SHERIFF APPEAL COURT

[2018] SAC (Crim) 14
SAC/2018/000290/AP

Sheriff Principal M W Lewis
Sheriff Principal C D Turnbull
Sheriff N McFadyen

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL LEWIS

in

APPEAL AGAINST CONVICTION BY WAY OF STATED CASE

by

CRAIG MELVILLE

Appellant

against

PROCURATOR FISCAL, DUNDEE

Respondent

Appellant: Ogg (sol adv); Paterson Bell Solicitors
Respondent: Borthwick; Crown Agent

11 September 2018

Introduction

[1] The appellant was charged with a breach of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 by behaving in a threatening and abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that he sent a number of text messages to the complainer that contained threatening, abusive and derogatory remarks regarding Muslims. The offence was said to be aggravated by racial prejudice in terms of

Section 74 of the Criminal Justice (Scotland) Act 2003. He pled not guilty and the matter proceeded to trial.

[2] In the early stages of the evidence of the complainer, the Crown sought to lead evidence regarding the source and content of a transcript of mobile phone messages (Crown production number 1) which had allegedly been exchanged by the appellant and the complainer. The defence objected to the admissibility of that document. The sheriff held a trial within a trial on that matter and thereafter repelled the appellant's objection. At the close of the Crown's case the defence made a submission of no case to answer on the basis that there was insufficient evidence to identify the appellant as the sender of the messages. The sheriff repelled that submission. The defence led no evidence. The sheriff convicted the appellant of the charge libelled and fined the appellant £1000 payable by way of instalments.

[3] The sheriff has stated a case for the opinion of this court. He poses three questions:-

1. Upon the evidence narrated was I correct to repel the objection made by the appellant to the admissibility of Crown production number 1?

2. Upon the evidence narrated was I correct to repel the appellant's motion of no case to answer?

3. On the facts stated was I correct to convict the appellant?

Trial within a trial

[4] The Crown led evidence from the complainer, her husband and two police officers. The sheriff accepted the evidence of these witnesses as credible and reliable save in one respect which is mentioned in paragraph [6] below. The defence did not lead evidence.

[5] The background evidence is not controversial. The complainer and the appellant were involved in an intimate relationship during 2014 and 2015 while both were working for

representatives for the Scottish National Party in Dundee. The complainer is Muslim. The appellant was aware of that and aware of her religious beliefs. The complainer and the appellant each had an iPhone which they used regularly to keep in touch by way of calls, WhatsApp messages and text messages. The complainer was married and to hide the affair she stored the appellant's iPhone number in her iPhone contacts under the name of one of her friends – 'Karen' and she routinely deleted from her iPhone messages which she sent to the appellant and messages which she received from him. Over the weekend of 14 November 2015 the complainer and the appellant exchanged texts about an attack in Paris by Islamic terrorists. In the early hours of Sunday 15 November the complainer received a rambling and incoherent phone call from the appellant which was followed by a series of text messages which upset the complainer. The three messages contain threats, are written in abusive terms, and are derogatory about Muslims in general. The solicitor advocate for the appellant accepted before us that the content of the messages is vile. Prior to deleting those messages, the complainer showed them to a work colleague, JF, and also to the appellant in order that he understand how offensive he had been. Despite the content of these messages the relationship continued and the complainer did not at that time report the matter to the police.

[6] By early December 2015 the complainer's husband had become suspicious that his wife was having an affair with the appellant. He is an IT technician with some skill in data recovery. He took her iPhone which he interrogated for the express purpose of having his suspicions confirmed. According to the complainer he took her iPhone without her consent – and it is on this point that the sheriff preferred the evidence of the complainer to that of her husband. He downloaded data recovery software from the internet and applied it to the iPhone. He recovered data, including the messages exchanged between the complainer and

the appellant, and confronted the complainer. The complainer acknowledged to her husband and indeed in her evidence that the data included messages which had passed between her and the appellant. The complainer's husband did not at that time notice the messages containing threats, abuse or derogatory comments about Muslims.

