APPEAL COURT, HIGH COURT OF JUSTICIARY

[2016] HCJAC 97
HCA/2016/000393/XC

Lord Justice Clerk
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

Appeal under section 74 of the Criminal Procedure (Scotland) Act 1995

by

ALEXANDER STURROCK

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Findlater; Faculty Services Edinburgh (for Myles Laverty, Dundee)
Respondent: A Prentice QC, Sol Adv, AD; Crown Agent

27 October 2016

Introduction

[1] This is an appeal from the determination of a preliminary issue challenging the admissibility of evidence obtained during a police search of the appellant's home without (initially, at least) a warrant, and without invitation. Amongst other things, the search yielded a quantity of heroin said to be valued at £35,000.

[2] The appellant asserted that the search was unlawful and irregular and, since the irregularity could not be excused, that the evidence was inadmissible. After hearing evidence the sheriff repelled the objection.

The sheriff's determination

[3] The sheriff found in fact that late in the afternoon on Saturday 5 July 2015, Inspector Lorente was advised by telephone by Chief Inspector Dow that the appellant had taken delivery of half a kilo of heroin. Inspector Lorente had no information as to when and by what means this information had been obtained, and sought no further particulars. He assumed that it was very recent. C I Dow referred Inspector Lorente to evidence on the police database concerning the appellant.

[4] Inspector Lorente considered there to be insufficient information to obtain a warrant to search the appellant's property. In any event, he considered that it might take about 3 hours to obtain a warrant on a Sunday afternoon. Nevertheless, in his opinion it was necessary for the heroin to be seized urgently to prevent its being distributed into the community. He instructed officers to force entry to the property, to detain any persons found therein and to preserve the property until a search warrant was obtained. He considered that this was a legitimate course of action in terms of *HMA* v *McGuigan* 1936 JC 16. The basis upon which he considered that he would be in a better position to obtain a warrant merely by having secured the property was not explained.

[5] The officers forced open the locked door of the property. Each room of the property was checked and found to be empty. The check lasted approximately five minutes. During it, burnt tinfoil and a roll of cling film were noted on a coffee table in the living room. The sheriff accepted the evidence of the officers that no further search was made at that time.

[6] The property having been secured, at about 1745 hrs two officers were instructed to remain in the property whilst another prepared to apply for a search warrant. The application for the warrant referred to the burnt tinfoil and the roll of cling film seen in the property and the information on the appellant contained on the Police Scotland database. It appears that no reference was made to the information regarding the information provided by C I Dow, and it is not at all clear what would have been Inspector Lorente's course of action had his officers not happened to stumble over the tinfoil and cling film when securing the property. In any event, the warrant was granted and the property searched at about 2115 hrs when the heroin was found. The burnt tinfoil and cling film were not bagged or logged. The sheriff accepted evidence from the police officers that such items are not commonly retained in drugs cases.

[7] The appellant lodged a Minute in terms of section 71 of the Criminal Procedure (Scotland) Act 1995 in which it was asserted that:

- The actions of the police in entering the premises being illegal and in circumstances of no urgency any evidence recovered was inadmissible
- There was in fact no drug paraphernalia visible within the premises
- Further, having entered illegally the police carried out an illegal search, the results thereof were not admissible.

[8] The sheriff described Inspector Lorente's decision that the property urgently required to be forced open and secured as "surprising". The sheriff noted that the Inspector had no information as to the urgency of the situation, and did not inquire of C I Dow as to that matter. He did not know, and took no steps to determine, whether the property was occupied. He did not investigate the feasibility of surveillance while a warrant was applied for. The sheriff appears to have concluded on the evidence that the property might easily have been capable of surveillance pending the obtaining of a warrant, noting that the Inspector did not consider whether "the property might (as transpired to be the case) easily

[be] capable of being informally watched pending a warrant being sought. He made almost no further enquiries before the raid commenced." The sheriff described Inspector Lorente's evidence as being "occasionally unsatisfactory".

[9] The sheriff concluded, however, that (a) the search was regular, being justified *per HMA* v *McGuigan;* and (b) there being no irregularity, he did not require to address the issue of excusal.

[10] The sheriff considered that the Inspector's "suspicion" that he needed to act to prevent any drugs being redistributed was reasonable, since any occupant of the premises "might have picked up on any watching police presence. ….and tried to dispose of the drugs". Police resources were spread thinly, and options such as surveillance were unrealistic or inadvisable. The sheriff considered that there was no evidence that the Inspector was acting in anything other than good faith and his actions were vindicated by the discovery of a considerable quantity of heroin. There was no or minimal interruption to the appellant's privacy since he was not in the property at the time.

