APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 16
HCA/2022/000215/XC

Lord Justice General
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

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

by

BARRY McLEAN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: GR Brown (sol adv); Bridge Legal Ltd, Glasgow
Respondent: Cameron AD; the Crown Agent

4 August 2022

Introduction

[1] This appeal concerns whether, during the course of a search of a house under a warrant, an occupier requires to be given access to legal advice before responding to a request from the police to provide a PIN or password for electronic devices which are found in the course of the search.

Facts

[2] The appellant was indicted to a First Diet on 25 May 2020 at the Sheriff Court in Ayr. The charges libel that, in February and March 2021 at an address in Ayr, he: (1) took, permitted to be taken or made indecent photographs or pseudo-photographs of children; and (2) had these photographs in his possession; contrary respectively to sections 52(1)(a) and 52A(1) of the Civic Government (Scotland) Act 1982.

[3] The appellant lodged a Minute in terms of section 71 of the 1995 Act. This raised an objection to prospective testimony from police officers about what the appellant had said when he was asked to provide the password for a Macbook Pro laptop computer and a PIN for a Samsung mobile phone. The objection also covered the recovery of incriminating content on the phone. The requests had been made by the police in the course of the execution of a search warrant for a house occupied by the appellant, his parents and other members of his family. The basis for the objection was that the appellant: had been a "suspect"; had not been free to leave the premises; and was being questioned with a view to eliciting an incriminating reply. In these circumstances, he had been entitled to access to legal advice.

[4] The sheriff heard evidence that, on 4 March 2021, the police had obtained a warrant to search the house in Ayr which was described as occupied by the appellant and four relatives. The warrant narrated that the police had information which led them to suspect that offences under the 1982 Act had been committed at an address in Blackheath, London. The warrant was in standard form. It authorised: the breaking open of doors; the search of persons found on the premises; and the taking of possession of material which was relevant

to the alleged offence, including computers, mobile phones and other electronic devices. The London address was also one which was occupied by the appellant.

[5] About five or six police officers arrived at the Ayr address at about 8.20 am on Friday, 26 March 2021. They were joined by another two officers from the cybercrime unit, whose task was to "triage" any electronic devices which were found during the search. This meant that, if there was no incriminating material on a device, it would be returned immediately to its owner. Otherwise, it would be retained, probably for a considerable period of time, pending examination at the cybercrime laboratory.

[6] The police cautioned three persons, including the appellant, who were in the house, that they were not obliged to say anything, but anything that they did say would be noted and may be used in evidence. The appellant made no attempt to leave the premises. One of the officers said that, had he attempted to do so, it was unlikely that he would have succeeded. Measures (which were not specified) to prevent him from doing so would probably have been invoked. There had been previous allegations concerning the appellant, which had not resulted in a conviction. The appellant had been the focus of the inquiry.

[7] One of the devices found was the Samsung phone. This was recovered from the floor under the headboard of the appellant's bed. The appellant admitted to being its owner. He was asked for the PIN and provided it. Initial investigations showed graphic moving images of child abuse which were "filmed by the device from an Apple Macbook Pro". The Macbook Pro was recovered from an under-stair cupboard. It did not contain any relevant images. Only the phone was retained by the police. The images found upon it formed the basis for the charges. Provision of its PIN had not been critical to the inquiry. In all probability the cybercrime unit could have overcome the security which the PIN provided

[8] The sheriff repelled the objection. The appellant had been cautioned; thus protecting his right not to incriminate himself. There was no ambiguity in the warrant. The appellant had proffered the PIN without objection. He could have refused to give the PIN, but had chosen not to do so. There was no evidence that the appellant had been a suspect or was being detained at the time of the search. Had he been arrested or detained and then questioned, "there would have been no argument that he would not have been entitled to access to legal advice". It was speculation as to what the police might have attempted to do, had the appellant attempted to leave the house.

[9] The sheriff reasoned that the investigation of crime would be severely impeded if, at the start of a search under warrant, persons named in the warrant had to be given access to legal advice. That advice was required in advance of any questioning by the police about what had been recovered with a view to eliciting an incriminatory response. The request for the PIN had been no more than a preliminary question to assist in the further direction of the search and investigation.

Submissions

[10] The ground of appeal is that, at the material time, the appellant had been a suspect who was not free to leave the premises. His freedom of action had been curtailed significantly. The request for his PIN had been a question designed to elicit an incriminating response. "Accordingly", submitted the appellant, the failure to afford the appellant access to legal advice rendered the reply, and the fruits of that reply, "unfair" (*Ambrose* v *Harris* 2012 SC (UKSC) 53 at para 71). Access to a lawyer should be provided "from the first interrogation of a suspect" (*Salduz* v *Turkey* (2009) 49 EHRR 19 at para 55, applied in *Cadder* v *HM Advocate* 2011 SC (UKSC) 13). Access to legal advice was required when a person was:

(1) a suspect; (2) in police custody; and (3) the subject of interrogation (*Ambrose* v *Harris* at paras 62-65).

