SHERIFF APPEAL COURT

[2024] SAC (Civ) 3
HAM-A136-19

Sheriff Principal A Y Anwar
Sheriff Principal D C W Pyle
Appeal Sheriff A M Cubie

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL A Y ANWAR

in the appeal in the cause

BARRY SCOTT

Pursuer and Appellant

against

KATE FRAME, POLICE INVESTIGATIONS & REVIEW COMMISSIONER

Defender and Respondent

Pursuer and Appellant: Dean of Faculty (Dunlop KC), E Campbell; PBW Law Solicitors
Defender and Respondent: Hood KC; Anderson Strathern LLP

31 January 2024

Introduction

[1] Section 1(1) of the Criminal Justice (Scotland) Act 2016 ("the 2016 Act") provides that a police constable may arrest a person without a warrant if the constable has reasonable grounds for suspecting that the person has committed or is committing an offence.

[2] Does an arrest require to be "necessary" for it to be lawful under the 2016 Act? If an individual is prepared to be interviewed voluntarily, does that render his arrest and continued detention in police custody unlawful? Upon whom does the onus of proof fall;

upon the police to prove an arrest is lawful or upon the arrested person to prove it is unlawful?

[3] Those are the central questions of law arising in this appeal.

Factual background

[4] The appellant is a serving police officer in the Police Service of Scotland. The respondent was at the date of the raising of these proceedings, the Police Investigations and Review Commissioner ("PIRC"). The respondent is responsible for investigating allegations of criminality made about police officers when requested to do so by the Crown Office and Procurator Fiscal Service. To enable the respondent's investigators to carry out their functions, they have all the powers and privileges of a constable.

[5] In April 2015, police officers sought to execute a warrant for Andrew Copestick. The officers arrested Mr Gary Webb. Mr Webb protested at the time of his arrest that he was not Mr Copestick. Mr Webb was some 9 years older than Mr Copestick. He was taller than Mr Copestick. He did not match Mr Copestick's reported profile. His fingerprints did not match those of Mr Copestick. Mr Webb was remanded in custody on 10 April 2015 and released on 13 April 2015.

[6] Mr Webb raised a civil action against the Chief Constable in April 2015. That action was settled extra-judicially.

[7] On 20 April 2017 the Criminal Allegations against Police Division ("CAAPD") of the Crown Office instructed the respondent to undertake an investigation into the arrest and detention of Mr Webb. The appellant was one of five police officers identified in the course of the respondent's investigations. The respondent's investigators considered that there were reasonable grounds to suspect that each of the five police officers had committed an

offence. The officers had proceeded with Mr Webb's arrest notwithstanding his protestations of mistaken identity and the availability of evidence capable of confirming Mr Webb's position. The respondent's investigators decided that all five police officers should be interviewed under audio-visual conditions in two groups, with the police officers in each group interviewed concurrently.

[8] The appellant received a letter from the Professional Standards Department of Police Scotland dated 18 May 2018. The letter informed the appellant to attend at Livingston Police Office with a legal representative on 24 May 2018 and that upon arrival he would be arrested under section 1 of the 2016 Act upon charges of police wilful neglect of duty and an attempt to pervert the course of justice. The letter stated the purpose of the arrest was to facilitate an interview with the appellant, under caution, into the circumstances of the arrest and detention of Mr Webb in April 2015.

[9] Senior Investigator Little was leading the respondent's investigation. On 23 May 2018 the appellant's solicitor sent a letter by email to SI Little advising that the appellant was prepared to attend on a voluntary basis for interview and as such the proposed arrest would be unnecessary and disproportionate. SI Little contacted the appellant's solicitor on 23 May 2018 by telephone. SI Little was aware of the letter sent by the appellant's solicitor; however, at the time of the telephone call, he had neither read it nor responded to it.

[10] On 24 May 2018 the appellant was arrested by the respondent's investigators (without a warrant) upon arrival at Livingston Police Office and kept in police custody. His detention in police custody was authorised by Deputy Senior Investigator Robertson. The appellant was initially questioned under caution. During the interview he was cautioned and charged by the respondent's investigators with suspicion of attempting to pervert the course of justice and wilful neglect of duty.

[11] A report was issued by the respondent to the Crown Office. The Crown Office chose not to prosecute the appellant. The remaining four police officers who were also investigated and charged were also not prosecuted.

[12] The appellant raised this action against the respondent in March 2019. He alleges that his arrest and detention in police custody on 24 May 2018 was unlawful (i) at common law and (ii) under Article 5 of the European Convention of Human Rights ("ECHR") and he seeks declarator to that effect.

[13] The other four police officers who were arrested and kept in police custody have raised separate actions against the respondent. Those actions are presently sisted.

Legislation

[14] The provisions of the 2016 Act relevant to this appeal, provide as follows:

> **"1 Power of a constable**
> (1) A constable may arrest a person without a warrant if the constable has reasonable grounds for suspecting that the person has committed or is committing an offence.
>
> (2) In relation to an offence not punishable by imprisonment, a constable may arrest a person under subsection (1) only if the constable is satisfied that it would not be in the interests of justice to delay the arrest in order to seek a warrant for the person's arrest.
> (3) Without prejudice to the generality of subsection (2), it would not be in the interests of justice to delay an arrest in order to seek a warrant if the constable reasonably believes that unless the person is arrested without delay the person will—
> (a) continue committing the offence, or
> (b) obstruct the course of justice in any way, including by—
> (i) seeking to avoid arrest, or
> (ii) interfering with witnesses or evidence.
> (4) For the avoidance of doubt, an offence is to be regarded as not punishable by imprisonment for the purpose of subsection (2) only if no person convicted of the offence can be sentenced to imprisonment in respect of it.
>
> …

7 Authorisation for keeping in custody

(1) Subsection (2) applies where—

(a) a person is in police custody having been arrested without a warrant, and

(b) since being arrested, the person has not been charged with an offence by a constable.

(2) Authorisation to keep the person in custody must be sought as soon as reasonably practicable after the person—

(a) is arrested at a police station, or

(b) arrives at a police station, having been taken there in accordance with section 4.

(3) Authorisation may be given only by a constable who—

(a) is of the rank of sergeant or above, and

(b) has not been involved in the investigation in connection with which the person is in police custody.

(4) Authorisation may be given only if that constable is satisfied that the test in section 14 is met.

(5) If authorisation is refused, the person may continue to be held in police custody only if—

(a) a constable charges the person with an offence, or

(b) the person is detained under section 28(1A) of the 1995 Act (which allows for detention in connection with a breach of bail conditions).

…

14 Test for sections 7, 11 and 13

(1) For the purposes of sections 7(4), 11(3)(b) and 13(2), the test is that—

(a) there are reasonable grounds for suspecting that the person has committed an offence, and

(b) keeping the person in custody is necessary and proportionate for the purposes of bringing the person before a court or otherwise dealing with the person in accordance with the law.

