SHERIFF APPEAL COURT

[2023] SAC (Civ) 21
INV-B123-22

Sheriff Principal M W Lewis
Sheriff Principal N A Ross
Appeal Sheriff A M Cubie

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M W LEWIS

in appeal by

JH

Second Defender and Appellant

against

SCOTTISH CHILDREN'S REPORTER ADMINISTRATION

Pursuer and Respondent

Second Defender and Appellant: Aitken, advocate; Berlow Rahman Hassan Limited
Pursuer and Respondent: Flannigan; Anderson Strathern LLP

30 May 2023

Introduction

[1] Was there sufficient evidence to find that JH had the necessary *mens rea* for having committed an assault on his child, AH? That is the central issue in this appeal.

[2] AH is a young child. Her mother is CD and her father is JH. They each hold parental rights and responsibilities in respect of AH.

[3] Within six weeks of her birth, AH was found to have sustained bruising in several places on her body. On the basis of the medical evidence obtained by the respondent ("the

reporter"), it was considered by the reporter that there was sufficient evidence that JH and CD had assaulted AH. The reporter formed the view that the grounds of referral set out in section 67(2)(b) of the Children's Hearing (Scotland) Act 2011 ("the 2011 Act") applied and that AH was in need of compulsory measures of supervision. The reporter referred AH to a children's hearing. The children's hearing took place on 18 May 2022. Neither parent accepted the grounds of referral submitted by the reporter. An application was made to the sheriff to find the grounds established. On 7 February 2023, following proof, the sheriff found that JH had assaulted AH on or before 23 April 2022. That being so, the grounds of referral were established, but only in respect of JH.

[4] JH appeals against that decision.

The statutory provisions

[5] Section 67 of the 2011 Act so far as relevant provides:

> "Meaning of 'section 67 ground'
> (1) In this Act 'section 67 ground', in relation to a child, means any of the grounds mentioned in subsection (2).
>
> (2) The grounds are that…
> b. a schedule 1 offence has been committed in respect of the child;"

The sheriff's findings

[6] The sheriff made the following findings in fact:

> "(11) A paediatric medical examination of said child was carried out by Dr Louise Ferguson on 28 April 22. The examination had the following concerning findings: …
> ii) 12mm linear light brown/ red mark on the antereolateral aspect of the left leg, just superior to the left knee
> iii) Two linear light brown/ red marks measuring 4 mm and 8 mm on the posterolateral aspect of the left leg superior to the child's knee, which were fading bruises; and
> iv) 10mm faint red/ light brown mark superior to the child's knee on the lateral aspect of her right leg, which was a fading bruise.

> …
> (21) The bruises detailed in finding-in-fact 11 ii), iii) and iv) were highly suspicious and indicative of non-accidental injury. This was due to the fact said child was non-mobile; the number, size, and location of the bruises; the fact they were in a cluster; the lack of any consistent explanation for them and the fact that considerable force was necessary to cause them.
> (22) The bruises detailed in finding-in-fact 11 ii), iii) and iv) were inflicted by the child's father."

[7] The sheriff found it established that a Schedule 1 offence had been committed in respect of AH. She named the appellant as the person who committed that offence and concluded that the offence committed was an assault.

[8] The sheriff did not make any findings as to the cause of bruises. She did not identify the mechanism by which AH was injured. She rejected the explanations given by the appellant to the police and a paediatrician as being inconsistent with his evidence in court, reasoned that he had been lying to "hide something that he knew he had done to the child" and concluded that he was incredible and unreliable. He had informed the police and the paediatrician that he had held the baby's legs firmly to stop her kicking when he was attempting to change her nappy. However, in his oral evidence he gave a different explanation. He stated that he had been helping with nappy changing on his return from work, he was tired and may have handled the baby roughly by grabbing her legs to prevent her rolling off the changing table, and blamed himself.

[9] Based on the number, sizes and locations of the bruises, the lack of any consistent explanation for the bruising, and the opinion evidence of the paediatricians about the level of considerable force required to cause such bruising, the sheriff inferred that the injuries to the baby were the result of an assault and not any lesser conduct.

[10] It is this inference which lies at the heart of the appeal.

The issues

[11] The issues for us to determine lie in the questions posed in the stated case –

(a) Did I err in holding that the father had the necessary *mens rea* for an assault on the child; and

(b) In the event that the answer to question one is in the affirmative, ought I to have held that the essential elements of an alternative offence existed?

Submissions for the appellant

[12] The appellant conceded that there was a sufficiency of evidence to justify the conclusion that the baby was harmed by the appellant in a non-accidental and criminal manner. He emphasised however that the criminality was not and could not be an assault due to the lack of any finding or inference that there was an intention to deliberately harm the baby. The sheriff ought to have made a finding of culpable and reckless conduct, failing which a breach of section 12(1) of the Children and Young Persons (Scotland) Act 1937 ("the 1937 Act"). All three of these offences are contained in Schedule 1 of the Criminal Procedure (Scotland) Act 1995. That being so, referral to the Children's Panel will occur no matter the outcome of this appeal.

