APPEAL COURT, HIGH COURT OF JUSTICIARY

[2026] HCJAC 8
HCA/2025/000318/XC

Lord Justice Clerk
Lord Mathews
Lord Clark

OPINION OF THE COURT

delivered by

LORD BECKETT, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

DAVID WILLIAM ROY CUTHILL

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Cox; Faculty Services Limited (for Dewar Spence, Leven)
Respondent: Cameron KC (Sol adv); the Crown Agent

3 March 2026

Introduction

[1] The appellant was convicted by a jury after a short trial at Dunfermline Sheriff Court and sentenced to imprisonment for 8 months on the following charge:

> "On 25th June 2023 at Cell A2/18, HMP Perth, 3 Edinburgh Road, Perth, being a prison, you DAVID WILLIAM ROY CUTHILL did, without lawful authority or reasonable excuse, have with you an article which had a blade or was sharply

pointed, namely a sharply pointed article; CONTRARY to section 49C(l)(b) of the Criminal Law (Consolidation) (Scotland) Act 1995 as amended."

[2] He appealed and leave was granted to challenge his conviction on two grounds. In ground 2 he complains that the sheriff caused irretrievable prejudice by directing the jury on a different offence, namely an offensive weapon under section 49C(1)(a) of the 1995 Act.

[3] In ground 3, he makes two complaints:

i) That the sheriff gave an inappropriate example in illustrating the scope of the phrase "having with him"

ii) That the sheriff ought to have given directions on the statutory defence under s 49C(2) where it was raised in the evidence.

Whilst in ground 3 there was also reference to fairness under Article 6 of the European Convention on Human Rights, it was not accompanied by a compatibility issue minute and was not insisted on in the appeal.

The evidence

[4] The following facts were established in a joint minute.

1. That on 25 June 2023, the accused ... was a prisoner at [HM] Prison, Perth. The accused was allocated to cell A2/18.

2. That Crown label 1 is a sharply pointed article measuring three inches in length, that consists of a metal point with red tape wrapped around the opposite end to form a grip. Crown production 1… is a photograph of Crown label 1.

[5] The prosecution called two witnesses in support of its case, Mr Crooks and Mr Costello, both prison officers. The sheriff summarised their evidence briefly in her report. For the purposes of the appeal, we were provided with a transcript of the evidence of Mr Crooks only.

[6] Their evidence was to the effect that they searched the appellant's cell, of which he was the only occupant both at the time of the search and on that day, albeit there were two beds in the cell which could accommodate two prisoners. Prison officers carry out routine searches to ensure the safety of those in their care, and prisoners know this. There would have been some opportunity earlier that morning, for a period of 30 minutes or so, for other prisoners to have entered the cell. The officers first performed a body search and then the appellant stood outside the cell. The offending article, an improvised weapon, was found by Mr Crooks during the search. Mr Crooks spoke to it being in a box under the appellant's bed. It was the only bed in use in this cell.

[7] Mr Costello had a less clear memory of exactly where it was found but knew that it was found by his colleague in the cell as he was there at the time. He recalled his colleague saying that he found it under the bed. Mr Costello recalled that when Mr Crooks asked the appellant about the article, the appellant responded that he had it to clean his nails. The sheriff reports that when it was put to Mr Costello in cross-examination that the appellant had said that the article was nothing to do with him, he was unable to comment. When he was shown his operational statement making no reference to the appellant's comment about nail-cutting, he explained that it had been a busy shift and he was under pressure and omitted that detail. He insisted that he had a memory of the appellant saying that he used the article to clean his nails as it was an unusual statement.

[8] Mr Crooks explained in evidence in chief that they were carrying out a routine search as part of their duty to ensure the safety and security of prisoners generally. It was not a search based on any intelligence that there may be a prohibited article. They asked the appellant if he had any article that should not be there that could harm them and he replied, "No." On finding the article he asked the appellant about it and he thought that the

appellant responded to the effect that "it wasn't his." The article had been in a cardboard box under the appellant's bed with part of the article protruding outside the box.