(2) Without prejudice to the generality of subsection (1)(b), in considering what is necessary and proportionate for the purpose mentioned in that subsection regard may be had to—

(a) whether the person's presence is reasonably required to enable the offence to be investigated fully,

(b) whether the person (if liberated) would be likely to interfere with witnesses or evidence, or otherwise obstruct the course of justice,

(c) the nature and seriousness of the offence.

…

50 Duty not to detain unnecessarily

A constable must take every precaution to ensure that a person is not unreasonably or unnecessarily held in police custody.

…

64 Meaning of police custody

(1) For the purposes of this Part, a person is in police custody from the time the person is arrested by a constable until any one of the events mentioned in subsection (2) occurs.

(2) The events are—

(a) the person is released from custody,

(b) the person is brought before a court in accordance with section 21(2),

(c) the person is brought before a court under section 28(2) or (3) of the 1995 Act,

(d) the Principal Reporter makes a direction under section 65(2)(b) of the Children's Hearings (Scotland) Act 2011 that the person continue to be kept in a place of safety."

The sheriff's judgment

[15] At the proof before answer, the respondent led by agreement. The sheriff identified two issues which he required to determine: first, whether the respondent had acted unlawfully in declining to agree to the appellant's voluntary attendance and insisting upon his arrest and secondly, whether the appellant's arrest and detention contravened his rights under Article 5 of the ECHR.

[16] The sheriff held that where a constable had reasonable grounds for suspecting that an individual has committed an offence an arrest is lawful. Neither the subjective attitude of the individual arrested nor an offer to attend voluntarily for interview rendered unlawful an arrest without warrant under section 1(1) of the 2016 Act. The sheriff held that section 50 of the 2016 Act did not place a limitation on the power of a constable to make an arrest without warrant under section 1(1) of the 2016 Act. The offer from the appellant to attend voluntarily for interview did not trigger section 50 and thereby render his arrest and subsequent detention in police custody unreasonable and unnecessary.

[17] The sheriff found that the continued detention of the appellant in police custody was lawful. DSI Robertson, who had authorised the detention, had applied his mind to the test

in section 14 of the 2016 Act. The ability to conduct an interview under caution had been the primary reason for arresting the appellant. The sheriff considered that it was significant that the appellant was not the only suspect in the enquiry and steps had been taken to arrest and interview each of the five officers simultaneously in different rooms and in different police stations. The decision to arrest and to keep the appellant in custody had been taken in order to achieve that result. Section 14(2) set out a non-exhaustive list of factors which may be taken into account when considering what is reasonable and necessary. The sheriff found that the decision to keep the appellant in custody was both reasonable and necessary having regard to the nature and seriousness of the offence and the evidence which supported the conclusion that the appellant's presence was reasonably required to enable the offence to be investigated fully. He held that the gravity of the offence rendered the decision to keep the appellant in custody proportionate. The sheriff accordingly held that the respondent's investigators had complied with the requirements of section 7 and section 14 of the 2016 Act.

[18] The sheriff found that the onus of proof fell upon the appellant; he required to prove that his arrest and detention in police custody were unlawful. The mere fact that the appellant had been willing to attend voluntarily for interview did not overcome the burden of proof, nor transfer it to the respondent.

[19] Having regard to his findings that the appellant's arrest and continued detention in police custody were lawful under the 2016 Act, the sheriff also found they were lawful under Article 5 of the ECHR.

[20] In light of his decision, it was not necessary for the sheriff to form a view on the terms of the declarators sought by the appellant. The sheriff noted, however, that it was unlikely that he would have granted a declarator that the appellant's arrest and continued

detention were unlawful in the terms first craved; any such declarator would have had no practical effect.

Grounds of appeal

[21] The appellant advanced six grounds of appeal, which, in summary, are as follows:

i. The sheriff erred in law in holding the onus of proof rested with the appellant to establish that both his arrest and continued detention in police custody were unlawful;

ii. The sheriff erred in holding that section 50 does not place a limitation on the power of a constable under section 1(1) to arrest (without warrant);

iii. The sheriff erred in law in failing to consider whether the arrest of the appellant was necessary;

iv. The sheriff erred in his approach to considering the lawfulness of the appellant's detention in police custody under sections 7, 14 and 50 of the 2016 Act, in particular his consideration of the authorising officer's evidence and the offer to be interviewed voluntarily;

v. The sheriff erred in finding there was no contravention of Article 5 of the ECHR and;

vi. The sheriff erred in holding that, had the appellant proven his case, he would not have been entitled to declarator of unlawful arrest or detention at common law.

Submissions for the appellant

[22] The Dean submitted that in England, Wales and Northern Ireland "the onus rests on the relevant agency of the executive to establish lawful justification": *Jonathan Bowe for Habeas Corpus* v *Police Service of Northern Ireland* [2019] NIQB 16 at para [28], citing *Liversidge* v *Anderson* [1942] AC 206 per Lord Atkin at p 245 and *R* v *Home Secretary, ex parte Khawaja* [1984] AC 74 per Lord Scarman at p 110F. This is now viewed as trite in England and Wales: *Mercer* v *Chief Constable of The Lancashire Constabulary* [1991] 1 WLR 267 per Lord Donaldson of Lymington, Master of the Rolls at p 373F; *Taylor* v *Chief Constable of Thames Valley Police* [2004] 1 WLR 3155 per Clarke LJ at pp 3167 - 3168 and *O'Hara* v *Chief Constable of the Royal Ulster Constabulary* [1997] AC 286 per Lord Steyn at p 290B. Although the legal frameworks were not identical in each jurisdiction, there was no reason in principle why the same onus of proof did not rest with the respondent. It was for the respondent to prove that any arrest and continued detention in police custody by its constables was lawful under Scots law.

[23] The Dean referred to the decision of the court in *Leask* v *Burt* (1893) 21 R 32. Lord Rutherfurd Clark's opinion suggested that he considered the onus of proof lay with the constable to prove an arrest was justified. The Dean cited the speech of the Lord Chancellor, then Lord Haldane, in *Shields* v *Shearer* 1914 SC (HL) 33. Lord Haldane held the position on the law of arrest and detention in police custody was the same in England, Wales and Scotland; however, no clarification was given by Lord Haldane as to what the then law in England and Wales was. To resolve that question, the Dean relied on the speech of Lord Atkin in *Liversidge v Anderson* [1942] AC 206 at p 246.