Submissions

Appellant

[11] By forcing entry to the property without a warrant, the police acted irregularly and inexcusably. *McGuigan* was authority for the proposition that entering premises without a warrant will only be regular if there is urgency. There was no urgency in this case. In the absence of further inquiry Inspector Lorente had insufficient information necessary to form the view that the situation was urgent. The sheriff was incorrect to suggest that there was little or minimal invasion of privacy simply because the appellant was not present at the time. The sheriff concluded that analysis of the facts led to the conclusion that the actions of

the police were urgent in nature, and, viewed objectively, justified. This conclusion was difficult to reconcile with the sheriff's observations as to the surprising nature of Inspector Lorente's decision, the unsatisfactory nature of some of his evidence and the lack of inquiry as to the urgency or otherwise of the situation. The sheriff's conclusion was not one which might reasonably be held on the facts. The sheriff erred and should have concluded that the actions of the police were irregular.

[12] The actions of the police could not be excused, and the evidence resulting therefrom was inadmissible (*Lawrie* v *Muir* 1950 JC 19). It was inexcusable for police to enter property without a warrant in circumstances where there was insufficient evidence to obtain a search warrant. To countenance otherwise was to offer what Lord President Cooper described in *Lawrie* v Muir (p26) as "a positive inducement to the authorities to proceed by irregular methods." The police ought to have placed the property under informal surveillance while a warrant was applied for. The actions of the police were both irregular and inexcusable, and in light of the irregular and excusable nature of the search, the evidence flowing from therefrom should be held to be inadmissible.

[13] It was no longer being maintained that a search had been carried out immediately upon entry to the premises, or that drug paraphernalia was not present.

Advocate Depute

[14] Initially, the Advocate Depute submitted that the sheriff did not err in concluding that in the circumstances the actions of the police were based on urgency and objectively justified, on the authority of *McGuigan*. However, he considered that there were unsatisfactory features of the case, not least of which was that the information available to Inspector Lorente at the outset would appear to be sufficient to justify an application for a search warrant. The suggestion that police resources were too thin to follow an alternative

course of action was difficult to sustain, given that two officers had been left in the house for three and a half hours, whilst others were delegated other tasks in relation to the case. The Advocate Depute did not seek to support the sheriff's suggestion that the invasion of privacy was minimal because the appellant had not been in the premises at the time. The Advocate Depute's primary submission thus became that there had been an irregularity, not sanctioned by McGuigan, but that the irregularity was excusable under the principles of *Lawrie* v *Muir.*

Procedure

[15] The terms of the preliminary issue minute proceeded on the basis that there had been a systematic search of the premises, after the police had forced entry to the premises, and before a warrant was obtained (para 2(II)), the implication being that the heroin was found during that search, and that evidence of that find would have been irregular and inadmissible. In fact, the sheriff having heard evidence accepted that there had been no such search. Accordingly, on the evidence the heroin was found following a search under the warrant granted at 9.15pm. That warrant could not be challenged before the sheriff (*Allan* v *Tant* 1986 JC 62), and to do so the proper course of action would have been to present a Bill of Suspension. That of course has not been done. It was rather implicit in Mr Findlater's submissions that his argument was that the entry to the premises which enabled the police to see the tin foil and cling film which was on open view, being itself unlawful invalidated the warrant. The court, having considered these submissions, was concerned that, standing the sheriff's finding in fact that there had been no search of the premises prior to the obtaining of the warrant, neither party had addressed the existence of the warrant upon which that search was based, or made reference to *Allan* v *Tant*. In

addition, the court was aware that practical difficulties have in the past arisen as to the most suitable method of challenging evidence in circumstances such as the present. The court accordingly asked the parties for further, written, submissions on these matters, which they supplemented orally during a brief hearing, and we are indebted to them for their assistance.

Further Submissions

Appellant

[16] For the appellant, it was submitted that if it were correct that the actions of the police in entering the property were illegal, irregular and inexcusable, all evidence flowing from that illegal act should be held to be inadmissible, and the subsequent obtaining of a warrant could not excuse the earlier illegal actions. The police relied upon what they found in the illegal entry as a basis for craving a warrant. The police did not have and would not have had knowledge of any drug paraphernalia at the property without having forced entry. If the action of forcing entry, as it is submitted for the appellant, was illegal then the warrant, being founded on illegally obtained material, does not correct that illegality.

[17] The correct way to challenge the initial action by the police was by section 71 minute, appeal from which could be taken under section 74. A Bill of suspension in advance of a section 71 minute would be premature, since the latter determines the factual matrix upon which any Bill of suspension may proceed: *O'Neill* v *Harvie* 2015 SLT 55. A Bill of Suspension presented in advance of the trial would have been doomed to failure, since the factual background could neither be ascertained or examined. The sheriff's decision on the Minute, that the police actings were regular, and in any event excusable, could not be

challenged by Bill of suspension (section 130 of the 1995 Act), and required to be the subject of an appeal under section 74.

