SHERIFF APPEAL COURT

[2023] SAC (Crim) 3
SAC/2022/384/AP

Sheriff Principal A Y Anwar
Appeal Sheriff T McCartney
Appeal Sheriff B Mohan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL A Y ANWAR

in the appeal by

JACK DICKSON

Appellant

against

PROCURATOR FISCAL, KILMARNOCK

Respondent

Appellant: Ogg, Solicitor Advocate; Douglas Wright, solicitors
Respondent: Cameron, Advocate Depute; Crown Agent

18 April 2023

Introduction

[1] On 27 October 2022, following a trial at Kilmarnock Sheriff Court, the appellant was found guilty of the following charge:

> "(001) on 21st November 2021 at Greenhill Farm, Darvel you JACK DICKSON did assault [the complainer] c/o Police Scotland in that you touched her on the bottom."

[2] The appellant had been charged with an offence in terms of section 3 of the Sexual Offences (Scotland) Act 2009. Section 3(2)(b) of the 2009 Act makes it a criminal offence for a person to intentionally or recklessly touch another person sexually.

[3] The sheriff was not satisfied that the appellant had touched the complainer "sexually". He convicted the accused of the alternative offence of assault at common law in terms of section 50(1)(b) and schedule 3 of the 2009 Act.

[4] The sheriff imposed a compensation order in the sum of £1000. The appellant appeals by stated case against both conviction and sentence.

The circumstances of the offence

[5] The circumstances of the offence can be summarised briefly. The complainer and the accused had attended a Shamanic healing event in November 2021. CS and LM were also in attendance. The appellant and CS had been seated near a sink. The complainer required water from the sink. As she passed by the appellant to obtain water, he extended his hand and touched her bottom.

The trial

[6] A joint minute of agreement had been lodged by the Crown which set out the transcript of the appellant's police interview. In his interview, the appellant admitted that he had sought to slap the complainer on her back. He had been seated when he touched her, and had not been looking when he touched her. He stated that he had touched the complainer as "a joke and a laugh".

[7] Evidence was led from the complainer, CS and LM. The complainer stated that the appellant had touched her leggings on the area around her vagina. The sheriff noted that LM had spoken to being advised by the complainer that the appellant had "touched her bum". CS observed the appellant put out his hand at shoulder level and make contact with

the complainer's "left bum cheek". He had formed the view that the appellant had meant to touch the complainer on her back and had accidentally touched her bottom.

[8] A no case to answer submission was repelled on the basis that there was sufficient evidence upon which to return an alternative verdict of assault at common law.

The stated case

[9] The stated case posed the following questions:

1 Did I err in not sustaining the submission of no case to answer?

2 On the facts stated, was I entitled to convict the appellant of the assault of [the complainer] at common law?

3 Was the disposal of a compensation order of £1,000 excessive?

[10] Question 1 was refused at sift. This appeal is concerned with questions 2 and 3 only.

[11] The stated case contains the following findings in fact:

"10. . . .the appellant deliberately extended his hand and deliberately touched AG on her body.

11. The appellant assaulted [AG] by deliberately touching her on her bottom without her consent.

12. [AG] did not consent to the appellant touching her on any part of her body.

13. The appellant had no reasonable belief of such consent."

[12] In the draft stated case, finding in fact 11 read "[The appellant] touched her on her bottom". The respondent had proposed an adjustment to finding in fact 11 which was accepted by both the sheriff and the agent for the appellant, so that it now reads "The appellant assaulted [AG] by deliberately touching her on her bottom without her consent." There is no challenge to finding in fact 11 in the stated case. Counsel for the appellant was

invited to address the court on this issue having regard to the opinion of the High Court of Justiciary in *PF, Edinburgh* v *Aziz* [2022] HCJAC 46.

Submissions

[13] On behalf of the appellant, it was submitted that the absence of a challenge to finding in fact 11 was not fatal to the appeal; the High Court of Justiciary had in fact considered the merits of the appeal in *PF, Edinburgh* v *Aziz*, and had looked beyond the findings in fact by examining the evidence, notwithstanding the absence of a properly directed question in the stated case. This court should, in the interest of justice, do likewise.

[14] Referring to the opinion lodged on behalf of the appellant in support of the application to the second sift, counsel submitted that the sheriff had erred in finding the *mens rea* of assault established. The appellant had intended to touch the complainer's back. He had inadvertently missed and touched her bottom. The appellant had accidentally, recklessly or negligently made contact with the complainer's bottom. The sheriff had not explained his conclusion that the appellant had acted with evil intent (*Lord Advocate's Reference (No.2 of 1992)* 1993 JC 43). The sheriff noted at para [9] of the stated case that the complainer gave evidence that she had felt the appellant pinch her on her perineum. The only corroboration of the incident came from the evidence of CS. The sheriff recorded at para [19] of the stated case that CS "observed the appellant put his hand out at shoulder level and make contact with [the complainer's] left bum cheek". CS had spoken to the complainer after the incident and told her that the appellant had meant to pat her on the back and that in his opinion, the appellant had accidentally touched her on the bottom. The sheriff had concluded that the appellant deliberately touched the complainer, however this

finding was inconsistent with CS's evidence and the sheriff has failed to explain how he had resolved that inconsistency.