[9] In cross-examination, Mr Crooks acknowledged that there was a period when there was nothing to stop any prisoner in the area entering the appellant's cell. The following leading question was answered:

> Q And Mr Cuthill told you that he didn't know anything about it?
> A Yes

He was asked if there was anything obscuring a view of the box and he said that he could not recall but acknowledged that prisoners would quite often have sheets or covers hanging down from the side of their beds.

The presentation of the case to the jury

[10] We are told nothing of the Crown approach but have a transcript of the defence speech at trial. His solicitor correctly stated that the crux of the case was whether the appellant had the item with him. He proceeded to the following effect:

a) That this would obviously be the case if he had it in his pocket, his shoe or somewhere in his possession and this would be a fairer way of looking at the situation.
b) Another way of looking at the situation was to consider if the appellant was in possession of the item, possession requiring both knowledge and control. "Control's quite straightforward. If you can see it, you can move it you control it."
c) It was not in open view, it was inside a box under a bed with a cover down and Mr Crooks had to open the box to see the item.
d) The issue was whether the words [have with him] are to be interpreted literally and the judge would explain that in due course.

The defence solicitor then told the jury that they had to be satisfied that the appellant had knowledge of the item and Mr Crooks had told them that the appellant had said he knew

nothing about it. The jury should reject Mr Costello's evidence of the appellant saying he used the item to clean his nails.

The sheriff's directions

Introductory directions

[11] The sheriff gave the jury the standard directions orally and in writing at the start of the trial, including on the presumption of innocence, the burden of proof lying only on the prosecution, the requirement on the prosecution for proof of guilt beyond reasonable doubt and corroboration. She directed that there was no such burden on the appellant and that if they believed any exculpatory evidence, or if any piece of evidence left them in reasonable doubt of his guilt, they must acquit him.

Closing directions

[12] The sheriff adopted the written directions and repeated the directions summarised in the preceding paragraph. In defining the crime, she told the jury that having an article with the appellant should be understood according to the normal meaning of the words. It was a factual situation of ready availability. The Crown did not have to prove that the appellant knew he had the item concerned with him. There must be a close physical link with, or a degree of immediate control over, the item.

[13] It is of some significance that the sheriff directed the jury, page 3 of the transcript of her charge, that what was reported to have been said by the accused was evidence and they must consider it. At page 9 she directed that:

> "If you believe any evidence which clears the accused of the charge you must acquit him, even if that evidence stands alone. Even if you do not completely believe that

> evidence but it leaves you with a reasonable doubt about his guilt you must acquit him. Any piece of evidence can raise a reasonable doubt."

She reminded the jury that they must consider the case for the appellant, the submissions made by his solicitor and if any piece of evidence left them with a reasonable doubt then they must acquit the accused of the charge.

[14] The sheriff did initially give a direction relevant to the offence under s 49C(1)(a) of the 1995 Act. At the conclusion of her directions, the defence solicitor pointed out the error and invited her to give the correct direction for the s49C(1)(b) offence which she did.

[15] The sheriff responded to what the defence solicitor had stated to the jury (para [10] at points [b] and [c] above) as follows:

> "[The appellant's solicitor] suggested to you in his speech that the accused did not have the item with him. That he didn't have it in his hand, his pocket or in his shoe. He suggested that the words of the legislation were clear. The words "have it with him", taken literally, meant that the accused did not have the item with him. I've defined to you what "has it with him" means and you will proceed on that ordinary, simple definition. For example, if you are on a train and you put your bag into the overhead luggage rack above your seat or on the seat next to you it's not on your person in the sense of being in your hand or your pocket, or your shoe, but you still have it with you."

[16] The sheriff directed the jury to consider all of the evidence and all of the submissions made about it by both prosecution and defence. Before explaining the verdicts available, she concluded by repeating her direction that if any piece of evidence left the jury in reasonable doubt of the appellant's guilt, they must acquit.

