SHERIFF APPEAL COURT

[2024] SAC (Crim) 6
SAC/2024/000121/AP

Sheriff Principal A Y Anwar
Appeal Sheriff A M Cubie
Appeal Sheriff F Tait

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL A Y ANWAR

in

Bill of Suspension

by

ANDREW GIBLIN

Complainer

against

PROCURATOR FISCAL, GLASGOW

Respondent

Complainer: Loosemore; The Robert Kerr Partnership Limited, Paisley
Respondent: Gill KC, AD; Crown Agent

15 May 2024

Introduction

[1] On 31 January 2024 at Glasgow Sheriff Court, the complainer pled guilty to the following charges:

> "(001) you ANDREW GIBLIN being an accused person and having been granted bail on 15 November 2023 at Paisley Sheriff Court in terms of the Criminal Procedure (Scotland) Act 1995 and being subject to the condition

> inter alia that you do not approach or contact, nor attempt to approach or contact [WM] in any way, did on various occasions between 27 and 28 December 2023 at [address], fail without reasonable excuse to comply with said condition in respect that you did repeatedly contact said [WM], your partner or ex-partner, c/o Police Service of Scotland, in that you did send text messages to him and make telephone calls to him; CONTRARY to the Criminal Procedure (Scotland) Act 1995, Section 27(1)(b) and it will be proved in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 that the aforesaid offence was aggravated by involving abuse of your partner or ex-partner
>
> (002) on various occasions between 27 and 28 December 2023 at [address], you ANDREW GIBLIN did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did act in an abusive manner towards [WM], your partner or ex-partner, c/o Police Service of Scotland, did make telephone calls to him, leave voicemail messages for him and send electronic messages to him which were of an offensive nature, and did shout, swear and utter offensive remarks and threats of violence towards him; CONTRARY to Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 you ANDREW GIBLIN did commit this offence while on bail, having been granted bail on 15 November 2023 at Paisley Sheriff Court and it will be proved in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 that the aforesaid offence was aggravated by involving abuse of your partner or ex-partner".

[2] The complainer was unrepresented. The presiding sheriff adjourned for the preparation of a criminal justice social work report and a restriction of liberty assessment.

[3] On 28 February 2024, having considered those reports, the circumstances of the offence and any mitigation offered by the complainer, the presiding summary sheriff, who had no previous involvement in these proceedings, sentenced the complainer to a fine of £600 on each charge discounted from £900 to take account of the timing of the plea. The sheriff imposed a non-harassment order requiring the complainer to refrain from contacting WM.

[4] The complainer seeks suspension of his conviction and sentence on the basis that his plea was tendered under error and misconception and in circumstances which were prejudicial. He seeks to withdraw his plea.

Submissions for the complainer

[5] The complainer avers that his solicitor withdrew from acting without appearing before the court on 31 January because of legal aid issues. It was submitted that he was unable to afford to pay for legal representation privately, that he felt under exceptional pressure, had been unsure of proceedings and had pled guilty in that state of mind without legal advice.

[6] The complainer was also unrepresented on 28 February when he was sentenced. At that time, he felt unable to fully explain what had happened previously to the court and unable to express himself. It was submitted that the complainer did not understand what he had pled guilty to. He did not accept that he had made threats of violence or that he had shouted. He did not expect the case to conclude as it did.

[7] The complainer had a range of medical conditions which were related to his mental health. Reliance was placed upon a "note of his medical situation from his medical practitioner". In light of his mental health needs, it had been prejudicial for him to appear without the assistance of a solicitor. The test in *Healy* v *HM Advocate* 1990 SCCR 110 was satisfied.

Submissions for the respondent

[8] The law in relation to the test to be applied where a convicted person seeks to withdraw a plea of guilty is settled (*Reedie* v *HM Advocate* 2005 SLT 742; *Aitken* v *Reith* 1997 SLT 2; *Healy* v *HM Advocate* (*supra*); *Morrison* v *PF, Dundee*, unreported, [2013] HCJAC XJ57/13).

[9] The sentencing sheriff's report explained in detail the steps the sheriff had taken to ensure that the complainer fully understood the nature and effect of proceedings and the

offences to which he had pled guilty. The sheriff had access to a criminal justice social work report which referred to discussions which had taken place between the author and the complainer, out with the court environment and provided a further basis upon which the sheriff could be satisfied as to the soundness of the complainer's plea. There was no information before the court to justify the conclusion that the complainer was under error or misconception or that the circumstances in which the plea had been tendered had been prejudicial.

Decision

[10] As the Lord Justice Clerk (Ross) observed in *Healy* v *HM Advocate* (*supra*) at p118, the need for finality in litigation is a recognised principle of the law and it would not be in the interests of justice if individuals after they were sentenced were permitted "lightly or easily" to withdraw pleas of guilty which had been tendered merely by asserting that there had never been any real willingness on their part to tender the plea.

