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More Fair Play for Suspects: *HM Advocate v Higgins*

In an article entitled "Fair Play for the Criminal", published in 1954,[1] Andrew Dewar Gibb railed against the decision in *HM Advocate v Keen*,[2] where the trial judge had held that a police-lieutenant could not give evidence of what he had heard two men shout to each other while in the cells at a police station. Describing the decision as "obviously wrong", Gibb argued:[3]

> If a voluntary statement may be received why should not a carelessly shouted remark? Men in a police station who shout their observations must surely be taken to know that policemen will hear them. That did not deter these accused. Such a decision, it is submitted, is carrying the idea of fair play beyond all reason.

For Gibb, *Keen* was symptomatic of a more significant problem with the Scottish law of evidence, namely the courts' reliance on the concept of "fairness" in determining the admissibility of irregularly obtained evidence, particularly confessions. Gibb argued that the courts' application of this approach was, at least in some respects, "little short of absurd… extending 'fair play' or 'fairness' to the prisoner almost as if the occupation of proving and punishing crime were a kind of sport".[4]

Although *Keen* can no longer be regarded as good law, the courts having been prepared to admit similarly obtained evidence in a number of cases since,[5] fairness remains the determinative criterion in deciding whether confession evidence should be excluded as having been improperly obtained.[6] The recent decision in *HM Advocate v Higgins*[7] provides an opportunity to explore some of the difficulties with this approach.

A. THE DECISION IN *HIGGINS*

In *Higgins,* two men were arrested on suspicion of involvement in an armed bank robbery. Initially they were held on different floors of a cell block in police quarters, but it was decided to move one of the men so that they were in adjacent cells. The purpose of this arrangement was to "facilitate conversation between the two accused

1 A D Gibb, "Fair play for the criminal" 1954 JR 199. No doubt the title of Gibb's article is unfortunate given the presumption of innocence (hence the title of this note), but Gibb did not seem particularly enamoured with that rule either: see the same article, at 199-200.

2 1926 JC 1.

3 Gibb (n 1) at 219.

4 Gibb (n 1) at 199.

5 *Welsh v HM Advocate* (1974) 38 J Crim L 151; *HM Advocate v O'Donnell* 1975 SLT (Sh Ct) 22; *Jamieson v Annan* 1988 JC 62.

6 See generally A G Walker and N M L Walker, *The Law of Evidence in Scotland*, 2nd edn, by M L Ross with J Chalmers (2000) paras 9.11-9.21.

7 [2006] HCJ 5, 2006 SLT 946, 2006 SCCR 305.

and the hearing and noting of any conversation" by "listening officers" who had been posted outside the cells.[8] In due course, the Crown sought at the subsequent trial to adduce evidence about conversations which had taken place between the two men. After a trial within a trial, Lord Macphail sustained a defence objection to the admissibility of this evidence.[9]

Although Lord Macphail's decision was ultimately based on "fairness", the case is complicated by a number of factors. First, the decision to move one suspect and engage in eavesdropping had been taken without reference to the Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA) and the Code of Practice on covert surveillance.[10] This meant that no authorisation had been sought for the actions of the police, in turn meaning that the evidence had been obtained in breach of RIPSA.[11] Secondly, because RIPSA had not been complied with, the surveillance was not "in accordance with the law" and had breached the suspects' rights under article 8 (the right to respect for private and family life) of the European Convention on Human Rights.[12]

Lord Macphail held, however, that the breach of RIPSA did not automatically render the evidence inadmissible,[13] and said that he "did not find it necessary to resort to the ECHR" in order to reach his decision.[14] In his view, the matter could be dealt with by applying the common law test of fairness. Specifically, it had been held in *Jamieson v Annan*[15] that evidence of an overhead remark made in custody would be admissible "provided that the remark is made voluntarily and not as the result of an inducement or trap".[16] In Lord Macphail's view, the police tactics in *Higgins* could "only be described as a trap", and the evidence was rendered inadmissible by a straightforward application of the rule in *Jamieson v Annan*.[17]

B. EAVESDROPPING ELSEWHERE

The fact that it was not "necessary" for Lord Macphail to resort to the ECHR to reach his decision should not be taken to mean that a Convention-based approach would have resulted in the same outcome. Although the suspects' rights under article 8 of the Convention had unquestionably been breached, it is well established that the fact that

8 *Higgins* at para 5 per Lord Macphail.

9 The three accused were then acquitted of all charges after the Crown decided not to proceed on certain charges and Lord Macphail sustained a submission of no case to answer in respect of the remaining charge. See para 30.

