SHERIFF APPEAL COURT

[2024] SAC (Crim) 8
SAC/2024/000094/AP

Sheriff Principal S F Murphy KC
Appeal Sheriff C M Shead
Appeal Sheriff P A Hughes

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL S F MURPHY KC

in appeal by

by

STUART MITCHELL KENNEDY

Appellant

against

PROCURATOR FISCAL, ABERDEEN

Respondent

Appellant: Adams, Advocate; John Pryde & Co (for Levy & McRae, Glasgow)
Respondent: Ewing KC, AD; Crown Agent

20 August 2024

[1] The appellant was convicted on 18 December 2023 after trial at Aberdeen Sheriff Court of two contraventions of section 3 of the Sexual Offences (Scotland) Act 2009 which were in the following terms:

> "(001) on 14 May 2022 at The Cellar, 31 Rosemount Viaduct, Aberdeen you STUART MITCHELL KENNEDY did sexually assault [NL], c/o Police Service of Scotland in that you did sit on her lap and repeatedly attempt to embrace her on the body;
> CONTRARY to Section 3 of the Sexual Offences (Scotland) Act 2009; and

> (002) on 14 May 2022 at The Cellar, 31 Rosemount Viaduct, Aberdeen you STUART MITCHELL KENNEDY did sexually assault [KM], c/o Police Service of Scotland in that you did repeatedly rub your body against her body; CONTRARY to Section 3 of the Sexual Offences (Scotland) Act 2009."

At a subsequent sentence hearing on 29 January 2024 the sheriff imposed a community payback order with a supervision requirement for 12 months. The sentence is not subject to appeal.

[2] A woman organised her own hen party within licensed premises in Aberdeen. She hired the appellant who operated a business which traded as "Alpha Male Strippers" to appear at the event. She told only a few guests that a male stripper had been engaged to attend and neither of the complainers was made aware. The appellant began his performance at about 10.30pm, dressed in a costume resembling that of a fire fighter. After delivering some remarks about the organiser which were designed to be amusing, he removed most of his clothing except for a small piece of cloth about the size of a face towel which covered his private parts. He then stood behind the organiser and pretended to pat her down for "flammable substances" by moving his hands up and down in the area of her breasts over her clothing before simulating sexual acts with her. She found the performance amusing and not offensive. Thereafter the appellant interacted in broadly similar ways with other female members of the audience. At one point he approached the complainer KM who moved behind a table to keep away from him. He stretched his arms out and moved behind the table. KM said, "No" and turned away from him, to crouch down with her arms across her chest. The appellant approached her from behind, placed his arms around her and repeatedly thrust his body against her back and buttocks for about 5 seconds. Next he turned towards NL who was sitting at the table which KM had moved behind. She held her arms and legs out to keep him away but he stepped over her legs. She picked up a glass of

water from the table and indicated that she would throw the water over him. The appellant took the glass from her, drank some of the water and sat on her lap, facing her. He thrust his hips back and forth towards her, simulating sexual intercourse, before she pushed him off and he moved away. All of the activity with NL lasted less than a minute. The sheriff found that neither complainer had consented to what occurred. The defence position was that the contact which had taken place was not "sexual" for the purposes of section 3 when read along with section 60 of the 2009 Act.

Grounds of appeal

[3] The convictions have been appealed on the basis that the sheriff had misdirected himself in law in relation to what amounted to sexual touching for the purposes of section 3(2)(b) or (c) of the 2009 Act read in conjunction with section 60(2) of the same Act. The appellant's actions had taken place in the context of a lawful form of sexualised entertainment. In all the circumstances a reasonable person would not have concluded that the appellant's physical contact with the complainers was "sexual" for the purposes of section 3 of the 2009 Act.

Submissions for the appellant

[4] It was accepted that the appellant had intentionally touched both complainers in the manner libelled but only in the context of a lawful performance of sexualised entertainment. The sheriff had focussed on the lack of consent of the complainer in relation to each charge but the defence had not argued at trial that either complainer had given her consent to being touched by the appellant. Section 3 required that an accused sexually touch a complainer intentionally or recklessly for the crime to be committed. The defence position was that the

contact which had taken place was not "sexual" for the purposes of section 3 when read along with section 60 of the 2009 Act and the appellant's state of mind was a relevant circumstance. The sheriff had found that the appellant had touched the complainers as part of a performance which he had intended to be funny and entertaining. Reference was made to *Lockhart* v *Stephen* 1987 SCCR 642 and to section 45A of the Civic Government (Scotland) Act 1982. The appellant had not acted to obtain sexual gratification.

