**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**[2023] HCJAC 41**
**HCA/2021/355/XC**

Lord Woolman
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD WOOLMAN

in

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

by

HER MAJESTY'S ADVOCATE

Appellant

against

MICHAEL DOCHERTY

Respondent

**Appellant: Kearney QC AD; Crown Agent**
**Respondent: Paterson sol adv; Paterson Bell, Edinburgh for Keenan Solicitors, Greenock**

15 December 2021

[1] The Crown served an indictment on the accused in early 2021. It charged him with two offences. Only the first is relevant to this appeal. It states:

> "(1) on 19 March 2020 at the common close of 17 Sir Michael Street, Greenock, being a public place, you MICHAEL DOCHERTY did, without reasonable excuse or lawful authority, have with you an article which had a blade or was sharply pointed, namely a screwdriver;
> CONTRARY to the Criminal Law (Consolidation) (Scotland) Act 1995, section 49(1) as amended."

[2] The defence solicitor took a preliminary plea. He contended that the screwdriver found on the accused did not have a blade, nor was it sharply pointed. Accordingly, the charge was irrelevant. The item in question was not an article for the purposes of section 49(1).

[3] The Crown took the opposite view. It argued that this particular screwdriver did have a blade, or a sharp point, or both. In any event it was the type of item that Parliament intended to prohibit, and using a purposive construction was caught by section 49(1).

[4] After a debate the sheriff sustained the defence plea. He concluded by stating:

> "I do not consider that section 49 should be properly applied to the screwdriver in this case having observed the screwdriver, its agreed description, the authoritative decision of *Davis* and the Parliamentary Debates."

[5] Three issues emerge from this passage. First, the sheriff considered the substantive merits of the case. Second, in doing so, he examined the screwdriver himself. Third, he relied on a description of it provided by the procurator fiscal and agreed by the defence solicitor, which was in the following terms:

> "A red and black handled screwdriver; metal part 4 – 4.5 inches long; not a Pozidriv or Phillips screwdriver. This is a flat-headed screwdriver with a wedge-shaped black tip."

[6] The sheriff erred in adopting this course. A preliminary plea to the relevancy focuses on legal issues: Criminal Procedure (Scotland) Act 1995 section 79(2)(a)(i). The question is whether the case (or individual charge) must necessarily fail, even if sufficient evidence is led to prove the disputed matter.

[7] Charge (1) is clearly relevant. It precisely reflects the wording of section 49(1). Mr Paterson (rightly) conceded that some screwdrivers could be caught by that provision. Each has to be individually assessed. In other words the "necessarily fail" test is not met.

[8] The matter can be looked at from another angle. If the Crown do not lead sufficient evidence to establish that the screwdriver found on the accused had a blade or was sharply pointed, the court will uphold a "no case to answer submission". If, however, the Crown does lead sufficient evidence, it will be a matter for the jury to determine.

[9] We note that in the case of *R* v *Davis* [1998] Crim LR 564 the decision of the Court of Appeal turned on the fact that the trial judge had misdirected himself in construing a similar provision in section 139 of the Criminal Justice Act 1988 by asking whether the screwdriver was capable of causing injury. The appellant had been convicted after trial. The case of *Davi*s is distinguishable from the present case where the issue is whether the charge is a relevant one.

[10] The sheriff followed a course that conflated questions of law and fact. We shall uphold the appeal and remit the case back to him to proceed as accords.