[15] On sentencing, the sheriff had failed to attach sufficient weight to the appellant's lack of previous convictions and to his clearly expressed remorse. The offence was at the lower end of offences of assaults in terms of gravity and culpability. The sheriff had attached too much weight to the level of distress suffered by the complainer.

[16] On behalf of the respondent, it was submitted that the stated case procedure was well established and long standing. In the present case, the appeal fell to be refused as the appellant had not challenged finding in fact 11.

[17] *Esto*, the court could deal with the merits of the appeal, it was not entirely clear why the sheriff had not convicted the appellant of the original charge. On the findings in fact he would have been entitled to do so. The sheriff had explained in para [36] that not every intentional touching of another person will amount to an assault at common law but had not then explained why he had concluded that the appellant had acted with "evil intent". While it was conceded that para [36] of the stated case was not consistent with finding in fact 11, and that the sheriff had not provided a logical account of his reasoning, nevertheless, the sheriff had been entitled on the finding in fact, as adjusted, to convict the appellant of the common law offence of assault.

Decision

[18] Section 176(1)(b) of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") provides that an application for a stated case shall:

> "contain a full statement of all the matters which the appellant desires to bring under review and, where the appeal is also against sentence or disposal or order, the ground of appeal against that sentence or disposal or order".

[19] A deficient application may in turn lead to a stated case that does not properly focus the issues an appellant wishes to have determined by the appellate court. As observed by the Lord Justice General (Hope) in *Crowe, Petitioner* 1994 SCCR 784, "what is required is that the matter to be brought under review should be identified with sufficient specification to enable a case to be stated".

[20] Accordingly, an application for a stated case should allow the sheriff to pose questions of law which reflect those matters being challenged. An appellant who wishes to challenge a finding in fact on the basis that the sheriff had no material before him entitling him to make that finding, should, in the absence of a properly directed question in the draft stated case, propose a question of law specifically raising that issue. The requirement for properly directed questions in a stated case is not a mere procedural technicality. Specific and focussed questions both identify the issues for the appellate court and inform the content of the stated case, affording the sheriff the opportunity to set out and explain his or her findings in fact, where these are challenged, and his or her decision on any question of law. Inadequate questions will present difficulties at appeal, as the solicitor advocate for the appellant acknowledged in the present case.

[21] The importance of properly directed questions was emphasised by the court in *Prentice* v *Skeen* 1977 SLT (notes) 21 and more recently in *PF, Edinburgh* v *Aziz.*

[22] *PF, Edinburgh* v *Aziz* concerned a private hire taxi driver who had offered his services in exchange for sexual favours. The Lord Justice General noted the absence of a challenge to a finding in fact that the respondent, intentionally and for the purpose of obtaining immediate and deferred sexual gratification, directed a sexual communication to the complainers without any reasonable belief that either of them consented to his approach.

No question had been posed as to whether the sheriff had been entitled to make that finding in fact.

[23] The Lord Justice General observed (at para [9] of his opinion) that the absence of a question directed at the finding in fact:

> "ought to have been fatal to the appeal to the Sheriff Appeal Court. The SAC were not entitled, in the absence of a properly directed question, to go behind the findings in fact and look directly at the evidence. The appeal from the sheriff ought to have been refused on that basis".

[24] Counsel for the appellant noted that notwithstanding these observations, in *PF, Edinburgh* v *Aziz,* the court had gone on to pose and answer the question of whether the sheriff had been entitled to make the finding in fact referred to. However, it is important to note the circumstances in which the court did so. The court considered the merits of the respondent's appeal as:

> "the sheriff, having considered the application for a stated case, might have framed an appropriate question relating to the findings in fact given the nature of the respondent's complaint." (at para [9]).

[25] In the present case, the primary focus of the application for a stated case had been the sheriff's decision to refuse a submission of no case to answer. Thereafter, in a few short paragraphs, it is briefly stated that the sheriff had erred in finding the "necessary *mens rea* for intention or recklessness had been established" and had erred in finding a conjunction of testimony as to the *actus reus;* the complainer had spoken to a different assault to that spoken to by CS and LM. We note that the alleged lack of conjunction of testimony as to the *actus reus* was raised by the appellant's agent during his submission of no case to answer. As we have already noted, the appeal against the sheriff's decision on that submission did not pass the sift.

