6 October 2011

PRESS SUMMARY

Her Majesty's Advocate v P (Scotland) [2011] UKSC 44
Reference from the High Court of Justiciary, at the request of the Lord Advocate

JUSTICES: Lord Hope (Deputy President), Lord Brown, Lord Kerr, Lord Dyson, Lord Matthew Clarke

BACKGROUND TO THE APPEAL

In *Cadder v HM Advocate* [2010] UKSC 43, the Supreme Court held, having regard to the decision of the European Court of Human Rights in *Salduz v Turkey* (2008) 49 EHRR 421, that the Crown's reliance on admissions made by an accused who had no access to a lawyer while he was being questioned as a detainee at a police station was a violation of his rights under Article 6(3)(c) read with Article 6(1) of the European Convention on Human Rights. The question in this case is whether the *Salduz* principle extends to the use of any evidence whatever, the existence of which was discovered as a result of answers given by the accused while in custody without access to legal advice; or whether evidence which, although derived from those answers, has an independent life of its own and does not require to be linked to those answers in order to support the Crown's case will normally be admissible.

The accused has been indicted at the High Court of Justiciary on a charge of assault and rape. He was detained under section 14 of the Criminal Procedure (Scotland) Act 1995, and was taken to a police station and interviewed. He was not given access to legal advice prior to or during the interview. He was asked where he had been on the date of the alleged rape, and replied that, prior to the alleged incident, he had taken a powdered substance at another pub that had provoked an adverse reaction. He stated that his best friend could back up his statement. The police subsequently took a statement from the friend, who confirmed what the accused had said about his reaction to the drug. But he also described having a telephone conversation with the accused the next morning, when the accused described meeting a woman the previous night and having consensual sex with her. The accused submitted that his rights under Article 6(3) would be contravened if the Crown were permitted to elicit evidence of his police interview, that the evidence of his friend about the telephone conversation was incriminatory evidence which had been obtained as a direct result of his replies during the police interview, and that the Crown should not be permitted to lead this evidence.

When this point came before the trial judge for debate the Lord Advocate asked him to refer the issue to this Court. The questions referred by the trial judge are:

1. Whether the act of the Lord Advocate in leading and relying on evidence obtained from information disclosed during the course of a police interview with an accused person… without the accused person having had access to legal advice would be incompatible with that person's rights under Article 6(1) and (3)(c) of the Convention, having regard in particular to the decision in *Cadder*; and
2. Whether the act of the Lord Advocate in leading and relying on the evidence of the friend in these proceedings would be incompatible with the accused's rights under those Articles.

JUDGMENT

The Supreme Court unanimously allows the appeal. It answers question 1 in the negative, and declines to answer question 2, leaving it to the trial judge to decide whether, if the Crown were to lead and rely on the friend's evidence about the telephone conversation, the accused would, in all the circumstances, be deprived of his fundamental right to a fair trial. Lord Hope gives the main judgment, with which Lords Dyson, Kerr and Clarke agree. Lord Brown gives a short concurring judgment.

REASONS FOR THE JUDGMENT

The *Salduz* principle is not restricted to admissions made without access to legal advice during police questioning *(Gafgen v Germany* (2010) 52 EHRR 1). The question is whether the rule extends to evidence derived from a detainee's answers but which can speak for itself, without it being necessary to refer for support or explanation to anything the detainee said in his police interview **[9]**. In this case, the statement allegedly made by the accused to his friend in the telephone call was at least partly incriminatory, in relation to the fact of sexual intercourse taking place at the locus. But this of itself does not make it inadmissible. The assumption is that the police would not have obtained this evidence but for what the accused told the police when he was arrested. If that is the case, the question is whether the fact that the source of the friend's information was the accused himself renders the friend's evidence inadmissible **[15]**. The guiding principle in Scots law is *Lawrie v Muir* 1950 JC 19, which states that an irregularity in the method by which evidence has been obtained does not necessarily make that evidence inadmissible in a criminal prosecution **[17]**. The law of England and Wales is to the same effect (Section 76(4) of the Police and Criminal Evidence Act 1984l. Ultimately the question is whether it would be fair to admit the evidence **[18]**.

In *Gafgen*, the ECtHR noted that there is no clear consensus about the exact scope of application of the exclusionary rule. In particular, factors such as whether the impugned evidence would, in any event, have been found at a later stage, independently of the prohibited method of investigation, may have an influence on the admissibility of such evidence **[22]**. Where the boundary lies between what the Convention requires to be automatically excluded because it is derived from what the person has said and what is not remains unclear **[23]**, and there have been no other cases dealing with the issue since *Gafgen*. Strasbourg has not, however, suggested that leading evidence of the fruits of questioning that is inadmissible because the accused did not have access to a lawyer when he was being interviewed will always and automatically violate the accused's rights under Article 6(1) and (3)(c).

Regard can be had to the position in England and Wales, where, subject to the court's discretionary power to exclude it under section 78(1), evidence derived from an involuntary statement which can be adduced without having to rely on that statement is admissible **[24]**. Assistance may also be found in the Canadian Supreme Court case of *Thomson Newspapers Ltd v Canada (Director of Investigation and Research)* [1990] 1 SCR 425, where attention was drawn to the distinction between evidence that simply would not have existed independently of the exercise of the power to compel it; and evidence derived from compelled testimony which is, by definition, evidence that existed independently of the compelled testimony **[25]**. This supports the conclusion to be drawn from what Strasbourg has said so far on this issue: that there is no absolute rule that the fruits of questioning of an accused without access to a lawyer must always be held to be a violation of his rights under Article 6(1) and (3)(c). It is one thing if the impugned evidence was created by answers given in reply to such impermissible questioning. It is another if the evidence existed independently of those answers, so that those answers do not have to be relied upon to show how it bears upon the question whether the accused is guilty of the offence in question. The question whether such evidence should be admitted has to be tested by considering whether the accused's right to a fair trial would be violated by the leading of the evidence **[27]**.

References in square brackets are to paragraphs in the judgment.