Michaelmas Term
[2012] UKSC 62

JUDGMENT

Kinloch (AP) (Appellant) *v* Her Majesty's Advocate (Respondent) (Scotland)

before

Lord Hope, Deputy President
Lady Hale
Lord Mance
Lord Kerr
Lord Reed

JUDGMENT GIVEN ON

19 December 2012

Heard on 26 November 2012

Appellant	*Respondent*
Brian McConnachie QC Claire Madison Mitchell (Instructed by Paterson Bell)	Andrew F Stewart QC Kathleen Harper (Instructed by The Appeals Unit, Crown Office)

LORD HOPE (with whom Lady Hale, Lord Mance, Lord Kerr and Lord Reed agree)

1. This is an appeal under paragraph 13(a) of Schedule 6 to the Scotland Act 1998, which provides that an appeal lies to this court against a determination of a devolution issue by a court of two or more judges of the High Court of Justiciary. But the circumstances that have led to its coming here cannot be regarded as satisfactory. It is far from clear that the issue identified in the devolution minute is a devolution issue within the meaning of paragraph 1(d) of Schedule 6. As the determination against which the appeal has been brought was taken on paper at the second sift, we do not have a fully reasoned opinion of the judges for the decision that they took to refuse to grant leave to appeal. The motion for leave to appeal to the Supreme Court against their determination was not opposed by the Lord Advocate on the question of jurisdiction, although he did oppose it on the ground that it did not raise a matter of general public importance. The Appeal Court in its turn did not give any reasons when it gave leave to appeal to this court.

2. As a result we are, in effect, having to deal with this case at first instance without having the benefit of the views of the judges of the High Court of Justiciary as to whether a devolution issue has been raised and, if so, how it should be determined. In *Follen v HM Advocate* 2001 SC (PC) 105, para 10 the Judicial Committee observed that, where the Appeal Court refused leave without giving reasons, the Board might find it difficult to appreciate that a petition for special leave to appeal was without merit from the information given on paper by the petitioner. This is not such a case, and there are no grounds for criticising the judges for the fact that no reasons were given. The motion for leave was not opposed on this point. But it is unfortunate that, as there has been no reasoned judgment because of the procedural route the case has followed, the question whether a devolution issue has truly been raised appears to have been overlooked until now.

The facts

3. On 16 December 2010 the appellant James Kinloch was found guilty on indictment in the Sheriff Court at Glasgow of, on 6 February 2007 at various addresses in Glasgow including the appellant's home at 32 Prospecthill Crescent, converting and transferring criminal property consisting of large sums of money in breach of sections 327(1)(a), (b), (c) and (d) and 329(1)(a), (b) and (c) of the Proceeds of Crime Act 2002. He was, in short, convicted of money-laundering. At a diet held on 13 September 2010 a preliminary plea was taken on the appellant's

behalf that the police had acted unlawfully when they kept him under observation on 6 February 2007, as they had failed to obtain authorisation under the Regulation of Investigatory Powers (Scotland) Act 2000 ("the 2000 Act") to conduct covert surveillance on him and his associates. A devolution minute was moved in support of this argument. The sheriff refused the devolution minute. He also refused leave to appeal, and the case went to trial before another sheriff.

4. The devolution minute began by stating that the appellant intended to raise a devolution issue within the meaning of Schedule 6 to the Scotland Act 1998. The charges which had been brought against him were referred to, as were production 1 which was a copy of a form purporting to authorise directed surveillance on a group of individuals and production 2 which was a police surveillance log dated 6 February 2007. The observations which the police carried out from about 0835 hours to about 1200 hours were described. The appellant was seen leaving his car and entering the block of flats in which he lived, leaving the block carrying a bag and entering a car which then drove off. He was observed leaving various other locations and cars in Glasgow and then entering a taxi carrying a bag which appeared to be heavy which was later seen parked outside his brother's home. The police approached the taxi, and the appellant and his brother were detained. Various searches were carried out and large sums of money were recovered by the police.

5. Reference was made in the minute to article 8 of the European Convention on Human Rights. Article 8(1) provides that everyone has a right to respect for his private and family life, his home and his correspondence. Article 8(2) states that there shall be no interference by a public authority with the exercise of this right except such as is, among other things, in accordance with the law. Reference was also made to section 1(2) of the 2000 Act which defines what amounts to directed surveillance for the purposes of that Act, and to section 5(1) which provides that such conduct is lawful for all purposes if an authorisation under the Act confers entitlement to engage in it on the person whose conduct it is and that person's conduct is in accordance with the authorisation. The Crown conceded that no authorisation had been granted for the surveillance of the appellant, any associate of his or anyone else who was the subject of the observations by the police which were referred to in evidence at the trial.