[11] The test adopted in *Healy* and recently repeated in *McGarry* v *HM Advocate* 2022 JC 148 is a high one and, importantly, will only be made out where there are "exceptional circumstances" which allow the court to conclude that a plea of guilty had been tendered under some real error or misconception or which were clearly and demonstrably prejudicial to the appellant such that a miscarriage of justice has occurred.

[12] That high test has not been met in this case.

[13] It is unfortunate that on 31 January 2024 the complainer, who had expected to be represented by a solicitor, found that he was not. We do not have the benefit of a note from the sheriff presiding over that diet. We accept that the complainer tendered his plea without legal advice and that he may have found the proceedings somewhat overwhelming. There

is, however, no suggestion that the presiding sheriff did not read the charges to him and ensure that the complainer understood them before taking his plea. There is also no suggestion that the complainer sought and was refused further time to obtain representation or that he advised the court of any relevant medical history.

[14] We have the benefit of a full and detailed report from the summary sheriff who presided over the sentencing diet on 28 February. The sheriff had read the contents of the criminal justice social work report ("CJSWR"). In particular, he noted that the complainer had explained his history of mental health conditions to the author and had provided information on his current medication.

[15] The sheriff had been aware of the complainer's potential vulnerability. He spoke to the complainer about obtaining representation. The complainer explained that he wished to represent himself. The sheriff carefully read over both charges in detail as he wished to make sure the complainer understood the allegations. He did not require to do so, the plea already having been tendered; however, he took a cautious and considered approach effectively treating the diet as a pleading diet. The sheriff notes that the complainer listened and engaged with him. He further describes their interaction as follows:

> "I was satisfied that [the complainer] understood and he confirmed he wished to plead guilty to both charges. I felt he made the pleas freely and without any pressure. He was articulate and seemed, to me, to understand what was happening . . . I did not get the impression that he was under pressure or made the pleas for any reason other than he genuinely accepted he was guilty as libelled."

[16] The complainer asserts that there were elements of charge 2 which he does not accept, namely that he made threats or that he shouted. Two observations require to be made in relation to this. First, a plea of guilty constitutes a full admission of the libel in all its particulars (*Healy* v *HM Advocate)*. Second, the sheriff explains in his report that the Crown narrative of the circumstances reflected the summary of evidence, a copy of which

had been provided to the complainer and was made available to this court. We note that the summary of evidence refers to text message exchanges between the complainer and WM which are capable of being described as threatening. We note that the author of the CJSWR notes that the complainer stated that "he may have shouted potentially offensive remarks" during telephone calls with WM.

[17] If there were any doubt that the complainer understood the charges he had pled guilty to and the consequences of so doing, it is removed upon consideration of his explanation of the circumstances of the offence to both the sheriff and to the criminal justice social worker. The sheriff reports that the complainer explained that he had acted as he did because WM had made allegations against his sister; he accepted that contacting WM was "stupid and wrong". When he was advised by the sheriff that a non-harassment order was to be imposed, he responded that "he did not care" as he had no intention of ever contacting WM again.

[18] It is clear from the contents of the CJSWR that the complainer was able to engage fully with the author, understood the charges and the various sentencing options which were explored with him during interview. He provided explanations for his offending conduct which mirrored those provided to the sheriff.

[19] We are satisfied that the complainer was able to fully explain the circumstances of the offence and was able to express himself. While we accept that appearing in court without the assistance of a solicitor can be a daunting experience for many, there is no basis upon which to conclude that the complainer felt pressured or unable to fully participate in the process, notwithstanding his unfamiliarity with the law or procedure. The sheriff had quite properly been at pains to put him at ease, to again confirm his pleas and the complainer had availed himself of the opportunities provided by the sheriff to

explain his position. It cannot be concluded that the complainer tendered his plea without understanding the consequences of doing so, still less, that there are exceptional circumstances which disclose that he did so under some real error or misconception or which were clearly and demonstrably prejudicial.

[20] We should add that we are unable to place any meaningful weight upon the complainer's medical history. The court was provided with a printed copy of the complainer's medical record which simply listed a summary of medical conditions or interventions, the last of which was recorded as being in 2014. We were not provided with any report from a medical practitioner to suggest that the complainer's conditions might have impaired his capacity or cognitive abilities at either the pleading diet or the subsequent sentencing diet. The complainer reported to the criminal justice social worker that his medication was assisting him. We note that since his last admission to hospital in 2014, the complainer has undertaken a 2 year period of study and is currently in employment. We do not accept the proposition that the complainer's medical history, as presented to this court, necessitated legal representation prior to the tendering of a plea.

[21] Accordingly, we shall refuse to pass the Bill.