



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 34
HCA/2024/7/XM

Lord Justice General
Lord Matthews
Lord Beckett

OPINION OF THE COURT

delivered by LORD CARLOWAY the LORD JUSTICE GENERAL

in

PETITION TO THE NOBILE OFFICIUM

by

KEVIN SMITH

Petitioner

against

HIS MAJESTY'S ADVOCATE

Respondent

Petitioner: Deans; John Pryde & Co
Respondent: Dickson AD; the Crown Agent

26 July 2024

[1] This is a petition to suspend a warrant for the arrest of the petitioner following upon the refusal of his appeal against sentence by the Sheriff Appeal Court. On 22 June 2023, he pled guilty to a charge of theft by housebreaking, which had proceeded by way of summary complaint. The offence had occurred in September 2021 and involved the appellant breaking into a private semi-detached house, when the occupants were absent. He forced a

ground floor window and stole property worth almost £2,000, including a Nintendo games console, a MacBook Air, a Wii games console and two sets of bagpipes. The offence was recorded on closed circuit television. He provided a “no comment” interview. None of the property was recovered.

[2] On 15 August 2023, the petitioner was sentenced to 8 months imprisonment (discounted from 12 months for the early plea). The sheriff noted, in particular, the appellant’s previous convictions, which indicated that he was a habitual thief and housebreaker. He had some 15 previous convictions for dishonesty, including four housebreakings. He had been sentenced to 20 months in 2011 for assault and robbery.

[3] On 15 September the appellant lodged a Note of Appeal against Sentence. He was granted *interim* liberation by the sheriff. The appeal was refused on 4 October, when a warrant was issued. According to the petition, the warrant was sent to the Crown Office and Procurator Fiscal Service, but they had not sent it to the police. According to the respondent, it was passed to the police, although there is no record of the police having received it. The respondent has explained that the system of transfer of warrants to the police at Glasgow has changed so that the COPFS check that the police have received and executed warrants.

[4] The petitioner has not been arrested on this warrant despite having been arrested in April 2024 for road traffic offences.

[5] The petitioner maintained that the appellant’s position was analogous with *Beglan*, *Petnr* 2002 SCCR 923 and *Waugh v HM Advocate* 2005 SCCR 102. In each case, the court held that the failure by the Crown to execute a warrant was oppressive. The Advocate depute agreed with this analysis and was unable to distinguish *Beglan* and *Waugh*. Whether the conduct of the Crown in failing to execute a warrant is oppressive was a fact sensitive matter

which depended on the facts and circumstances of each case. Apologies were tendered to the petitioner, the court and the householders for the delay in executing the warrant.

[6] In *Beglan*, the petitioner had abandoned his appeal against sentence, during which he had been at liberty, on 13 August. A warrant for his arrest was issued on 25 September. Letters were written by the petitioner to the local procurator fiscal, both before and after the issue of the warrant, in an attempt to ensure prompt execution. Nothing had happened. There was no reply to the letters and no explanation was given. The petitioner was a first offender. He was a chartered accountant who had embezzled a significant sum from a landscape gardening business some 5 years earlier. The whole sum had been repaid. The court reasoned that, had the petitioner been given the opportunity to serve his sentence promptly, he would have been at liberty “long ago”. He had, meantime, tried to rebuild his life and was due to commence a University course in two months time. The court held that the “failure of the authorities to execute [the warrant] is oppressive”.

[7] In *Waugh* the petition was not opposed. The petitioner had pled guilty to a racially aggravated breach of the peace and an assault to severe injury. She was sentenced to a total of 5 months imprisonment. The court considered that *Beglan* was analogous in that in both cases there had been “unreasonable and oppressive delay” that the Crown could not justify. The warrant had been forwarded to Strathclyde Police, but, because of an “administrative error”, it had not been forwarded to the relevant Division for over 9 months. Even then, there was no attempt to serve the warrant for at least another 3 months. Nothing about the petitioner’s personal circumstances or previous convictions is recorded by the court.

[8] The petitioner’s situation bears some resemblance to *Beglan* and *Waugh*, but there are significant differences, notably the petitioner’s record of analogous offending. There are no special circumstances as existed in *Beglan* such as the repayment of the funds, the

petitioner's rehabilitation and pending University placement. Very little is known of Ms Waugh's personal circumstances. The Crown have provided some explanation of what has happened. The warrant somehow went astray between the PF's office and the police. It cannot be in the interests of justice that a relatively short delay of a few months in the execution of a warrant should result in a serial offender avoiding punishment altogether for yet another housebreaking. The conduct of the Crown or the police might be described as negligent but, in this case, it cannot be said to amount to oppression. The prayer of the petition is refused.