[5] The sheriff had erred and the conviction should be quashed.

Submissions for the respondent

[6] The appellant's performance had an explicitly sexual theme and tone and his interaction with the audience was sexualised in nature. Both complainers had indicated that they did not want to interact with the appellant. Findings in Fact 29 and 30 - that neither complainer had consented to being touched by the appellant and that he had not held a reasonable belief that they did - were not challenged in the appeal. The test on whether the touching was sexual was an objective one, the evidence for which was a matter for the sheriff: *Ferguson* v *HMA* 2022 SCCR 26. In the present case there was ample evidence to support the view reached by the sheriff. The purpose of section 3 of the 2009 Act was to protect the sexual autonomy of an individual so that the issue of the appellant's sexual gratification was irrelevant. The motivation underlying a deliberate act was irrelevant. The real issue was that the appellant knew that the complainers were not consenting yet carried on regardless. The sheriff had made no error of law and the appeal should be refused.

Decision

[7] The parts of section 3 of the Sexual Offences Act 2009 which are relevant to this case are in the following terms:

> "1) If a person ('A') –
>
> (a) Without another person ('B') consenting, and
> (b) Without any reasonable belief that B consents,
> does any of the things mentioned in subsection (2), then A commits an offence, to be known as the offence of sexual assault.
>
> 2) Those things are, that A-
> …
> (b) intentionally or recklessly touches B sexually,
> (c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact with B (whether bodily contact or contact by means of an implement and whether or not through clothing) with B"

Section 60(2) says the following:

> "For the purposes of this Act-
>
> (a) penetration, touching or any other activity,
> …
> is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual."

Section 45A of the Civic Government (Scotland) Act 1982 contains the following:

> "45A Licensing of sexual entertainment venues: interpretation
>
> (1) This section applies for the purposes of the interpretation of section 45B and Schedule 2 (as modified for the purposes of section 45B).
> (2) 'Sexual entertainment venue' means any premises at which sexual entertainment is provided before a live audience for (or with a view to) the financial gain of the organiser.
> (3) For the purposes of that definition-
> ...
> 'sexual entertainment' means –
>
> (a) Any live performance, or
> (b) Any live display of nudity,
> which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually

> stimulating any member of the audience (whether by verbal or other means)."

[8] The critical findings in fact are the following:

> "26. The appellant's physical interactions with both [KM] and [NL] were part of his performance, which he intended to be funny and entertaining.
>
> 27. The appellant intentionally touched and had physical contact with both [KM} and [NL] in the manner described in the preceding findings.
>
> 28. A reasonable person would, in all the circumstances of the case, have considered the appellant's touching of, and physical contact with, both [KM] and [NL] to be sexual.
>
> 29. [KM] did not consent to the appellant touching or having physical contact with her in the circumstances described in the previous findings. Nor did the appellant have any reasonable belief that she did consent.
>
> 30. [NL] did not consent to the appellant touching or having physical contact with her in the circumstances described in the previous findings. Nor did the appellant have any reasonable belief that she did consent."

[9] The defence did not at any point suggest that the appellant had held a reasonable belief that either complainer had consented so that findings in fact 29 and 30 were not challenged in this appeal. The core issue was whether the sheriff had been correct to find that a reasonable person would have considered the appellant's interaction with each complainer to be sexual.

[10] We consider that the terms of section 45A of the Civic Government (Scotland) Act 1982 are of no assistance in determining this question, which relates to the interpretation of section 60(2) of the 2009 Act. Section 45A expressly states that it applies in relation to the interpretation of section 45B and Schedule 2 of the 1982 Act, all of which is concerned with the licensing of premises for hosting sexual entertainment which must reasonably be presumed to be provided solely or principally for the purpose of sexually stimulating members of the audience. Such activity is sexual in terms of its own definition. The

2009 Act has its own definition of what is "sexual" which is a very different test, as set out above.

[11] We also found *Lockhart* v *Stephen* to be of no assistance because it was concerned with the offence of shameless indecency. The case, a first instance decision by the sheriff at Aberdeen, predates *Webster* v *Dominick* 2005 JC 65 which substantially reconsidered that offence in that the High Court decided that the law did not recognise the crime of shameless indecency. While the case considered public performances of sexualised acts, the context was very different: there was no suggestion of any assault and the sheriff specifically found that the audiences had enjoyed the performances. The question in that case had been whether the public performances of sexualised acts amounted to an offence of shameless indecency in the light of developing social attitudes.

