SHERIFF APPEAL COURT

[2021] SAC 4
SAC/21-36/AP

Sheriff Principal M M Stephen QC
Sheriff Principal A Anwar
Appeal Sheriff N McFadyen

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

APPEAL BY STATED CASE

by

ANTHONY WILSON

Appellant

against

PROCURATOR FISCAL, DUMFRIES

Respondent

Appellant: Keenan, Sol-Adv; Paterson Bell, solicitors, James McKay, Solicitors, Elgin
Respondent: McDonald AD, Crown Agent

6 April 2021

[1] The appellant was convicted after trial at Dumfries Sheriff Court on 16 December 2020 of a contravention of section 2 of the Road Traffic Act 1988. On conviction the appellant was fined £500 and disqualified from holding or obtaining a driving licence for one year and until he sits and passes the extended test of competence to drive. The sheriff

granted interim suspension of the disqualification on 21 December 2020 when the application for a stated case was lodged. The appellant appeals conviction only.

[2] The respondent charged the appellant in the following terms:

> "(001) on 8th January 2020 on a road or other public place, namely the A74(M) Glasgow to Carlisle Road, northbound, near to Junction 17, Lockerbie you ANTHONY WILSON did drive a mechanically propelled vehicle, namely motor car registered number SY60MKU dangerously and did fall asleep whilst driving said motor car, lose control of said motor car, collide with the central reservation barrier and cause damage to same; CONTRARY to the Road Traffic Act 1988, Section 2 as amended"

[3] The issue in this appeal relates to the admissibility of the answers given by the appellant to the police at the locus. At the trial objection was taken to the admissibility of the police questioning of the appellant in the police vehicle. The sheriff repelled the objection after a trial within a trial.

[4] The sheriff has posed the following questions for the opinion of the court:

(1) Upon the evidence narrated was I entitled to repel the objection made by the appellant to the admissibility of the police interview?

(2) On the facts stated was I entitled to convict the appellant?

[5] The Crown led evidence at trial from two traffic policemen who had attended a one vehicle collision on the northbound carriageway of the A74(M) near to junction 17 at 10.40am on 8 January 2020. They found a Nissan motor vehicle at the locus on the hard shoulder. The vehicle had sustained damage to the front with the front offside wheel detached. They also observed that approximately 30 metres of the central reservation was damaged. The appellant approached the police officers when they arrived at the locus and indicated that he had crashed and ended up on the hard shoulder. His wife was a passenger in the vehicle, however neither required medical attention. The appellant was asked to take a seat in the police vehicle and was formally required in terms of section 172 of the Road

Traffic Act 1988 to state who the driver of the vehicle had been at the time of the accident. This requirement was complied with and the appellant confirmed that he had been driving the vehicle. One of the officers then cautioned the appellant before asking him some questions. The record of the interview may be found at Finding in Fact 6 and paragraph [9] of the stated case. The officer's first question was a general one relating to the collision. The appellant answered that to the effect that he had driven from Manchester Airport having been on holiday for a fortnight and "coming up the road, I must have dozed off because the next thing I knew I was woken by the sound of my car hitting the central barrier. I struggled with the car hitting the barrier. There were no vehicles behind me so I managed to steer the car onto the hard shoulder." There then followed questions such as where he had been on holiday; how much sleep he had got on the flight and when he left Manchester Airport? Afterwards the appellant was warned in terms of section 1 of the Road Traffic Offenders Act 1988 and cautioned and charged with a contravention of section 2 of the Road Traffic Act 1988 ("the 1988 Act").

[6] In determining the question of admissibility the sheriff took the view that "suspicion did not properly crystallise until the appellant responded that he must have fallen asleep." The sheriff does note that the officers differed somewhat on the point when the appellant became a suspect but the sheriff did not consider that to be a significant variation. Both officers indicated at some point in their evidence that there were various options or potential reasons for the collision. PC Aitken initially stated that by the stage he had administered the caution he had reached the view that the appellant was a suspect. However, he went on to explain that he needed to question the appellant to clarify his position. He may have been in theory a suspect however he could have committed the offence of careless or dangerous driving or no offence at all. In re-examination he indicated there was a possibility that

something might have gone wrong with the front offside wheel. There was further evidence about the practical difficulties which would have arisen if he had arrested the appellant who was returning home to Elgin.

