SHERIFF APPEAL COURT

[2016] SAC (Crim) 13
SAC/2016/000161/AP

Sheriff Principal M M Stephen QC
Sheriff Principal M W Lewis
Sheriff P J Braid

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

NOTE OF APPEAL
Under section 174(1) of the
Criminal Procedure (Scotland) Act 1995

by

WILLIAM WARWICK

Appellant;

against

PROCURATOR FISCAL, DUMFRIES

Respondent:

Appellant: Ms Mitchell, Advocate; John Pryde & Co
Respondent: Goddard Solicitor, AD; the Crown Agent

5 April 2016

[1] The appellant, William Warwick, appeals in terms of section 174 of the Criminal Procedure (Scotland) Act 1995 (the "1995 Act") the sheriff's decision to repel the minute

lodged on his behalf objecting to the lawfulness of the actings of the police officers who will speak to the charges on this complaint, who took hold of him at the locus in charge 1.

[2] The charges on the complaint are as follows:-

> *"(001) on 28th November 2014 at Babbington Drive, Dumfries you WILLIAM ROBERT WARWICK did resist, obstruct or hinder Lyndsay Nicolson, Ryan Kirk, Victoria Urwin and Kerry Bowie, all Constables of the Police Service of Scotland, then in the execution of their duty and did struggle and fight with them and attempt to bite them;*
> *CONTRARY to the Police and Fire Reform (Scotland) Act 2012 Section 90(2)(a)*
> *you WILLIAM ROBERT WARWICK did commit this offence while on bail, having been granted bail on 17 November 2014 at Dumfries Sheriff Court*
>
> *(002) on 28th November 2014 at the Custody yard, Loreburn Street Police Station, Dumfries you WILLIAM ROBERT WARWICK did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did shout and swear, repeatedly kick the caged van door and challenge Police officers to fight;*
> *CONTRARY to Section 89(1) of the Criminal Justice and Licensing (Scotland) Act 2010*
> *you WILLIAM ROBERT WARWICK did commit this offence while on bail, having been granted bail on 17 November 2014 at Dumfries Sheriff Court*
>
> *(003) on 28th November 2014 at custody area, Loreburn Street Police Station, Dumfries you WILLIAM ROBERT WARWICK did have in your possession a controlled drug, namely Cannabis a Class B drug specified in Part II of Schedule 2 to the Misuse of Drugs Act 1971 in contravention of Section 5(1) of said Act;*
> *CONTRARY to the Misuse of Drugs Act 1971, Section 5(2)*
> *you WILLIAM ROBERT WARWICK did commit this offence while on bail, having been granted bail on 17 November 2014 at Dumfries Sheriff Court"*

[3] The essence of the objection before the sheriff, and before us, is that the police officers in taking hold of the appellant acted unlawfully, he having committed no offence. They had no reason or justification to arrest or detain him at the locus in charge one, Babbington Drive, Dumfries on 28 November 2014. Accordingly, he having been assaulted by the police officers who were not acting in the course of their duty was entitled to resist. If the police officers are not acting in the course of their duties as constables the appellant could not be held to have contravened section 90 of the Police and Fire Reform (Scotland) Act 2012 by resisting them (charge 1). The argument before the sheriff focussed on the question whether

the police officers were acting lawfully in the course of their duties. This seems to have led to an acceptance by those appearing before the sheriff that if the appellant was unlawfully detained or arrested at the locus above then not only would charge 1 fall, but charges 2 and 3 could not be supported by the evidence of the constables who speak to these charges as their evidence of what flowed from his detention would be inadmissible. That may be a correct approach in relation to charge 3, but otherwise that approach appears to overlook that even had the police officers been acting outwith the scope of their duties, it would still be open to the court to have convicted of the common law charge of assault in relation to charge 1; and possibly also of charge 2, depending upon the reasonableness or otherwise of the appellant's conduct.