10 *Covert Surveillance: Code of Practice*, issued by Scottish Ministers under the Regulation of Investigatory Powers (Scotland) Act 2000 s 24(1) and brought into force by the Regulation of Investigatory Powers (Covert Surveillance – Code of Practice) (Scotland) Order 2003, SSI 2003/183. The text is available at *http://www.scotland.gov.uk/Publications/2003/03/16695/19532*.

11 Para 23.

12 Para 29.

13 Para 24, citing *Henderson v HM Advocate* 2005 JC 301 at para 36 per Lord Hamilton. See also *Gilchrist v HM Advocate* 2005 JC 34.

14 Para 29.

15 1988 JC 62.

16 1988 JC 62 at 64 per Lord Justice-Clerk Ross. Here, Lord Ross is simply approving the conclusion reached by Sheriff Macphail (as he then was) himself in *HM Advocate v O'Donnell* 1975 SLT (Sh Ct) 22.

17 *Higgins* at para 21.

evidence has been obtained in breach of article 8 does not automatically mean that its use in court will breach article 6.[18] For that reason, the European Court has not been prepared to hold that the use of evidence obtained by eavesdropping on suspects in police custody amounts to a breach of article 6.[19]

The facts of *Higgins* are strikingly similar to those in the English case of *R v Bailey and Smith*,[20] where two suspects were placed together in a bugged cell after they had been charged. The Court of Appeal refused to hold that the evidence obtained thereby should have been excluded by the trial judge. One reason for the difference from *Higgins* is that the English courts have historically laid considerable stress on whether or not incriminating statements were made "voluntarily", and the *Bailey and Smith* court held that it was wrong "to equate voluntarily talking to each other with making involuntary statements to the police".[21] Lord Macphail, however, seems to have taken the view either that the voluntary nature of the statements in *Higgins* was irrelevant, or that the "trap" meant that they could not properly be considered "voluntary".[22]

C. WHAT IS FAIRNESS FOR?

"Fairness" is a conspicuously malleable concept, and the Scottish courts' consistent reliance on it obscures any discussion of the *reason* for disallowing improperly obtained evidence. Writing with particular reference to confession evidence, Ashworth has identified three possible operative principles: first, a "reliability principle", secondly, a "disciplinary principle", and thirdly, a "protective principle".[23]

In the context of *Higgins*, each of these principles might lead to a different conclusion. There is no reason to believe that the manner in which the evidence was obtained might mean that it was unreliable (in contrast, for example, to a "confession" obtained by bullying or threats), and so an application of the reliability principle would not lead to its exclusion. An application of the disciplinary principle might lead to the opposite conclusion: the police officers had acted improperly by disregarding the provisions of RIPSA and the relevant code of practice, and so the court should mark its disapproval by excluding the evidence obtained thereby.

But a disciplinary approach is open to obvious objections, not least that the court's exclusion of the evidence may have little or no effect on the persons who acted improperly, at the same time as conferring a substantial benefit on a person who may have committed a serious crime – a benefit which itself serves no disciplinary purpose and which runs contrary to the public interest in the detection and prosecution of crime. And if Parliament chose not to legislate in RIPSA to the effect that evidence obtained

18 *Khan v United Kingdom* (2001) 31 EHRR 45; *Gilchrist v HM Advocate* 2005 JC 34. Furthermore, it is now settled that s 57(2) of the Scotland Act 1998 does not act to prevent the Lord Advocate (or a procurator fiscal) from leading evidence obtained in breach of article 8: *McGibbon v HM Advocate* 2004 JC 60.

19 *Khan v United Kingdom* (2001) 31 EHRR 45; *Allan v United Kingdom* (2003) 36 EHRR 12.

20 (1993) 97 Cr App R 365.

21 (1993) 97 Cr App R 365 at 374 per Simon Brown LJ.

22 See *Higgins* at para 27.

23 A J Ashworth, "Excluding evidence as protecting rights" [1977] Crim LR 723.

in breach of its provisions should be inadmissible in court, why should the courts independently append an exclusionary rule to the legislation?