Submissions

Appellant

[17] In his written submissions, the appellant noted that the sheriff acknowledged in her report that she gave a direction on the offence under s 49C(1)(a) of the 1995 Act, namely an

offensive weapon, before giving the correct direction under s 49C(1)(b) of the 1995 Act. The initial erroneous direction was liable to make the jury think the charge facing the appellant was more serious than it was, exposing him to prejudice so grave that it was not cured by the subsequent correct direction.

[18] By giving the example of a passenger with a bag on a train as illustrating a person having an item with them, the sheriff misdirected the jury where the defence had founded on the importance of the appellant's knowledge in the circumstances of this case where the article was found in a box under a bed when there was a cover hanging down from the bed. Any illustration should have related only to the circumstances of this case.

[19] The sheriff erred in failing to direct on the statutory defence of reasonable excuse. Since the appellant had put in issue the question of his knowledge, such a direction was required, and its absence had caused a miscarriage of justice.

[20] At the hearing, counsel adopted the propositions summarised in paras [17] and [18] above before addressing the statutory defence point more fully. Whilst the defence had not articulated reliance on the statutory defence, that did not alleviate the sheriff's responsibility to give an appropriate direction where, as in this case, it arose on the evidence. The appellant discharged the onus on him by Mr Crooks agreeing with the proposition put to him that the appellant had told him that he did not know anything about the article. This was evidence of his reaction and was available to prove fact and carried more weight when there was evidence that other prisoners could have accessed the appellant's cell where the article was found.

[21] In response to questioning from the bench of the legal status of the appellant's response to Mr Crooks, counsel conceded that if it was not evidence of fact there was no other basis for the statutory defence. Counsel did not submit that this was rendered

evidence to prove fact by the Criminal Procedure (Scotland) Act 1995 section 261ZA. It might be that if a statement spoken to by Mr Crooks in evidence in chief, that the appellant had said in response to the finding of the article that it was not his, was added to the evidence elicited in cross-examination for the appellant, there was a mixed statement.

Crown

[22] The complaint about the erroneous reference to the wrong offence was groundless because the sheriff corrected herself and made it clear that the jury should disregard her direction on an offensive weapon and proceed on the further direction she gave on the correct offence. There was no prejudice to the appellant, if anything it was the prosecution that was prejudiced by the initial, erroneous, direction that more needed to be proved than the Act required under s 49C(l)(b).

[23] The background to the second complaint was that the appellant's solicitor had erroneously suggested that knowledge was an ingredient of the crime when it is not for this kind of offence. If it can feature at all, it can only be in the context of the statutory defence: *Crowe* v *Waugh* 1999 JC 292, *Hill* v *HM Advocate* [2014] HCJAC 117, 2014 SCCR 659 at [9]-[11]. The sheriff required to correct the appellant's erroneous submissions on the ingredients of the offence and provide a sound direction on the action constituting the offence, "have with you," and not possession as the appellant's solicitor had proposed. The example given was appropriate to demonstrate that having something with a person does not require it to be on the person physically.

[24] In this case, the appellant required to do more than introduce, or found on, evidence that may give rise to a reasonable doubt of his guilt if relying on the statutory defence. There was a legal burden the appellant had to meet on the balance of probability: *Donnelly* v

HM Advocate 2009 SCCR 512; *Glancy* v *HM Advocate* [2011] HCJAC 104, 2012 SCCR 52. In convicting, the jury must have accepted that the appellant had with him the prohibited article. The only possible route to a reasonable excuse was a complete absence of knowledge about the article on his part. There was no such evidence, no foundation for the defence, no misdirection and no miscarriage of justice. The evidence from the prison officers did not fall within the scope of s 261ZA of the 1995 Act as they were not police officers or equivalent officials and they were not investigating an offence when they searched the appellant's cell for safety reasons and then spoke with him on finding the article. None of the things reported to have been said by the appellant constituted evidence to prove fact. There was no mixed statement. It was all hearsay: *McCutcheon* v *HM Advocate* 2002 SCCR 101. Even if it was admissible to prove fact, in the particular circumstances of this case it could not surmount the balance of probability.