[18] Mr Findlater submitted that *Allan* v *Tant* could be distinguished, since in that case there was no suggestion that the police had acted illegally in advance of the warrant, or in obtaining the basis for applying therefor. His submission was that in the present case, all evidence flowing from the illegal entry should be held inadmissible. That would include evidence obtained under the warrant. If the court felt unable to reach such a conclusion in the absence of a Bill of suspension, a Bill could be lodged.

Advocate Depute

[19] *Allan* v *Tant* was authority for the proposition that a sheriff had no power to review the granting of a warrant, a power held only by the appeal court. Had the appellant wished to challenge the warrant he would have been required to do so by Bill of suspension, but would have had no ground for doing so since he does not aver bad faith on the part of the police, or that there were insufficient grounds to suspect that there were controlled drugs in the appellant's home.

[20] In the present case the grounds for the warrant arose not only because of the consequence of the potentially illegal entry: there was information about delivery of a large quantity of drugs. Forced entry by the officers was irrelevant to the question of the admissibility of the evidence later recovered under warrant. The forcing of the property was to ensure that the drugs were not distributed. Had no drug paraphernalia been found, it is likely that a warrant would have been sought and granted in any event.

[21] The Advocate Depute submitted that there was uncertainty over the procedure to adopt when seeking to challenge the admissibility of evidence seized under warrant where the warrant was obtained on the basis of evidence which was itself irregularly obtained.

The accused may present a challenge by Bill of Suspension or objection may be taken in the course of a trial. He submitted that the most appropriate method is by section 71 minute. It was more logical for such matters to be determined at first instance since disputed questions of fact may arise. A different question arises when a Bill to suspend a warrant is sought, the question then being whether the warrant was competently granted. Here the only question was whether the sheriff had been correct to repel the section 71 Minute and that question should be answered in the affirmative.

Analysis

[22] In *Allan* v *Tant* the sheriff had concluded, during an objection taken during trial, that a police officer to whom a warrant had been granted under section 23 of the Misuse of Drugs Act 1971, did not, at the time of seeking the warrant, have reasonable grounds for so doing, and ruled that the evidence recovered during the search was inadmissible. In the Opinion of the Court, the Lord Justice Clerk (Ross) said (p64):

> "It is thus clear that what the sheriff did was to go behind the warrant. In our opinion, this is something which he was not entitled to do. If a warrant is *ex facie* invalid, as where it contains the wrong name or address or where it is not signed, a sheriff will be justified in holding that the procedure following thereon was unwarranted (*H.M. Advocate* v *Bell 1985 S.L.T. 349*). But a sheriff is not an appellate judge, and he has no jurisdiction to review the granting of a warrant.
>
> The High Court has power to suspend an illegal search warrant (*Bell* v *Black & Morrison* (1865) 5 Irv. 57), but a sheriff has no such power. Unless and until a warrant has been suspended or reduced or set aside, the warrant stands. It follows that in the present case the sheriff had no right to decide as he purported to do; he was not entitled to hold that the search warrant should not have been applied for or granted; nor was he entitled to hold that the evidence relating to the finding and analysis of the piece of opium was inadmissible."

The procedure which has developed (see *Stuart* v *Crowe* 1992 SCCR 181) to challenge the admissibility of evidence obtained on the basis of an *ex facie* valid warrant was described in *Stewart* v *Harvie* 2016 SCCR as "cumbersome":

> "where a warrant has been granted by a justice of the peace in exercise of power conferred, for example, by s.23 of the 1971 Act, and it is proposed to lead evidence about what may have been seized in execution of that warrant in a forthcoming High Court trial, then application can be made to a quorum of this court by way of bill craving suspension of the warrant on the basis of illegality: see eg *Birse* v *MacNeill*. On such an application the powers of this court include power to remit to a single judge to determine any issues of disputed fact; see eg, *Evans* v *Procurator Fiscal, Glasgow*. While the consequent procedure can be seen as cumbersome: see *Stuart* v *Crow*; *Herd* v *HM Advocate* and Sir Gerald Gordon's associated commentaries, the decision in *Allan* v *Tant* makes it clear that where the contention is that an ex facie valid warrant should not have been granted, it is not open, at least to a sheriff, to 'go behind the warrant'. The warrant has to be suspended, or reduced or set-aside and that is something that only the High Court can do. It was not argued to us that the power of the High Court could be exercised by a single judge at, for example, a preliminary hearing in terms of s.72 of the Criminal Procedure (Scotland) Act 1995."

