



SHERIFF APPEAL COURT

**[2017] SAC (Crim) 3
SAC/2016-663/AP**

Sheriff Principal M M Stephen QC
Sheriff Principal C D Turnbull
Sheriff K M Maciver QC

EX TEMPORE OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

APPEAL AGAINST SENTENCE

by

A. S.

Appellant

against

PROCURATOR FISCAL, KILMARNOCK

Respondent

Appellant: Mackintosh; John Pryde & Co

Respondent: Cottam, AD; Crown Agent

31 January 2017

[1] We have considered the oral and written submissions and the authorities cited by counsel for the appellant together with the case of *Murphy v SB* 2014 SCCR 501 which considered the competence of granting an absolute discharge following conviction recorded in the court minute. As a preliminary matter in this appeal we propose to follow the view

expressed in *Murphy v SB* at para [4] that in summary proceedings the option of an absolute discharge is not available to the sheriff once there has been a conviction. In this case the sheriff specifically rejected the proposition that an absolute discharge was an appropriate disposal in the circumstances.

[2] Returning to the circumstances of this appeal, the appellant was convicted after trial at Kilmarnock Sheriff Court of a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 on 16 September 2016. He was acquitted of the second charge on the complaint, that being the charge of assaulting his wife. We set out the terms of the amended charge of which the appellant was convicted as follows:

"(001) On 18 July 2016 at an address in Ayrshire, you A. S. 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 behave in an aggressive manner towards L.S., your wife, care of the Police Service of Scotland, and did shout abuse at her and swear at her; CONTRARY to Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010."

[3] We observe that on 16 September the sheriff also considered the plea in mitigation advanced on behalf of the appellant. The sheriff also had available to him a report by Assist which provided information as to the complainer's attitude towards the offence and the appellant. The sheriff heard a submission on behalf of the appellant that the court should discharge the appellant absolutely without proceeding to conviction. The sheriff declined to do so. The sheriff also declined to adjourn in terms of section 201 of the 1995 Act. The sheriff deferred sentence for the appellant to be of good behaviour and continued bail, including the special condition of bail preventing the appellant from contacting the complainer.

[4] The appeal today now lies against the sheriff's decision to proceed to convict and defer sentence. Provision is made for absolute discharge in summary proceedings by

section 246(3) of the Criminal Procedure (Scotland) Act 1995. The court must be satisfied that the appellant committed the offence and in that regard the sheriff's findings are not challenged. Before the sheriff may order an absolute discharge the court must be of the opinion that it is inexpedient to inflict punishment and in determining that the court must have regard to the circumstances of the case which will include the nature of the offence and the offender's character. It is noted that the provision is permissive. The sheriff has prepared a report and also a supplementary report explaining further the facts of the case; the submissions made in respect of sentence and his reasons for declining to order that the appellant be discharged absolutely.

[5] There requires, in our view, to be exceptional circumstances before the court may order absolute discharge. The statutory provision requires the court to have regard to the circumstances and obviously make specific reference to the nature of the offence and the character of the offender. The appeal is presented with specific emphasis on the appellant's lack of previous record together with his exemplary and meritorious military service as a wing commander in the RAF. Written submissions refer to his profession as a solicitor. The appellant is a member of the Law Society of Scotland and a member of the council of the Society of Writers to the Signet. Put briefly these are the circumstances of the offender. He is likely to face disciplinary action by the RAF and quite likely also by the Law Society of Scotland.

[6] It is clear that the sheriff did not accept that the offence was a trivial one. The sheriff was well aware of the background and context against which the offence took place, namely the breakdown of the parties' marriage. The sheriff did take account of the appellant's previous good character and the possible repercussions a conviction might have on his career. These reasons are reinforced in the supplementary report prepared by the sheriff

where he adverts further to the circumstances of the offence, the appellant's attitude to the offence and his complete lack of remorse or contrition. Clearly the circumstances of this offence caused the appellant's wife and children a great deal of upset. The complainer and the eldest child gave evidence at the trial together with a neighbour. The offending can be categorised as angry, abusive and aggressive behaviour of a controlling and jealous nature. There was also agreed evidence relating to the appellant's attendance at a police station. It is noted that it was the appellant's eldest son who contacted the police by dialling 999 due to the appellant's behaviour over a laptop which resulted in all of the household becoming concerned and very upset. These are the background facts.

