain observations upon the position of the appellant before the summary sheriff and in their note of appeal. The summary sheriff was advised that the Crown did not see the need for the specification of documents but did not oppose it. In the note of appeal, it is stated that the application was opposed by the appellant; and that the appellant submitted that they were not the havers of the records referred to and were accordingly not in possession of the material. In their written submissions in support of the appeal, the appellant stated that this was the appellant's understanding when the note of appeal was lodged. When this was disputed by the respondent and the summary sheriff in his report, the procurator fiscal depute who appeared on 19 January 2022 was asked for her recollection of events. We were advised that she was unable to recall whether she had specifically stated that the petition was opposed but she did state that the petition was unnecessary. The appellant submitted that, whilst regrettable, this is of no consequence to this appeal. We disagree.

[38] In appearing for the appellant, the Lord Advocate candidly accepted that the Crown neither intimated the application to the complainer nor discussed it with her. They did not seek the complainer's views. Contrary to the advice and instructions given to procurator

fiscal deputes, the Crown had not done that which they should have done in this case. The apology was, in our view, properly made and we propose to say no more on this aspect of the hearing of the application before the summary sheriff. What was not addressed by the Crown in the hearing of the appeal is the material inaccuracy in the note of appeal; and the fact that the views of the procurator fiscal depute who appeared in the hearing of the application appear not to have been sought until both the summary sheriff and the respondent took issue with what was said in the note of appeal. It is difficult to envisage how the note of appeal could have been drafted without the views of the procurator fiscal depute.

[39] As set out above (see para [7]), the appellant made a number of submissions in relation to application. In our view, those submissions are well founded. The mobile telephone numbers in respect of which records were sought ought to have been specified. The dates between which the records were sought ought to have been specified. To that extent, the application was lacking in essential specification. The failure to specify the telephone service provider was not, in our view, a fundamental defect. In the majority of such applications, the identity of the relevant telephone service provider will not be known by the applicant.

[40] Irrespective of the position taken by the appellant in the hearing, it was incumbent upon the summary sheriff to properly consider the application, by reference to the *dictum* of the Lord Justice General (Rodger) in *McLeod* v *HM Advocate (No 2)* 1998 JC 67 at 80:

> "… an accused person who asks the court to take the significant step of granting a diligence for the recovery of documents, whether from the Crown or from a third party, does require to explain the basis upon which he asks the court to order the haver to produce the documents. The court does not grant such orders unless it is satisfied that they will serve a proper purpose and that it is in the interests of justice to grant them. This in turn means that the court must be satisfied that an order for the production of the particular documents

> would be likely to be of material assistance to the proper preparation or presentation of the accused's defence. The accused will need to show how the documents relate to the charge or charges and the proposed defence to them. Such a requirement imposes no great burden on an accused person or his advisers: the averments in the application may be relatively brief and the court will take account of any relevant information supplied at the hearing."

[41] The Court must be satisfied that recovery of the documents in question will serve a proper purpose and that it is in the interests of justice to grant the order sought. This in turn means that the Court must be satisfied that an order for the production of the particular documents would be likely to be of material assistance to the proper preparation or presentation of the accused's defence. The summary sheriff's report is, regrettably, silent on these issues.

[42] The terms of the application, and the submissions made by the solicitor for the respondent at the hearing on 19 January 2022 were, in our opinion, insufficient to satisfy the test set out in *McLeod*. In the circumstances of offence with which the respondent has been charged (more particularly detailed at paragraph [8] above), it was incumbent upon the respondent to specify why the production of the complainer's telephone records would be of material assistance to him. The respondent failed to do so. Whilst the telephone records would likely show what, if any, contact was made by complainer to the respondent, that would not assist the respondent in establishing that he did not repeatedly contact the complainer. We are not satisfied that an order for the production of the telephone records would be likely to be of material assistance to the proper preparation or presentation of the respondent's defence. It was not in the interests of justice to grant the order sought.

[43] In light of the conclusion we have reached in the foregoing paragraph, coupled with the serious procedural defects outlined above, it is unnecessary for us to consider whether the order granted was also unnecessarily intrusive and, for that reason, a disproportionate

interference with the complainer's Article 8 rights. It was properly conceded by the respondent that any order for recovery ought to have been restricted to the period of the libel. In our view, in any summary proceedings in the sheriff court where an order for the recovery of documents is sought, and in which such an order may amount to an interference with a third party's Article 8 rights, consideration should be given to the appointment of a commissioner to take excerpts from the documents. In the present case, no such consideration appears to have been given.

Decision

[44] We shall quash the decision of the sheriff granting commission and diligence for the recovery of documents.