APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 67
HCA/2016/000606/XC

Lady Paton
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL UNDER SECTION 74
OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

ALAM SADIQ AND OMAR SADIQ

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

First Appellant: Fitzpatrick, (Sol Adv); Fitzpatrick & Co, Glasgow
Second Appellant: Duguid QC; Faculty Services Ltd
Respondent: McSporran QC, AD; Crown Agent

11 January 2017

Introduction

[1] The appellants were indicted to a preliminary hearing in the High Court at Glasgow along with two others. The charges on the indictment which they faced included being

concerned in the supplying of Class A drugs between 20 July 2015 and 24 July 2015 at the Radisson Blu Hotel Glasgow and at Oswald Street in Glasgow.

[2] Each appellant lodged a preliminary issue minute objecting to the admissibility of evidence arising from a search of a bedroom at the Radisson Blu Hotel in Glasgow. Whilst each minute also objected to the admissibility of evidence found as a result of a subsequent search of an Audi motor vehicle, neither appellant insisted upon that part of their minute before the first instance judge. An evidential hearing took place after which the judge upheld the objection taken in part and excluded the evidence of the search of the hotel bedroom but permitted evidence to be admitted of the recovery of a key for Audi motor vehicle registration number LM57 NXW. The appellants have now appealed against the decision to admit evidence of the recovery of the car key.

The Circumstances of the Search

[3] The evidence led disclosed that at around 11pm on the night of 23 July 2015 Mr Rankin, the security manager at the Radisson Blu Hotel in Glasgow, became aware of CCTV footage which caused him concern. That footage disclosed that two male visitors to the hotel had attended at room 441 and that the two guests who had earlier checked into that room had then made their way to a Mercedes motor vehicle parked nearby in Robertson Street. These two men were seen to be putting items in a container in the central console of the vehicle and all of this activity led Mr Rankin to suspect that there might be a drugs deal going on. In light of this suspicion he telephoned the police.

[4] Police officers arrived and viewed the CCTV footage for themselves, during which PC Corkindale was able to observe the two men in the front seats of the motor vehicle packing what appeared to be white powder into a cylindrical object. That officer decided

that he and his colleagues should go to room 441 to speak to the other males who were still there as he was concerned that they might be in possession of drugs. He explained that he did not wait until a search warrant had been obtained as he was concerned about the preservation of evidence.

[5] A ruse was agreed upon in which Mr Rankin accompanied the uniformed police officers to the bedroom and knocked on the door whilst they remained out of sight around the corner. Mr Rankin pretended that he was from reception and was checking whether a sofa bed had been delivered to the room. When the door was opened Constable Corkindale moved into a position where he could see into the bedroom. He observed the appellants' co-accused Hassan Malik to be at the door which was then immediately slammed shut. Despite the constable shouting for it to be opened it was held shut and there was a struggle during which it was observed that the appellant Omar Sadiq was using his body pressure to try and keep the door closed. Eventually, one of the police officers kicked the door open bursting the security chain and all four officers present gained entry. There was a struggle with the appellant Omar Sadiq and both he and the co-accused Malik were taken into custody and removed from the room.

[6] The only police officer who gave evidence at the hearing was Constable Corkindale. He explained that he returned to the bedroom after the two males had been removed. By that time two of his colleagues were already in the room and it is clear from the judge's opinion that they had begun to conduct a search. Constable Corkindale saw that certain items of drugs paraphernalia had been gathered up, apparently by his colleagues, and placed on a table in the room. Also on the table was a bag which had been there throughout but had been searched by one of the other officers. Constable Corkindale instructed that the search be stopped. In addition to these items, an Audi car key and a token for a nearby NCP

car park were seen on the same table. It was agreed by joint minute that the car key was lying in plain view on the table when the police first entered the room. Having heard the evidence the judge concluded that the token was also lying on the table when the police first entered (see paragraph 12 of his opinion).

[7] Constable Corkindale conceded in evidence that he may not have had the right to enter the bedroom up until the point at which it was forcibly closed on him and his colleagues but explained that the situation became urgent when that happened.