[11] The Advocate depute responded that there was no right to legal advice during the course of a search (*Ambrose* v *Harris* at paras 72, 87 and 123). Whether a caution alone was sufficient to ensure a fair trial depended upon the circumstances (*Ambrose* v *Harris* at para 60). The fact that a person had been cautioned did not mean that he had been charged (at para 62). The right of access to legal advice only arose when a person had "had their freedom of action significantly curtailed, had been deprived of their freedom in any significant way or been deprived of their liberty of movement to any material extent (*Ambrose* v *Harris* at paras 71, 105 and 115).

[12] The test of whether the evidence was admissible was whether the appellant's right to a fair trial would be breached by the leading of that evidence (*HM Advocate* v *P* 2012 SC (UKSC) 108 at 27). Any objection should be confined to the reply given and not to the subsequent recovery of the images. Each case had to be considered upon its own circumstances (*Wilson* v *Brown* [2021] SAC (Crim) 4 at para 14). The court had to seek a balance between the rights of individuals and the proper investigation of crime (*Miln* v *Cullen* 1967 JC 21 at 29-30). The purpose of the search warrant was to see if any crime had been committed. A request for a PIN was not designed to elicit an incriminating response. The appellant's freedom of action had not been curtailed. He was not subjected to interrogation.

Decision

[13] The appellant's complaint is that he was not afforded a right of access to legal advice prior to being asked for his PIN. This begs the question of when a person is entitled to such

access. Neither *Salduz* v *Turkey* (2009) 49 EHRR 19 nor *Cadder* v *HM Advocate* 2011 SC (UKSC) 13 had made this clear; some *dicta* suggesting that the right arose when a suspect was detained for questioning and others that it was connected to questioning, even if the suspect had not been detained. Clarity came with *Dayanan* v *Turkey* [2009] ECHR 2278, in which it was said that the right of the suspect arose as "soon as he or she is taken into custody" (para 32)", and regardless of whether the suspect was being questioned. This was because of the need for a suspect to be able, soon after his arrest, to instruct his defence. *Ambrose* v *Harris* 2012 SC (UKSC) 51 subsequently referred to the right arising when the suspect's "freedom of action has been significantly curtailed" (Lord Hope at paras [55] and [71]), was put in a "sufficiently coercive" position (*ibid*) or was "deprived of his liberty of movement" (Lord Clarke at para [115]). It is difficult to envisage how these situations would arise now in the absence of an arrest or some form of statutory detention.

[14] *Salduz, Cadder, Dayanan* and *Ambrose* formed the basis for the recommendations in the Carloway Review (p 167). The recommendations in turn resulted, after consultation, in the provisions of the Criminal Justice (Scotland) Act 2016. These (s 44) make it clear that the point at which a suspect is entitled to access to legal advice (specifically the right to have a private consultation with a solicitor at any time) is when that person is "in police custody"; ie after he or she has been arrested (s 64). In practical terms, the right will normally be afforded at the point when the suspect arrives at the police office. One reason for the use of police custody as the relevant time is that, prior to being arrested, a person is free to access legal advice if he or she so chooses. Put another way, the right to access legal advice, which was explored in the various cases which were cited, is now codified by statute. There is no right to be informed of any right to access legal advice unless a person is in police custody.

A suspect who is not in custody, and who is thus at liberty, is already able to access that advice.

[15] The appellant was not in police custody. He may have been a suspect in a very general sense of being a person whom the police suspected of having committed crimes of the type with 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. That, so far as the court is aware, could only have arisen once the search had been executed and the images recovered.

[16] *Quantum valeat*, a person is, of course, generally entitled, not just to have access to legal advice, but also to have a solicitor present either when he is under arrest or when not arrested but in a police station voluntarily and, in either case, is to be interviewed (2016 Act, s 32). The right, which has again been codified in statute, does not apply to a person who happens to be present at a search. In that situation, in order to preserve fairness, it will often be prudent to caution such a person that, in short, they need not say anything to the police and that anything they do say may be used in evidence. However, in the absence of arrest or its equivalent no more need normally be done by way of safeguarding the rights of those present.

[17] The police are entitled to make requests outwith the confines of the police office which are designed, not to elicit an incriminating reply to a charge, but to progress their inquiries. In the context of a search under warrant, that will include being able to ask persons to open lockfast places or to provide the necessary keys or combinations to do so or, as in this case, to provide PINs or pass codes to enable access to devices which fall within the scope of the search warrant.

[18] If the appellant had obtained legal advice during the search, one question which would have arisen is what the advice might have been. He would have been told, no doubt, that if he did not provide the PIN, his phone would be seized and transmitted to the cybercrime unit's laboratory where the security would probably be overcome anyway. If it was not, the police would have been entitled to serve a notice under the Regulation of Investigatory Powers Act 2000 (s 49) to require disclosure of the PIN. Failure to comply with that requirement would be an offence which carried with it the potential for a significant prison sentence. In these circumstance, the court is not persuaded that the result of obtaining legal advice would have been that the images would not have been recovered. In the event, none of this arises since the appellant volunteered his PIN when he was not under any coercive circumstances. He was free to seek such advice as he wished. Had he been prevented from doing so, different consideration might have arisen. He was not.

[19] In all of these circumstances, no unfairness arises. The appeal must be refused.