[7] I propose to refer to the authorities that were mentioned today. In these cases the High Court considered a summary appeal and granted an absolute discharge. These are *Galloway v Mackenzie* 1991 SCCR 548, *Kheda v Lees* 1995 SCCR 63 and *M v Murphy* [2015] HCJAC 8. In each of these cases the appellant had previously been of good character and the conviction was likely to have consequences for the appellant's employment or future employment prospects. However, it is noteworthy that all three cases involve a first offender committing an offence involving children or youths in circumstances where provocation caused by the behaviour of the youths led to the offence being committed.

[8] In *Galloway* the appellant was walking home with two of his own children in the evening when he became concerned about the behaviour of a large group of youths who were letting off fireworks. The appellant was frightened for the safety of his children. The provocation amounted to the youths continuing to let off fireworks whilst laughing, jeering and swearing at the appellant. The appellant assaulted one of the youths by striking him on the neck with his arm. The appellant was a principal careers officer for the Western Isles Council. The Lord Justice Clerk described the circumstances as being unusual. The court

considered that it was appropriate to grant an absolute discharge and in doing so it was noted that no injury was libelled and it was accepted that the lead up to the incident had been frightening and frustrating for the appellant who was concerned about his children.

[9] In the case of *Kheda* the appellant also became involved with a group of youths who for some time had been behaving in a deliberately annoying fashion by kicking a ball against his garage and tramping through his garden. The appellant's conviction was likely to have repercussions on his career as a nurse. The court accepted that the appellant and his family had been harassed by the complainers for some time and the appellant had previously threatened to puncture their football. On the date of the incident his temper had snapped and he had taken a knife which was an attempt to frighten the boys off, or perhaps indeed to puncture the football. The case was described as a highly unusual situation and again the Appeal Court set aside the conviction and made an order discharging him absolutely.

[10] In *M v Murphy*, which also involved an appeal against conviction for assault, the appellant had been convicted and sentenced for a section 38 offence. The appellant had intervened in a playground squabble between her son and another 6 year old who was striking her son with a school satchel. The appellant's conviction for assault was quashed. The Appeal Court considered the section 38 offence to be a trivial matter involving the appellant shouting at the 6 year old child who was battering her own son. The court concluded that a criminal conviction with all the consequences that might have for someone who might wish to seek employment in nursing and who was involved in voluntary work with children was a harsh sanction for a loss of temper.

[11] All these cases can be seen to involve provocation or indeed naughty behaviour on the part of children and the offending involved the same children. In this case the sheriff has given a full explanation of the facts concluding that this was not a trivial incident. The

type of offending in the domestic context is indeed serious and far from unusual in the Sheriff Court. Special courts have been set up to deal with this type of behaviour, that is the domestic section 38 or other domestic offending. Sheriffs daily deal with this type of offence and indeed section 38 arguably was enacted precisely to deal with this type of domestic breach of the peace.

[12] We take the view that the sheriff was entitled to find that this was not trivial and that the circumstances of the offence were concerning and serious. As we have observed, the behaviour is described as angry, aggressive, threatening and abusive behaviour (jealous controlling behaviour is another way of putting it) involving the appellant's determination to obtain and elicit information from his wife's phone and laptop. The sheriff's assessment of the gravity of the offences is underlined by the complainer's fear that the appellant would continue to contact her once these proceedings were concluded. She did not wish that to happen. The complainer's views were conveyed to the court by Assist, the support and advocacy service in domestic abuse and violence cases. The sheriff's decision to monitor the appellant's behaviour by way of a deferral of sentence continuing the special conditions of bail is a disposal which we consider to be entirely understandable and appropriate in the circumstances of the case. We fully accept that the consequences for the appellant may well be serious. It is however a matter for the RAF to decide what steps ought to be taken in respect of discipline and it is for them to take account of the appellant's meritorious record in the exercise of their judgment on the matter of discipline. Likewise the Law Society of Scotland may institute disciplinary proceedings and if they do the outcome of such proceedings will involve a range of penalties from reprimand upwards to more significant consequences.

[13] For these reasons we are not satisfied that there has been a miscarriage of justice and we propose to refuse the appeal. This necessarily means that the case will go back without further order to the sheriff court to allow the sheriff to deal with further matters relating to sentence.