[8] Additional police officers attended and the senior officer present instructed two others to go to search the NCP car park in Oswald Street for the Audi motor car as soon as possible as he was aware that the other two men had not been apprehended and he was not sure what they might try to do. That same officer then telephoned the on duty procurator fiscal to ask about obtaining a search warrant for the room but was told that hotel staff could provide consent and a warrant was not required. Consent was then obtained from Mr Rankin and the police officers searched the room.

[9] Having heard submissions, the first instance judge concluded that search of the hotel bedroom without a warrant was unlawful. He concluded that the evidence as to the circumstances in which a limited search had taken place before Constable Corkindale returned was unsatisfactory and he held that there was no urgency once the officers had gained entry to the room. He also held that the advice which had been given by the procurator fiscal to the police officer was erroneous and, putting all of the factors which he considered relevant together, he declined to excuse the irregularity and refused to admit evidence of what had been recovered during any search of the room.

[10] However the judge also concluded that the police officers did have good reason to go to the room and ask the occupants questions about what they had observed on the CCTV

footage. He also concluded that the occupants of the room had created a situation in which the officers felt they had no option but to force entry in order to ensure the preservation of evidence and in particular to prevent the disposal of any drugs. He drew the same distinction as was drawn in the case of *Campbell* v *Vannet* 1997 SCCR 787 between the lawfulness of entry into premises and the lawfulness of any subsequent search.

[11] Having approached matters in this way the judge then considered the question of the recovery of the car key and the NCP token. In paragraph 44 of his opinion he explained the matter as follows:

> "The key to the Audi motor car was on the table in the room in plain view. It was not in the bag. Once the officers were in the room they could see the key and the NCP token. There was an urgency in finding and securing the car. The officers knew that the two men were still unaccounted for. They did not know whether there might be other keys in their possession. If they came by the hotel they would have seen marked police vehicles outside. That might have prompted them to recover the vehicle and anything in it. For these reasons evidence of the recovery of the key is admissible in evidence."

The Basis of the Appeal

First Appellant

[12] In argument before us, Mr Fitzpatrick for the first appellant submitted that the judge at first instance had been wrong to permit the evidence of the recovery of the Audi key. His submission was that the question raised by the present appeal did not relate to search, or to the excusal of an irregularity in that context. The question raised was whether the police had lawful authority to force entry into the hotel room. If they did not have lawful authority then it would be wrong to admit evidence of anything which they saw on doing so.

[13] It was submitted that it was plain from what the judge had said in paragraph 28 of his opinion that the police officers had all along intended to gain entry to the room, by force, if necessary. As the judge had noted, the police officers asked Mr Rankin for permission to

breach the door if they were denied admission prior to attending outside bedroom number 441.

[14] There was no need for the officers to have engaged in the ruse with Mr Rankin. There were other methods by which a lawful search could have taken place which would not have infringed any of the appellant's rights. Surveillance of the room could have been undertaken until a warrant was obtained. Instead, a deliberate decision was taken to interfere with the right to privacy of the residents of the room. In these circumstances the police officers' conduct had been unlawful and the first instance judge had been wrong to permit evidence of the recovery of the car key to be admitted.

[15] Mr Fitzpatrick submitted that the present case should be distinguished from the case of *Campbell* v *Vannet* upon the basis that in that case the police officers concerned had observed the commission of a crime at the property which they forced entry to. In the present case nothing of a suspicious nature had been seen to take place at the hotel room. He submitted that there had been no urgency prior to the police attending at the bedroom door and that the only urgency which arose had been created by the police officers themselves.

Second Appellant

[16] On behalf of the second appellant, Mr Duguid supported the submissions advanced by Mr Fitzpatrick and relied upon the proposition that there had been no evidence of urgency. He also drew attention to the terms of the opinion from the first instance judge. He submitted that, correctly interpreted, that opinion made it plain that the first instance judge had decided that the forced entry to the room was illegal. Mr Duguid submitted that upon this reading it then became clear that the first instance judge had gone on to rule that the

subsequent search was illegal because the entry had been illegal. He submitted that everything which had been recovered from the room thereafter had been taken in what should properly be called a search. Upon this analysis there was no reason for excusing the illegal conduct of the police officers to the extent of permitting evidence of the recovery of one item to be admitted. The judge's reasoning ought to have led to the appellant's minute being upheld in its entirety.