[26] The sheriff prepared the draft stated case having regard to the terms of the application. The agent for the appellant did not propose any adjustments. In particular, he did not seek to adjust the findings in fact nor the questions posed. He did not propose any additional findings in fact nor any deletions. At a hearing on the adjustments, he accepted the adjustments proposed by the respondent, including, the adjustments to finding in fact 11. Unlike the position in *PF, Edinburgh* v *Aziz*, standing the terms of the application for a stated case, the absence of any challenge to the findings in fact and the consent of the appellant's agent to the proposed adjustment, this court is unable to conclude that the sheriff might have framed an appropriate question relating to the findings in fact, and in particular to finding in fact 11.

[27] On the issue of conviction, the only question posed for this court is: "On the facts stated, was I entitled to convict the appellant of the assault of AG at common law?" That question is predicated on an understanding that the facts stated are not in dispute. In terms of findings in fact 10 and 11, the sheriff found that the appellant had deliberately touched the complainer on her body, and in particular on her bottom. Those findings contain the necessary elements of both the *mens rea* and the *actus reus* of assault, which entitled the sheriff to convict. Question 2 falls to be answered in the affirmative and the appeal against conviction refused.

[28] Even if we were prepared to consider the question which ought to have been posed in the stated case to allow the appellant's challenge to conviction to be considered by this court, namely, "On the evidence, was I entitled to make findings in fact 10 and 11?", the appeal against conviction would fall to be refused.

[29] The sheriff accepted the testimony of the witnesses about what happened. CS spoke to having formed the opinion that the appellant had "meant to pat [the complainer] on the

back", but had accidentally touched her bottom. The clear inference to be drawn from this evidence is that the appellant intended to make contact with the appellant. In his police interview, the appellant admitted that he "went to slap [the complainer] on the back". Again, his actions were deliberate. While evil intention is essential for proof of assault, as the Lord Justice Clerk (Ross) explained in *Lord Advocate's Reference (No 2 of 1992),* 1993 JC 43 (at page 48) "what this means is that assault cannot be committed accidentally or recklessly or negligently". Here, the appellant's actions were deliberate; he intended to make contact with the complainer's body. It matters not on which part of her body he had intended to made contact. That being so, he had the necessary intent for his actions to amount to assault.

[30] On the absence of a conjunction of testimony in relation to the *actus reus,* as we have observed at para [25] above, this issue was raised as part of the appellant's submission of no case to answer, the appeal against which was refused at sift. As we heard submissions on this matter, we will address this very briefly. The sheriff noted that the complainer spoke to being touched inappropriately by the appellant. She had been touched on her leggings on the "area around her vagina - on her perineum to be exact". She had felt the appellant pinch her on that part of her body. When she described this to LM (some 50 minutes after the incident), she referred to the appellant having "touched my bum" and she demonstrated a hand gesture towards her bottom. CS had observed the appellant make contact with the complainer's "left bum cheek" and "make contact with [the complainer]'s bottom". We do not consider the discrepancies or inconsistencies between these accounts to be such as to conclude that the complainer's account could not be corroborated. Both the complainer and CS spoke to the appellant having made contact in the same general area of the appellant's body. The complainer's statement to LM shortly after the incident was in similar terms.

[31] Turning to the question of sentencing, the sheriff took into account the complainer's distress and in particular the difficulty she experienced in giving evidence to the court, when assessing the amount of compensation to be paid. He took into account the appellant's financial circumstances and the seriousness of the offence.

[32] We are not persuaded that the sheriff ought to have had regard to the appellant's status as a first offender when determining the sum to be paid. In making a decision not to fine the appellant or impose any other penalty, the sheriff had taken account of the appellant's lack of previous convictions (*Robertson* v *Lees* 1992 SCCR 545). The purpose of a compensation order is restitution. However, we consider the appellant's submission that the sheriff had erred by taking account of the effect upon the complainer of giving evidence, well founded. Section 49 of the Criminal Proceedings etc (Reform)(Scotland) Act 2007 amended section 249 of the 1995 Act by introducing a compensation order for "alarm or distress caused directly". This can be contrasted with the language used in section 249(1)(a) which refers to "personal injury, loss or damage caused directly or indirectly". The observations of Lord Justice General (Hope) in *Robertson* v *Lees (*in relation to compensation orders imposed under section 58 of the Criminal Justice (Scotland) Act 1980) remain relevant; the effects on the complainer of being called on to give evidence in the performance of her public duty so that the charge might be proved against the accused do not fall within the scope of section 249(1)(b).

[33] We consider a compensation order of £1,000 to be excessive. In light of the sheriff's assessment of the distress caused to the complainer by the incident, we consider a compensation order of £500 to be appropriate.

[34] Accordingly, we shall answer both questions two and three in the stated case in the affirmative, quash the compensation order made by the sheriff and impose a compensation order in the sum of £500.