SHERIFF APPEAL COURT

[2025] SAC (Civ) 18
LAN-B35-22

Sheriff Principal A Y Anwar KC (Hon)

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL AISHA Y ANWAR KC (HON)

in the appeal by

KENNETH PRENTICE

Pursuer and Appellant

against

CHIEF CONSTABLE OF THE POLICE SERVICE OF SCOTLAND

Defender and Respondent

Pursuer and Appellant: Party
Defender and Respondent: Cartney, solicitor: Ledingham Chalmers LLP

8 November 2024

Introduction

[1] The appellant successfully raised proceedings seeking recall of the respondent's decision to revoke the appellant's shotgun certificate. Having found in favour of the appellant, the sheriff made a finding of no expenses due to or by either party.

[2] The appellant appeals the sheriff's decision on expenses. He does not appeal the sheriff's decision on the merits. The respondent contends that any appeal under the

Firearms Act 1968 can only be upon a point of law. No point of law was disclosed in the appellant's grounds of appeal and, accordingly, the appeal is incompetent.

Background

[3] The appellant is a self-employed landlord and part-time farmer. He has held a shotgun certificate continuously since 8 August 1989; his certificate was renewed periodically. On 21 July 2015, he notified the police that he had held an unregistered shotgun for 35 years which had not been included on any of his certificates. The police seized the shotgun, before returning it and adding it to his shotgun certificate. The appellant was reported to the procurator fiscal who issued him with a warning letter for a contravention of section 2(2) of the Firearms Act 1968.

[4] During 2019, the appellant was involved in an employment dispute. That ultimately settled in early 2022; however, an undisclosed third party notified the police of that dispute and indicated that the appellant was a danger to staff at his employment. They reported that he had displayed aggressive and bullying behaviour.

[5] Following the report, discussions took place between the appellant and the respondent's officers. On 20 December 2019, the appellant alleged that the undisclosed third party had made a disclosure which was malicious and unlawful. Notwithstanding that, he agreed to voluntarily surrender his shotguns and his certificate on 22 December 2019, pending a suitability review. The suitability review took place on 31 December 2019. The appellant was told he could collect both his shotguns and his certificate.

[6] The appellant's allegation was investigated by one of the respondent's constables. He came to the conclusion that the disclosure by the undisclosed third party was not malicious and had been made in good faith; however, he had arrived at that conclusion

without speaking to the undisclosed third party or any employee at the appellant's former employer. The appellant made a formal complaint about that investigation.

[7] Separately, the appellant made a renewal application for his shotgun certificate on 29 April 2020. The renewal application asked him to confirm whether he had ever been diagnosed with any specified medical conditions, including acute stress reaction; the answer he gave was no. By contrast, his general practitioner completed a similar form and disclosed that the appellant had suffered from stress related to work in 2019. The matter was investigated by one of the respondent's constables; the decision was made to allow the renewal application in May 2020.

[8] Subsequently, in September 2021, the same constable who had authorised the shotgun certificate in May 2020 reviewed the appellant's firearms file. Based on a press clipping, the constable considered there was a discrepancy over where the appellant advised he resided. On 1 October 2021, police constables attended and asked that the appellant again surrender his shotguns and his certificate for a suitability review; he refused to do so and asked them to return with a warrant. A warrant was duly obtained on 4 October 2021. The appellant complied with the warrant and handed over his shotguns and certificate.

[9] By letter dated 11 March 2022, the respondent revoked the appellant's shotgun certificate. The appellant raised a summary application inviting the court to: (i) recall the respondent's decision of 11 March 2022; (ii) issue a declarator that the appellant was not prohibited from holding a shotgun certificate, nor was he a person who could not be permitted to possess a shotgun without danger to the public safety or to the peace; (iii) issue a declarator that he was entitled to hold the shotgun certificate issued to him on 29 April 2020; (iv) direct the respondent to issue the appellant with a new shotgun certificate in

terms of section 26B and 28 of the Firearms Act 1968 and (v) to find the respondent liable in expenses.

The sheriff's decision

[10] Following proof, the sheriff granted the appellant's first four craves on 15 May 2023. There was then a delay in fixing a suitable date for submissions to be made on expenses. The delay was attributed to the progress of a separate summary application lodged by the appellant on 26 September 2023 (LAN-B158-23) in which he sought disclosure of his personal data by the respondent. In particular, he sought all personal data contained in his firearms file and all correspondence and data relating to the removal of his shotguns in October 2021, including the application for the warrant to remove his shotguns.