[7] On the other hand, his colleague, Police Constable Parry, confirms the section 172 requirement was made and answered. Constable Parry's position appears to have been that he did not know if any offence had been committed until the appellant stated that he must have dozed off and there was no other explanation why the vehicle collided with the central reservation. Prior to that PC Parry said he could not have determined what the appropriate charge might have been. However, after the appellant's response it was clear that the appropriate charge was dangerous driving.

[8] Following a trial within a trial, the sheriff decided that the interview had been conducted fairly and admitted the answers in evidence. The appellant did not give evidence at the trial within a trial or at the trial itself. The sheriff convicted the appellant of dangerous driving contrary to section 2 of the 1988 Act.

Submissions for the Appellant

[9] The appellant contended that the interview was unfair at common law. The sheriff had been referred to *Miller* v *Smith* [2012] HCJAC 166, 2013 SCCR 169 and the decision of both the UK Supreme Court and the Criminal Appeal Court in *Ambrose* v *Harris* ([2011] UKSC 43, 2012 SC(UKSC) 53; and [2011] HCJAC 116, 2012 SCCR 465). That case involves circumstances not dissimilar to the present, although the interview took place at the roadside rather than in a police vehicle. The important issue relates to the stage when an individual becomes a suspect and has the right to have legal advice and a lawyer present when questioned. The solicitor advocate for the appellant did not suggest that all

questioning by police at the roadside should be disallowed. It was permissible to clarify the circumstances of a road traffic accident or incident. The appellant relied on the decision of the UK Supreme Court in *Ambrose* v *Harris* at paragraph [65] which deals with police interrogation including questioning which takes place at the roadside. Such questioning could amount to interrogation, depending on the circumstances. The appellant highlighted the evidence of PC Aitken who had reached the view that the appellant was a suspect by the stage he cautioned him. The officer had agreed that it was possible to access legal advice at the roadside via the Scottish Legal Aid Board Helpline (paragraph [12] of the stated case). The appellant had not been made aware of the availability of legal advice at the roadside. This is not in dispute. In these circumstances, the questioning amounted to interrogation and was unfair in terms of *Ambrose* where Lord Hope, at paragraph [65] observes:

> "Questions that the police need to put simply in order to decide what action to take with respect to the person whom they are interviewing are unlikely to fall into this category. But they are likely to do so when the police have reason to think that they may well elicit an incriminating response from him."

Here, PC Aitken had considered the appellant a suspect and in his evidence said it was clear that the driver had fallen asleep. The questioning of the appellant in these circumstances had the aim of extracting an admission or incriminatory response and that evidence should not be admitted.

[10] Further, questioning the appellant in the back of a police vehicle was equivalent to being in police custody. It was oppressive and intimidatory and without access to a lawyer any questioning amounts to interrogation and the answers should not be admitted. This was arguably a more obvious example of unfairness than arose in *Ambrose* where the questioning took place at the roadside after the police had received information from a member of the public regarding the occupants of the vehicle who appeared to be drunk

there also being signs of vomit beside the driver's door. If PC Aitken considered that the driver had fallen asleep then he ought to have arrested him; charged him with dangerous driving and taken him to a police station for questioning where he would have access to a lawyer.

Crown submissions

[11] The advocate depute considered that *Smith* could be distinguished. *Ambrose* v *Harris* was concerned with a similar situation namely an interview at the roadside without a lawyer present. That was considered to be fair and therefore admissible.

