



SHERIFF APPEAL COURT

**[2017] SAC (Crim) 14
SAC/2017-000344/AP**

Sheriff Principal I R Abercrombie QC
Sheriff M O'Grady QC
Sheriff S F Murphy QC

OPINION OF THE COURT

delivered by SHERIFF S F MURPHY QC

in

STATED CASE

by

FRASER MITCHELL

Appellant

against

PROCURATOR FISCAL, KIRKCALDY

Respondent

**Appellant: Martin (sol adv); Martin Johnston & Socha (Kirkcaldy)
Respondent: I McSparran QC (sol adv), AD; Crown Agent**

5 September 2017

[1] On 16 January 2017 the appellant was convicted by the sheriff at Kirkcaldy of a charge of domestic assault by striking his partner in her groin with his knee and repeatedly striking her to the head and body to her injury at her address in Kirkcaldy. He has appealed against that decision and the sheriff has stated a case for the opinion of this court in relation to three matters: whether he erred in law in repelling a defence objection to the admissibility

of evidence of a remark made by the appellant while he was being processed at the charge bar at the police station; whether his decision to repel that objection had brought about a miscarriage of justice; and whether he had been entitled to convict the appellant of the charge on the facts stated.

[2] The complainer testified that she had been assaulted in the manner described in the charge by the appellant within her home on the night of Saturday 24 October 2015. They had fallen out after he had admitted an incident of infidelity. The appellant's ring finger was said to have been scratched during these events. Things had calmed down and he had spent the night in the complainer's house.

[3] Over the following days the complainer explained away her injuries by telling colleagues that she had been in an accident and by telling her mother that she had fallen down the stairs. When her mother questioned that account she admitted to her on Thursday 29 October 2015 that she had been assaulted by the appellant. The matter was subsequently reported to the police.

[4] On 23 November 2015 the appellant was detained at his own address. He was told that he had been identified as being responsible for an assault. He was cautioned at common law in the course of the detention procedure and taken to Dunfermline Police Station. On arrival there he was asked a series of what were described as routine questions by the custody sergeant in relation to his welfare and vulnerability. He was encouraged to answer these questions accurately and honestly. The appellant was asked whether he had any injuries and he referred to one on his hand. The sergeant asked how recent that injury was and the appellant replied, "What's been ... why I'm here". The questions were asked in order to ascertain whether the appellant might require any medical attention while he was in police custody.

[5] For corroboration of the complainer's account that an assault had taken place the Crown was able to rely on the observations of her injuries made by her mother shortly after the day of the incident and medical evidence and photographs of those injuries were agreed by joint minute. For corroboration of the complainer's account that she had been assaulted by the appellant the Crown sought to rely upon the comments made by him to the custody sergeant.

[6] Before the sheriff at trial the defence objected to the admissibility of those remarks. The sheriff conducted a trial-within-a-trial and, having heard parties' submissions, he decided that the comments had not been unfairly obtained and were admissible. He proceeded to convict the appellant, relying on the appellant's remarks to the custody sergeant for corroboration of the identity of the assailant.

Submissions for the Appellant

[7] Before this court Mr Martin argued that the sheriff had been wrong to do so. In particular, the appellant's reply should not have been seen as a spontaneous admission. It was accepted that the custody sergeant had no connection with, or knowledge of, the enquiry and that he had asked the questions for the purpose of determining the appellant's fitness for detention and to ascertain whether he might require medical attention. It was obviously important for reasons of public policy that questions relating to the appellant's health and well-being were answered honestly as they were being asked to ensure his safety and wellbeing while in custody. The procedure was a standard one. However, context was very important. The appellant had been detained in connection with an assault. The questions of whether he was injured and the time at which any injury had been sustained were clearly and obviously relevant to the enquiry. For that reason *Gilmour v HMA* [2014]

HCJAC 2 fell to be distinguished. In that case the reply given could not reasonably have been anticipated; in the present case any reply to either of the questions asked was obviously likely to be relevant. The present situation was closer to the cases of *Jolly v HMA* [2013] HCJAC 96 and *Tole v HMA* [2013] HCJAC 109. The appellant had been specifically encouraged to answer the questions put by the sergeant with no caution or warning as to the use which might be made of his replies and no reference to his right to silence. As there was no corroboration of the identity of the assailant in the absence of the inadmissible replies, the conviction should be quashed.

Submissions by the Respondent

[8] In reply the advocate depute submitted that the sheriff had heard the evidence of what had happened and had considered the matter very carefully. The appellant's answer was truly spontaneous and had been fairly obtained. He was being asked questions about his own welfare; he had not been asked about the incident at all. No weight should be attached to the fact that the sergeant had told him that he was required to answer honestly as the purpose of the welfare questions would be defeated otherwise. It had been a legitimate enquiry for a proper purpose which could not have been expected to invite a response which was relevant to the enquiry and the appellant's reply was not an answer to the questions he had actually been asked. The relevant law was to be found in paragraph 3 of *Gilmour* and the situation here was similar to that case. The enquiry had been made in advance of his being advised of his right to legal advice which would follow at the relevant time. The case of *Tole* related to an enquiry into the accused's mental health by a doctor which was a totally different process. The sergeant's second question clearly anticipated that a time period would be given in response, not reference to an incident. The court in

Gilmour was clearly alive to the issues in *Tole*. It might be unfair for an answer to be used, depending on the context; for example, if the sergeant had asked the appellant how the injury to his hand had happened. The actual question which had been asked related to the freshness of the injury, which was relevant to the issue of whether the appellant might require medical attention at that time. The appellant's reply did not answer the question which he had been asked, was unexpected, and had been fairly obtained. The sergeant had tried to stop the appellant from talking any further about the incident which showed that he had not expected the answer which he had been given. The sergeant had not acted in bad faith, the reply had not been unfairly obtained and was admissible.