[11] In written submissions made to the sheriff, the appellant acknowledged that, as a general rule, no order for costs could be made against the respondent unless he could demonstrate that the decision by the respondent to revoke his shotgun certificate had been made due to an improper motive, bad faith or was unreasonable to the extent that no decision maker would have made such an order (*R (on application of Chief Constable of Hampshire Constabulary)* v *Oldring* [2003] EWHC 1807 (Admin)). The appellant submitted his purpose in making the new summary application was that he considered it may lead to disclosure of material that would establish the respondent had acted with an improper motive when attempting to remove his shotguns and certificate on 1 October 2021 and, subsequently, in the obtaining of the warrant that allowed for their actual removal on 4 October 2021. If such material was disclosed, the appellant contended it had a material bearing on the expenses of the summary application.

[12] The respondent submitted that the appellant had, at the time of proof, been represented by senior counsel and agents. Had he wanted to allege that the respondent or any employee of Police Scotland acted with improper motive or bad faith, he could have sought disclosure of information prior to the diet of proof. He could have put such documentation, if it existed and was relevant, to the witnesses led by the respondent; however, he did not do so. The respondent contended that the sheriff should solely determine the question of expenses on the basis of the evidence led during proof and the submissions thereafter. To do otherwise would effectively amount to a relitigating of the summary application. For those reasons, the respondent invited the sheriff to make a finding of no expenses due to or by.

[13] The sheriff issued a note on 5 January 2024. He acknowledged the test to award expenses in a summary application of this nature was as set down in *Oldring* (*supra*) and *Cameron* v *Chief Constable of the Police Service of Scotland* 2018 SLT (Sh Ct) 75. He agreed with the respondent that any evidence relevant to improper motive, bad faith or unreasonableness should have been led at the proof; it had not. He observed that had unreasonableness, in the sense it is described in *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223, existed, then it is likely that such unreasonableness would have become apparent during the course of the evidence at proof. Thus, the sheriff advised that his initial view was that he could not consider the further evidence the appellant wanted to put before him in deciding whether to award expenses.

[14] A further hearing on expenses took place on 6 February 2024. The appellant continued to argue that there was evidence of bad faith and malice such as to justify a departure from the general rule on expenses in applications of these nature. The appellant intimated that he wished to show that a deponing witness had actively perjured themselves

during the course of applying for the warrant which led to the removal of his weapons. He listed a number of points in the warrant application that he insisted supported his argument. He argued that had the "false" information not been provided, the warrant would not have been granted. With no seizure of weapons there would have been no revocation.

[15] The sheriff considered that as the appellant could not have made this argument at proof, he would consider it when deciding the issue of expenses. At a subsequent hearing on 16 April 2024, the sheriff found no expenses due to or by. The sheriff considered the additional evidence relied upon by the appellant including: the search warrant; the application for the warrant; the nature of labelling of weapons; and transcripts of conversations. The appellant submitted that the process followed was not in line with the standard operating procedures of the respondent. The sheriff did not accept that; while the process followed might have shown poor practice, there was no evidence of improper motive or malice.

Submissions for the appellant

[16] The appellant contended that the sheriff had erred in law in determining that there was insufficient evidence to show improper motive on the part of the respondent's constables and, in turn, had erred making a finding of no expenses due to or by. In particular, he submitted that the sheriff ought to have considered the statutory guidance issued to chief officers in his assessment as to whether the respondent had acted with improper motive, bad faith or unreasonableness.

Submissions for the respondent

[17] Paragraph 4 of Schedule 5, Part III of the Firearms Act 1968 states "The decision of the sheriff on an appeal may be appealed only on a point of law." It was submitted that no arguable point of law was in fact disclosed in the note of appeal. That provision prevented appeals challenging a finding in fact and an appeal challenging a finding in expenses. Accordingly, the appeal was incompetent.

[18] Mr Prentice had accepted that the legal test for the award of expenses was as set out in *Oldring* (*supra*). The matter of assessment of bad faith, improper motive and *Wednesbury* unreasonableness must necessarily depend to a very large extent on an assessment of the witnesses and (in the absence of a manifest error) was a matter for the sheriff and not for the appeal court to consider of anew.

[19] Appeals relating solely to the question of expenses are severely discouraged. There was no basis to interfere on appeal unless it could be shown that a sheriff had applied the wrong test or the wrong principle or came to a result that was clearly or plainly wrong. In the present circumstances, where only an appeal on a point of law is competent in terms of the Firearms Act 1968, there must have been an obvious miscarriage of justice of such a type that it would be necessary for an appellate court to interfere as a matter of law.