[13] The definition of assault is contained in Gordon, *The Criminal Law of Scotland*, 4th Edition, Volume II, (2017) at paragraph 33.29 which states the following:-

> "Assault is a crime of intent and cannot be committed recklessly or negligently. Unintentional infliction of personal injury is in certain circumstances criminal, but it is not assault. … the *mens rea* for assault is simply an intent to cause another bodily harm or an intent to put him in fear of such harm and that use of epithets such as 'evil' is both unnecessary and misleading, as well as being in itself the source of much confusion. It would be preferable for the standard definition of assault, therefore, to simply refer to intention as the *mens rea* of the crime."

[14] Counsel submitted that the sheriff's findings in fact were insufficient to allow her to infer that JH intended to cause bodily harm to AH. It was not possible to categorise what JH did was so obvious that it must have been done with the intention of causing bodily injury. The sheriff found that JH "intended to interfere with the child's person." Without that intention extending to additionally include the intention to cause bodily harm or fear of that, the *mens rea* of assault was not established. The sheriff erred in not recognising that such an intention is an essential element of the offence.

[15] The sheriff erred in her interpretation of Lord Sutherland's opinion in *Lord Advocate's Reference (No 2 of 1992)* 1993 JC 43 at 52H-53C. Counsel considered the sheriff had interpreted Lord Sutherland's opinion to mean that where conduct is deliberate then that was all that was required for the *mens rea* of an assault to be established. That failed to take account of the fact that Lord Sutherland stated that to find an assault proven, it was necessary to establish that the deliberate act was done with the intention of "evil" consequences. Using the definition put forward by Gordon, that means it was necessary for the reporter to prove to the sheriff that JH had an intention to cause bodily harm or fear of that to AH. No such finding in fact was made by the sheriff. That being so, the sheriff had no basis to find assault proven; however, counsel accepted the sheriff could infer non-accidental injury based on the medical evidence of the force required to cause the injuries AH sustained and, in turn, it was open to the sheriff to make a finding of breach of section 12 of the 1937 Act or culpable and reckless conduct.

Submissions for the reporter

[16] The sheriff did not err in finding on the balance of probabilities that the father JH had the requisite *mens rea* for the offence of assault. The issue was subjective intention and the

extent to which a sheriff is required to make a finding of subjective intention. The sheriff was entitled to infer the *mens rea* for the crime of assault by the quality of the act. Where a sheriff is satisfied that an evil act has occurred (i.e. an act which was not committed accidentally or recklessly or negligently) the sheriff need only establish that it was done deliberately in order for the sheriff to be able find an individual had committed an assault: *Lord Advocate's Reference (No 2 of 1992)* 1993 JC 43 at 51B-D; *Kennedy* v *A* 1993 SLT 1134 and *D* v *Irvine* 2005 S.L.T (Sh Ct) 131). That analysis was consistent with the comments of the then Lord Justice Clerk Carloway in *Stewart* v *Nisbet* 2013 SCCR 264 at 267F-268D.

[17] In *S* v *Authority Reporter* 2012 S.L.T (Sh Ct) 89 at 101J-102B, Sheriff Principal Stephen accepted that *Kennedy* v *A* and *D* v *Irvine* remained authority for the proposition that the quality of the *actus reus* may provide a basis from which to infer the *mens rea* for assault. In that case, she found that the quality of the act was such that it was almost obvious that injury would result. The agent for the respondent submitted that, in contrast to the findings made in *S* v *Authority Reporter*, here the sheriff found the appellant to have "intended to interfere with the child's person as the size, number, location and extent of the bruises were eloquent of such interference". The sheriff's use of the word "inflicted" in her findings in fact, reinforced the quality of the *actus reus* found proven by the sheriff, from which the *mens rea* of assault could be inferred.

[18] It is the person's intention to carry out an action itself, rather than their motive in carrying out the action, that is important. Having regard to the medical evidence as to the force which would have been required to inflict the injuries upon AH, the sheriff was entitled to find that *mens rea* was sufficiently established to constitute assault in the absence of evidence of justification or any other exonerating factor.

Decision

[19] This is an unusual appeal. The appellant does not challenge the decision of the sheriff to find that a section 67 ground had been established: he brings under review the sheriff's decision regarding the supporting facts in the statement of grounds. We proceed on the basis that it is competent to do so (*Locality Reporter, Stirling* v *KR* 2019 SC (SAC) 22).

Question one

[20] We answer question one in the affirmative for the following reasons.

[21] Assault involves intention: an intention to cause bodily harm or to put another in fear of bodily harm. The clearest analysis of the crime of assault appears in Gordon, *The Criminal Law of Scotland*, 4th Edition Volume II, 2017 at paragraph 33.29 which is quoted in paragraph 13 above.

[22] That passage is part of an examination of the development of the law regarding the use of the phrase "evil intention". In *Lord Advocate's Reference (No.2 of 1992)* 1993 JC 43 at 51C-D the Lord Justice Clerk stated that "It has often been said that evil intention is of the essence of assault …. But what that means is that assault cannot be committed accidentally or recklessly or negligently." In relation to "evil intent" he said:

> "It is the quality of the act itself, assuming that there was no justification for it, which must be considered in deciding whether it was evil. ….. Having established that the act is an evil one, all that is then required to constitute the crime of assault is that that act was done deliberately and not carelessly, recklessly or negligently."