Crown

[17] On behalf of the Crown, the advocate depute submitted that the issue in the appeal was a narrow one, namely whether the forced entry to the bedroom was lawful. He acknowledged that entry and the recovery of any items could only be lawful if a situation of urgency was present. He submitted that, correctly interpreted, it could be seen that the first instance judge had decided that the forced entry was lawful. He drew attention to what the judge had said at paragraph 29 of his opinion.

[18] The advocate depute also submitted that the circumstances in *Campbell* v *Vannet* were in fact remarkably similar to the circumstances of the present case and he submitted that the decision in *Campbell* supported the legality of the police officers' conduct in the present case. He submitted that the use of a ruse by Mr Rankin was neither here nor there and observed that had the police officers knocked on the door and identified themselves, as they did in *Campbell* v *Vannet*, then, as in that case, an opportunity would have been provided to the occupants of the room to dispose of any items in their possession.

[19] The advocate depute submitted that the first instance judge had correctly separated the question of the legality of entry from that of the legality of the search. In allowing evidence of the recovery of the key to be admitted he had not excused an irregularity on the

principles of the case of *Lawrie* v *Muir*. He had permitted the evidence to be admitted because the police officers had acted lawfully in a situation of urgency and had observed the key on open view as soon as they entered the room.

Discussion

[20] In our view, the submissions in connection with urgency advanced on behalf of the appellants failed to give proper weight to the whole circumstances of the events with which the police officers were concerned. There were not two separate incidents. As the first instance judge made clear in paragraph 4 of his opinion, the CCTV footage showed that about half an hour after checking in, the two hotel guests were joined in their room by two other males. The two hotel guests then left the two visitors in the room and made their way to a Mercedes motor vehicle parked nearby in which they could be seen placing suspicious powder into a container within the car. It was an obvious inference that the powder was connected with the hotel room and that there might well be more there. To this extent then, in our view, the circumstances were the same as in *Campbell* v *Vannet*, namely that the police officers had seen what they suspected to be a crime taking place. A situation of urgency already existed for the reasons given by the first instance judge in the fourth sentence onwards of paragraph 44 of his opinion, as quoted above.

[21] In these circumstances the police officers were entitled to make enquiries at the hotel room and to have in mind the need for the preservation of evidence. The fact that they took steps to avoid disclosing their presence before the door was opened, and thus took steps to prevent giving the occupants an opportunity to dispose of any items which may have been within, is of no consequence. The conduct of the two occupants of the room on appreciating that police officers were in attendance strengthened their suspicions. In our view the police

officers were then well entitled to treat the matter as one of urgency requiring that they force entry into the premises in order to preserve evidence and to detain the occupants. Their conduct was lawful as vouched both by the case of *Campbell* v *Vannet* and by the case of *HM Advocate* v *McGuigan* 1936 JC 16.

[22] We are also satisfied that this is the approach which the first instance judge took. It is clear from what he said at paragraph 29 of his opinion that he considered the question of whether a situation of urgency existed, such as would permit the officers to force entry, and considered this question separately from that of any subsequent search. He decided that entry was lawful on the basis of urgency and, in our view, he was correct to do so. The police actions were urgent in nature and, viewed objectively, justified. On considering the question of search separately, for the reasons which he gave, the first instance judge concluded that the search was unlawful. He considered whether he ought nevertheless to admit evidence of the items recovered on the basis of the excusal of an irregularity, but decided not to do so. His reasoning on the issue of search has not been challenged by the Crown.

[23] There remains the decision of the first instance judge to permit evidence to be admitted of the recovery of the car key. It was agreed by joint minute that the car key was on a table in plain view when the officers entered the bedroom. It was not recovered in the context of the limited search which took place before permission was sought from Mr Rankin or during the search which took place thereafter. We cannot accept the submission advanced by Mr Duguid that the unlawful search encompassed everything which was seen by the police officers. The car key was simply observed by the police officers who gained lawful entry to the room in the circumstances described. It came to their

attention in the same way as they observed the furniture within the room and were able to identify who was present.

Decision

[24] For the reasons which we have given we are satisfied that the first instance judge was correct to refuse to give effect to the preliminary issue minutes to the extent that he did and the appeal taken by each appellant is refused.