[24] The Dean submitted that only the speech of Lord Shaw of Dunfermline in *Shields* could support the respondent's contention that the onus to prove an unlawful arrest lay

with the appellant. The speech of Lord Shaw of Dunfermline was not consistent with what was said by the other members of the Appellate Committee, nor the rationale for the decision of the Appellate Committee in that appeal. His speech was not internally consistent. On the one hand he approved the decision of the sheriff-substitute as to who had the onus (who held the constable had the onus of proof); however, two paragraphs later he stated that Lord Salvesen's opinion in the Second Division of the Inner House was correct in holding that the onus of proof lay with the pursuer. The speech was not consistent with the current legal position in England, Wales and Northern Ireland.

[25] The Dean submitted that Lord Jauncey's opinion as regards onus of proof in *Henderson* v *Chief Constable, Fife Police* 1988 SLT 361 at p 364B-D was also flawed as it relied on Lord Shaw of Dunfermline's speech in *Shields* in the House of Lords. By contrast, Lord Ross correctly stated the position of Scots law on onus of proof in *Dahl* v *Chief Constable, Central Scotland Police* 1983 SLT 420 at p 422.

[26] The sheriff was wrong to hold that section 50 did not place a limitation on the power of a constable under section 1(1). The sheriff had failed to have regard to section 64. The effect of sections 50 and 64 read together was that as soon as an individual, such as the appellant, is arrested they are in police custody. The structure of the 2016 Act was such that section 64 engaged section 50 and that section 1(1) and section 50 required to be read together. That being so, for the arrest of an individual without warrant to be lawful, a constable had to have reasonable grounds for suspecting that the person has committed or is committing an offence and the arrest had to be necessary. The phrase "from the time the person is arrested" in section 64 was inclusive of the point of arrest.

[27] Under the 2016 Act, for an individual to be detained in police custody, sections 7, 14 and 50 had to be complied with. In assessing whether the continued detention in police

custody was lawful, the sheriff required to consider the evidence of the authorising officer, DSI Robertson; however, the Dean submitted that the sheriff had, instead, relied upon the evidence of SI Little to assess whether arrest and continued detention were necessary and proportionate. As a consequence, the sheriff had erred in two respects. First, it meant there was no enquiry by the sheriff into the decisions of the individual whose actions fell to be judged, namely the authorising officer. The sheriff ought to have done so: *O'Hara* v *Chief Constable of the Royal Ulster Constabulary* [1997] AC 286 per Lord Steyn at pp 291H, 293A-C and 293E-G. Secondly, the evidence at the proof before answer had been that the authorising officer was not advised that the appellant had offered to attend voluntarily. That submission by the Dean was disputed by senior counsel for the respondent. Notwithstanding that, the Dean submitted that the authorising officer, DSI Robertson, had only authorised the continued detention of the appellant on the basis that SI Little told him he required the appellant to be interviewed under caution. At the point of arrest and the point of deciding whether to keep an individual in police custody, it was necessary for the constable effecting arrest and, separately, the authorising officer authorising continued detention, to at least consider whether the same information could be obtained by voluntary interview from the individual. There was an absence of any such consideration by the authorising officer in this case.

[28] The sheriff ought to have made findings in fact as to why the authorising officer considered continued detention in police custody was necessary and proportionate; however, he had not. On the assumption that the appellant was correct on his first ground of appeal, namely that the onus of proof lay with the respondent, the respondent was not in a position to prove the continued detention had been lawful. There were insufficient

findings in fact by the sheriff to allow a finding in fact and law that the continued detention had been unlawful.

[29] With respect to breach of Article 5 of the ECHR, the Dean submitted that if the appellant was successful in his second, third and fourth grounds of appeal, it followed that his fifth ground was also successful.

[30] Finally, it was submitted that the sheriff erred in holding that declarator at common law could not be granted. Either both declarators sought by the appellant were competent or neither was.

Submissions for the respondent

[31] Senior counsel for the respondent submitted that the onus for proof for an unlawful arrest and continued detention in police custody lay with the individual who had been arrested and detained. She referred to Lord Salvesen's opinion in the Second Division's decision in *Shields*, as well as Lord Shaw of Dunfermline's speech in the House of Lords in *Shields*. Senior counsel submitted that *Shields* confirmed that the pursuer had the onus of proof. That was confirmed by Lord Jauncey in *Henderson*. Senior counsel submitted that Lord Ross's opinion in *Dahl* was to the same effect. It is not enough for a pursuer to contend that an arrest, by itself, places the onus of proof upon the constable to prove a lawful arrest. A pursuer must aver why the arrest was illegal. If the constable wishes to make a positive case, they may make averments in response. As the appellant in this case was not seeking damages for unlawful arrest and continued detention, there was no requirement for him to aver malice and want of probable cause on the part of the respondent's officers: *Whitehouse* v *Chief Constable of Police Scotland* 2020 SCLR 27.

[32] As for the legal position in England, Wales and Northern Ireland, senior counsel submitted that the appellant could not simply state that the onus of proof for unlawful arrest and continued detention was the same across all of the jurisdictions in the UK without justification. In her submission, none had been provided by the appellant. Moreover, the authorities from the other jurisdictions of the UK involved considerations of English law concepts such as habeas corpus.

[33] Senior counsel submitted that the sheriff was correct to find that section 50 did not create a limitation on the power of arrest without warrant under section 1(1). A constable only requires to hold reasonable suspicion of the commission or potential commission of an offence to arrest without warrant. That is what section 1(1) states in its plain terms. Nowhere in section 1 is it stated that it is subject to section 50. Arrest is the "gateway" for investigation of an individual by a constable. Whether continued detention is required is, by contrast, subject to a test of necessity and proportion. Thus, section 50, by virtue of section 64, is only engaged "from the time the person is arrested". Contrary to the Dean's submission, it did not include the point of arrest of the individual. That was supported by the findings of The Carloway Review.

[34] There was no requirement of "necessity" for an arrest to be lawful. That is not what section 1(1) states. Paragraph 6.13 of *Renton & Brown Criminal Procedure,* Sixth Edition supported that proposition. Even if the court found there was a test of necessity, the sheriff had found the arrest to be both reasonable and necessary based on the evidence.

[35] By contrast, it was accepted by the respondent that the 2016 Act had a test of necessity and proportion for continued detention at section 14(2)(b). Analysis was required of the word "necessary". Senior counsel submitted that it lay somewhere between

"indispensable on the one hand and useful, reasonable or desirable on the other hand": *S* v *L* 2012 SC 8 per Lord Hamilton at para [18].

[36] Senior counsel referred to decisions of the Court of Appeal in England and Wales which considered section 24 of the Police and Criminal Evidence Act 1984 ("the 1984 Act"). She cautioned that many of the authorities from the Court of Appeal in England and Wales dealt with the requirement of "necessity" for arrest. In England and Wales, for an arrest to be lawful it was a statutory requirement that an arrest be necessary. It was also the case that in England and Wales any continued detention of an individual had to be necessary. That requirement was set down explicitly in section 24 of the 1984 Act.