6. The issue that the Minute sought to raise was described in these terms:

> "That the police have acted unlawfully in that they failed to obtain authorisation to conduct covert surveillance upon the minuter or his associates. That all of the subsequent actions by the police officers and the materials recovered under search warrants obtained by the police flowed from the said unlawful acts. That as a consequence the

> surveillance and the searchers (sic) and seizures which followed upon the minuter's arrest were unlawful and any evidence in respect of said surveillance or items seized is inadmissible in evidence."

The prayer at the end of the Minute invites the court:

> "to hold that the surveillance carried out on James Kinloch on 6 February 2007 was unlawful and that the productions 1 and 2 are inadmissible and that all subsequent action by the police including the obtaining of a warrant and the seizing of various items as described in crown production 5 was unlawful and, as a consequence, inadmissible as evidence."

7. In *Gilchrist v HM Advocate* 2005 (1) JC 34 there was an invalid authorisation for the directed surveillance that the police carried out because it lacked the necessary detail. A devolution minute was lodged by the second appellant in which it was contended that his rights under article 8 had not been properly protected, and that for the Crown to lead evidence obtained by that infringement would compromise his right to a fair trial under article 6. The High Court of Justiciary rejected the submission that the events in question involved the obtaining of private information, which is defined by section 1(9) of the 2000 Act as including any information relating to a person's private or family life. It also rejected the submission that, because the surveillance operation was being carried out under an invalid authorisation, there was an infringement of the second appellant's rights under article 8. The effect of the decision was that the leading of the evidence was not incompatible with his rights under article 6 either. Giving the opinion of the Appeal Court, Lord Macfadyen said in para 21:

> "What took place in Albion Street at the relevant time was that a plastic bag was handed by the first appellant to the second appellant. That was done in a public place. The event was there to be observed by anyone who happened to be in the vicinity, whatever the reason for their presence might be. It was in fact observed by police officers. They had reason to suspect that criminal activity was taking place. They therefore detained the appellants. On further investigation it was found that the bag contained controlled drugs. That sequence of events did not involve the obtaining of private information about the second appellant, in the sense mentioned in section 1(9) or in any broader sense. Nor did it involve any lack of respect for the second appellant's private life. What was done did not, in our opinion, amount to an infringement of the second appellant's rights under article 8."

8. A note of appeal was lodged following the appellant's conviction in which it was narrated, among other things, that the Crown relied on the decision in *Gilchrist* when opposing the devolution minute. It was submitted that the case of *Gilchrist* was wrongly decided. It was conceded that the sheriff was bound by that decision, but the sheriff was said to have erred in law by refusing to allow leave to appeal his decision. The sheriff said in his report that, as it was not in dispute that he was bound by *Gilchrist*, the only appropriate course was for him to refuse the minute and that, as he did not find his decision to be a matter of fine balance, he refused leave to appeal. It was also submitted that the sheriff who presided at the trial erred in repelling a submission of no case to answer.

9. The judge who dealt with the application at the first sift refused leave to appeal on both grounds. With regard to the point raised in the devolution minute, he said that the sheriff was entitled to refuse leave to appeal and that the note of appeal contained no adequate basis upon which to advance an argument that the case of *Gilchrist* was wrongly decided. An opinion was then obtained from counsel as to whether the appeal was arguable. Various reasons were given for criticising the approach that was taken in *Gilchrist* to the question whether there had been a violation of article 8. It was said that the relevant decisions of the European Court supported the appellant's argument. The second sift panel, having considered that opinion, also refused to grant leave to appeal. In relation to the devolution minute all it said was that it agreed with the sheriff that he was bound by the decision in *Gilchrist* and that he did not err in refusing leave to appeal. On 2 November 2011 the Appeal Court, having heard counsel for the appellant and without giving reasons, granted leave to appeal to the Supreme Court.

10. In the statement of facts and issues lodged for the purposes of this appeal it is stated that the issues in the appeal are as follows:

> "i) Whether the observations by the police, not having been authorised under the Regulation of Investigatory Powers (Scotland) Act 2000, breached the appellant's rights under article 8(1).
>
> The appellant maintains that the following second issue also arises and should be considered by the Supreme Court.
>
> ii) If so, whether the act of leading the evidence derived from that surveillance was incompatible with the appellant's rights under article 8(1) et separatim article 6(1) and thus ultra vires in terms of section 57(2) of the Scotland Act 1998?

> The respondent does not accept that the second issue arises in the appeal."

Is there a devolution issue?