[7] The circumstances of how the three offending messages were brought to the attention of the press, the Scottish National Party, and the police are somewhat opaque, although it seems that pressure had been brought to bear upon the complainer from the Muslim community and from within the Scottish National Party 'to get something done about the messages' whereas the complainer's husband reported the affair to the Scottish National Party.

[8] In January 2016 the complainer reported the matter to the police. Her iPhone and the appellant's iPhone were seized and forensically examined by the police. The complainer's husband had selected messages which he believed to be concerning and saved them to a disc which he then provided to the police (Crown label number 1). DC McI examined the disc and found on it numerous messages, some of which were concerning as they appeared to be racist. DC McI printed the content of the disc (Crown production number 1).

[9] DC MacL, a forensic mobile phone examiner, examined the appellant's iPhone and discovered an extensive call history between the appellant's iPhone and the complainer's iPhone. He traced specific calls over the weekend of the libel. He was unable to recover messages or texts to or from the complainer's iPhone but he concluded that their respective iPhones had been connected at some point via a chat room application. He had not examined the complainer's iPhone. His findings appear in Crown production number 2.

[10] The sheriff found that although the three messages were recovered without the consent of the complainer and were clearly irregularly obtained, he was prepared to excuse

the irregularity based on the nature of the irregularity, the serious nature of the offences, the fact that the accused was a public official at the time the messages were sent and the fact that it could not be said to create unfairness to the accused to admit them. He also concluded that the transcript was best evidence of two of the offending messages and the oral evidence of the complainer was best evidence of the third message. Accordingly he repelled the defence objection to the admissibility of the transcript.

Evidence following ruling in trial within a trial

[11] The evidence of the final witness for the Crown, JF, was brief. She spoke of her friendship with the complainer, her knowledge of the affair and of the methods of communication used by the complainer and the appellant, of being shown the offending messages by the complainer and being told that the appellant had sent them. She could not remember the content.

No case to answer submission

[12] The defence argued that there was no corroboration that the appellant had sent the offending messages. The sheriff was satisfied that the complainer was credible and reliable and was the primary source of identification of the appellant as the sender. He found that corroboration of the existence of the affair came from JF, the complainer's husband and the transcript; and that corroboration that the appellant was the sender came from the transcript.

Final stages of trial

[13] No evidence was led on behalf of the appellant and having heard submissions the sheriff found him guilty.

Appeal

Irregularly obtained evidence

Submissions

[14] An irregularity in obtaining real evidence does not necessarily mean the evidence is inadmissible (*Lawrie* v *Muir* 1950 JC 19 pages 25 & 27). The sheriff, partly based upon a concession made by the Crown, concluded that the data recovered by the complainer's husband had been irregularly obtained. The advocate depute considered himself bound by that concession but made it clear that it was not one which he would have made. Be that as it may, we were not invited by either party to interfere with that part of the sheriff's decision.

[15] Having decided that the evidence was improperly obtained by the complainer's husband, the sheriff was faced with competing interests in whether to excuse the irregularity and to admit the evidence – fairness to the appellant as against the public interest - and found *Lawrie* v *Muir* to have application.

[16] The solicitor advocate for the appellant submitted that the sheriff ought not to have excused the irregularity because he had failed to properly determine the context in which the messages were recovered by the complainer's husband, filtered by him for passing to the police, and transcribed by the police. The complainer's husband had been selective in his choice of messages; the messages are incomplete; the messages are not in date or time order; and appear to have been written and sent by "fit4less" and not by "Karen" or the appellant.

It would be inherently unfair to the appellant to allow the transcript to be admitted in evidence.

[17] The advocate depute invited us to uphold the sheriff's decision as regards the exercising of the irregularity.

Decision

[18] The approach advanced for the appellant does correctly identify an important consideration - whether the admission of the evidence will be fair to the accused. However it fails in our view to have regard to "… the nature of the irregularity and the circumstances in which it was committed…" (*Lawrie* at page 27), fails to take account of the whole context in which the messages came to be written, recovered and transcribed and singularly fails to take into account the content of the transcription, the oral evidence of the complainer, the seriousness of the offence and that the investigative authorities had no role in the recovery of the material and were plainly acting in good faith.

