SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 8
P985/23

Lord Justice Clerk
Lord Matthews
Lord Beckett

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Reclaiming Motion

by

THE PRESIDING CORONER OF NORTHERN IRELAND

Petitioner & Respondent:

against

SOLDIER F

Respondent & Reclaimer:

Petitioner & Respondent: M Ross, KC; D Welsh (Balfour+Manson LLP)
Respondent & Reclaimer: D Findlay, KC; B Ross (Burnett Christie Knowles McCourts)

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24 April 2024

Introduction

[1] For the purpose of this opinion we will continue to refer to the parties using the terminology of the petition, as applied in the Outer House. The respondent, known by his cipher Soldier F, reclaims (appeals) the Lord Ordinary's interlocutor of 26 February 2024, in which she ordered that he be imprisoned for 6 months for contempt of court. The

respondent was found to be in contempt of court on 9 February 2024 for failing to comply with a subpoena issued by the High Court of Northern Ireland. The finding of contempt is not challenged. Rather, the respondent contends that the Lord Ordinary erred in imposing a custodial penalty, which was excessive in the circumstances of the case.

Background

[2] The background to the case is set out at length in the Lord Ordinary's opinion (see [2024] CSOH 11). What follows is a brief summary of the facts insofar as relevant to the issues that arise in this reclaiming motion.

[3] The petitioner is the Presiding Coroner of Northern Ireland, who led an inquest into the deaths of three Provisional IRA members who were killed during military operations in Coagh, County Tyrone in June 1991 when British soldiers opened fire on their vehicle. The respondent was part of a group of soldiers known as "the arrest group" in the inquest, whose identities are protected by Public Interest Immunity Certificates.

[4] On 5 September 2022 the respondent applied to be excused from giving oral evidence at the inquest on medical grounds. On 10 November he submitted a witness statement, after which his application ultimately came to be one for special measures. He asked that any issues arising from his statement be dealt with only by way of written questions and answers. The petitioner noted that the respondent was an important witness whose evidence was directly relevant to a number of issues for determination at the inquest. Having heard evidence, including medical and psychiatric evidence, he refused the application for written evidence only. He ruled that the respondent should give oral evidence, albeit subject to various special measures including conditions of anonymity, use of a live link from outside the jurisdiction and screening from public view.

[5] On 22 June 2023 the petitioner received a further application by the respondent seeking to excuse him from giving evidence to the inquest altogether. That application was refused. The petitioner was scathing about the evidence of the medical experts, who had failed to reflect on the special measures which were in place, and had entirely failed to grapple with the extent to which these might mitigate any adverse effect of giving evidence. The petitioner was satisfied that the correct balance could be struck by the respondent giving evidence orally with the benefit of the special measures outlined.

[6] Shortly before the respondent was due to give evidence to the inquest on 29 June 2023, his solicitor wrote to the solicitor to the Coroner Service and advised that he would not be attending. On 30 June 2023 a subpoena *ad testificandum* was issued by the High Court of Northern Ireland requiring the respondent to appear at the inquest on 31 July. The respondent's representatives again communicated his intention not to comply with the subpoena. An application to have the subpoena set aside, relying on his mental health issues, was heard and dismissed on 28 July. The respondent did not appeal. His solicitor then wrote to the solicitor to the Coroner Service advising that he would not attend to give evidence.

[7] The petitioner applied to the High Court of Northern Ireland seeking transmission of a certificate of default, advising of the respondent's failure to appear at the inquest on 31 July 2023, to the Court of Session in terms of section 67(5) of the Judicature (Northern Ireland) Act 1978.

[8] The petitioner thereafter raised a petition and complaint in the Court of Session, requesting that the court "proceed against and punish Soldier F in like manner as if that person had neglected or refused to appear in obedience to process issued" by the Court of Session.

[9] The petitioner has issued his provisional findings that the deceased were shot by Soldiers B and G, but that the use of lethal force was justified as the soldiers had an honest belief that it was necessary in order to prevent loss of life. Although he concluded that there was no real prospect of the respondent giving evidence the petitioner has afforded him an opportunity up until 30 April to give evidence.