11. Of the various questions listed in paragraph 1 of Schedule 6 to the Scotland Act 1998, the only one that is relevant to this appeal is that listed in sub-paragraph (d), as amended by section 12(2) of the Scotland Act 2012: a question whether a purported or proposed exercise of a function by a member of the Scottish Government is incompatible with any of the Convention rights or with EU law. That provision has to be read together with section 44(1), which provides that there shall be a Scottish Government whose members shall be (a) the First Minister, (b) such Ministers as the First Minister may appoint and (c) the Lord Advocate and the Solicitor General for Scotland. Section 57(2) of the 1998 Act provides:

> "A member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with EU law."

It is unlawful under section 6(1) of the Human Rights Act 1998 for the police to act in a way which is incompatible with a Convention right, as they are a public authority. But they are not members of the Scottish Government. So the question whether they have acted in a way that is incompatible with any of the Convention rights is not a devolution issue within the meaning of paragraph 1(d).

12. The first issue in the statement of facts and issues is a reasonably accurate summary of the contents of the devolution minute. It refers to the actions of the police, and it raises the issue whether their observations were in breach of the appellant's rights under article 8. As the proceedings below indicate, what the appellant was seeking to do was to argue that *Gilchrist v HM Advocate* was wrongly decided. His argument at the first sift was that the sheriff erred in refusing him leave to appeal on that matter. But, in contrast to what was submitted in *Gilchrist*, no mention was made at any stage of the question whether the act of the Lord Advocate in leading evidence obtained by the surveillance would compromise the appellant's rights under article 6.

13. Taking it on its own terms, therefore, the devolution minute does not appear to raise a devolution issue at all. The question which it does raise is not one that can be determined by this court under the jurisdiction that it has been given by Schedule 6. The appellant seeks to remedy this defect by the second question

raised in the statement of facts and issues. But the respondent objects to that question because the appellant gave no notice of an intention to raise that issue in his devolution minute. So there was no determination of that issue in the High Court of Justiciary as the question it raises was not before it, and this court does not have an original jurisdiction in these matters: *Follen v HM Advocate* 2001 SC (PC) 105, para 9. Except in regard to devolution issues as defined by paragraph 1 of Schedule 6 to the Scotland Act 1998, every interlocutor of the High Court of Justiciary such as that pronounced by the judges at the second sift is final and conclusive and not subject to review by any court whatsoever: Criminal Procedure (Scotland) Act 1995, section 124(2); *Hoekstra v HM Advocate (No 3)* 2001 SC (PC) 37, 41. The decision at the second sift was that the sheriff was bound by the decision in *Gilchrist*. It does not appear from the reasons that were given that the panel gave any consideration to the question whether the act of the Lord Advocate in leading the evidence was incompatible with the appellant's rights under article 6(1).

14. The proper course, in view of the limits to the jurisdiction of this court under the statute, might well have been to dismiss this appeal as incompetent. But, with considerable hesitation, we decided that we should hear argument on the second issue. Three factors in particular have led us to this conclusion. The first is the fact that the Crown did not oppose the appellant's motion for leave to appeal to this court on this point. The second is the fact that the Appeal Court took the view that it should give leave to appeal. The third is that, as noted in para 12 above, what the appellant was really seeking to do was to enable the correctness of the decision in *Gilchrist* that the evidence led by the Lord Advocate was admissible to be re-examined. As Mr McConnachie QC for the appellant pointed out, that was the only court to have heard any submissions at all on the matter. It must be taken to have been satisfied that it was proper for it to give leave. Our decision to allow this appeal to proceed should not be taken, however, as an indication that this Court is not aware of the limits to its jurisdiction, or of its responsibility to ensure that those limits are respected. Devolution minutes should say what they mean.

Was the act of leading the evidence incompatible with article 6?

15. The starting point for an examination of this issue, as it was in *Gilchrist*, is the question whether there was a breach of the appellant's right to respect for his private life under article 8. The fact that evidence was irregularly obtained as the surveillance was not authorised under section 6 of the 2000 Act does not, of course, of itself make that evidence inadmissible at common law: see *Lawrie v Muir* 1950 JC 19. Nor does the fact that evidence was obtained in breach of article 8 necessarily mean that it would be incompatible with article 6 for that evidence to be led at the trial: *Khan v United Kingdom* (2000) 31 EHRR 1016, para 40; *PG and JH v United Kingdom* (2001) 46 EHRR 1272, para 81.

16. It has also to be noted that any breach of article 8 in the obtaining of the evidence was due to acts of the police, not the Lord Advocate. It was so held in *McGibbon v HM Advocate* 2004 JC 60, where it was conceded that there had been a breach of article 8 in the obtaining of covert video and audio recordings of the appellants' incriminating conversations. Lord Justice Clerk Gill said in para 20 that the act that was relevant to section 57(2) of the Scotland Act 1998 was the act of the Lord Advocate in leading the evidence. The appellant in this case suggested that the distinction which the Lord Justice Clerk drew in *McGibbon* between the acts of the police and the Lord Advocate was unsound. I think that the Lord Justice Clerk was well founded in holding that the functions of the police and the Lord Advocate are constitutionally separate. The Lord Advocate was, however, responsible for the leading of the evidence.