[23] In the case of *Evans & Kerr* v *P F Glasgow,* unreported, 8 February 2013, the court had, in the first instance at least, remitted the case to the sheriff to hold an evidential inquiry and report his findings, although it had done so erroneously on the basis of sections 182(5)(e) and 191 of the 1995 which had no application.

[24] In *HMA* v *Rae* 1992 SCCR 1, Lord McCluskey during a trial, referred to the case of *Allan* v *Tant*, saying:

> "In my reading of that case the reasoning would apply equally to a judge in the High Court, sitting in solemn proceedings. He is not an appellate judge when he sits in that capacity and no authority was quoted to me to show that he could suspend an illegal search warrant. In *Allan* v *Tant* it was said that
> 'Unless and until a warrant has been suspended or reduced or set aside, the warrant stands.'
>
> On this basis it appears that the only remedy for someone who seeks to reduce a warrant is to take proceedings before a quorum of the High Court sitting as an appellate court. No doubt that court would have power to remit to one of its number or to some other person to hear evidence if that was thought necessary, but the court itself would, in my opinion, have to decide the matter."

[25] In *Herd* v *HMA* 1999 SCCR 315, the court had cause to reflect upon the procedure which applied. In delivering the opinion of the court, Lord Prosser said:

> "Like the trial judge in *H.M. Advocate* v *Rae*, we are not satisfied that we have really had full argument presented to us on all the matters which may be relevant to determining the appropriateness of any given procedure. Without expressing any concluded view, we are strongly inclined to think that the adoption of a separate procedure to determine the validity of a warrant in vacuo before there has been any consideration of the use to which that warrant was put, or as to the lawfulness of any ensuing search or the admissibility of any consequential evidence, is unsatisfactory and will only be appropriate in rare and special situations; and even then probably only if a preliminary diet has led to that course being seen as unavoidable.
>
> Adjournment of a trial in order to allow procedure by bill of suspension if reduction of an ex facie valid warrant becomes a significant practical issue is plainly unsatisfactory. None the less we think that it will usually be preferable to take the risk of that situation emerging, rather than have procedure by bill which may turn out to have had only academic significance, divorced from consideration of practical issues, and perhaps itself, as in this case, involving the discharge of trial diets and possible extensions of statutory time-limits."

[26] The position adopted by both parties in the present case was that there was a lack of clarity about the appropriate procedure to be followed, and a degree of uncertainty amongst the profession. This is a highly undesirable state of affairs. A Bill of Suspension is not a process designed to address or resolve issues of fact; it is rather "truly appropriate …. where the relevant circumstances are instantly, or almost instantly, verifiable.." (*Fairley* v *Muir* 1951 JC 56 at 60)

[27] An example of the somewhat clumsy procedure which may be adopted can be seen in *O'Neill* v *Harvie* 2015 SLT 55 where the complainer had been indicted in the Sheriff Court on charges contrary to the Misuse of Drugs Act 1971. In the course of proceedings he presented a Minute under section 71 challenging the admissibility of evidence recovered during search under warrant. The Sheriff considered that the appropriate procedure was a Bill of suspension, and adjourned the hearing on the Minute for a bill to be presented. When

the Bill was presented, the High Court continued consideration of the Bill, remitting to the Sheriff to resolve the Minute, and only after the sheriff reported did it consider the Bill. The Advocate Depute gave an example of a case in which a situation such as the present had arisen, where the Crown had determined that, should the section 71 Minute be resolved in favour of the defence, the Crown would not rely on the warrant, absolving the defence from the need to present a Bill of Suspension. It cannot be desirable that the procedure to be adopted is considered to be so cumbersome as to lead to reliance on such an approach.

[28] The submissions of the parties in the present case tend towards a position in which the issue of whether there was a proper basis for granting the warrant (the first issue addressed in *Allan* v *Tant*) might be separated from the second, the admissibility of the evidence flowing from the warrant. The result would be that in a section 71 Minute the court would not be considering the question whether the warrant had properly or validly been granted: rather it would be addressing the wider question of admissibility of the evidence, in consideration of which the existence of the warrant would only be one relevant factor.

[29] We make no observations as to the merits or otherwise of such a proposal. The issue is clearly one of very great importance, and is one on which there currently appears to be some confusion. Any reconsideration of procedure would involve an appraisal of the decision in *Allan* v *Tant,* or at least the way in which it has been interpreted. To do that requires this case to be remitted to a larger court, which is the course of action we shall adopt. Having recorded our thanks to parties above, we should say that if either party wishes to present further written submissions, or to consolidate the submissions presented so far, they should feel free to do so in advance of the hearing before a larger court.