[37] In *Hayes* v *Chief Constable of Merseyside* [2012] 1 WLR 517 the Court of Appeal in England and Wales held that necessity, in the context of arrest, meant that arrest must be believed (on reasonable grounds) to be "the practical and sensible option". It also considered and rejected the submission that in order to have reasonable grounds it was necessary for the constable to interrogate whether the suspect would attend voluntarily: *Hayes* per Hughes LJ at p 526.

[38] With respect to the authorising officer's evidence, senior counsel submitted that the sheriff had considered whether the tests at sections 7 and 14 were met and had found that they were. The respondent's officers wished to carry out concurrent audio-visual interviews of the suspects, including the appellant. The offences which were being investigated (and with which the appellant was charged at the conclusion of the interview) were serious. Moreover, the sheriff had been correct to hold that the voluntary attendance of the appellant, while a factor to be considered by the authorising officer, did not exclude the option of arrest and keeping in custody. SI Little had told DSI Robertson that he wished to interview the appellant under audio-visual conditions. DSI Robertson had correctly

considered the test for giving authorisation for the keeping of the appellant in police custody.

[39] In any event, the appellant's submission that if no consideration was given to the possibility of voluntary attendance, an authorising officer would have failed to prove that the arrest and detention was necessary was misconceived and did not accurately reflect the position in Scots law. In terms of the 2016 Act, the lawfulness of arrest is not tested by whether it is necessary, reasonable or proportionate. With regard to keeping in custody, what is "necessary and proportionate" for the purposes of the second limb of the section 14(1) test, is given content by the list of factors in section 14(2). The suspect's willingness is not one of the listed factors: whilst the list of factors is not exhaustive, it may be inferred that had voluntary attendance been a key factor which had to be considered in every single case it would have been expressly included by the legislature. The 2016 Act and the accompanying Standard Operating Procedures do not require that voluntary attendance of a suspect must specifically be considered for the suspect's arrest and detention not to be unlawful. The sheriff correctly concluded that, in terms of the 2016 Act, an officer is not precluded from arresting a suspect and keeping him in custody where they have offered to attend voluntarily.

[40] Whether there was a breach of Article 5 of the ECHR was dependent on the appellant establishing grounds two, three or four of his appeal.

[41] As to whether it was competent for declarator at common law to be issued for an unlawful arrest and/or continued detention in police custody, senior counsel submitted the sheriff had not erred. Giving such a declarator would have no practical effect. In any event, even if the appellant argues he should not have been arrested, he cannot say he should not have been charged.

Decision

Onus of proof

[42] Following a proof or a proof before answer, the sheriff is tasked with assessing the evidence adduced by the parties to ascertain where the truth lies, on a balance of probabilities. Occasionally, the evidence is so inconclusive or insufficient that the sheriff is unable to carry out that assessment and must apply the rules as to the onus or burden of proof in order to arrive at a decision.

[43] The present case is not one of those rare cases in which the onus of proof is decisive. Having assessed the evidence and having considered the terms of the 2016 Act, the sheriff concluded that the respondent had acted lawfully in arresting and keeping the appellant in custody. He did not require to resort to considerations of onus of proof to do so.

[44] The sheriff's references as to where the onus of proof lay require to be read in context. At paras [55] to [60], following his assessment of evidence pertaining to whether the arrest and continued detention of the appellant was lawful, the sheriff considered what he described as the appellant's "central submission", namely, that as the appellant had been willing to attend for interview voluntarily, it was for the respondent to then justify every step taken leading to the appellant's arrest and detention in custody. In rejecting that submission, the sheriff noted that such an approach would place the burden of proof on the respondent; the mere fact that the appellant had been willing to attend for interview voluntarily did not overcome the burden of proof nor transfer it to the respondent.

[45] Whether the sheriff was correct in his analysis of which party bore the onus of proof is immaterial. It was of no consequence to his decision on the lawfulness of the appellant's arrest or detention in custody. The first ground of appeal is without merit.

[46] It is accordingly unnecessary for this court to consider whether the sheriff has erred in law in relation to the question of onus; however, had we been required to do so, and recognising that in cases such as these, the issue of onus is rarely determinative, we would have concluded that the onus of establishing that the appellant's arrest and continued detention was unlawful lay with the appellant.

[47] We acknowledge that the Scottish authorities to which we were referred pre-date the 2016 Act. Unlike the present case, which proceeded to proof before answer, the authorities to which we were referred (with the exception of *Henderson)* were concerned primarily with issues of relevancy or specification of the pleadings or with the need to aver malice or ill will on the part of the arresting constable (*Leask; Shields and Dahl)*.

[48] Nevertheless, the issue of onus was discussed and considered by the House of Lords in *Shields* v *Shearer*, a decision which is binding upon this court. Mr Shields sought damages for alleged illegal apprehension and detention in custody. When the matter came before the Second Division, Lord Salvesen, with whom the members of the Division agreed, noted that "the presumption is that the officer acts in pursuance of his duty, and the pursuer must rebut this presumption" and further that "It is obvious that the pursuer cannot succeed unless he convinces the jury that the defenders had no reasonable cause to suspect him of the crime charged . . ." (*Shields* v *Shearer* 1913 SC 1012 at p 1017). The Second Division accordingly concluded that the onus of establishing an arrest was unlawful fell upon the pursuer.

[49] Upon appeal to the House of Lords, the decision of the Second Division was upheld in a unanimous decision. Lord Shaw of Dunfermline made the following comments:

> "I adopt entirely what I consider, if I may say so, to be the excellent summary of the position given by the learned sheriff-substitute. He says: 'By virtue of section 88 of the Glasgow Police Act, 1866, a police constable has power to arrest without a

> warrant any person whom he may reasonably suspect of having committed a crime. But it rests upon the constable to prove that his suspicion was reasonable, and his act therefore justifiable. It may quite well be that the defenders here will be able to establish at the proof that the pursuer brought his arrest upon himself by his own furtive and suspicious behaviour, by his giving confused and contradictory accounts of how the watch came into his possession, and the like. If that be so the defenders were doing no more than their duty in arresting him'…
>
> …The difficulty in this case is said to have arisen from one sentence in Lord Salvesen's opinion. I think it right to call attention to that because it ought to be said, in justice to the learned judge, that that sentence has been misconstrued. No doubt he did say (1913 S. C.; at p. 1017) that 'the constable who arrests a person without a warrant takes the risk of justifying the apprehension.' The learned Solicitor-General for Scotland argued that that must mean that the onus was upon the constable; but the learned judge in the succeeding sentence shows that that is not so. For he cites the statute and he says: 'The presumption is that the officer acts in pursuance of his duty, and the pursuer must rebut the presumption'; and he concludes his judgment by saying this, in which I entirely agree: 'It is obvious that the pursuer cannot succeed unless he convinces the jury that the defenders had no reasonable cause to suspect him of the crime charged; and it is desirable that officers of the law should as far as possible be protected in the discharge of their duty by the grounds of liability being pointedly brought under the notice of the jury.' It humbly appears to me that those sentences of Lord Salvesen make clear where the onus lies, namely, that it rests upon the pursuer."