Proceedings before the Court of Session

[10] After sundry proceedings in which the petition was found to be competent and the petitioner to have title and interest, the Lord Ordinary found the respondent to be in contempt of court, a finding which, as we have noted, is not challenged.

[11] The Lord Ordinary heard senior counsel for the respondent on mitigation on 19 February. The details are recorded in the Lord Ordinary's opinion of 26 February 2024, and need not be repeated in detail. Essentially he relied on the respondent's distinguished and highly decorated military service, the mental health issues from which he suffered as a result of past deployments, and factors which were said to mitigate the otherwise serious character of the contempt. The Lord Ordinary ordered that the respondent be imprisoned for 6 months. She made practical arrangements for the respondent's reception into custody, including a period of grace within which to hand himself in. The reclaiming period was marked in the *interim* and the operation of the warrant suspended in the meantime.

The reclaiming motion

[12] The crux of the respondent's position is that the sentence imposed was excessive, that a non-custodial disposal was sufficient and appropriate in the circumstances, and that the respondent is in a position to pay a financial penalty. These arguments proceed on two grounds.

1. The Lord Ordinary failed to recognise or attach appropriate weight to the respondent's mental health issues. He suffered from PTSD and depressive illness, which were a direct consequence of his military experiences. He rarely left the house due to fears for his personal safety. Speaking about experiences in Northern Ireland triggered his symptoms. The prospect of giving evidence at the inquest exacerbated his fears. The Lord Ordinary failed to understand the direct relationship between the respondent's mental health issues and his failure to comply with the subpoena, leading to the contempt. The medical reports were relevant in assessing the respondent's culpability and the gravity of the contempt, and did not, as the Lord Ordinary put it, merely reflect "his own subjective view that he should not be required to give evidence" (para 23). The Lord Ordinary had underestimated the impact on the respondent, if required to give evidence, as mere distress (para 23). It was submitted that a recent medical report by Dr Gray vouched a deterioration in his condition, meaning that he was medically unable to purge his contempt. It should therefore have been attributed more than the "relatively little weight" given to it by the Lord Ordinary (para 27).

It was also unclear whether the Lord Ordinary had attached any weight to the respondent's endeavours to co-operate with the inquest. The coroner had been able to conclude the inquest and the respondent's failure had no adverse impact on the conduct of the inquest.

Given the medical evidence, the Lord Ordinary should have considered that a period of imprisonment would have a significantly greater impact than for other prisoners. Special arrangements to protect his identity would be required throughout, to avoid a serious risk of harm, as the Lord Ordinary accepted. He would live in constant fear of its being revealed. There was a risk of jigsaw identification. A less severe penalty was justified either due to

this greater impact or as a matter of generally expressed mercy in the individual circumstances of the case (*RC* v *HM Advocate* 2020 SCCR 20, para 41). The penalty was also excessive when compared with sentences imposed in more serious contempt cases with significantly less compelling mitigating factors (*HM Advocate* v *Murray* 2021 SCCR 158). There was a clear alternative to prison, in that he could meet a fine.

2. The court could not pass a sentence which would bring with it an inevitable breach of Articles 2 and 3 ECHR (*Edwards* v *UK* (2002) 35 EHRR 19; *R* v *Hall* [2013] 2 Cr App R (S) 68, para 13; *R* v *Qazi* [2010] EWCA Crim 2579, para 35). The possibility of his being identified and subjected to violent retribution or attack created such a risk. It was not clear that a comprehensive risk assessment had been carried out to facilitate his reception into custody. There would be significant practical difficulties in ensuring adequate protection of his identity. In this regard several exceptional measures had been required during the court proceedings, including excusal from attendance, reporting restrictions and the closure of the court to both public and press. Enquiries should have been made prior to the sentence being passed. Sentence should have been deferred for the prison authorities to (i) be put on notice, and (ii) confirm that suitable arrangements could be made (*RC* v *HM Advocate*, paras 33-36). The arrangements proposed in the interlocutor – of a grace period and surrender to officers with security clearance – were insufficient.

The petitioner's position

[13] The petitioner made no substantive submissions. Senior counsel observed that the Lord Ordinary's decision was a discretionary one and that the sentence imposed lay within the boundaries of her discretion.