Decision

[25] Section 49C provides:

> "49C Offence of having offensive weapon etc. in prison
> (1) Any person who has with him in a prison–
> (a) an offensive weapon, or
> (b) any other article which has a blade or is sharply pointed, commits an offence.
> (2) It is a defence for a person charged with an offence under subsection (1) to show that the person had a reasonable excuse or lawful authority for having the weapon or other article with him in the prison…"

[26] There is no merit in the first ground of appeal. Having directed on the wrong offence, the sheriff corrected herself and gave the correct direction on the offence under s 49C(1)(b). There is no possible prejudice and, viewing the charge as a whole, there was no misdirection, far less a miscarriage of justice.

[27] Judges frequently give examples removed from the particular circumstances of a case to illustrate a legal principle. There is nothing wrong in the illustration given by the sheriff. She was responding to a submission to the jury that implied that the appellant required to have the article on his person to have it with him. That was wrong and the sheriff's illustration was an appropriate one.

[28] Section 261ZA provides:

> "261ZA Statements by accused
> (1) Evidence of a statement to which this subsection applies is not inadmissible as evidence of any fact contained in the statement on account of the evidence's being hearsay.
> (2) Subsection (1) applies to a statement made by the accused in the course of the accused's being questioned (whether as a suspect or not) by a constable, or another official, investigating an offence.
> …"

Counsel did not submit that prison officers are officials who investigate an offence and we do not consider that they are. We note that the Prisons and Young Offenders Institutions (Scotland) Rules 2011 has provisions for welfare, discipline and searching prisoners but makes no provision for the investigation of offences. In any event, the prison officers were not investigating an offence. When offences require criminal investigation in prison, investigations are carried out by the police.

[29] In *McCutcheon*, in giving the opinion of a court of 9 judges, the Lord Justice Clerk (Cullen) clarified the law on statements made by an accused person. Except as provided for in section 261ZA, *McCutcheon* continues to have effect. In short, a report of an exculpatory statement by an accused person is generally not admissible, it is secondary hearsay. It may only be used as primary hearsay. His Lordship summarised the law at para [16] in this way:

> "(i) It is a general rule that hearsay, that is evidence of what another person has said, is not admissible as evidence of the truth of what was said.
> (ii) Thus evidence of what an accused has been heard to say is, in general, not admissible in his exculpation, and accordingly the defence are not entitled to

> rely on it for this purpose. Such evidence can be relied on by the defence only for the purpose of proving that the statement was made, or of showing his attitude or reaction at the time when it was made, as part of the general picture which the jury have to consider.
>
> (iii) There is, however, an exception where the Crown have led evidence of a statement, part of which is capable of incriminating the accused. The defence are entitled to elicit and rely upon any part of that statement as qualifying, explaining or excusing the admission against interest."

[30] Thus far, and on the arguments presented, it appears that what the appellant was reported to have said to Mr Crooks was inadmissible secondary hearsay and available only as primary hearsay. However, we note that the 9-judge bench was convened to overturn part of what a bench of 7 judges had determined in *Morrison* v *HM Advocate* 1990 JC 299. In giving the opinion of the court in *Morrison*, the Lord Justice Clerk (Ross) noted that Hume [*Commentaries* vol ii p 401 para 5 of note a] envisaged that it was an accused's hearsay denials after the commission of the offence that were not admissible as the truth of their contents. In other words, the position would be different if the statement reported to have been made by the accused was truly part of the *res gestae*. LJC Ross affirmed the *res gestae* exception as LJC Cullen noted in *McCutcheon*, [3].