[19] The complainer's husband suspected that his wife was having an affair with the appellant. The iPhone which was examined by the complainer's husband did not belong to the appellant but to the complainer. His purpose in using data recovery software was not to uncover evidence of criminality but to secure evidence of adultery on the part of his wife. Having uncovered evidence of adultery through the downloaded messages, he shared the data with his wife. It was his wife who made the complaint to the police. She voluntarily handed over her iPhone to the police for examination. He voluntarily provided the police with the transcript of some of the messages passing between the appellant and the complainer.

[20] The transcript runs to several pages of mainly puerile exchanges, some of a romantic nature, some of which are simply chatter, and three of which are the offending messages. It is difficult to navigate but it does contain the date and time of sending and receipt of each message. Within the transcript there is mention of "Craig", "the elusive Craig Melville" and birthday wishes being sent and acknowledged on the same date as the appellant's birthday, at least as it appeared on the summary complaint. The complainer confirmed that the messages within the transcript had variously been sent by her to the appellant or sent by the appellant to her. The offending messages are racist and anti-Muslim. The messages were sent by a public official to a Muslim who as the sheriff notes "was alarmed and shocked by the content".

[21] We are not persuaded that the sheriff erred by failing to consider context. He had regard to the factors which we have mentioned in the preceding two paragraphs, including fairness to the appellant. He was well entitled to hold that any irregularity should be excused.

[22] While the case proceeded at trial and indeed before us on a Crown concession that the evidence was irregularly obtained, we do pause to question whether what happened was properly viewed as an irregular search or indeed a search at all. Examination of the complainer's telephone was not conducted by the police or anyone investigating alleged or suspected criminal conduct, but by the complainer's husband, whose purpose was to find evidence, if it existed, of adultery. It was the complainer's privacy which was affected by her husband's action and, of course, she proceeded to report the matter to the police, plainly waiving any right she may have had to take issue with the use of the material.

[23] In that situation it seems to us difficult to see this as a case which involves the irregular securing of evidence, far less one which triggers the need to consider whether an

irregularity should be excused. We find support for that view in the cases of *Mackintosh* v *Stott* 1999 SCCR 291; *Baxter* v *Stott* 1992 SLT 1125, and, in particular, *Howard* v *HM Advocate* 2006 SCCR 321, where Lord Macfadyen, delivering the opinion of the court, stated:

> "[11] ….. If a search is conducted in circumstances in which it is illegal, evidence uncovered in the course of it will be inadmissible unless the court excuses the irregularity. That rule applies whether the search is conducted by a police officer (eg, *Graham v Orr* 1995 SCCR 30), or by others purporting in one way or another to be investigating criminal conduct (eg, *Lawrie v Muir*; *Fairley v Fishmongers of London*1951 JC 14; *Wilson v Brown* 1996 JC 141). But it is also recognised that evidence may be discovered in circumstances that do not constitute a search at all, and in such cases the rule does not apply (eg, *Mackintosh v Stott*; *Baxter v Scott*). The common feature of cases in the former category is that the activity which resulted in discovery of the evidence was undertaken with a view to ascertaining whether evidence of criminal behaviour existed.
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> [12] In the present case there is no basis in the evidence led before the sheriff for supposing that Mrs Young was looking for evidence of criminal behaviour on the part of the tenant. The finding was that she was gathering the tenant's belongings together with a view to their removal from the premises. When she came upon the gift bag, she looked into it 'out of curiosity'. She was not searching for the cannabis resin. She stumbled upon the cannabis resin by accident in the course of an activity which was not focused in any way on finding evidence of criminal activity. The fact that that activity was itself illegal in terms of the Rent Acts does not place her in the same position as a police officer carrying out a search without lawful justification, or an official or other person looking for evidence of criminality without authority or beyond the scope of limited authority. Nor does the fact that, having realised that the gift bag was heavy, she looked inside to see what was in it take her actings into the category of search. The element of purpose aimed at uncovering evidence of criminality remained absent.
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> [13] In these circumstances, the sheriff was right to hold that Mrs Young was not engaged in a search, and that the rule excluding evidence obtained by an irregular search (unless excused) did not apply……"