[50] We agree that these two passages on the question of onus might appear to be difficult to reconcile. On a closer reading, however, we understand his Lordship to have concluded in the first passage that where a constable has justified his decision to arrest without warrant by reference to a statutory provision (the relevant statute in *Shields* being section 88 of the Glasgow Police Act 1866) evidence will require to be lead of the facts and circumstances upon which the constable relied. However, as his Lordship explains in the second passage, that does not involve a shift in the onus of proof; it remains for the pursuer to establish that the suspicion was unreasonable and the arrest therefore unlawful. The concluding words of the second passage are clear.

[51] In *Dahl,* Lord Ross was dealing with the relevancy of averments in relation to an action for damages for wrongful arrest. During the debate before him, each party contended

that the other bore the onus of proof. Having considered the authorities, Lord Ross made the following observations (at p 422):

> "In an action for damages for wrongful arrest against a police officer, it is not enough for a pursuer merely to aver that the arrest was without a warrant, because not every case of arrest without a warrant is illegal. What the pursuer must aver is that the arrest was wrongful and illegal, i.e. that it was without a warrant and that there were no circumstances which would justify arrest at all. On the other hand, if the pursuer does make averments which meet these requirements, and the defender wishes to justify the arrest on any of the grounds referred to by Lord Deas in *Peggie v. Clark*, then the defender should make averments to that effect. However if the defender cannot make averments to that effect, it will still be open to him to seek to negative the pursuer's contention that there was no reason or justification for the arrest without a warrant. If, of course, the defender has not sought to make any specific case of justification in his defences, he may not be able to lead evidence of any such specific cause at the trial."

[52] We respectfully agree with the approach of Lord Ross in *Dahl*. It is consistent with our observations at para [50] above and the comments of Lord Jauncey in *Henderson* (at p 364). The onus falls upon the arrested person to prove that their arrest was unlawful.

[53] The Dean submitted that the need to guard an individual's liberty was reflected by the onus of proof falling to the respondent and accordingly, we should adopt the same position as that of England, Wales and Northern Ireland. We are not persuaded that is correct. It is a clearly established general rule that the common law will jealously protect the liberty of the subject from undue interference. As Lord Young observed, no-one should be deprived of his or liberty without a warrant from a magistrate unless the circumstances fall within certain well defined exceptions to the rule (*Leask* v *Burt* at p 36). The 2016 Act provides an exception to the rule by setting out the circumstances in which the liberty of a person may be interfered with by a constable without a warrant. The protection of the subject lies in the nature of the test which requires to be applied in terms of the 2016 Act (or its equivalent in England, Wales and Northern Ireland), not in considerations of onus of

proof. There is accordingly no lesser protection of liberty arising from the approach to onus in Scotland and that elsewhere in the UK.

Arrest

The test of necessity

[54] It is not disputed that the respondent's officers, who enjoy the powers and responsibilities of a constable, had reasonable grounds for suspecting that the appellant had committed the offence of attempting to pervert the course of justice and wilful neglect of duty. The appellant contends that having volunteered to attend at the police station and having agreed to be interviewed, his arrest was not necessary. The respondent contends that an arrest does not require to be necessary to be lawful in terms of the Act.

[55] Section 1(1) of the 2016 Act provides that in respect of an imprisonable offence, "A constable may arrest a person without a warrant if the constable has reasonable grounds for suspecting that the person has committed or is committing an offence". An arrest is thus authorised if "reasonable grounds" for suspicion exists. As is plain from the opening words of section 1(1), a decision to arrest, where reasonable grounds for suspicion exist, is a discretionary one. How then is that discretion to be exercised?

[56] Prior to the enactment of the 2016 Act, at common law, the power to arrest without warrant could be exercised when necessary for the purposes of preventing crime, preventing the escape of a suspect or the destruction of evidence (Hume: *Commentaries on the Law of Scotland respecting Crimes* (Bell ed) ii, 75 et seq). That power could be exercised upon a reasonable suspicion that an offence had been committed; however, a constable was "not entitled to overstep the necessity or reasonable requirements of the particular case" (*Peggie* v *Clark* (1868) 7 M 89 per Lord Deas at p 93).

[57] Following the publication of The Carloway Review in November 2011, the 2016 Act introduced a single power of arrest without warrant to replace the common law and statutory rules on arrest and detention. The Review had recommended that arrest be defined "as meaning the restraining of the person, and when necessary, taking him/her to a police station" (page 94). Contrary to the recommendations of The Carloway Review, the 2016 Act does not contain a definition of "arrest" but rather section 1(1) of the Act sets out when the power of arrest may be exercised.

[58] Plainly, section 1(1) does not expressly refer to any requirement that an arrest should be necessary; however, the test of necessity is woven throughout the statutory framework of Part 1 of the Act. Section 1(1) cannot be read in isolation, nor divorced from that framework. It is implicit that any arrest must be necessary.

[59] In terms of section 50, a constable must "take every precaution to ensure that a person is not unreasonably or unnecessarily held in police custody". Section 64(1) provides that "a person is in police custody from the time the person is arrested by a constable" until any one of the events set out in subsection (2) occurs. That an arrested person is in police custody immediately upon his or her arrest is also reflected in the language of sections 4, 5 and 7 of the Act. We do not accept that the Act has created some form of artificial two stage test with each limb of the test being applied within moments of the other, namely the need to have formed a "reasonable suspicion" for suspecting that a person has committed or is committing an offence in order to arrest that person, and in the moments following the arrest, a requirement to take "every precaution to ensure that a person is not unreasonably or unnecessarily held in police custody". An arrest is an event not a process. These tests require to be applied at the time of arrest. An arrest involves taking a suspect into custody

with the consequent initial deprivation of liberty. In our judgment, the discretion afforded to a constable under section 1(1) is to be exercised having regard to the terms of section 50.

[60] The respondent's position before this court (and before the sheriff) appeared to be at odds with the terms of the "Criminal Justice (Scotland) Act 2016 (Arrest Process) Standard Operating Procedure version 1.00 dated 23 January 2018" issued by Police Scotland (Appendix to Appeal Print pages 309 - 367). The Standard Operating Procedure ("SOP") is designed to provide instruction and guidance to all police officers in relation to criminal justice processes and procedures in respect of arrest and custody as required by the Criminal Justice (Scotland) Act 2016 (as set out in paragraph 1.2).