[12] In terms of section 60(2) of the 2009 Act the interplay between the appellant and each of the complainers in this case would be sexual for the purposes of section 3 of the Act if a reasonable person would consider it to be so in all the circumstances. The sheriff set out his reasoning in relation to the circumstances within paragraphs 49-51 of his stated case before concluding, at para [52]:

> "Applying the objective test in Section 60 of the 2009 Act, it was clear to me that a reasonable person would, in all the circumstances of the case, have considered the appellant's physical contact with each of the complainers to have been sexual in nature. That was clear from the evidence of both complainers and was supported by the evidence given by the appellants and [the organiser] about the general nature and sexual theme and tone of his performance, even though it was also intended to be funny and entertaining, and by the evidence that he was virtually naked at the time of his physical contact with the complainers."

The relevant evidence of the physical contact between the appellant and each of the complainers was not in dispute and is summarised within para [2] above. Neither complainer had consented to it and it was not contended that the appellant had held any

reasonable belief that they had. The sheriff concluded, at para [54] of the stated case, that all of the components of an offence under section 3 of the 2009 Act were proved beyond reasonable doubt.

[13] In our view that conclusion was one which the sheriff was entitled to reach. In relation to the activity carried out in the course of the appellant's act, it is important to note that in relation to each complainer there was actual physical contact rather than any simulated touching or gesturing. In relation to KM he had approached the complainer from behind while scantily clad, placing his arms around her and had thrust his body repeatedly against her back and buttocks. In relation to NL he had sat on her lap, facing towards her, and had thrust his hips back and forth against her repeatedly to simulate a sexual act. In each case the movements made were sexual in nature and the fact that he had done so only for a short period of time in each case is of no moment; nor is the consideration that he had made other gestures of a sexual nature towards other attendees, including the organiser, who were consenting. In these circumstances we consider that the sheriff was entitled to conclude that the touching was sexual by application of the test contained within section 60(2) of the 2009 Act. In *Ferguson* v *HMA* the court, in criticising the decision in the earlier case of *SD* v *Dunn* 2015 SCCR 449, held that the assessment of the evidence was a matter for the sheriff. *SD* was a case in which the appellate court had held that the appellant's behaviour in grabbing a woman's buttocks had been "drink-fuelled" rather than sexual. In *Ferguson* the court went on to state (at paragraph 22):

> "In every case, if all of the other requirements of section 3 are satisfied, the question is whether in all the circumstances a reasonable person would consider the relevant activity to be sexual. That is the position whether or not the perpetrator was intoxicated."

In the present appeal the position is the same whether or not the appellant was engaged in a form of entertainment.

[14] The appellant's position that this was a form of sexualised entertainment is not a defence to either charge in our view. Sexualised entertainment is sexual in nature by definition. The acts described by the complainers were carried out deliberately in each case and the motivation behind these deliberate acts is not a relevant consideration in relation to the question of dole or mens rea. If the constituent elements of a contravention of section 3 of the 2009 Act are made out, the accused's motivation is irrelevant.

[15] The case of *Wightman* v *HMA* 2017 SCCR 437 considered the test in section 60(2) of the 2009 Act in the context of offences under section 30 of the Act (engaging in sexual activity with an older child). Essentially the court decided that behaviour might not be indecent but could be sexual in terms of section 60(2) if one person touched another for the purposes of obtaining sexual gratification (per the opinion of the court delivered by Lord Drummond Young at paragraphs 13-15). There is no suggestion in the present case that the appellant acted in order to obtain personal sexual gratification. The evidence indicated that he was registered with Equity and had had operated a business since 2006 which provided sexualised entertainment and which carried public liability insurance. His purpose was to deliver the type of entertainment which he had been hired to provide and the issue in the case related to the nature of his performance rather than any question of his seeking to obtain sexual gratification on his own part. If his performance had not involved actual physical contact with members of his audience the position could have been very different.

[16] We agree with the Crown's submission that the provisions of the 2009 Act are designed to preserve the sexual autonomy of a complainer. The statute emphasises the

centrality of consent as marking the boundary between criminal and non-criminal sexual conduct and it is the non-consensual nature of the appellant's behaviour in a sexual context which renders his conduct criminal in this case, and, as we have indicated, we agree with the sheriff's assessment of the circumstances in this case in relation to the sexual nature of the appellant's behaviour.

[17] It follows that we shall answer Questions 1, 2 and 3 in the stated case in the affirmative and refuse this appeal.