17. It should be noted too that issues relating to the lawfulness of an interference with private life must be distinguished from those about the fairness of the use of evidence in the trial: *Perry v United Kingdom* (2003) 39 EHRR 76, para 48; also *HM Advocate v P* 2012 SC (UKSC) 108, para 18 for the test of fairness in this context. The tests as to whether there was a breach of these two articles are different, as are the remedies if they are held to have been breached. So the way the evidence was obtained may infringe article 8, yet the leading of that evidence may be held not to be incompatible with article 6. Nevertheless it would not be right to examine the issue as to whether the leading of the evidence in this case was incompatible with article 6 without examining the underlying question whether the appellant's article 8 right to respect for his private life was interfered with. The key to the whole argument lies in what one makes of the article 8 issue.

18. Decisions of the Strasbourg court on the question whether there has been an interference with the right to respect for a person's private life indicate that the answer to it will depend in each case on its own facts and circumstances. Private life is regarded by that court as a broad term not susceptible to exhaustive definition: *PG and JH v United Kingdom* (2001) 46 EHRR 1272, para 56. The extent of the intrusion into the individual's private space will always be relevant, as will the use that is made of any evidence that results from it. The use of covert listening devices installed in the person's home or other premises where he has a reasonable expectation of privacy will require to have a clear basis in domestic law if it is to be held not to amount to an interference in breach of article 8: *Malone v United Kingdom* (1984) 7 EHRR 14, para 67; *Khan v United Kingdom* (2000) 31 EHRR 1016, para 27. There may also be a violation if the information that has been gathered by covert methods about a person's private life is systematically collected and stored in a file held by agents of the state: *Amann v Switzerland* (2000) 20 EHRR 843, paras 65-67; *Rotaru v Romania* (2000) 8 BHRC 449, paras 43-44. This case is not concerned with interferences of that kind.

19. There is a zone of interaction with others, even in a public context, which may fall within the scope of private life: *PG and JH v United Kingdom* (2001) 46 EHRR 1272, para 56. But measures effected in a public place outside the person's home or private premises will not, without more, be regarded as interfering with his right to respect for his private life. Occasions when a person knowingly or intentionally involves himself in activities which may be recorded or reported in public, in circumstances where he does not have a reasonable expectation of privacy, will fall into that category: *PG and JH v United Kingdom*, para 57. A person who walks down a street has to expect that he will be visible to any member of the public who happens also to be present. So too if he crosses a pavement and gets into a motor car. He can also expect to be the subject of monitoring on closed circuit television in public areas where he may go, as it is a familiar feature in places that the public frequent. The exposure of a person to measures of that kind will not amount to a breach of his rights under article 8.

20. The Strasbourg court has not had occasion to consider situations such as that illustrated by the present case, where a person's movements in a public place are noted down by the police as part of their investigations when they suspect the person of criminal activity. But it could not reasonably be suggested that a police officer who came upon a person who has committed a crime in a public place and simply noted down his observations in his notebook was interfering with the person's right to respect for his private life. The question is whether it makes any difference that notes of his movements in public are kept by the police over a period of hours in a covert manner as part of a planned operation, as happened in this case.

21. I think that the answer to it is to be found by considering whether the appellant had a reasonable expectation of privacy while he was in public view as he moved between his car and the block of flats where he lived and engaged in his other activities that day in places that were open to the public. Although Lord Macfadyen did not say so in as many words, it is plain that this was the basis for the decision in *Gilchrist v HM Advocate*. I would hold that it was rightly decided on this issue. There is nothing in the present case to suggest that the appellant could reasonably have had any such expectation of privacy. He engaged in these activities in places where he was open to public view by neighbours, by persons in the street or by anyone else who happened to be watching what was going on. He took the risk of being seen and of his movements being noted down. The criminal nature of what he was doing, if that was what it was found to be, was not an aspect of his private life that he was entitled to keep private. I do not think that there are grounds for holding that the actions of the police amounted to an infringement of his rights under article 8.

22. For these reasons I would answer the first issue in the statement of facts and issues in the negative. As the only ground for the submission that the leading of the

evidence was incompatible with the appellant's rights under article 6(1) was that it had been obtained in a way that infringed his rights under article 8, the question raised by the second issue must be answered in the negative too. I would only add that it has not been suggested that there was any coercion or trickery by the police which, if it had been present, might have led to the conclusion that the appellant did not receive a fair trial: see *Bykov v Russia*, (Application No 4378/02), given 10 March 2009 (GC), paras 99 and 102.

Conclusion

23. I would dismiss the appeal.