[61] Paragraph 4.3.1 of the SOP instructs officers to read a statement as soon as reasonably practicable when a person is arrested under the 2016 Act. The relevant part of that statement is in the following terms:

> "I am arresting you under Section 1 of the Criminal Justice (Scotland) Act 2016 for (general nature of offence). The reason for your arrest is that I suspect you have committed an offence and I believe that keeping you in custody is necessary and proportionate for the purposes of bringing you before a court or otherwise dealing with you in accordance with the law. Do you understand?"

[62] The SOP correctly recognises that the test of necessity falls to be applied at the time of arrest, having regard to the terms of section 64(1) and 50 of the Act; it does not envisage a two stage approach.

[63] The sheriff held that section 50 of the 2016 Act did not place a limitation on the power of a constable to make an arrest without warrant under section 1(1) of the 2016 Act. In doing so, he erred in law.

Was the appellant's arrest unnecessary and therefore unlawful?

[64] The sheriff having erred in law, we require to consider whether, having regard to the findings in fact made by the sheriff, the appellant's arrest was necessary.

[65] We were referred by the parties to a number of English and Northern Irish decisions which deal with voluntary attendances for interview. Section 24 of the Police and Criminal Evidence Act 1984 deals with a constable's power to arrest without a warrant in England and Wales. Unlike section 1(1) of the 2016 Act, section 24 of the 1984 Act provides that a constable requires to have reasonable grounds for believing that it is necessary to arrest a person for any of the specified reasons set out in section 24(5). Article 26 of The Police and Criminal Evidence (Northern Ireland) Order 1989 is in similar terms to section 24 of the 1984 Act. While neither section 24 of the 1984 Act nor Article 26 of the 1989 Order is in identical terms to section 1(1) of the 2016 Act, in the absence of any Scottish authority the English and Northern Irish decisions which consider the question of "necessity" are helpful and instructive.

[66] The definition of "necessary" in the context of the power of arrest was discussed in *In re Alexander's Application for Judicial Review* [2009] NIQB 20 by the Divisional Court of the Queen's Bench Division in Northern Ireland:

> "In one connotation, 'necessary' can mean indispensable or essential. It can also mean that which is required for a given situation. As always, the meaning to be ascribed to a particular word such as 'necessary' must depend on the context in which it falls to be interpreted. We consider that the requirement that the constable should believe that an arrest is necessary does not signify that he requires to be satisfied that there is no viable alternative to arrest. Rather, it means that he should consider that this is the practical and sensible option. We can illustrate this with an example. If an officer considers that a person's presence at a police station is essential for the purpose of questioning, he may decide that it is necessary to arrest even though it is theoretically possible that the individual would agree to attend voluntarily. Thus, if he concludes that the person to be questioned might initially agree to attend for questioning but is likely to refuse to remain if the questioning

> becomes difficult for him, he may have reasonable grounds for deciding that the arrest is necessary from the outset.
>
> Given the scope of decision available to a constable contemplating arrest, we do not consider that it is necessary that he interrogate a person as to whether he will attend a police station voluntarily. But he must, in our judgment, at least consider whether having a suspect attend in this way is a practical alternative. The decision whether a particular course is necessary involves, we believe, at least some thought about the different options. In many instances, this will require no more than a cursory consideration but it is difficult to envisage how it could be said that a constable has reasonable grounds for believing it necessary to arrest, if he does not make at least some evaluation as to whether voluntary attendance would achieve the objective that he wishes to secure." (Sir Brian Kerr, LCJ at paras [18] and [19]).

[67] The English Court of Appeal endorsed this analysis in *Hayes* v *Chief Constable of Merseyside* [2012] 1 WLR 517 at p 527. Hughes LJ, commenting on the above passage from *In re Alexander's Application* noted:

> "The correct analysis is contained in the last four lines of the passage cited above. The relevance of the thought process is not that a self-direction on all material matters and all possible alternatives is a precondition to legality of arrest. Rather it is that the officer who has given no thought to alternatives to arrest is exposed to the plain risk of being found by a court to have had, objectively, no reasonable grounds for his belief that arrest was necessary."

[68] The appellant referred us to a number of decisions which discussed the definition of "necessity" in the context of a power of arrest. We do not consider any of these decisions to contradict or disapprove of the formulation of the test set out in *In re Alexander's Application* and discussed in *Hayes*. In *B, N, O, Q, R, U, V (Former Soldiers)* v *Chief Constable of the Police of Service of Northern Ireland* [2015] EWHC 3691 (Admin) at para [26] necessity was said to plainly require "more than merely desirable or more convenient to the arresting authority"; in *Regina (L)* v *Chief Constable of Surrey Police* [2017] 1 WLR 2047, Jay J considered it "undesirable" to place any judicial gloss on the adjective "necessary" but noted that it was not a synonym for "desirable" or "convenient" (at paras [38] and [40]); in *Commissioner of the Police for the Metropolis* v *MR* [2019] EWHC 888 (QB), again, the dicta in *Hayes* was referred to

with Thornton J noting both that "necessity" meant more than "desirable" or "convenient" and that a decision to arrest an individual who attends a police station is "fact specific" (at paras [47] and [49]); in *Kandawala* v *Cambridge Constabulary CBS* [2017] EWCA Civ 391, Hamblen LJ noted that the court requires to consider the facts as known to the officer at the time and that a decision to arrest is a discretionary operational one which those present at the time of the arrest are best placed to make (paras [11] and [19]).

[69] We were referred to the decision of the Second Division in *Leask* v *Burt* (1893) 21 R 32 in which a seaman had been apprehended without a warrant in relation to an offence which was alleged to have been committed six months prior. The court made a number of observations relating to the available time to obtain a warrant prior to the arrest. It was submitted, with reference to these observations, that there required to be an "urgency" prior to an arrest without warrant. Whether an arrest without warrant is lawful now requires to be assessed in accordance with the terms of the 2016 Act. Urgency may have a bearing upon necessity and reasonableness, but the absence of an urgent need to arrest without a warrant will not, of itself, render an arrest unlawful. It is also noteworthy that the question for the court in *Leask* was whether the pursuer had pled a relevant case; the court found him entitled to a proof noting that *prima facie* the arrest was illegal. Whether the absence of an urgent need is a relevant consideration when considering the legality of an arrest will depend upon the established facts and circumstances of each case.