[4] The sheriff has provided a full account of the evidence led and submissions made relative to the minute. In particular, at paragraph [29] the sheriff indicates:

> *"It was clear that, when they (the police officers) attended at Babbington Drive, PCs Bowie and Nicolson were responding to a call from the householder of a flat there relative to the conduct of the appellant. The call was made shortly before 2300 hours on a November night. The call requested assistance because the presence of the appellant on the property was unwanted. It was plain that both the police officers who responded to the call, and those who attended as 'back up', attended at the locus in the execution of their duty as police officers (cf. Monk v Strathern 1921 JC 5)"*

and at paragraph [30]:

> *"The evidence disclosed that the police operated on the basis of the following information and circumstances. They were responding to a request for assistance in removing the appellant from the locus. The call came from a female householder. Two females were within the ground floor flat at the property. It was late on a November night. The appellant was intoxicated. His presence on the property, outside the flat, was unwanted. The police had been called because the householder did not want this uninvited situation to escalate. The appellant was given a number of opportunities to leave the property voluntarily. Even before officers laid hands on him the appellant was verbally aggressive towards the police. He refused to leave."*

and at paragraph [31]:

> *"The evidence also described quite clearly that, in laying hands on his arms, the police were not seeking to either detain or arrest the accused. It was clear from the evidence that the decision to do so was an expedient one designed to assist an intoxicated, and unwanted, presence from the property."*

Procedural History

[5] At the first diet or calling the appellant pleaded not guilty to the charges and was released on bail for trial on 11 May 2015. That trial and the subsequent trial fixed for 10 September 2015 did not proceed due to lack of court time. A further trial diet was fixed for 12 November 2015. The defence minute is dated 21 September 2015. The court minute of 12 November 2015 records that the appellant pled not guilty to the charges and evidence was led in respect of the minute for the defence. The minute was refused. The sheriff granted leave to appeal and thereafter the accused pled guilty and the diet was adjourned for the purpose of obtaining a criminal justice social work report. On 23 November 2015 the case called by minute of acceleration and the appellant was permitted to withdraw his plea of guilty tendered some ten days earlier. Thereafter, various diets have been adjourned pending the outcome of the appeal.

Competency of the appeal

[6] The note of appeal is lodged in Form 19.1A under section 174(1) of the 1995 Act and Rule 9.1 of the Act of Adjournal (Criminal Procedure Rules) 1996.

[7] Section 174(1) of the 1995 Act is in the following terms:-

> *"174-(1) Without prejudice to any right of appeal under section 175(1) to (6) or 191 of this Act, a party may, with the leave of the court…and in accordance with such procedure as may be prescribed by Act of Adjournal, appeal to the Sheriff Appeal Court against a decision of the court of first instance (other than a decision not to grant leave under this subsection) which relates to such objection or denial as is mentioned in section 144(4) of this Act;"*

Section 144(4) is in the following terms:-

> *"144-(4) Any objection to the competency or relevancy of a summary complaint or the proceedings thereon, or any denial that the accused is the person charged by the police with the offence shall be stated before the accused pleads to the charge or any plea is tendered on his behalf.*

[8] Counsel for the appellant without conceding that the appeal was incompetent, accepted that the objection raised in the minute was not an objection to the competency or relevancy of the complaint nor was it a denial in terms of section 144(4). Whatever view the court came to on competency this court was asked to follow the approach taken in *Connor MacAteer v PF Perth HCJAC 18 December 2015* and determine the merits of the objection which would allow the sheriff to proceed to conviction or acquittal without further appeal on this point.

[9] The advocate depute referred to the statutory provisions noting that section 144(4) of the 1995 Act restricted the ambit of appeal in terms of section 174 to preliminary pleas stated before any plea is tendered. The objection stated on behalf of the appellant was not a preliminary plea and was an objection which in summary procedure was a matter for the sheriff to determine usually in the course of trial. He agreed with counsel for the appellant that irrespective of the view taken on competency, it would be expedient for the court also to determine the merits of the objection, and we proceed on that basis.

