APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 10
HCA/2019/000607/XC

Lord Menzies
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST CONVICTION

by

VERONICA LOGAN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Collins (sol adv); Collins & Co
Respondent: Farquharson QC, AD; Crown Agent

18 March 2020

Introduction

[1] On 23 September 2019 the appellant was convicted in the Sheriff Court at Falkirk on three charges of being concerned in the supplying of the controlled drugs Etizolam, Diamorphine and Amphetamine.

[2] The evidence led against the appellant comprised the recovery of quantities of these drugs with a minimum value of around £32,000 at her flat at 22 Douglas Street Bannockburn on 4 February 2019. Prior to her trial the appellant intimated her intention to raise a preliminary issue under section 71(2) of the Criminal Procedure (Scotland) Act 1995 objecting to the admissibility of this evidence. In order to determine that objection the sheriff heard evidence on 2 August 2019 from 4 police officers and the appellant. Certain matters were also agreed by joint minute. The sheriff refused the minute and refused the appellant's motion for leave to appeal.

[3] At the trial the only evidence led was in the form of a joint minute of agreement which set out *inter alia* that the various controlled drugs were recovered from the appellant's property in the course of a search carried out under warrant on 4 February 2019 in her presence. The joint minute having been read, the sheriff directed the jury that they were required to find the accused guilty, which they duly did.

[4] In this appeal the appellant seeks to challenge the decision of the sheriff in refusing her preliminary issue minute.

The circumstances of the police visit

[5] Having heard the evidence in relation to the preliminary minute, the sheriff set out the findings which he made in the report which he prepared for this court. There is no challenge in the note of appeal to the facts as the sheriff found them to be.

[6] On 27 January 2019, an anonymous call was made by a male caller to police Scotland. The terms of that telephone call were agreed to have been accurately recorded in production 17, a certified copy redacted call card. The relevant portions of that document were in the following terms:

> "Caller reporting he has been called yesterday by female named Veronica 20 or 22 Douglas Street, Bannockburn asking for his help. She states she has been forced to house £250K worth of street valium in her house. States that males have forced her to do this. Caller states the caller is drug user herself. She states they have been doing this for the past week. Unsure if males are in the house with her. She asked caller not tell anyone because she is scared and worried males will cut off her drug supply also. Caller does not really know her that well, he was just friends with her son and daughter, 1 male was from Glasgow another from Liverpool and they show up in an Audi at her address, they have a back door key. Stated to caller they were coming back Sunday to collect the money. Caller asked if they were armed, stated 1 male had a knife nothing more stated."

[7] Police enquiry led to the conclusion that the appellant was likely to be the subject of the telephone call. Attempts by officers to test the veracity of the information conveyed by the anonymous caller were unsuccessful and senior officers concluded that the source of information was insufficiently reliable to request the procurator fiscal to seek a search warrant.

[8] In these circumstances two uniformed officers came to be tasked to visit the accused to enquire after her welfare and if she was being coerced into criminality against her will. The evidence accepted by the sheriff was that after the two police officers were invited to join the appellant in her bedroom they spoke to her and the following exchange took place:

PC Patterson:	"Veronica we are here to check on your welfare as we have received information that you may be being coerced into holding drugs against your will."
PC Smith:	"Are you being coerced into storing drugs?"
Appellant:	"That's not the case"
PC Smith:	"We are not here to get you into trouble, are you being coerced into doing anything, will you be honest with us so we can help you?"
Appellant:	No answer
PC Smith:	(After noticing that the appellant was becoming upset, a little bit teary and nervy)

> "I'm getting the impression you want to tell us something, are you being coerced into storing drugs?"

[9] At this stage the appellant said she had two bags while pulling the cover off two bags on the floor and lifting them up onto the bed. The officers could see that they contained white tablets. At that point the appellant was cautioned, said nothing incriminating, was arrested and taken to Falkirk Police Station. Thereafter the officers obtained a search warrant and the formal recovery of the items took place.

Submissions

[10] On behalf of the appellant it was submitted that the evidence as to the comments made by the appellant and the evidence recovered as a result of what she said was inadmissible and the sheriff erred in refusing to uphold the preliminary issue minute. It was submitted that the evidence which the sheriff accepted made it plain that the appellant was suspected of being involved in criminal activity by the police prior to their arrival at her home. She ought to have been cautioned before being questioned at all. It was also plain that they did not accept her initial response to their questioning and probed her further. The questions which the police officers asked made it clear that they did not believe the appellant's denial. They believed that she was storing drugs and anticipated that she would make a statement to that effect. These circumstances underlined the importance of cautioning the appellant prior to further questioning. Furthermore, it was submitted that the officers deliberately misled the appellant as to the purpose of their questions. They contended that they were there to help her and not to get her into trouble. The reality was that when she confirmed their suspicions she was immediately arrested. In the whole

circumstances the evidence ought not to have been admitted as it was obtained in circumstances which were unfair to the appellant.

