APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 45
HCA/2017/449/XC

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

SECTION 74 APPEAL

by

RAYMOND KYLE

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Mackintosh; McCusker McElroy & Gallanagh
Respondent: Fraser AD; Crown Agent

14 September 2017

[1] The appellant and a co-accused are charged with being concerned in the supply of a Class A drug, namely Diamorphine. A First Diet on 10 July was continued to 17 July for evidence of a police constable, PC Scott Sweetin, and for debate on a preliminary issue raised by the defence challenging the admissibility of certain evidence upon which the prosecution rely. That evidence related to the finding by police of bags of brown powder in

the appellant's house, following an entry which was forced for the preservation of life or property. This turned out to be heroin and the recovery provided the evidential basis for the charge. Following the finding of this item, the police immediately took no further action other than to obtain a search warrant.

[2] The sheriff ruled that the evidence was admissible, and this appeal relates to that decision. It was maintained that (a) the officers did not have sufficient grounds for forcing entry to the property; and (b) that in any event, once they had entered the property and found no-one there, the police should have left, and the actions which led to the recovery of the drugs being neither reasonable nor necessary, the evidence should not be admitted.

[3] The circumstances were that PC Sweetin had been allocated a missing persons inquiry of a "high risk" nature which is a categorisation given when there is understood to be a fear of risk to the life and safety of the individuals concerned. With a colleague he went to the property. He was unable to gain entry to the property, there being no response to his knocking, and he could not see into it. He was aware that there was a dog inside, because he could hear it barking. Inquiry with the neighbours indicated that the occupiers had not been seen since the missing persons report had been made. PC Sweetin was advised by his superior officer that there had been threats made against the individuals concerned. He was instructed to gain entry. In evidence he stated that he did so because he understood he had common law powers to do so if there were concerns for the safety of individuals, and he wished to check that no harm had come to the persons who were the subject of the missing persons inquiry. He considered that they could be lying hurt inside the property. It is important to note that the officers were not investigating a crime, but proceeding on the basis of concern for life and safety of individuals. It is also important to note that the sheriff was satisfied that they were acting in good faith. Against that background the officer forced

entry. Counsel submitted that the appropriate test for whether PC Sweetin was entitled to force entry in the circumstances of this case could be found in *Paton* v *Dunn* 2012 SCCR 441, paragraph 9:

> "We note the opinion of the court in *Turnbull* v *Scott* that there is no absolute rule that police officers may only enter private premises if they have a warrant or statutory authority to do so; that, in the absence of such authority, their right depends on the circumstances; and that one of the important circumstances is whether they are acting in the execution of their duty. … It is plain that circumstances will regularly occur in which it will be appropriate for police officers to implement their duty to protect life by taking reasonable steps designed to achieve that end. The question will generally be whether the police officers had reasonable grounds for taking the intrusive step they did of forcing entry to a private dwelling."

In our view the sheriff was entitled to conclude that there were reasonable grounds for doing so in this case.

[4] Once inside the property, the officers found that the front door had been barricaded by a sofa. They found that the back door was similarly barricaded. This, incidentally, might well have given an increased basis for concern. The officers found dog faeces and urine in the living room, the number of these suggesting that the dog had been there untended for some time, at least a day. They looked in the rooms and found no one. In the kitchen, PC Sweetin gave the dog some water, and decided to look for food for the dog. He also decided to look for documents which might disclose the whereabouts of the individuals. He opened a cupboard and found the brown powder which turned out to be heroin. It was accepted that had the officers found documents lying about that would have been within the acceptable limits of what they were entitled to do. It was also accepted in relation to both parts of the argument that the threshold for intervention for the preservation of life or property was not the same as that for the investigation of crime. However, it was submitted that opening a cupboard – either to look for documents or to feed the dog – went beyond it.

We are unable to accept that argument. In assessing the actions of the police it remains relevant that they were not investigating a crime, as is the fact that they were acting in good faith in this regard. They had lawfully entered the property in pursuit of their duty to protect life and in our view looking in the cupboard for dog food – or documents to help trace the occupants- was not unreasonable and did not constitute an unlawful invasion of the occupiers' privacy.

[5] Even if we were in error in reaching this latter conclusion, the minimal nature of the intrusion once inside the property, and the whole circumstances, would have made the actions readily excusable.