[10] The minute, which is the subject of this appeal proceeds as an objection to the statutory charge contravening section 90 of the Police and Fire Reform (Sc) Act 2012 and the admissibility of evidence in support of that charge. The minute purports to raise a preliminary issue objecting to the admissibility of evidence following his arrest and events following said arrest, said arrest being unlawful. That issue is not a preliminary plea objecting to the competency or relevancy of the summary complaint or the proceedings

thereon. Any objection to the admissibility of evidence is an objection to be taken at trial which, in summary proceedings, the sheriff may consider either under reservation or following a trial within a trial. Accordingly the defence minute, not raising a preliminary plea and, in any event, not stated before the appellant pleaded to the charge cannot be the subject of an appeal under section 174(1) of the 1995 Act. The Sheriff's determination on the minute may competently be appealed at the conclusion of these summary proceedings in terms of section 175 of the 1995 Act. The appeal therefore falls to be refused as incompetent.

[11] The procedure adopted following the lodging of the minute is, in our view, irregular. An objection to the admissibility of evidence is an objection which the appellant may properly take and in summary proceedings ought to be dealt with at trial (or at trial within a trial). It is unnecessary to hear evidence on the minute distinct from the evidence to be led at trial. In summary proceedings, especially proceedings where two trial diets have been lost due to lack of court time care must be taken to avoid superfluous procedure which merely serves to duplicate and protract these proceedings which should be summary in nature. In any event, in our opinion, this is not an objection to the evidence but rather that the evidence cannot support charge one as libelled. Such an objection could properly form the basis of a submission in terms of section 160 of the 1995 Act that the appellant has no case to answer on the offence libelled in charge one, subject always to the point made above that it would always be open to the court to convict of the alternative charge of assault at common law.

The substantive Grounds of Appeal

[12] Counsel for the appellant submitted that the officers in laying hands on the appellant were not acting in the execution of their duty. They were not entitled to take hold of the appellant. They may only lawfully lay hands on an individual when detaining or arresting.

Their laying on of hands could be considered to be a criminal act such as assault or abduction. They had no lawful authority to remove the appellant from the property unless he was committing an offence. In support of these submissions counsel referred to *Twycross* v *Farrell* 1973 SLT (Notes) 85; *Stocks* v *Hamilton* 1991 SCCR 190; *Cardle* v *Murray* 1993 SCCR 170 and *Craig* v *Normand* 1996 SCCR 823. In *Cardle* when the police constable approached the break-dancer in the shopping centre and took hold of him by the arm and told him to calm down he had no intention of arresting or detaining him. The court decided that the police officer acted illegally. Accordingly, if police officers are not acting to detain or arrest, to lay hands on an individual is not lawful and therefore not in the execution of duty. The sheriff was not entitled to repel the minute.

[13] The advocate depute emphasised that the minute must be considered in the context of the facts and circumstances as disclosed. The officers were clearly acting in the course of their duty in prevention of a crime or avoiding the escalation of a situation which may lead to a crime being committed. By way of analogy, the advocate depute referred to the responsibilities of police officers in directing and ushering football fans to avoid the potential for disorder. In so doing police officers are clearly acting in the course of their duty. The depute argued that the authorities of *Twycross*, *Stocks* and *Cardle* could readily be distinguished. The circumstances of this case did not involve restraint or detention or arrest. In the case of *Craig*, which is of more assistance to the court, the police officers were called to a public service vehicle where an intoxicated female could not be roused and there were concerns for her safety. Police officers took hold of her in order to assess the situation. The appellant reacted violently. It was held that the officers were acting in the execution of their duty.