[11] The advocate depute submitted that the sheriff's findings made it clear there was no unfairness to the appellant in admitting the evidence. The appellant was not under suspicion. That was plain from the fact that it was two uniformed officers who attended at her house rather than officers from the CID or the drug squad. Since she was not under suspicion, the question of unfairness did not arise. The officers had a duty in terms of section 20 of the Police and Fire Reform (Scotland) Act 2012 to protect life and property. Their attendance at the appellant's home arose from a concern for her welfare rather than a suspicion that she was committing a criminal offence.

Discussion

[12] It is of course a matter for the investigating officers and their senior colleagues to decide, in any given circumstance, whether or not they are in possession of sufficient information to request the granting of a warrant. That is not the issue which arises in this particular case. It is, however, common enough for powers of detention and search to be exercised on the basis of suspicion emanating from an informer or a tipoff from a member of the public (see for example *Hussien* v *Chong Fook Kam* [1970] AC 942 as quoted and relied upon by Lords Steyn, Goff of Chievely, Mustill and Hoffmann in *O'Hara* v *Chief Constable of the Royal Ulster Constabulary* [1996] UKHL 6).

[13] The evidence which was accepted by the sheriff in the present case included evidence of an email exchange between senior officers in the aftermath of the anonymous call in which the arrangements for the visit to the appellant's property were discussed. The

exchange included the explanation that the visit was: "… in order to test the Intel" and "For welfare and information gathering regarding any potential county lines issues".
The email exchange also included the statement that: "we cannot test this Intel without a welfare visit now been completed".

[14] At the invitation of the Crown, the sheriff approached the issue before him by seeking to identify the stage which the police investigation had reached. He concluded that the nature and source of the intelligence was insufficient to provide reasonable suspicion on the part of the officers that the accused was in possession of controlled drugs and that the investigation was still within the preliminary stage. He concluded that at such a stage the officers were entitled to ask anyone any questions. He concluded that it was only once suspicion had crystallised upon the appellant that a caution was necessary. He appears not to have placed any weight on the actual questions which the officers asked the appellant.

[15] The same approach was advanced by the advocate depute in supporting the decision arrived at. The core of the Crown's argument was that the appellant was not a suspect. The advocate depute accepted that if the evidence was wrongly admitted there was no other evidence available against the appellant.

[16] In *Gilroy* v *HM Advocate* 2013 JC at paragraph [55] the Lord Justice-Clerk (Carloway) in giving the opinion of the court explained that:

> "Although the overarching test in relation to the admissibility of statements by accused persons is one of `fairness`, it is well recognised that this normally requires that a person in the category of a `suspect` must be cautioned before being questioned by the police about the offence of which he is suspected."

[17] In discussing how to identify whether an individual properly fell to be characterised as a suspect, the Lord Justice-Clerk referred, at paragraph [58], to the opinion of Lord Wheatley in *Miln* v *Cullen* 1967 JC 21. He noted that whilst Lord Wheatley may have

viewed the issue of whether a person was a suspect as being a subjective one, which depended upon the attitude of the police at the time, he did qualify that by stating that the police attitude may require to be justified by reference to the facts in their possession. Having made this observation the Lord Justice-Clerk stated:

> "Thus, what is of particular importance is whether the police are acting in good faith when questioning a person whom they say was properly categorised as a witness rather than a suspect."

[18] As can be seen from the quote taken from the opinion of the court in *Gilroy*, the issue of whether or not a caution is important tends to be debated in the context of determining whether an individual interviewed by the police fell to be viewed as a witness or as a suspect. In the present case none of the police officers seem to have characterised the appellant as a witness. There were two components to their interest in speaking to her. First, to test the intelligence received, that being that she was in possession of a large quantity of drugs, and second, to enquire after her welfare by ascertaining if she was being coerced into criminality against her will. Both of these purposes had in mind that the appellant may have been engaged in criminal activity by being concerned in the supplying of controlled drugs.

[19] Although there was mention in the anonymous telephone call of the appellant being forced to house drugs, and the word "coerced" was used by the police officers who spoke to the appellant, there is no suggestion in anything which the sheriff has set out in his report, or in the written submissions presented to him which are attached to that report, that "coercion" was being considered by the police in the context of a legal defence. Apart from anything else, the initial information conveyed by telephone included the account that one of the reasons why "Veronica" did not want the anonymous caller to tell anyone was

because she was worried that the males would cut off her drug supply. Such an explanation would render a defence of coercion untenable. In any event, it seems inconceivable that the defence of coercion could have been thought to apply in circumstances where the appellant was free to come and go from her own house as she chose and to seek help from the authorities should she wish to do so (see *Van Phan* v *HM Advocate* 2018 JC 195 at paragraphs [42] and [43]).