[24] The underlying principle in *Howard* would appear to be that evidence which is discovered in an activity which is not itself a search for evidence of criminality is not irregularly obtained, especially where it is discovered by a member of the public. It is difficult to see why that principle would not apply equally to the circumstances of this case.

However, since we were not invited to go behind the concession, we confine ourselves to these observations.

Best evidence

Submissions

[25] The selectivity of the complainer's husband and the lack of context became the subject of further scrutiny in relation to the application of the best evidence rule. The solicitor advocate for the appellant argued that the limitations of the transcript meant that it was secondary evidence and was inadmissible. The iPhone of the complainer and the forensic report containing the examination of its contents was the best evidence. These items were, or ought to have been, available to the court, and yet were not produced by the Crown (*Lennox* v *HMA* 2010 SCCR 837*),* resulting in substantial prejudice to the appellant.

[26] The advocate depute relied upon the following authorities as examples of the operation of the best evidence rule: *MacIver* v *Mackenzie* 1942 JC 51, *MacLeod* v *Woodmuir Miners Welfare Society Social Club* 1961 JC 5, *McKellar* v *Normand* 1992 SCCR 393, *Kelly* v *Allan* 1084 SCCR 186, *Friel* v *Leonard* 1997 SLT 1206, *Tudhope* v *Stewart* 1986 JC 88 and *Anderson* v *Laverock* 1975 JC 9. These cases are concerned with items lost or destroyed in the custody or control of the police, perishable goods, goods too bulky to be produced at trial, and where the absence of the item does not lead to injustice. The absence of the complainer's iPhone and the report do not lead to an injustice. They have no evidential value. The transcript and the parole evidence of the complainer are best evidence.

Decision

[27] We do not propose to repeat what we have already said about the matter of context and content (see paras [18]-[21] above). We recognise that the transcript is disjointed but that does not mean it is indecipherable. If it is incomplete, then the appellant could have given evidence about the missing elements. As the sheriff observed the appellant "would be uniquely placed to provide his perspective, assessment and instructions to assist in challenging allegations made in relation to them." (para [32] of his note).

[28] To be clear, parties had agreed before the sheriff that nothing had been found by the forensic examiners on either of the iPhones. The appellant did not instruct forensic examination of the iPhones. The sheriff found that the police did not retrieve the messages contained in Crown production number 1 through forensic examination (finding in fact [13]). He considered that even if the complainer's iPhone and the report had been lodged "they would have been of no evidential value" (para [28] of his note). We agree with that assessment. We cannot therefore see what prejudice there would have been to the appellant due to the absence of the complainer's iPhone during the trial.

[29] *Lennox* can be distinguished. In that case CCTV footage (primary evidence) had been lost or destroyed while in the hands of the police or third parties acting under the direction of the police whereas in the present proceedings, the messages had been deliberately deleted by the complainer and the appellant. We agree with the advocate depute that the transcript taken together with the clear evidence of the complainer are best evidence of the offending messages.

No case to answer

Submissions

[30] The defence submission was brief. There is no corroboration that the appellant sent the messages. The Crown response was that there was sufficient circumstantial evidence to corroborate the complainer's evidence that he was the source of the messages.

Decision

[31] It seems to us that the complainer identified clearly and explicitly that the appellant had sent to her the offending messages, that she had challenged him about the content of the messages and that he had apologised for upsetting her. Corroboration comes from the surrounding facts and circumstances of the affair which was known to JF and discovered by the complainer's husband, the deception in deleting messages, and the retrieval of data including the messages, certain of which identify the appellant.

[32] For the above reasons we refuse the appeal and answer each question in the affirmative.