23 November 2011

PRESS SUMMARY

McGowan (Procurator Fiscal, Edinburgh) (Appellant) v B (Respondent) (Scotland)
[2011] UKSC 54
Reference of a devolution issue from Edinburgh Sheriff Court

JUSTICES: Lord Hope (Deputy President), Lord Brown, Lord Kerr, Lord Dyson, Lord Hamilton (Scotland)

BACKGROUND TO THE APPEAL

This is a reference of a devolution issue at the request of the Lord Advocate. It is directed to the issue of waiver. The Respondent, 'B', whose case has not yet gone to trial, has been charged on summary complaint with housebreaking with intent to steal and having in his possession a controlled drug contrary to section 5(2) of the Misuse of Drugs Act 1971. Before the commencement of a police interview, he was offered legal assistance but declined the offer. His waiver of the right to legal assistance took place without his having received advice on the point from a solicitor In advance of the trial, B's solicitor lodged a Devolution Minute stating that B's right to a fair trial under Article 6(3)(c) of the European Convention on Human Rights would be breached if the Crown were to lead evidence of his police interview since, it was claimed, access to a solicitor should be automatic when someone has been detained in police custody.

The propositions in the Devolution Minute were based on observations of the High Court of Justiciary in *Jude v HM Advocate* [2011] HCJAC 46, 2011 SLT 722, in which the Lord Justice Clerk (Gill), delivering the unanimous opinion of the Court, had stated that he could not see how a person could waive his right to legal advice when he had not had access to legal advice on the point. In view of the importance of the question raised by that observation, the Lord Advocate invited the sheriff to refer the issue to the Supreme Court. The amended reference agreed between the parties sets out the following questions for consideration by the Court:

(i) Whether, in principle, it would be incompatible with Article 6(1) and 6(3)(c) for the Lord Advocate to lead and rely upon evidence of answers given during a police interview of a suspect in police custody who, before being interviewed, had been informed of his *Salduz*/Article 6 rights to legal advice, and, without having received advice from a lawyer, had stated that he did not wish to exercise such rights;

(ii) Whether it would be compatible with B's rights under Articles 6(1) and 6(3)(c) for the Lord Advocate to lead and rely upon evidence of answers given in his police interview.

Both parties agreed that question (i) should be answered in the negative. The Appellant argued that question (ii) should be answered in the affirmative. The Respondent disagreed.

JUDGMENT

The Supreme Court, by a 4-1 majority, answers the first question in the reference in the negative, and remits the second question to the sheriff. Lord Hope gives the leading judgment. Lord Kerr gives a separate dissenting judgment.

REASONS FOR THE JUDGMENT

Article 6 does not expressly state that a person must have had legal advice before he can be taken to have waived the right of access to a lawyer. However, it is clear that the article is to be interpreted broadly by reading into it a variety of other rights to which the accused person is entitled, so as to give

practical effect to the right to a fair trial **[11]**. The task for the Supreme Court is to identify as best it can the requirements which the Strasbourg court has set for the making of an effectual waiver of Convention rights. It may be that the way police interviews are currently conducted in Scotland is in need of improvement. But that should not be done by giving a more generous scope to the Convention rights than that which is to be found in the jurisprudence of the Strasbourg court or by laying down fixed rules that may impede the prosecution of crime in Scotland unless they have been clearly identified as such by Strasbourg **[5, 6]**.

In order to be effective as a waiver of a Convention right, the acts from which the waiver is to be inferred must be voluntary, informed and unequivocal **[21]**, and must be attended by the minimum safeguards commensurate to the importance of the right **[27]**. None of the Strasbourg cases indicate that an accused who acts of his own free will in waiving his right to legal assistance must always have access to legal advice before he can be held validly to have waived that right. This also reflects the position of the Supreme Courts of Canada and the United States **[37-44]**. There is no generally internationally recognised human rights standard on the issue of waiver that would support the conclusion that access to legal advice is an essential prerequisite to an effective waiver by a detainee of the right of access to a lawyer when he is being questioned by the police **[45]**.

The statements of the Lord Justice Clerk in *Jude* to the effect that there is a rule requiring legal advice for the purpose of a valid waiver of the right to legal assistance should be disapproved. Where the detainee, having been informed of his rights, states that he does not want to exercise them, his express waiver of those rights will normally be held to be effective. The minimum guarantees are that he has been told of his right, that he understands what the right is and that it is being waived and that the waiver is made freely and voluntarily **[46]**. The Strasbourg decisions indicate, however, that in some cases access to a lawyer may well be a prerequisite of a valid waiver. In particular, it must not be taken for granted that everyone understands the rights in question. People who are vulnerable or under the influence of alcohol or drugs may need to be given more than standard formulae if their right to a fair trial is not to be compromised **[36 & 47]**. What we have been given by Strasbourg is a guiding principle as to what is needed for there to be an effective waiver. Its application in determining whether there will be, or has been, a fair trial will depend on the facts of each case **[50]**.

Two suggestions are made for the improvement of the practice that is adopted at present: first, in order to minimise the risk of misunderstanding, police should ask the detainee for his reasons for waiving his right to legal assistance, and record the reasons given. This will provide an opportunity for any obvious misunderstandings to be corrected, though police officers should not go so far as to offer advice to the detainee **[49]**. Second, police should inform the detainee not only of his right to legal assistance, but also of the arrangements that may be made if he is unable to name a solicitor or is concerned about the cost of employing one **[51]**.

It would not be appropriate to reach a decision on question (ii) in this case. The issue comes before the Court as a reference and not as an appeal. It raises questions of fact and degree which ought properly to be dealt with by the sheriff, after hearing all the evidence on this issue **[53]**.

Lord Kerr would have answered both questions in the negative. No attempt had been made to discover why B had refused to avail himself of legal assistance, and therefore it was impossible to say that this was an unequivocal and informed waiver **[128]**. Only in exceptional circumstances should statements made by a suspect who has not had access to a lawyer be admitted in evidence **[125]**. The suggestions made by Lord Hope should be implemented as rules requiring police to obtain reasons from suspects who purport to waive their right to legal assistance. Unless one knows why the decision to waive has been made, it cannot be said to be 'voluntary, informed and unequivocal' **[115]**.

References in square brackets are to paragraphs in the judgment