[20] The appellant had had the ability to recover and lodge the statutory guidance and put questions to the respondent's witnesses at proof regarding it; however, he did neither.

Decision

[21] Both parties strayed into the merits of the appeal in their submissions. The question before this court at this stage is whether the appeal is competent. Does paragraph 4 of

Schedule 5, Part III of the Firearms Act 1968 restrict appeals against decisions on expenses to a point of law only? In my judgment, it does not. The appeal is competent.

[22] Section 44(1)(b) of the Firearms Act 1968 provides a right of appeal to the sheriff against a decision of a chief officer of the police relating to the granting, refusal, renewal, variation or revocation of a firearm or shot gun certificate. Such an appeal is to be determined on the merits, not by way of review. Part III of Schedule 5 to the Act provides as follows:

> "1 An appeal to the sheriff shall be by way of summary application.
> 2 An application shall be made within 21 days after the date on which the appellant has received notice of the decision of the chief officer of police in respect of which the appeal is made.
> 3 On the hearing of the appeal the sheriff may either dismiss the appeal or give the chief officer of police such directions as he thinks fit as respects the certificate or register which is the subject of the appeal.
> ..4. The decision of the sheriff on an appeal may be appealed only on a point of law."

[23] Paragraph 4 restricts the decision of the sheriff "on an appeal" to a point of law. That is a reference to the substantive matter before the sheriff namely, the chief officer's decision to grant, refuse, renew, vary or revoke a firearm or shot gun certificate. The sheriff's decision on that matter, the subject matter of the appeal, cannot be appealed further except on a point of law. Paragraph 4 is not directed towards matters which are incidental to the appeal, such as questions of expenses.

[24] The Act does not confer any specific power on a sheriff to deal with the expenses of an appeal. The sheriff has an inherent jurisdiction at common law to determine the expenses of proceedings before him;

> "there still exists a common law right inherent in every civil court to award expenses in any cause that comes before it, and that right may be exercised unless expressly taken away or qualified by statute." (McLaren, *Expenses*, p.3).

The Act does not remove nor qualify the court's common law right to regulate the expenses of the appeal. It follows then that the normal rules on appeals against decisions on expenses apply.

[25] Whether expenses ought to payable, if so by whom, on what basis and to what extent, are all matters within the discretion of the court. The normal rule is that expenses will follow success. It is well settled, and it was accepted by both parties, that where expenses are sought in proceedings against a public body and relate to the exercise of a regulatory or licensing power of that body, the court will not normally make an award of expenses (Macphail, *Sheriff Court Practice*, 4th ed, paragraph 26.111). Dealing with an appeal against an award of costs arising from a successful appeal against a decision to revoke a firearms certificate in England, Kay J explained the rationale for this restriction, in the following terms:

> "The Chief Constable is performing a statutory licensing function when he revokes firearm certificates. It is important when he does so that he should not have to look over his shoulder at the possible risk of costs in the Crown Court if it should transpire that the Crown Court allows an appeal against his revocation." *(Oldring* at paragraph [5]).

[26] In such cases, expenses should only be awarded against the public authority where the authority has acted in bad faith, had an improper purpose, acted out of malice, or has behaved irrationally or unreasonably in the *Wednesbury* sense. The test is a high one. It involves more than assertions of incompetence, inexperience, a lack of professionalism, or an honest mistake. Where the test is made out, whether to award expenses and to what extent, remains a discretionary decision for the court to be exercised having regard to the particular facts of the case.

[27] While appeals solely against awards of expenses are severely discouraged and will not generally be entertained unless there has been a miscarriage of justice (*Lord Advocate* v *Mackie* 2016 SLT 118 per Lord Justice Clerk (Carloway) at paragraph [11]), they are not limited or restricted to a point of law.

[28] In the present case the appellant's grounds of appeal may not be as focussed as one might expect had they been drafted by a solicitor or counsel. Nevertheless, it is tolerably clear the appellant asserts that the sheriff failed to have regard, in particular, to statutory guidance issued to chief officers in his assessment of whether the respondent's officers acted improperly or unreasonably; had he done so, he would have made an award of expenses in favour of the appellant; his failure to do so amounts to a miscarriage of justice. Whether the appellant is correct in that assertion will be determined at a hearing on the appeal.

[29] Accordingly, the appeal being competent, it will be assigned to Chapter 8 procedure and a hearing will be assigned to consider its merits. All issues of expenses arising from the competency hearing are reserved meantime.