Analysis

Ground 1

[14] Mr Findlay sought to persuade us that the respondent's decision not to comply with the subpoena had no adverse impact on the conduct of the inquest. We recognise that the written evidence of the respondent was before the inquest and indeed taken into account by the coroner (see paras 134, 135 and 332). However, had he given oral evidence it is likely that he would have been asked further questions relating to the planning of the operation, the circumstances on the ground, and the evidence of other witnesses including other servicemen, especially that of Soldier M referred to within the inquest report. The mere fact that his written evidence was taken into account in a limited way does not justify the inference that there was no impact on the conduct of the inquest. On the contrary, the findings confirm the comments of the coroner at the outset that the respondent was an important witness whose evidence was, and remains, directly relevant to a number of issues for determination at the inquest.

[15] In considering the weight to be given to the medical reports placed before the Lord Ordinary it is important to identify the matters which were relevant to consideration of the issues properly before her and those which were not. The Lord Ordinary had heard detailed submissions as to, and reached a concluded (and now unchallenged) view as to the scope of the inquiry before her. She concluded, rightly, that the issue whether the respondent was fit to give evidence at the time the subpoena was issued, or when the application to set it aside was dismissed, had been conclusively determined as a matter of fact in the proceedings in Northern Ireland. The decision had been made that his condition would not prevent him from being able to give oral evidence, subject to detailed special measures being put in place. The Lord Ordinary had to proceed on the basis that these were

valid decisions in law which were not open for reconsideration by her. Her decisions that averments on these issues were irrelevant, that inquiry thereanent should not be permitted and would be inconsistent with the respect which this court owes to orders of courts of competent jurisdiction in other parts of the United Kingdom were thus not only entirely appropriate, they had consequences for the extent to which the medical reports relied on in submissions as to fitness to appear remained relevant. The Lord Ordinary required to proceed on the basis that the respondent had been fit to give evidence. She recognised that the reports remained relevant in indicating the condition or conditions from which the respondent suffered, and that they would be relevant in mitigation. The issue of a deterioration which prevented the contempt being purged might also be relevant.

[16] This provides the context for the Lord Ordinary's analysis of the relevance of the various reports before her.

[17] Dr Gray's report was relied on to suggest that there has been further deterioration of the respondent's condition, and it is true that there is reference to the flashbacks intensifying and a worsening of anger and irritability, but it is equally clear that the underlying premise of Dr Gray's report is that his condition has all along rendered him unfit to give evidence, and that this remains the case. It is not therefore evidence that even if fit at the time of the subpoena he no longer is, and that he could not purge his contempt. The underlying premise is thus one upon which the Lord Ordinary was unable to proceed. Her comment that she could attach "relatively little weight" to the report is clearly made in the context of the submission that he was medically unable to purge his contempt. The comment has to be viewed in the light of the respondent's submission in his plea-in-mitigation that he had not complied with a lawful order because he followed medical advice, thus seeking to undermine the conclusions as to fitness already made. Again, that is not something which

the Lord Ordinary could accept, nor can we to the extent that this was repeated in submissions in this reclaiming motion. The Lord Ordinary proceeded (para 23) on the basis that:

> "[T]he respondent suffered from post-traumatic stress disorder and other mental health problems, and that he also had physical health problems. I accepted that he had experienced traumatic incidents in the course of his service that were of a significant and distressing nature".

[18] The real question in all of this is whether the Lord Ordinary gave sufficient weight in mitigation to the serious and disabling mental condition from which the respondent suffers, and the other factors relied on in mitigation, such as his military service, his good character, his attempts to co-operate with the inquest and so on.

[19] It seems clear that there was indeed a direct relationship between the significant mental health difficulties from which the respondent suffers and the circumstances which led to the contempt of court. His condition has been consistently diagnosed as PTSD, severe depression and anxiety, characterised *inter alia* by regular and intrusive flashbacks and nightmares of a highly distressing nature, hypervigilance against potential sources of danger (he refers to sitting in an alcove at home, where he has a clear view of the street), an inability to socialise and living a reclusive lifestyle, in constant fear of reprisals. The Lord Ordinary of course had to proceed on the basis that the special measures which could be put in place were such as could mitigate the risk to the respondent from giving oral evidence, and that he could not be regarded as unfit to give evidence in person subject to these special measures. However, it is clear that his own assessment, and his apprehension of the potential exacerbation of his symptoms from having to give evidence in person, fed into his decision not to comply with the subpoena. Thus whilst it was a deliberate decision, it was made according to a subjective assessment by someone undoubtedly suffering from a