A better approach, as advocated by Ashworth, may be to ask whether exclusion of the evidence in question is necessary in order to protect the rights of the accused. Here we have to ask what, exactly, is *wrong* with eavesdropping? Dealing with the question without reference to formal questions of Convention rights, if it is wrong because the suspect has a reasonable expectation of privacy in a police cell which is violated by the practice,[24] then it is difficult to see why anything should turn on whether the eavesdropping is accidental or deliberate: in either case, the suspect's reasonable expectations have been breached. Yet the decision in *Higgins* implies that the distinction is crucial.[25] Of course, it was accepted that the police officers' actions in *Higgins* had breached article 8 of the Convention, but as already noted, the European Court has not been prepared to hold that such breaches should result in the exclusion of evidence obtained thereby.[26]

Decisions of the European Court of Human Rights,[27] the Canadian Supreme Court,[28] the High Court of Australia,[29] the English Court of Appeal,[30] and the United States Supreme Court[31] have all suggested that, while eavesdropping may not be fatal to the admissibility of evidence, a line is crossed where the deceptive conduct of the police is such as to offend against the right to silence and the privilege against self-incrimination. In other words, evidence obtained by eavesdropping is not *per se* inadmissible, but where the police employ an undercover officer (or private individual) to question a suspect without the benefit of the usual protections such as a caution, the use of such evidence is prohibited. In terms of the ECHR, this result obtains because the right to silence and the privilege against self-incrimination are aspects of the right to a fair trial, and so the use of evidence obtained in this way violates that right.

This approach, which can be described as an application of the protective principle, is attractive because it makes clear *why* such evidence is to be excluded, rather than relying upon vague notions of "fairness". The weight of comparative authority supporting it is not conclusive: it is open to the Scottish courts to adopt a stricter exclusionary rule than that operating elsewhere. But if this is to be done, a more principled basis than assertions of "fairness" is called for. In any event, the approach is not alien to

24 Although it might not be thought that such expectations could be particularly strong, the relevant Code of Practice states that police cells are included within "residential premises" for the purposes of RIPSA: see *Higgins* at para 23. This interpretation of the statute is doubted by Sir Gerald Gordon in his commentary on the case (at 2006 SCCR 318). Cf A Ashworth, "Should the police be allowed to use deceptive practices?" (1998) 114 LQR 108 at 137.

25 In addition to *Higgins* itself, some of the earliest relevant Scottish cases suggest that this distinction is of importance: *Tait and Stevenson* (1824) Alison, ii, 536 (but see *John Johnston* (1845) 2 Broun 401, where the accuracy of Alison's note of that case is doubted) and *Miller* (1837) Bell's Notes 244.

26 Nor have the Scottish courts been prepared to accept at common law that exclusion of evidence is a necessary consequence of irregular activity by investigatory authorities: see *Lawrie v Muir* 1950 JC 19 at 26-27 per Lord Justice-General Cooper.

27 *Allan v United Kingdom* (2003) 36 EHRR 12.

28 *R v Hebert* [1990] 2 SCR 151; *R v Broyles* [1991] 3 SCR 595; *R v Liew* [1999] 3 SCR 227.

29 *R v Swaffield and Pavic* [1998] HCA 1.

30 *R v Roberts* [1997] 1 Cr App R 217, but see *R v Jelen and Katz* (1990) 90 Cr App R 456.

31 *Kuhlmann v Wilson* (1986) 477 US 436.

Scots law, and is supported by the cases dealing with questioning by an individual who is effectively operating as an undercover agent of the police, in circumstances where the police could not interview the suspect without due caution. The courts have held that such questioning is improper as undermining well-established safeguards, and will result in any replies elicited being inadmissible in evidence.[32]

D. CONCLUSION

Fairness is an attractively flexible but dangerously unprincipled concept. First instance decisions are not, of course, the most appropriate circumstances for fundamental questions of principle to be addressed. It is suggested, however, that issues such as those arising in *Higgins* would be better understood and addressed if the principles underlying the exclusion of irregularly obtained evidence were better articulated and understood.[33]

In such circumstances, relying solely on the common law principle of fairness, rather than the more principled approach under the ECHR, may be undesirable. There is no question of incompatibility here: the Scottish courts are free to apply exclusionary rules which go further than the Convention requires. But in formulating such rules, reference to the Convention may be a useful source of principle rather than an unnecessary resort.

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32 *HM Advocate v Graham* 1991 SLT 416; *HM Advocate v Campbell* 1964 JC 80. Cf *Weir v Jessop* 1991 JC 146, where Lord Justice-Clerk Ross doubted (at 152) whether the evidence obtained in *Campbell* should have been held inadmissible, on the basis that the suspect in that case had offered to make a voluntary statement to a reporter (who was, in the event, accompanied by an undercover police officer) and had not done so as the result of questioning. This fortifies rather than weakens the argument presented here.

33 See also P Duff, "Admissibility of improperly obtained physical evidence in the Scottish criminal trial: the search for principle" (2004) 8 Edin LR 152.