[14] The question of whether police officers are acting in the execution of their duties must turn on the precise facts and circumstances of the particular case. In the present case, the sheriff concluded from the evidence that the officers who attended at the locus in charge 1 were acting in the execution of their duty throughout. The sheriff accepted the Crown's submission that Constables Nicolson and Kirk were neither detaining nor arresting the appellant when they laid hands on him. Instead they were defusing a situation which had arisen and which gave rise to the female occupants of a flat in Babbington Drive calling for police assistance. The incident occurred around 11pm on a November evening. The appellant was heavily intoxicated and was slurring his speech. He was standing close to the living room window looking into the flat. Clearly the occupants of the premises did not wish to have his presence and wanted him to leave. They asked him to leave and when he would not leave they had called the police. The appellant refused to move and the police witnesses tried to persuade him to move on. This situation went on for some time.

[15] In our opinion this minute is misconceived. The issue of whether a complaint had been made is something of an irrelevance. Looked at objectively a complaint had been made by the householder who called the police to request assistance to facilitate the removal of the appellant from immediately outside her living room after 11 o'clock on a November evening. It is necessary to look at the facts and circumstances in their entirety. It is unnecessary that there be any complaint by a member of the public in order for there to be a breach of the peace or a contravention of its statutory equivalent, section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. The appellant's behaviour at the locus firstly, with regard to the occupiers of the dwelling house at Babbington Drive and secondly with regard to his threats to the police are capable of causing a reasonable person to suffer fear and alarm that being the objective test in terms of the statutory charge (*Paterson* v *Harvie*

[2014] HCJAC 87). It is unnecessary that either the occupiers, or indeed, the police officers speak to fear or alarm. The facts and circumstances as narrated in the sheriff's report are capable of constituting a breach of the peace or its statutory equivalent.

[16] Nevertheless, the sheriff did not require to answer the question whether the conduct of the appellant constituted a criminal offence. The sheriff instead decided the matter on the basis that the police were clearly acting in the course of their duties as police officers when after some prolonged negotiation with the appellant they sought to resolve the incident which had led to the householder calling for police assistance. The reasonable inference which can be drawn from the evidence as narrated in the sheriff's report is that the police were seeking to defuse the situation and avoid having to detain or arrest the appellant. The officers could, without any criticism, have detained the appellant for the reasons we have already given. Instead, they tried to resolve the difficulty and only called for backup when the appellant threatened to "go fighting", a promise which he subsequently fulfilled.

[17] The appellant referred to *Stocks* v *Hamilton* 1991 SCCR 190. That case involved the illegal detention of an individual who was lawfully in the police station for investigation of an armed robbery. When his lawful detention came to an end he was prevented from leaving the detention room and a struggle ensued. On appeal the Crown did not support the conviction and the court held that the police constable could not be said to have been acting in the exercise of his duty. As a result the statutory charge under the then Police (Scotland) Act 1967 section 41 was unavailable. In our opinion the sheriff was correct to distinguish the circumstances in this case from *Stocks*. In *Stocks* the illegality of the ongoing detention was clear. These circumstances do not exist here. Accordingly, we did not find *Stocks* v *Hamilton* to be of assistance. Likewise, the authorities of *Twycross* and *Cardle* fall to be distinguished on their facts. In these cases there was clearly restraint or detention by

police officers which is absent here. On the other hand the circumstances in *Craig v Normand* are closer to the situation which arises here. In *Craig* the police officers took hold of the appellant to assist her and assess the situation. In this appeal, the evidence as reported on by the sheriff discloses that the police officers, although entitled to detain or arrest, chose instead to prevent any escalation of the difficult situation which had developed outside the complainer's house late at night. The appellant was clearly intoxicated and was refusing to leave the curtilage of the complainer's home. The officers had given the appellant opportunities and time to leave voluntarily. The police officers, in taking hold of the appellant, were trying to defuse the situation by ushering the appellant away. There was, at that stage, no question of detaining or restraining him. The sheriff was entitled to reach the conclusion that the police were acting in the course of their duties having responded to the householder's complaint about the appellant's presence at her property. We therefore detect no error in the sheriff's approach to the minute. We will, accordingly, refuse the appeal as both lacking in competence and merit and remit to the sheriff (Weir) at Dumfries to conclude the trial which commenced on 12 November 2015.