SHERIFF APPEAL COURT

[2024] SAC (Crim) 7
SAC/2024/000046/AP

Sheriff Principal A Y Anwar
Sheriff Principal G A Wade KC
Appeal Sheriff P Mann

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL A Y ANWAR

in

APPEAL AGAINST SENTENCE

by

GRAHAM KANE

Appellant

against

PROCURATOR FISCAL, KILMARNOCK

Respondent

Appellant: A. Ogg (sol ad); Paterson Bell Solicitors (for McCusker, McElroy & Gallanagh, Paisley)
Respondent: J. Keenan KC (sol ad), AD; Crown Agent

6 June 2024

Introduction

[1] On 20 December 2024 at Kilmarnock Justice of the Peace Court, the appellant's solicitor tendered a plea of guilty on behalf of the appellant to the following charge:

> "(001) on 4th September 2023 at [address] you GRAHAM KANE did cause to be sent, by means of a public electronic communications network messages and comments on social media platform Facebook to Ardrossan Herald Facebook account Facebook, that were grossly offensive or of an indecent, obscene or menacing character, in that you did post threats and disablist content and/or media;

> CONTRARY to the Communications Act 2003, Section 127(1)(b) and it will be proved in terms of Section 1 of the Offences (Aggravation by Prejudice)(Scotland) Act 2009 that the aforesaid offence was aggravated by prejudice relating to disability.

[2] The solicitor sought an absolute discharge. The Justice refused and proceeded to record the conviction. Sentence was deferred to 17 January 2024 for the appellant to appear personally. At that diet, the appellant's solicitor again sought an absolute discharge. The Justice again refused. A fine of £300 was imposed, discounted to £200 having regard to the timing of the plea.

[3] The appellant appeals against that sentence. The issues which arise in this appeal are (i) the correct mode of appeal in such circumstances; and (ii) whether the Justice erred in refusing to grant an absolute discharge.

The facts and proceedings before the Justice

[4] On 4 September 2023, the accused posted comments online in response to an article about a Christmas shop opening in West Kilbride. The post included two pictures of an offensive nature, a comment that the shop should be burned to the ground and an abusive reference to an individual with Down's Syndrome. The comments were repeated by the appellant on the same platform a few hours later.

[5] In mitigation, the solicitor acting for the appellant explained that the appellant had been acting under the influence of alcohol. The comments were described as "dark humour" with the appellant having "misread the room". The appellant had no previous convictions. A conviction could affect the appellant's employment. References were provided to vouch the appellant's good character.

[6] The sifting sheriff, while allowing leave to appeal, noted an absolute discharge can only be granted where the court does not proceed to conviction: section 246(3) of the Criminal Procedure (Scotland) Act 1995. As the Justice had proceeded to sentence the appellant, a further question which arose was whether the appellant could in fact challenge his fine in an appeal against sentence or whether he ought to have appealed by way of stated case.

Submissions for the appellant

[7] The procedure to be adopted in challenging the failure to grant an absolute discharge was not clear. In *Kheda* v *Lees* 1995 SCCR 63, the appellant had made an appeal against sentence; in the course of the appeal, the appellant sought leave at the bar to appeal against conviction as well which was allowed. The appellant in *McLay* v *Ruxton* 1996 GWD 23-1311 had done likewise. The primary position of the appellant was that a stated case was not required; the grounds of appeal would make clear that the challenge was only against sentence. In the course of the sift by an appeal sheriff, it would be possible for them to refer the matter to a bench of three. If an appeal by stated case was required it would put defender's solicitors in a difficult position in that they would be forced to challenge the conviction, even though they only wish to challenge sentence. Nonetheless, if the court came to the view that an appeal by stated case was required to challenge conviction, then the appellant sought leave to appeal against conviction at the bar, under reference to *Kheda* and *McLay*.

[8] On the merits of the sentence, it was accepted that only in exceptional circumstances would an absolute discharge be granted. The appellant was employed as a mental health nurse. He had previously worked in the army. Prior to this offence, he had no criminal

record. His current employer has, as yet, taken no action as a result of his conviction. The Nursing and Midwifery Council and, separately, Disclosure Scotland, were carrying out investigations; however, the appellant was not able to anticipate what action, if any, those professional bodies would take if the appellant did not receive an absolute discharge.

[9] In the event the court was not prepared to consider an absolute discharge, the appellant sought to be admonished.

Submissions for the Crown

[10] Senior counsel for the Crown submitted that an appeal seeking to quash a conviction and inviting the court to grant an absolute discharge required to proceed by way of stated case under section 176 of the Criminal Procedure (Scotland) Act 1995, not an appeal against sentence. By way of example, stated case was the method of appeal where the court declined to order an absolute discharge in the cases of: *Galloway* v *Mackenzie* 1991 SCCR 548; *M (E)* v *Murphy* [2015] HCJAC 8; and *S (A)* v *Procurator Fiscal, Kilmarnock* 2017 SLT (Sh Ct) 89. It was recognised that, on a practical level, proceedings by way of stated case was cumbersome and unnecessary if the facts were unlikely to be disputed. Nonetheless, the court had to convene a quorum of three if it were to overturn any conviction and in its place grant an absolute discharge. On the merits of the appeal against the sentence, the Crown made no submission.