[12] The advocate depute submitted that the questioning of the appellant by the police was fair given the circumstances of this case. It was preceded not only by a caution but by the appellant volunteering that he had crashed his vehicle. The police could not know exactly what had happened. Various scenarios remained open when they began to question the appellant. As confirmed in *Ambrose* the police were entitled to ask questions to ascertain what had happened, indeed, they had a duty to do so. The appellant argues two aspects which he considers leads to the conclusion that the questioning was unfair. Firstly, that he was suspected of committing an offence and secondly the locus of the questioning. The question of him being a suspect has already been referred to. The situation in this case was much more uncertain than in *Ambrose* where there had been a tip off. There was evidence of vomit at the driver's door however the appellant was in the passenger seat. *Ambrose* involved a higher factual matrix than here. This case involves a one vehicle road traffic collision which the police were investigating. That is obvious from the initial question posed by PC Aitken which was an open question. The locus of the questioning namely in the back of the police vehicle is not, of itself, unfair. There was no evidence from the

appellant at all at the trial within a trial and therefore no evidence of whether he felt intimidated. Conducting the interview in the police vehicle was entirely suitable based on both safety and practicality. The vehicles were on the hard shoulder of a motorway and the appellant's wife was still seated in the damaged vehicle. None of the questions asked of the appellant were unfair. There was no question designed to elicit an incriminating response. In these circumstances the court should answer both questions of law in the affirmative and refuse the appeal.

Decision

[13] The submissions made to the sheriff focussed on when the appellant became a suspect. It could be said that when the appellant approached the police officers to inform them of the circumstances of the collision and confirmed he was the driver he potentially fell into the category of suspect. He had been driving when the vehicle crashed, however, it is accepted, that the possibility of mechanical failure or other external cause such as an animal crossing his path cannot be discounted leaving open the question whether any road traffic offence had been committed at all. In these circumstances we doubt whether focussing on the precise stage when the appellant became a suspect is the correct approach and truly determinative of fairness and therefore admissibility. In *Ambrose,* the issue of the fairness of the police questioning was decided by the Criminal Appeal Court (at paragraphs 5-7) after the UK Supreme Court held it was not incompatible with the appellant's rights under Article 6 of the European Convention on Human Rights for the police to question a suspect at the roadside without him having access to legal advice. Lord Reed did not consider the fact that the appellant was suspected of a contravention of section 5(1)(b) of the 1988 Act to be the determining factor. Instead, the concern is whether the questioning was fair in the

sense of how and in what circumstances the questioning was carried out. The law will protect a suspect from improper or coercive questioning carried out in an intimidatory or oppressive manner. In this case the police officers were responding to a one vehicle road traffic collision (RTC). They were making enquiries in order to decide what, if any, action to take (see *Ambrose* para [65]). The sheriff heard evidence from the police officers and made a finding (finding in fact 5) in the following terms:

> "Prior to interviewing the appellant the police did not know what had caused the collision and mechanical failure was a possibility."

[14] The issue is truly one of fairness. The question of fairness must be considered in its correct context which involves careful consideration of the facts and circumstances of each case. In *Ambrose* (at the UKSC) paragraph [65] and in *Smith* at paragraph 22 the court emphasises that proposition. In *Ambrose* Lord Hope refers to this issue and to "police interrogation" as being "extremely fact sensitive" and in *Smith* "The question of fairness is ultimately one of fact and degree to be assessed by the judge at first instance" (per Lady Paton). We must consider the question of fairness against the facts and circumstances of what occurred at the roadside on 8 January last year. The police officers came across a single vehicle RTC with the appellant's vehicle damaged on the hard shoulder. They were in uniform and in a marked police vehicle. They noticed the damage not only to the vehicle but also to the central reservation. The appellant approached the officers and told them he had crashed and ended up on the hard shoulder. The officers checked in case anyone was injured and in need of medical attention. The appellant confirmed he had been the driver in response to the s 172 requirement. He was cautioned prior to being asked any question. The first question posed was open and neutral – "Antony, I am making enquiries into a one vehicle RTC pm (sic) the A74 (M) northbound carriageway near to junction 7, Lockerbie.