[31] The meaning of *res gestae* was the subject of authoritative consideration by a full bench of 7 judges in *Lord Advocate's Reference (No 1 of 2023)* [2023] HCJAC 40, 2024 JC 140 and by another full bench of 9 judges, in *Lord Advocate's References (Nos 2 and 3 of 2023)* [2024] HCJAC 43, 2025 JC 200. In the latter, in giving the leading opinion, the Lord Justice General (Carloway) explained, at [52]:

> "*Res gestae* is translated by Trayner as '[t]he thing done, the whole transaction or circumstance'; literally the thing (*res*) accomplished or achieved (*gesta* or *gestae*). The important point is that, whatever its outer limits, it includes, but extends beyond, the *actus reus*…"

The crime charged was continuing throughout the time the article was in the appellant's cell and was continuing when it was found. A question was then asked, and Mr Crooks said the

appellant responded. Whilst we were not addressed on it, we consider that the evidence of Mr Crooks as to what the appellant said on being asked about the article just found comes within the *res gestae* exception and is admissible, for what it is worth, as evidence to prove fact.

[32] In determining whether there was a requirement on the sheriff to direct the jury on the statutory defence in the circumstances of this case we note the following. The appellant did not give evidence. His solicitor did not clarify that he was relying on the statutory defence, albeit he tried to make an issue of knowledge by suggesting that the appellant's denial of knowledge undermined the Crown case that the appellant had the article with him. This was not a situation where it was sufficient to discharge an evidential burden with any piece of evidence that may give rise to reasonable doubt. There had to be some evidence capable of persuading the jury on a balance of probability that the appellant had no knowledge of the article in his cell: *Donnelly* [8] and [9], *Glancy* [6] - [9]. None of these circumstances viewed individually would absolve the sheriff from the responsibility of giving a direction on the statutory defence if appropriate, but we have to consider the whole circumstances.

[33] Mr Costello testified that the appellant said that he used the article for cleaning his nails. That would fix him with knowledge. Whilst this was the subject of criticism in cross-examination and defence submissions, there was no evidence from the appellant to contradict it, and Mr Crooks was not asked about it. Mr Crooks' evidence of the appellant saying that the article did not belong to him did not advance the appellant's position. It did not need to belong to him for him to be guilty of the offence. He must have had no awareness of its presence to even begin to allow him a defence of reasonable excuse. The only possible foundation was an affirmative answer to a leading question put to Mr Crooks

meaning that the jury did not even hear a report of the appellant's own words. For a report of *res gestae*, the actual words used by the person who made the utterance plainly matter.

[34] In these circumstances, and where nobody in the trial identified that the comment was *res gestae*, we are not persuaded that the sheriff erred in omitting a direction on the statutory defence, for which there was a reverse burden on the appellant on balance of probability, on such a slender basis. Even if we concluded the omission was a misdirection, in the circumstances of this case in which any defence would rest on fanciful grounds that in a short interval someone was motivated to, and managed, to secrete a prohibited article in a box under the appellant's bed without the appellant knowing about it, we would be slow to conclude there was a miscarriage of justice. As we shall explain, if there was a misdirection it was favourable to the appellant and that is fatal to his appeal.

[35] The sheriff directed the jury that anything said by the appellant was evidence. Before turning to verdicts, her final direction was that if any piece of evidence left the jury in reasonable doubt, they must acquit the appellant. Accordingly, she directed the jury that they could acquit based on anything said by the appellant if it left them in reasonable doubt. There was very little evidence of what the appellant had said but it included Mr Crooks' report of him saying something to the effect that he knew nothing about the article. Had the sheriff introduced the statutory defence there would have been a formal obstacle to acquittal: the requirement for the jury to be satisfied on a balance of probability that the appellant had a reasonable excuse based on his not knowing that the article was in his cell. Instead, the sheriff's directions left it open to the jury to acquit on an evidential burden only. This was favourable to the appellant. Accordingly, there has been no miscarriage of justice and the appeal is refused.