serious and disabling illness caused by his military service, and in circumstances where he had made attempts to find another means of co-operating with the inquest. Whilst he was not entitled to decline to comply with the subpoena, his reasons for deciding not to do so, although deliberate, were influenced by his apprehension of his condition and not by an intention to undermine the proceedings, or to refuse entirely to engage. Of course, he was not entitled to seek to impose terms for his involvement, but there are aspects of his reasoning which mitigate what is otherwise a very serious contempt. This was not, for example, the calculated and deliberate challenge to the authority of the court, intentionally designed to circumvent both the reporting restrictions imposed and normal journalistic conventions, which characterised the decision in *Murray.*

[20] It is not clear that these were factors which were adequately taken into account by the Lord Ordinary. It was something of a disservice to the respondent to suggest that he would merely be "distressed" by giving evidence. Although she refers to his subjective view that he should not give evidence, she appears to have given this little, if any, weight as a mitigatory factor. At para 28 she refers to his "wilful failure … to give evidence", which suggests that she has not taken account of the fact that he did indeed supply some evidence to the inquest.

[21] The remaining question is whether the Lord Ordinary adequately took into account the possibility that the effect of imprisonment might be more significant on someone in the position of the respondent, than on another without his medical condition, (*R* v *Bernard* [1997] 1 Cr App R (S.) 135; *RC* v *HM* Advocate). It is not apparent that this was the subject of any submission to the Lord Ordinary, which no doubt explains why it did not feature in her reasoning. In *RC* v *HMA* the court, in a criminal context, recognised that in selecting a custodial penalty, and deciding on its length, the court should recognise that in some cases

the impact upon the individual may be significantly greater than on a prisoner without the relevant disability, which **may** justify the imposition of a shorter period of imprisonment than might otherwise have been selected. The effect of a disability or condition will not always have this result, and in most cases of depression, anxiety and PTSD will not do so. However there are features of the respondent's illness, which are directly linked with his military service, which give rise to the real possibility that a period of imprisonment would be more punitive for him than for others: specifically these are the flashbacks and nightmares; his hypervigilance; and his fear of reprisals consequent upon his service in Northern Ireland. On their own these might have little effect but they are relevant factors, particularly in light of the broader mitigation.

[22] We do accept the submission from Mr Findlay that it is as relevant in a case such as this as in a criminal case to ask whether a custodial sentence is the only reasonable means of marking the behaviour in question, recognising that in this type of case the only options are imprisonment, fine or no action. In most cases of contempt the court will clearly treat the possibility of imprisonment as a primary option, and whether it is one which must follow will generally be determined according to whether there is any mitigation and the extent thereof.

[23] In this case, there is substantial mitigation in the form of the respondent's hitherto good character, his distinguished and decorated military service, the fact that his mental health difficulties appear to have resulted from that service, the direct relationship between his mental health difficulties and the contempt of court, his original willingness, albeit limited, to engage with the inquest via special measures and the effect on him of imprisonment being potentially greater than the norm. Taking these factors into account, and comparing the respondent's case with other cases of contempt such as *Murray*, a non-

custodial penalty was appropriate. We were advised by Mr Findlay that the respondent's financial circumstances had not changed from those which were put before the Lord Ordinary. We will allow the reclaiming motion, recall the Lord Ordinary's interlocutor of 26 February 2024 and, of new, impose a fine of £5,000 in respect of the contempt of court. We will put the case out by order to discuss arrangements for payment.

Ground 2

[24] In these circumstances, ground two does not arise for consideration. Had it done so we would not have been able to conclude that the circumstances met the required threshold for such a ground to succeed. The overarching approach in respect of the principle underlying this ground of appeal is that the court is entitled to proceed on the basis that the prison authorities will comply with their obligations under the Convention. While there would doubtless have been a number of practical difficulties, there is no reason for us to conclude that they would not have been overcome.