APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 49
HCA/2025/000204/XC

Lord Matthews
Lady Wise
Lord Clark

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

APPEAL UNDER SECTION 74 OF THE

CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

J K-P

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Gravelle, solicitor advocate; Beltrami and Company Limited
Respondent: Cross, solicitor advocate, Advocate Depute; the Crown Agent

2 July 2025

[1] The appellant is indicted in the sheriff court on charges under the Civic Government (Scotland) Act 1982 in connection with indecent images. It appears that they were found on an examination of his mobile phone.

[2] A preliminary plea minute was tendered to the sheriff challenging the admissibility of evidence recovered from the phone. In short it is alleged that the appellant was taken into custody at his workplace and conveyed to another address in respect of which the police had a search warrant. Thereafter he and the premises were searched. It is said that the "*de facto* arrest" and the later search were unlawful.

[3] In due course, an evidential hearing was heard before the sheriff at Dundee. Evidence was led from three police officers, the appellant, the appellant's father and his partner, another occupier of the premises. The sheriff repelled the plea and on 2 July 2025 we refused an appeal against that decision. We indicated that we would give our reasons in writing and this we now do.

[4] In summary, the evidence was as follows. DC Gibbs gave evidence that the police arrived at the address at 09:15 and were met by CR, the appellant's partner. It was established that the appellant was at work, so the officer and a colleague DC Austin went to his work to trace him and bring him back to his home address, where they had expected to find him. DC Austin asked the appellant to confirm his identity and told him that there was an enquiry at his home. He was not told the nature of the enquiry or shown the warrant. DC Austin asked the appellant to come back with them. It appears that the warrant was based on intelligence relating to an online account on a social media platform linked to the appellant. DC Gibbs's view was that the appellant was a suspect.

[5] The appellant agreed to return to the premises and was taken back. On arrival, he was informed of the purpose of the enquiry and cautioned. The officer rejected suggestions that the appellant was told he had to return to the locus or that he was restrained. He did not know what would have happened had the appellant refused to return. He confirmed that child locks were on in the back of the police car and the appellant would not have been

able to leave the car because of that. The appellant had not been asked about his phone before leaving the garage where he worked.

[6] DC Austin confirmed that he told the appellant he was carrying out an enquiry at his house but did not tell him the nature of it. The appellant had not asked about the nature of the enquiry. The appellant agreed to return to the flat. The officer did not at any stage tell him to come with him and he was always free to leave. The officer did not take hold of the appellant. At the property he cautioned the appellant before proceeding with the search. The decision to locate the appellant was standard practice because of a duty of care towards persons whose properties were searched. He did not see the appellant in possession of his phone at the garage and did not ask him about it.

[7] DC Fyfe could not recall if the nature of the enquiry was discussed on arrival at the locus and could not remember whether the warrant had been shown.

[8] The appellant's position was that he had placed his phone in the garage office on charge. The police had said that he "was to go with them". He did not think he had a choice and was never told why he had to go with them. He was not told he was arrested. As they went to leave, one of the officers asked him if he had his phone. When he replied that he did not the officer told him that he "might need it to get back from where we are going." The officers held his arm in a tightish grip and he could not pull it away. He was held all the way to the car and had to be let out of it. When the warrant was read out at the locus the officers then said, "I'll have your phone." Under cross-examination, he agreed that he was not handcuffed. He said he was unsure about the situation and did not think to ask why he was under arrest if that was the position. He could not recall the exact words spoken by the police but believed it was compulsory at the time.

[9] CR said that the police had told her that they had to go and get the appellant. When the officers arrived with him, one officer was holding his arm so tightly that the officer's knuckles were white.

[10] The appellant's father said that, as the police and the appellant left, the appellant said, "I need my phone, I'll need it to phone you for you to pick me up after."

[11] The sheriff preferred the evidence of the officers to that of the appellant and his partner. They considered the appellant to be a suspect. He was not in any form of custody and there was no significant curtailment of his freedom of action as that term was used by Lord Hope in *Ambrose* v *Harris* [2011] UKSC 43. The sheriff interpreted the word "suspect" as it was used in *Mclean* v *HM Advocate* [2023] HCJAC 16. In other words, the appellant was a suspect in the very general sense of being a person whom the police suspected of having committed crimes of the type of which he was eventually charged, but he could not have been charged in the absence of evidence that he had at least possession of the relevant images. We pause to observe that it was not clear at that stage, at least according to the evidence, what exactly the relevant images were.

[12] The sheriff found that the officers were acting in good faith. He rejected any suggestion that they deployed trickery or deception to have the appellant return to the locus. He rejected the suggestion that the appellant was to any extent in *de facto* custody. He did not accept the account of the appellant or that of his partner. He was not satisfied that the appellant was given no opportunity to refuse to attend or that he was taken by force. The evidence of the appellant and his partner was contrived and self-serving. He rejected the evidence of the appellant that he was left with the impression that he had no option but to leave his work and attend the locus. He did not consider that the police asking the appellant to attend with them to his home on the voluntary basis necessitated them telling

him in detail what the nature of the enquiry was. The appellant was an adult and was not in any way vulnerable. The sheriff rejected the evidence of the appellant that the police told him he would need his phone to secure his travel home after they were finished with him. The evidence of the appellant's father supported the evidence that the appellant went and got his mobile telephone but it did not support the appellant's evidence that that was at the suggestion of the police. The evidence that the appellant was held was also rejected. The child locks in the police car amounted to nothing more than a red herring, in the sense that if on the journey the appellant had asked to get out of the car the officer would have had to let him out. Having reached the conclusion that the appellant was not in *de facto* custody, the procedures adopted by the police were fair, given that he was cautioned at common law on arrival at the locus, the warrant was read and the case was on all fours with *Mclean*. The recovery of the phone was allowed in terms of the search, as it had been at the locus.