[70] We consider the following matters to be relevant to an assessment of whether an arrest is necessary without warrant in terms of the 2016 Act, namely:

(a) for an arrest to be "necessary" it must be designed to achieve an operational or investigatory policing objective;

(b) an arrest will be unnecessary if it is merely desirable or convenient for the constable to arrest an individual;

(c) an arrest does not require to be the only viable means of achieving an operational policing objective; however, a constable is required to give consideration to any alternatives, including whether voluntary attendance for interview would achieve the same objective;

(d) the court will examine a constable's decision to arrest both subjectively, having regard to what was in the mind of the arresting officer at the time of arrest, and objectively, by reference to whether the decision to arrest was necessary in the circumstances;

(e) in doing so, it is to be recognised that constables may exercise a power to arrest without warrant under challenging, dangerous or fast moving circumstances and an assessment of "necessity" is not be conducted with the benefit of hindsight;

(f) a decision to arrest is a discretionary one and accordingly, the question is whether no reasonable constable would have concluded that an arrest was necessary; and

(g) as each case will turn on its own facts and circumstances, an examination of previous cases in which voluntary attendance secured a particular policing or investigatory objective without the need for an arrest will be of limited utility.

[71] When considering the matters set out in para [70] above in relation to the present case, we are constrained by the sheriff's findings in fact. We have not been invited to interfere with any particular finding in fact. The Appendix to the Appeal Print contained a number of witness statements. We understand that these statements were used as evidence

in chief. We were not provided with the extended notes of evidence. As such, we do not have a means of identifying what evidence was controversial or was challenged in cross-examination.

[72] However, we note that at paras [8] to [12] of his judgment, the sheriff describes the factual background as "largely uncontroversial", noting that the only issue on which there was an acute divergence of evidence was the content of a telephone call between SI Little and Ms Girven, a representative of the Scottish Police Federation, which dealt with the respective understanding of the parties as to whether the appellant would be arrested upon his attendance at the police station. That issue did not affect the sheriff's decision and is not relevant for this appeal. The sheriff noted that his decision turned "not on witnesses' recollection of the facts but on whether the steps taken by the PIRC officers were justified and lawful". The real issue between the parties related to whether, in light of the appellant's agreement to attend for interview voluntarily, his arrest was "necessary".

[73] In that regard, the sheriff made the following relevant findings in fact:

> "[20] An investigation into the arrest and detention in custody of Gary Webb was duly commenced by the [respondent]. The lead investigator was Acting Senior Investigator William Little . .
> [21] During the said investigation it was identified by the [respondent's] staff that there were five Police Scotland officers in respect of whom they considered that there were reasonable grounds to suspect that they had committed an offence . .
> [22] SI Little decided that the said five officers should be interviewed under audio/visual conditions with:
> a. the interviews of the three police officers who had been based in Loreburn Street (Dumfries) being carried out concurrently; and
> b. the interviews of the [appellant] and [the fifth officer] being carried out currently.
> [23] No. 7/5 of Process is excerpts from the [respondent's] 'Management Policy File': (i) completed by SI Little on 8 May 2018, regarding the planned arrest and interview of the [appellant]; and (ii) completed by SI Little on 11 May 2018, regarding asking the Police Scotland Professional Standards Department to facilitate the said interview of the [appellant].
> [60] Had the [appellant] been interviewed . . . on a voluntary attendance basis, he would have been free to withdraw his consent to attend voluntarily at any time."

[74] The Management Policy File completed by SI Little and referred to in finding in fact 23 formed pages 71 - 75 of the Appendix to the Appeal Print. The reasons for the decision to arrest without warrant recorded by SI Little are as follows:

> "1. There is a sufficiency of evidence that justifies each of the officers being treated as a suspect.
> 2. The crimes under investigation are of a serious nature.
> 3. There is a requirement to interview each of the officers under audio/visual conditions.
> 4. The officers will be interviewed concurrently to allow the interviewing officers to assess any answers or admissions/explanation provided by any of the officers and adopt interviews as required.
> 5. The officers will be arrested to ensure that they are not free to leave to ensure the investigation interviews are allowed to be completed and all aspects are put to each of the officers.
> 6. Each interview is necessary and proportionate to ensure that each officer is dealt with in accordance with law.
> 7. At the conclusion of the interviews no matter the outcome the officers will be allowed to leave and no requests will be made for them to be kept in custody.
> 8. The arrest and interview of the officers concurrently is to ensure that following interview they will not be able to discuss with each other, which may happen if they are brought in for interview on different days or if they attend voluntarily and then left prior to completion of interview."

[75] At paras [39] to [50] of his statement, SI Little explains why he considered that the appellant and the other five serving police offers should be arrested in terms of section 1(1) of the 2016 Act. He referred to the suspects having been arrested for "operational and investigatory reasons". During the interview, SI Little intended to put to the appellant information and documents of which he may have been unaware and which might otherwise have been disclosed to the other suspects if the interviews were not conducted concurrently. At para [44(e)] of his statement, SI Little notes that had the interview been conducted on a voluntary basis, the appellant would not have been allowed to leave and would have been arrested had he sought to do so. SI Little considered it disingenuous and unfair to conduct an interview on that basis, preferring to ensure that the appellant understood his status. He explained that each of the suspects was processed in a custody

suite which was in a geographical area outwith their normal working environment and that the custody suite was closed to normal police business, to minimise any embarrassment.

[76] We were referred during submissions to the witness statement of Chief Inspector Michael Duddy, who was referred to as a "quasi-expert" for the respondent. He had been responsible for police training and the implementation of the provisions of the 2016 Act, including the development of policy and training for officers. We note that at para [11] of his witness statement, he was asked to address the factors to which the officers should have regard in order to assess whether an arrest is necessary and proportionate. He explains that officers should have regard to the whole circumstances of the case but primarily (a) whether the person's presence is required for the investigation; (b) whether the person would be likely to interfere with witnesses; and (c) the nature and seriousness of the offence. At para [40] of his witness statement, SI Little explains that he addressed each of these factors.

[77] The sheriff found that SI Little had been aware of the appellant's willingness to attend voluntarily for interview under caution (findings in fact [32] and [33]). The sheriff notes the facts which he considered to be relevant to the question of whether the appellant ought to have been treated as a voluntary attendee. He notes that the respondent's investigation was not complete; that the respondent's officers wanted to interview the appellant (and the other suspects) in a controlled environment and that the potential charge was a serious one (para [30]). At para [36] of his judgment, in the context of his discussion of the appellant's continued detention, the sheriff noted:

> "It was significant that the [appellant] was not the only suspect in this enquiry. Steps were taken to arrest and interview all of the suspects simultaneously in different rooms and in different police stations. While that turned out to be less easy to achieve than had been originally hoped was, in my view, not to the point. The decision to arrest was made in order to achieve that result."

[78] We are satisfied that the evidence before the sheriff, and his assessment of it, plainly established that SI Little had been aware of the appellant's desire to attend for interview voluntarily and that SI Little had evaluated whether a voluntary attendance was a practical alternative to arrest. For operational and investigatory reasons, which included the desire to interview all suspects simultaneously to protect the integrity of the investigation and prevent any possibility of collusion between the suspects, he had concluded that arresting the accused was not simply desirable or convenient, but was necessary. He had also considered it disingenuous or unfair to conduct an interview of the appellant on a voluntary basis when it was clear that if the appellant chose to leave, he would be arrested. As Hughes LJ noted in *Hayes* (at para [42]), conducting a voluntary interview in such circumstances would not be honest or effective. We are satisfied that, in these circumstances, the appellant's arrest was indeed necessary.

