



19 December 2012

PRESS SUMMARY

Kinloch (Appellant) v Her Majesty's Advocate (Respondent) (Scotland) [2012] UKSC 62

On appeal from the High Court of Justiciary (Scotland)

JUSTICES: Lord Hope (Deputy President), Lady Hale, Lord Mance, Lord Kerr and Lord Reed.

BACKGROUND TO THE APPEAL

On 6 February 2007, police officers carried out observations on the Appellant from about 0835 hours to about 1200 hours. He 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, carrying a bag which appeared to be heavy, entering a taxi 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. On 16 December 2010 the Appellant was found guilty on indictment in Glasgow Sheriff Court of money-laundering offences [3 – 4].

At a preliminary stage, the Appellant had lodged a devolution minute. He referred to article 8 of the European Convention on Human Rights which provides that everyone has a right to respect for his private life. He argued that the police had acted unlawfully because they had failed to obtain authorisation to conduct covert surveillance on him and his associates under the Regulation of Investigatory Powers (Scotland) Act 2000 (the "2000 Act"). He asked the Court to hold that the surveillance was unlawful and that the fruits of that surveillance were inadmissible as evidence. The Sheriff refused the devolution minute and refused leave to appeal his decision [3 and 5 – 6].

Following his conviction, the Appellant appealed to the High Court of Justiciary. His first ground of appeal was that the Sheriff should have granted leave to appeal his decision to refuse the devolution minute. The Appellant conceded that the Sheriff was bound by the decision of the Appeal Court in *Gilchrist v HM Advocate* (which he said the prosecution had relied on when opposing the devolution minute) but argued that it was wrongly decided. The Appellant's second ground of appeal was that the trial Sheriff was wrong to reject his no case to answer submission [8].

In the High Court of Justiciary, leave to appeal on both grounds was refused at the first and second siftings. 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 [9].

The parties agreed that the issue whether the observations of the police breached the Appellant's rights under article 8 arose in the appeal to the Supreme Court. The Appellant maintained that the issue whether the act of leading that evidence was incompatible with the Appellant's rights under article 8 and article 6 (to a fair trial) and therefore unlawful under the Scotland Act 1998 also arose, but the Respondent did not accept this [10].

JUDGMENT

The Supreme Court unanimously dismisses the appeal. There has been no interference with the Appellant's rights under articles 8 and 6 of the Convention. The judgment is given by Lord Hope with whom all the other Justices agree.

REASONS FOR THE JUDGMENT

Taking it on its own terms, the devolution minute did not appear to raise a devolution issue at all. The question of whether the police acted in a way that is incompatible with the Appellant's Convention rights is not a devolution issue. The only relevant devolution issue would have been whether the act of the Lord Advocate in leading the surveillance evidence would have been incompatible with the Appellant's Convention rights. But no mention of the issue whether the Lord Advocate leading such evidence would have breached the Appellant's article 6 right was made or appears to have been considered at any stage of the proceedings. There was no determination of the issue in the High Court of Justiciary because the question it raises was not before it. In terms of the Scotland Act 1998, the Supreme Court does not have an original jurisdiction in these matters. Except in regard to devolution issues as defined in the Scotland Act 1998, every order of the High Court of Justiciary is final and conclusive and not subject to review by any court whatsoever [11 – 13].

The proper course might well have been to dismiss this appeal as incompetent. But, with considerable hesitation, the Court decided that it should hear argument on the issue for three reasons in particular. First, the prosecution did not oppose the Appellant's motion for leave to appeal to the Supreme Court. Second, the Appeal Court gave leave to appeal to the Supreme Court. Third, the Appellant was really seeking to re-examine the correctness of the decision in the *Gilchrist* case (which was that surveillance evidence obtained without a valid 2000 Act authorisation led by the Lord Advocate was admissible). However, the Supreme Court's decision to hear the appeal should not be taken as an indication that it 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 [14].

Any breach of article 8 in obtaining the surveillance evidence in this case was due to acts of the police, not the Lord Advocate. The fact that evidence is irregularly obtained because there is no authorisation under the 2000 Act does not of itself make that evidence inadmissible at common law. Nor does the fact that the evidence is 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. Nevertheless, the key to the whole argument lies in what one makes of the underlying article 8 issue [15 – 17].

The Strasbourg Court has not yet considered the situation 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 article 8 right. In this case, notes of the Appellant's movements in public were kept by the police over a period of hours in a covert manner as part of a planned operation. However, there is nothing to suggest that the Appellant could reasonably have had any expectation of privacy. He engaged in his 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 [20 – 21].

On the first issue in the appeal, there are no grounds for holding that the actions of the police amounted to an infringement of the Appellant's rights under article 8. It is plain that the absence of a reasonable expectation of privacy was the basis for the decision in *Gilchrist*, which was rightly decided in this respect. On the second issue in the appeal, it follows that there has been no breach of article 6, since the only ground for arguing this was that there had been a breach of article 8 [21 – 22].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

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