[23] What the sheriff took from that authority is that if "a person deliberately performs an act which would in itself be criminal then both the *actus reus* and the *mens rea* coexist and a crime has been committed". In other words if the conduct is deliberate then this is all that is required for the *mens rea* to be established.

[24] We agree with the appellant that such a narrow approach ignores another facet of the Lord Justice Clerk's opinion which is that "It is, however, perfectly possible to have an intention to perform particular acts without necessarily intending evil consequences from those acts". In *HM Advocate* v *Harris* 1993 JC 150 at 156C-D, Lord Murray reinforces that proposition - "Not all seizing or pushing is done with intent to injure, which is the *mens rea* necessary for assault".

[25] We consider that the sheriff misconstrued a passage in *Stewart* v *Nisbet* in which the Lord Justice Clerk said:

> "Having established the sequence of events, in order to convict, the sheriff required to be satisfied beyond reasonable doubt that the appellant had acted with 'evil intent'; in the sense of deliberately intending to interfere with the complainer's person, as distinct from doing something accidental or even reckless which affected her person' ….. On any view, the appellant's actions were deliberate and intended so to interfere with the complainer's person."

[26] We do not derive assistance from the cases cited for the respondent. *Kennedy* v *A* 1993 SLT 1134 involved a father striking a baby twice on the bare bottom with the palm of his hand. *D* v *Irvine* 2005 SLT (Sh Ct) 131 involved a child being been subject to severe violent and wilful shaking. *S* v *Authority Reporter* 2012 SLT (Sh Ct) 89 involved a mother throwing her child on to a soft bed from which the child bounced off onto hard furniture. We were urged by the respondent to conclude that these cases provide authority for the proposition that the quality of the *actus reus* provided a basis for the inference which can be drawn to find the *mens rea* for assault.

[27] That submission ignores a fundamental point. In each of these cases and also *Lord Advocate's Reference, Harris* and *Stewart* the actions of the accused and of the parents were readily identifiable. In the present proceedings no mechanism was ascertained. There is a gap in the findings and a corresponding gap in the reasoning. There is no finding that the

appellant struck the baby or threw the baby or shook the baby violently or acted in any violent manner which would have caused the bruises. The appellant accepted blame when offering an explanation – an explanation which was rejected by the sheriff. That does not give rise to an inference to find the *mens rea* for assault. Rejection of an explanation does not prove the opposite is true.

[28] The sheriff made reference to *JS and PS* v *The Authority Reporter for West Lothian*, (Unreported, Inner House, 18 July 2001) as authority for the proposition that it is permissible to infer that an assault had been committed from medical evidence without other evidence pointing to the act. That case does not, however, show that intent to cause bodily harm can be inferred absent evidence of the mechanism of injury.

[29] For an assault to be established, the court must find it proved that there was an intention to cause bodily harm, or fear of such harm. The sheriff did not make findings sufficient to allow any inference that the appellant intended to cause the baby the bruising which she suffered. Her explanation does not justify an inference of intent to deliberately harm the child. There is no reasoning to that effect anywhere in her stated case or original note and it is not open to us to draw such an inference from the facts as found by the sheriff. Without that intention, the *mens rea* of assault is not established.

Question two

[30] We answer question two in the affirmative.

[31] Rule 3.50 of the Act of Sederunt (Child Care and Maintenance Rules) 1997 makes provision for the determination of any other offence established by the facts. The sheriff was invited by the appellant to find an alternative offence of wilful and reckless conduct established rather than assault. In her stated case she observes "…. "if I am wrong that the *mens rea* for assault existed I would have considered either or both of those offences made

out on the facts." The other offence to which she refers is a breach of section 12 of the 1937 Act.

[32] Causing injury to a person by reckless conduct is a distinct offence from assault. The *mens* rea is different for the two offences and reckless conduct may be established where there is no intention to cause bodily harm or fear of bodily harm (*HM Advocate* v *Harris).*

[33] Section 12 (1) of the 1937 Act provides that if any person:-

> "who has attained the age of 16 years and who has parental responsibilities in relation to a child or to a young person under that age or has charge or care of a child or such a young person, wilfully ill-treats, neglects, abandons or exposes him, or causes or procures him to be ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health … that person shall be guilty of an offence."

[34] The essential elements are these –

- the conduct must be deliberate,
- the court must be able to categorise the conduct as cruelty,
- the conduct must be likely to cause unnecessary suffering or injury to health.

Having analysed the findings in fact, we consider that it was open to the sheriff to find that the essential elements under section 12 (1) had been established. In our view, and following both parties' submissions, that is the appropriate offence in these circumstances.

Disposal

[35] We were addressed on the various permutations of disposal. In light of our decision it is open to us under section 163(10) of the 2011 Act to remit the matter back to the sheriff for disposal with a direction that she make an appropriate amendment to the statement of grounds to reflect the commission of an offence under section 12 of the 1937 Act, find the amended statement of grounds established and remit the case to the Principal Reporter.

[36] We so direct.