[13] Even if there had been an irregularity he would have excused it in terms of *Lawrie* v *Muir* 1950 JC 19.

Submissions for the appellant

[14] The appellant was a suspect. The police had been informed that his social media account was the source of the criminality. They could have searched the property in his absence. The questions to the occupant, the appellant's partner, focused on his whereabouts. They went to get him rather than telephoning him and inviting him to return. The reality was that he was being told to return to his property and the circumstances were such that he could not refuse. He was not told of the nature of the investigation or that a search warrant was to be executed. He was not cautioned, arrested or informed of any rights. He was locked in the rear of the police vehicle. The fact that he retrieved his mobile

phone was consistent with his evidence that he was instructed to bring it. Suspicion had clearly crystallised upon him. The case was distinguishable from *Mclean*. The sheriff did not require to accept the evidence of the appellant and his partner in order to uphold the plea. There was a route to that in the evidence of the police witnesses and the appellant's father. That showed that his freedom of action had been significantly curtailed. The focus on whether force was used was an error. The whole circumstances required to be scrutinised. The police had not told him anything about why they wanted him and the assessment as to whether there was a significant curtailment of the appellant's freedom of action and circumstances which were coercive was flawed. The sheriff had not properly applied *Ambrose* v *Harris*. The appellant's evidence was that the conduct of the police left him with the impression that he had no option but to accompany them. It was submitted that the report of the sheriff was silent on his determination of the appellant's perception at the time and the extent to which this was influenced by the police but that submission is clearly incorrect, as we have indicated. It was clear that the purpose in abandoning the search was to retrieve the appellant and the circumstances were demonstrative of a *de facto* arrest.

[15] This was not just a disagreement as to the facts. The appellant had not been afforded his rights as a suspect and the sheriff had fallen into error by not having due regard to the purpose of the police's attendance at his work and their failure to communicate key pieces of information in the whole circumstances. The fact that he had not been given the full story should have been taken into account by the sheriff in deciding whether or not his freedom had been curtailed. The police had enough to arrest him and should have done.

Submissions for the respondent

[16] The police had intelligence that an IP address linked to a social media account connected to the appellant had indecent images but that was all they had. The police did not know who was using the account, albeit it was in the name of the appellant. More than one person was in the house. He was a suspect in a general sense and there was no evidence that he had committed the crime. There were no grounds to arrest him until the matter was investigated.

[17] The sheriff was entitled to equate this with the case of *Mclean.* The police had expected the appellant to be in the premises but were told he had gone to work and their evidence was that it was standard practice in cases of this nature to search in the presence of the person. The sheriff was entitled to find that there was no curtailment of his freedom and that he had attended fully voluntarily. He had given evidence that the police had given him no choice but the sheriff rejected that evidence. There was no evidence that he was told to get his phone. The sheriff took full account of the whole circumstances. The appellant went voluntarily with the police to his home address and was cautioned. There was no evidence that the police knew that images were on the phone. They looked at other devices. In short, there was no irregularity.

[18] Even if the search was irregular, it could and should be excused. The police could have waited and searched the premises when the appellant returned. That was a relevant consideration. This indictment charged serious offences covering just short of 2 years. When the police went to the appellant's work they told him that there was an ongoing incident at his house, albeit without reference to the subject matter. There was no trick or lie. Neither was there any pressure, deception, or intimidation.

[19] On the intelligence available to the police, the appellant was a suspect in general terms but there was insufficient evidence to charge him or reasonable grounds to arrest him. He could not have been charged with being in possession of indecent images until the search was executed and the images were recovered from a device attributable to him. His status was correctly equiparated to that of the appellant in *Mclean.*

[20] The sheriff was correct to find that he was not in *de facto* custody and that the procedures adopted by the police were fair.

Analysis and decision

[21] Despite counsel's best efforts, we were satisfied that this case turned largely on the sheriff's assessment of the evidence and his findings in fact. He was entitled to find that the police did not use any force or compulsion but merely invited the appellant to accompany them back to the house. He clearly had regard to the test in *Ambrose* v *Harris* and considered the whole circumstances. He rejected the appellant's evidence that he felt as if he had no choice but to comply. There was no reason for the police to go into details about the nature of the enquiry, which in any event might have been inappropriate at his workplace: *CF Freeburn* v *HM Advocate* 2013 SLT 70.

[22] It is true to say that identification of the appellant as a suspect was slightly further advanced than in *Mclean*. In that case there were four potential suspects in the premises and in the current case the social media account appeared to be linked to the appellant. However, the inquiry was still at the stage of acting on intelligence and the advocate depute was correct to say that others might have used his phone. The sheriff concluded, based on the evidence before him, that the police did not have sufficient information to allow them to arrest the appellant. He was entitled to find that there was no subterfuge or trick in asking

him to return to the house, which was in accordance with the general practice. The fact that there were child locks on the police car seemed to us to be of no consequence. The sheriff found that he could have asked to be let out and that would have happened.

[23] The sheriff was satisfised that the officers acted in good faith. They did not ask the appellant to retrieve his phone. He went with them to the house voluntarily and indeed, voluntarily retrieved his phone before doing so.

[24] We were satisfied that the attack on the sheriff's findings was no more than a disagreement with his conclusions on the evidence. He had full regard to the relevant tests and made findings, all of which were open to him.

[25] Even if we had been satisfied that the search was unlawful, we would have excused it for the reasons set out by the sheriff himself and by the advocate depute. These were serious offences, the officers acted in good faith, they could have waited until the appellant returned home, in which case they would have retrieved the phone, and there would have been no issue.

[26] In all the circumstances the appeal was refused.