[20] The information received by the police was that the appellant was storing a high value quantity of controlled drugs. In response to that information senior police officers were concerned about any potential county lines issues. We would understand this to refer to the practice of trafficking drugs from larger cities to more rural areas for distribution and sale.

[21] In any investigation into the trafficking or supplying of controlled drugs there will not be a single possible perpetrator of the crime (cf *HM Advocate* v *Rigg* 1946 JC 1, Lord Justice-Clerk Cooper, page 4) nor will there be a person upon whom suspicion has centred as *the* likely perpetrator of the crime (cf *Chalmers* v *HM Advocate* 1954 JC 66, Lord Justice-General (Cooper) page 78). It is in the nature of any drug supplying operation that a number of individuals play different but complementary roles, be they financiers, importers, couriers, custodians, packagers, those who provide storage facilities, street level suppliers or the like. In the case of a drug supplying operation, the question of whether a person is a suspect may involve different considerations from those which arise in a single perpetrator crime.

[22] When the two police officers attended at the appellant's flat they plainly did suspect her of involvement in a drug supplying operation. They told her so. Finding in fact (14) as set out in the sheriff's report explains:

> "The officers then verified who the accused was and then explained to her that the reason they were there was that they had reason to believe that she had been coerced into criminal activity and been put into a vulnerable position and wanted to ask her if she had been placed in a vulnerable position by storing drugs for anyone;"

[23] Having reason to believe that the appellant was storing drugs for someone cannot be distinguished from suspecting that she was doing so, nor did the officers attempt to do so in giving evidence.

[24] The officers went on to explain that the appellant had to be honest with them so they could help her. There was no evidence before the sheriff of any briefing or discussion about what assistance or advice was to be offered to the appellant. Nor does there seem to have been any exploration in evidence of what the attending police officers had in mind providing by way of help to the appellant should she confirm their suspicions. All that is known is that on doing so she was immediately cautioned, said nothing incriminating and was arrested. In the debate before us, the advocate depute was unable to explain what form of help the police officers had in mind, or would be able to provide.

[25] The overarching test of fairness referred to by the Lord Justice-Clerk in *Gilroy* does not of course require that a suspect must always be cautioned before any question can be put to him by the police. The question in each case is whether what was done was unfair to the accused (*Pennycuick* v *Lees* 1992 SCCR 160 Lord Justice-General (Hope) at page 164F). In applying that test in all the circumstances of a given case the question whether the appellant was or was not a suspected person will be one of the circumstances to take into account (Lord Hope at page 164 C-D). Consideration will be given to matters such as whether the questioning which had been engaged in was designed to elicit admissions of guilt, whether any threats were made, any inducements were offered or whether undue pressure was put

upon the individual (see *Tonge v HM Advocate* 1982 SCCR 313 Lord Cameron at page 350 and *Harley v HM Advocate* 1995 SCCR 595).

[26] In the present case we consider that the sheriff erred in acceding to the Crown's submission. We consider that in doing so the issue was approached from too narrow a perspective. The police officers had information about the appellant's conduct which they decided to act upon. The issue of whether or not she was being taken advantage of in some fashion was no doubt a complicating one but there was no basis upon which it could reasonably be thought that a legal defence of coercion would be available to the appellant if she was storing drugs. Nor was it said that the police had this in mind. It is commonplace for drug users, such as the appellant, to be taken advantage of and to be put under pressure in all sorts of different ways to provide assistance to drug suppliers. Such circumstances regularly feature in pleas in mitigation.

[27] The officers who attended did suspect that the appellant was storing drugs. That was why they were there, although they may have had other unspecified notions in mind as well. In questioning the appellant in the manner in which they did the officers declined to accept the appellant's initial response. They persisted and sought to obtain an admission of involvement. They misled the appellant as to the consequences of answering their questions. They offered the inducement that they were not there to get her into trouble and that if she was honest with them they would be able to help her. No effort was made to justify or explain those comments.

[28] In *Gilroy* at paragraph [59] the Lord Justice-Clerk recognised that matters of the sort debated before the sheriff in the present case remain matters of fact and that respect has to be given to the advantage which the judge (or sheriff) has had in seeing and hearing the witnesses giving evidence. He went on to state:

> "However, he is not taking a discretionary decision and it is not necessary for the appellate court to categorise his decision as `unreasonable`. His decision is one involving the exercise of a judgement in determining whether the investigative stage has passed. His decision will be reversed if, upon the central facts found, the appellate court considers that the wrong view has been taken even if the finding of these facts remains primarily a matter for the first instance judge, subject to review on conventional grounds."

Decision

[29] For the reasons which we have set out above, we are satisfied that the sheriff erred in his assessment of whether or not the evidence objected to was admissible. In our opinion, the combination of a failure to caution the appellant at any stage and the encouragement given to her to respond upon the premise that the police officers would provide her with help, resulted in unfairness such as ought to have led to the objection being upheld.

[30] The appeal shall be allowed and the appellant's conviction quashed.