What if anything can you tell me about this?" We do not consider that this can be categorised as questioning designed to elicit an incriminating response. The fact that an incriminating response emerged does not render a fair question or process unfair. (See Lord Advocate's Reference (No 1 of 1983) 1984 JC 52, quoted with approval by Lord Reed sitting in the Criminal Appeal Court in *Ambrose* at paragraph 6). Unlike what happened in *Smith* (*supra*) there could be little doubt at all in the mind of the appellant what the police were asking questions about, standing what had occurred. Conducting the interview in the back of the police vehicle, whilst not ideal, cannot be considered either intimidating or oppressive given the locus of the accident on a major traffic route which at that precise area was classified as a motorway. Practical considerations would suggest that conducting the interview at the roadside might be unsafe and noisy. The police were investigating how the collision had occurred which caused the damage to the vehicle. The appellant chose not to give evidence at the trial within a trial. There was no evidence before the sheriff which suggested the situation was either oppressive or intimidating for the appellant. The police had arrived at the locus as first responders to assist and then to make enquiries as to the accident.

[15] The circumstances of this case can be readily distinguished from what happened in *Smith* where the beat keeper was questioned by a police officer and SSPCA inspector in plain clothes without being told about the matters he was suspected of and on which he was to be questioned. He had no idea that he was the prime suspect (in relation to contraventions of the Wildlife and Countryside Act 1981) and that he might face prosecution. The circumstances of this case are quite different. The appellant could be in no doubt as to what the police were making inquiries about. The appellant volunteered to the police that he had crashed his vehicle in circumstances where apparently no other vehicle was involved and

where it was not inevitable that a road traffic offence had been committed. We take the view that the questions posed, certainly the opening question, fall into the category mentioned in paragraph [65] of *Ambrose* (in the UK Supreme Court) namely, questions the police need to ask to decide what action to take or not as the case may be. We consider that the sheriff was entitled to find that *Ambrose* v *Harris* was in point; to repel the objection to the fairness of the interview and to admit the appellant's answers as evidence. It follows that we will answer the Questions of Law in the affirmative and refuse the appeal.

[16] That is sufficient to deal with the issue of admissibility and the questions of law posed in the stated case. However, a matter of real and practical importance arose at the appeal hearing (and before the sheriff) relating to the submission that the appellant should have been arrested and taken to a police station where any questioning would have triggered the requirement that he be provided with access to a solicitor. Before the sheriff the solicitor for the appellant contended that the police ought not to have questioned the appellant at the locus but instead, he should have been arrested. At the appeal hearing the solicitor advocate for the appellant conceded that it could not be contended that all questioning by police at the roadside should be disallowed. We consider that this concession is properly made. However, the solicitor advocate for the appellant did not consider that this was a case where it was open to the police to continue to question the appellant once the police officer reached the point of considering him a suspect. It was submitted that this point had been reached at an early stage prior to caution and any questioning. In these circumstances, it was suggested that the appellant ought to have been arrested and afforded the right to legal advice and have a solicitor in attendance when interviewed at a police station.

[17] However, we would be concerned at both the principle and the practicality of requiring police officers to arrest drivers in circumstances such as existed in this case where the driving may possibly have been dangerous or careless or indeed, no driving error may have been attributable to the driver at all. Arguably, interview at a police station, even with a solicitor in attendance, is more intimidating for a person in the appellant's situation. In this case the driving turned out to be dangerous by virtue of the driver having fallen asleep but may have simply been careless due to momentary inattention on the part of the driver on a motorway. There may have been no offence committed at all. In these circumstances we would be concerned at the suggestion that there be a requirement on the police to arrest a driver whose car goes off the road simply because the driving may after inquiry turn out to have been dangerous but may equally well have been careless. The importance lies in the provisions contained in section 1 of the Criminal Justice (Scotland) Act 2016 which set out the power of a constable to arrest without warrant. Read as a whole, the test for arrest without warrant depends on whether the offence of which the person is charged is imprisonable unless, of course, subsections (2) and (3) apply which is unlikely in this situation and indeed many RTCs. Careless driving is, of course, a non-imprisonable offence. It appears to us to be both disproportionate and wrong in principle to require police officers to arrest in these circumstances.