[79] The respondent's officers have, since the creation of the respondent's office to 30 December 2019, conducted 39 interviews of individuals treated as suspects. 33 of those individuals were interviewed as voluntary attendees. Five of the six individuals who were not interviewed as voluntary attendees are those connected to the present case (finding in fact [4]). These figures indicate a general absence of a "blanket policy" to arrest those who attend voluntarily and the presence of a more considered approach to the facts and circumstances of each case.

[80] Assessed both subjectively and objectively, in our judgment, the appellant's arrest which placed him in police custody, was necessary.

[81] Accordingly, although we consider that the sheriff erred in determining that the arrest did not require to be necessary (and to that extent the second ground of appeal is upheld), we are satisfied having considered the facts and circumstances that the test of

necessity was met in the present case and that the arrest was lawful. Ground three is refused.

Necessity of detention

[82] In terms of sections 7(1) and 7(2) of the 2016 Act, where a person is in police custody having been arrested without a warrant and has not been charged with an offence, authorisation to keep the person in custody must be sought as soon as reasonably practicable after the person is arrested at, or arrives at, a police station. Authorisation may only be given by a constable who is of the rank of sergeant or above and has not been involved in the investigation (section 7(3)). Section 7(4) provides that authorisation may only be given if the authorising constable is satisfied that the test in section 14 is met.

[83] The test in section 14 is that there are reasonable grounds for suspecting that the person has committed an offence and keeping the person in custody is necessary and proportionate for the purposes of bringing the person before a court or otherwise dealing with a person in accordance with the law. Section 14(2) sets out a non-exhaustive list of the matters to which regard may be had in considering what is necessary and proportionate, namely (a) whether the person's presence is reasonably required to enable the offence to be investigated fully; (b) whether the person (if liberated) would be likely to interfere with witnesses or evidence, or otherwise obstruct the course of justice; and (c) the nature and seriousness of the offence.

[84] The authorising officer for the purposes of section 7 was DSI Robertson. The appellant criticised the sheriff's assessment of his evidence. That criticism was based on what was described as a lengthy cross-examination. It was said that DSI Robertson had accepted that in order to undertake his duties as the authorising officer, he was reliant upon

what he was told by SI Little. SI Little had provided only partial information and that at no point had DSI Robertson been made aware that the appellant had been prepared to be interviewed voluntarily. SI Little accepted that DSI Robertson had not been informed that there was a concern about possible collusion between the five officers suspected. It was submitted that DSI Robertson had accepted in oral evidence that the "only thing" weighing on his mind was to allow an interview under caution and had accepted that the appellant could have been interviewed under caution on a voluntary basis. It was submitted that the sheriff had erred; he had focussed on the decision-making of SI Little when the authorising constable had been DSI Robertson.

[85] In the absence of the extended notes of evidence and there being no concession by senior counsel for the respondent that she accepted the summary of the cross-examination provided by the Dean, it is not open to this court to hold that the sheriff failed to address his mind to the parts of the evidence referred to by the Dean (*SY* v *FA* 2019 Fam LR 84 and the authorities cited therein at paras [8] to [10]).

[86] We accept however that there is some force in the Dean's submission that the sheriff appeared to focus on the evidence of SI Little rather than that of DSI Robertson when considering the question of whether it was necessary to keep the appellant in custody in terms of sections 7 and 14. It would have been helpful had the sheriff set out in his findings in fact what information was relied upon by DSI Robertson in making his decision. However, it cannot be concluded, in our judgment, that a failure to do so did not allow the sheriff to make a finding in law that the respondent had acted lawfully in keeping the appellant in custody. The sheriff found that DSI Robertson gave authorisation to keep the appellant in custody and that he completed an entry in the Management Policy File (finding in fact [40]). The sheriff noted at para [33] that DSI Robertson had "applied his mind to the

test in section 14, as he was obliged to do, and decided that it had been met." The relevant entry in the Management Policy File read:

> "SI Little gave the reason for [the appellant's] arrest is to allow investigators to interview him under audio and visual conditions regarding the crimes he has been arrested for. I deem his presence in custody necessary and proportionate to conduct an interview under caution with him".

As we have previously noted, there was no dispute that there were reasonable grounds for suspecting that the appellant had committed an offence. The first limb of the test in section 7 was thus met. Referring to the non-exhaustive nature of the list set out in section 14(2), the sheriff noted that one factor alone might suffice in determining whether it is necessary and proportionate to keep a person in custody. In the present case, he held the nature and seriousness of the offence would suffice. We agree with that assessment. We note that the nature of the offence was recorded by DSI Robertson in the Management Policy File. In addition, the sheriff noted that the evidence supported the conclusion that the appellant's presence was reasonably required to enable the offence to be investigated fully, by way of interview (paras [42] to [44] of the sheriff's judgment). We understand that DSI Robertson acted as authorising constable for all five officers who had been arrested. While the sheriff noted that authorisation to keep a person in custody following arrest afforded the person protective measures under the 2016 Act which are not available to those attending for interview voluntarily (para [46]), he correctly did not consider that factor to be determinative. On the meaning of the word "necessary", the sheriff noted that it did not mean "essential or that there was no alternative course open" to the constable in considering whether to authorise the keeping in custody of an arrested person. The sheriff was correct to so conclude. We refer to our comments on the test of "necessity" in the context of section 1(1) of the 2016 Act above. The fourth ground of appeal is refused.

Article 5

[87] It follows that the fifth ground of appeal also falls to be refused.

Declarator

[88] Having regard to our decision on grounds one to five, it follows that the sheriff was correct to refuse to grant the declarators sought.

[89] The sheriff correctly noted that it was not a function of the court to issue interlocutors of no practical effect. In the present case, however, the declarator sought by the appellant could not be described as academic. He had volunteered to attend for interview. Having been arrested, he was subject to police standard operating procedures which included being photographed and having a DNA sample and fingerprints taken from him. His arrest had implied that he was not to be trusted and might collude with other officers. As the Dean submitted, as a serving police officer, the declarator sought had meaning and effect for the appellant particularly in relation to his interaction with colleagues. It was of practical importance to him.

[90] Had we allowed the appeal and concluded that the appellant's arrest and continued detention on 24 May 2016 were unlawful, in our judgment, the appellant would have been entitled to declarator in terms of the first crave.

Disposal

[91] Accordingly, for the foregoing reasons, we shall refuse the appeal. Parties were agreed that expenses should follow success. We find the appellant liable to the respondent in the expenses of the appeal.