Decision

The mode of appeal

[11] This appeal proceeds by way of an appeal against sentence. As the appellant seeks an absolute discharge, were the appeal to be granted, his conviction would require to be

quashed. The question which arises is whether such an appeal should be treated as an appeal against conviction, requiring a stated case and a quorum of three appeal sheriffs.

[12] Section 175 of the 1995 Act is the principal provision dealing with appeals against conviction and disposal in summary proceedings. Section 175(2) in so far as relevant provides as follows:

> "Any person convicted, or found to have committed an offence, in summary proceedings may, with leave granted in accordance with section 180 or, as the case may be, 187 of this Act, appeal under this section to the Sheriff Appeal Court —
>
> (a) against such conviction, or finding;
> (b) against the sentence passed on such conviction;
> (c) against his absolute discharge or admonition or any drug treatment and testing order or any order deferring sentence . . ."

[13] Appeals against conviction under section 175(2)(a) are by way of application for a stated case. Appeals against sentence or disposal under section 175(b) or (c) are by way of note of appeal (section 186).

[14] We are not persuaded by the submissions made by the Crown, namely that an appeal inviting the court to grant an absolute discharge required to proceed by way of a stated case. It is correct that in *Galloway* v *McKenzie* 1991 SCCR 548 and *M(E),* the appeals proceeded by way of stated case. In each of these cases, the appeal court was asked to determine whether the sheriff had been entitled to convict on the evidence. These were appeals against both conviction and sentence.

[15] Where an absolute discharge is sought and there is no challenge to a finding of guilt after trial or admission of guilt by way of a plea, there is no requirement for the court to consider the sufficiency of the evidence or findings in fact. It is not the finding of, or admission of guilt, but the recording of a conviction which is challenged. That is reflected in the language of section 175(2) which refers to a "person convicted, or found to have

committed an offence". Those words recognise that where an absolute discharge has been granted, there has been a finding of guilt, as distinct from a conviction. We accept that there is no express provision providing for the mode of appeal against a refusal to grant an absolute discharge; however, we are mindful that a Crown appeal against the granting of an absolute discharge (which if successful would result in a conviction without an appellate court considering the evidence) proceeds by note of appeal in terms of section 186, being an appeal under section 175(4)(i). To require a stated case where the refusal to grant an absolute discharge is challenged would, in our view be unduly cumbersome, unnecessary and place an undesirable burden on sheriffs and justices. It is logical that appeals by the defence and the Crown on the question of an absolute discharge, should both proceed by way of a note of appeal.

[16] We note the pragmatic approach taken by the High Court in *Kheda.* The appellant in that case appealed by way of a note of appeal against sentence but sought an absolute discharge. The court granted leave to appeal the conviction during the appeal hearing. A similar course was followed in *Mclay* v *Ruxton* unreported, 3 May 1996. Had it been necessary in this case, we would have had no difficulty in granting leave to appeal the conviction upon such a motion being made at the bar.

[17] Does an appeal against a refusal to grant an absolute discharge require a quorum of two or three appeal sheriffs? The terms of section 173(2) of the 1995 Act might suggest an intention on the part of the legislature to have such appeals determined by a quorum of two appeal sheriffs. That would certainly be a proportionate means of dealing with such appeals which do not require an examination of the evidence or findings in facts. However, section 173(1) is the principal provision which specifies a quorum for criminal appeals from summary proceedings as being three Appeal Sheriffs. Section 173(2) provides for specific

circumstances in which a quorum of two appeal sheriffs is permitted and refers only to appeals under section 175(2)(b), (c) or (cza). It does not expressly provide for a quorum of two appeal sheriffs when dealing with an appeal against the refusal to grant an absolute discharge. It also does not apply to appeals by the Crown against the granting of an absolute discharge under section 175(4)(i). Again, it is logical that appeals by the defence and the Crown should be treated with parity, that is under section 173(1), being determined by a quorum of three appeal sheriffs.

Absolute discharge

[18] Absolute discharge was first made available as a sentencing disposal in Scotland by virtue of section 1 of the Criminal Justice (Scotland) Act 1949. The ability to grant an absolute discharge in summary procedure was subsequently re-enacted in section 383 of the Criminal Procedure (Scotland) Act 1975 and, in its present form, can be found at section 246(3) of the Criminal Procedure (Scotland) Act 1995 which is in the following terms:

> " Where a person is charged before a court of summary jurisdiction with an offence (other than an offence the sentence for which is fixed by law) and the court is satisfied that he committed the offence, the court, if it is of the opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment may without proceeding to conviction make an order discharging him absolutely."