Discussion and Decision

[9] We accept that the custody sergeant had acted in good faith throughout and that the enquiries which he made were intended to relate to the welfare of the appellant as a person who was under police detention. His questions were not intended to elicit any information about the incident which had led to that detention.

[10] However, this exercise had been carried out before he had been afforded any right of access to a lawyer. In order to answer the questions posed in this stated case the context in which the questions had been asked and answered must be considered carefully. The appellant had been cautioned at common law at the time of his detention. He had been asked the welfare questions on his arrival at the police station but before he had been advised of his rights to access to legal advice. He had not been reminded of his right to silence but had in fact been told to answer the sergeant's questions accurately and honestly. The welfare questions were designed to find out whether the appellant had any current

condition or injury which might require medical attention while he was under detention by the police.

[11] In the case of *Tole* the Lord Justice Clerk summarised the general principle of the approach to these matters in Scots Law in this way (at para 12):

“As a generality, if evidence is relevant then it ought to be admitted. An admission by an accused person is, *prima facie*, relevant. However, if the evidence has been unfairly obtained then it ought, as a general matter of legal policy, to be excluded.”

In that case an accused person had made an admission while being interviewed by a psychiatrist who had been asked by the Crown to assess his mental state after he had been charged with murder. His Lordship stated, at para 15,

“Ultimately, the court requires to decide whether remarks made during the interview of an accused by a psychiatrist, acting on the instructions of the prosecution for the purpose of determining the accused’s mental state, are fairly obtained such that they can be used by the prosecution to prove the offence itself. The court considers that such statements, secured in a process to determine mental state, are not fairly obtained insofar as they may be used to prove fact beyond that of the accused’s mental state. That appeared to be the position accepted by the Crown and the court considers that it is the correct one.”

In the present appeal the learned advocate depute contended that a psychiatric examination was a very different situation from the welfare enquiries being carried out with the appellant. However, in our view there is no difference in the principles to be applied in either situation. The enquiries into the appellant’s welfare should be inadmissible in relation to matters beyond that. The case of *Jolly* is consistent with this approach (*per* the Opinion of the Court at paras 37 & 38).

[13] In the particular circumstances of the present case we consider that the questioning was unfortunate. The purpose of the exercise was to determine whether the appellant might require medical attention. He was not asked directly if that was the case. He was asked if he had any injuries and thereafter how recent they were. The Crown position before the

sheriff and before this court was that the latter question would assist in deciding if medical attention was immediately required. In the context of a person who had been detained in connection with an allegation of assault those questions were, in our view, likely to stray into matters connected with the incident, a situation which would be much less likely to arise over allegations which did not involve any type of physical contact.

[14] In our view the case of *Gilmour* falls to be distinguished on its facts. In that case the accused made an unsolicited admission on being asked informally by a police officer if he understood the detention procedure as they were travelling to the station in a police car. The question was not foreseeably likely to elicit any response relating to the subject matter of his detention. This conversation had occurred before he had been afforded his right of access to legal advice. The court said, at para 3:

“However, it is not the law that statements made to the police are rendered inadmissible where they are made following upon questions unrelated to the offence but concerning, for example, the suspect’s physical or mental wellbeing, in advance of affording him that right.”

The court considered that there might be many situations in which asking questions about the physical or mental wellbeing of an accused person before he had been afforded his right of access to a lawyer were an important part of ensuring the fairness of proceedings. It must be borne in mind that the court in *Gilmour* referred to questions relating to a suspect’s physical wellbeing as a general example of a situation in which the questioning would be admissible, in a different context from the present case. No detailed consideration was given, because none was required in that case, to any particular set of circumstances which might make such questioning inadmissible in an individual case. In the present case we consider that specific questions were asked which were, in the particular context, potentially likely to stray into matters relevant to the enquiry itself.

[15] We regard the fact that the appellant was advised to answer the welfare questions accurately and honestly as a particularly important feature of this case because that statement conflicted with the terms of the caution which had earlier been administered to him and may have been considered to have over-ridden the caution. At the point of the enquiries at the charge bar he had not yet been advised in the usual way about his rights in relation to legal advice before being questioned and he had not been cautioned again since his detention at his own home.

[16] It follows that we do not consider that the reply made to the sergeant by the appellant was admissible evidence in relation to the incident at the complainer's house. Without that evidence there was no corroboration of the identification of the appellant as the assailant. Accordingly we shall sustain the appeal by answering the first and second questions in the affirmative, the third question in the negative, and quashing the conviction.