[19] In *McPherson* v *Henderson* 1984 SCCR 294 the High Court noted that a decision not to proceed to conviction was an exceptional step (*McPherson* at 298, approved in *Burns* v *Wilson* 1993 SLT 809 at p813). That there require to be exceptional circumstances before the court may order absolute discharge has been re-iterated by this court on several occasions: *S (A)* v *Procurator Fiscal, Kilmarnock* 2017 SLT (Sh Ct) 89 per Sheriff Principal Stephens QC at paragraph [5]; *Procurator Fiscal, Dumfries* v *McTaggart* [2019] SAC (Crim) 3 per Sheriff

Principal Abercrombie QC at paragraph [6]. The test is a high one. In so far as it might be suggested that this court's decision in *SB* v *Procurator Fiscal, Aberdeen* [2023] SAC (Crim) 9 signalled a departure from that test, we do not agree; there too, the court noted the exceptional nature of the cases in which absolute discharge is appropriate (per Sheriff Principal Pyle at paragraph [8]).

[20] Unsurprisingly, given the exceptional nature of the disposal, there are a limited number of reported cases. Each case will turn on its own facts and it is neither helpful nor desirable to compare one set of facts with another. Those who seek an absolute discharge often make reference to the decisions of the High Court in *Galloway*, *Kheda* and *M (E)*. As was noted by this court in *S (A)* (*supra*) at paragraph [11] and in *F (D)* v *Procurator Fiscal, Dundee* 2023 SLT (SAC) 17 at paragraph [30], these cases involve circumstances in which a first offender had made either a momentary lapse of judgement or an ill-judged reaction to a situation or provocation. The cases involve both aspects of the circumstances of the offence itself which may be considered trivial or minor or which may diminish the offender's culpability, together with some extenuating circumstances personal to the offender, such as his previous good character or the effect upon his livelihood or career prospects.

[21] As section 246(3) of the 1995 Act makes plain, the court must form the opinion that it is inexpedient to inflict punishment. In forming that opinion, the court is required to have regard to the circumstances of the case including the nature of the offence and the character of the offender.

[22] In this case, the appellant relied principally, if not exclusively, upon the consequences of a conviction for his employment and future prospects. Two general observations require to be made. First, upon tendering a plea of guilty or being found guilty after trial, those in employment do not enjoy any particular privilege or special status not

enjoyed by those who are unemployed. The consequences of conviction for an offender in employment may include disciplinary proceedings with a range of disposals from reprimand to dismissal and may have an effect upon future employment prospects. However, those are consequences which ordinarily those who offend require to bear. The effect upon current and future employment may, in appropriate cases, be relevant to the question of whether an admonition ought to be granted but will not, in most cases, on its own, amount to "exceptional circumstances" justifying the granting of an absolute discharge. Second, little weight can be attached to vague submissions that a conviction "may affect" or "could affect" an offender's employment. In the absence of contrary information, the court is entitled to proceed on the basis that an employer or regulatory or disciplinary body will consider the circumstances of the offence, the offender's previous good character and the severity or otherwise of the sentence imposed when making decisions regarding an offender's employment following conviction.

[23] We note that the appellant has no previous convictions and that the references placed before the court indicated that he has a good work record. He currently works with vulnerable individuals as a mental health nurse. Before the Justice, the appellant confirmed that his conviction had been reported to his employer and the Nursing and Midwifery Council and that no further action was being taken by either. Before this court, it was said that both the appellant's employer and professional regulatory body were investigating matters. No details were provided as to the consequences for the appellant were the appeal to be refused. The information in relation to the appellant's current employment and his future employment prospects was vague. We consider the Justice was correct to have attached little weight to it.

[24] The Justice was also correct to have attached significant weight to the nature and circumstances of the offence. The appellant's posts on Facebook were abusive, offensive and threatening. The comments directed at those with Down's Syndrome in particular could not be described as trivial or minor, nor were the posts an ill judged reaction to a provocation or momentary lapse of judgement; the appellant's conduct took place in the privacy and comfort of his home after a period of contemplation having read and considered an online article. He was not compelled to respond. He chose to do so. He reposted his comments hours later. He removed his comments only after he was advised that they had caused offence and the matter had been reported to the police. That he had been under the influence of alcohol at the time might explain his behaviour as being out of character, but it does not excuse it.

[25] For these reasons, we consider that the Justice was correct to proceed to convict the appellant and to refuse to discharge him absolutely. However, the appellant is a first offender who has hitherto been of good character. He has expressed remorse for his conduct and no doubt these proceedings have had a salutary effect upon him. In the circumstances, we will allow the appeal to the extent of quashing the decision of the Justice to impose a fine and will instead admonish the appellant.