SHERIFF APPEAL COURT

[2018] SAC (Crim) 16
SAC/2018/000436/AP

Sheriff Principal I R Abercrombie QC
Sheriff Principal C D Turnbull
Appeal Sheriff S F Murphy QC

OPINION OF THE COURT

delivered by APPEAL SHERIFF S F MURPHY QC

in

STATED CASE AGAINST CONVICTION

by

RICKY TAYLOR

Appellant

against

PROCURATOR FISCAL, ABERDEEN

Respondent

Appellant: C Findlater; Paterson Bell, Edinburgh for Aberdein Considine, Aberdeen
Respondent: A Edwards QC, AD; Crown Agent

11 September 2018

[1] The appellant Ricky Taylor was convicted in Aberdeen Sheriff Court of one contravention of section 5 of the Sexual Offences (Scotland) Act of 2009, that is the offence of coercing another into being present during sexual activity, in the circumstances of this case by repeatedly exposing himself and masturbating in view of his next door neighbour on various occasions between 16 October and 16 November of 2017. At trial a defence

submission of no case to answer was made which was repelled by the summary sheriff. Appeal is taken against that decision and against the conviction on the basis that only the final episode, that which occurred on 16 November 2017, was corroborated in the evidence which was heard. Two questions have been set out within the stated case: firstly, was the summary sheriff entitled to repel the submission of no case to answer; and secondly, was the summary sheriff entitled to convict the appellant of four incidents rather than the one incident of 16 November 2017?

[2] In our view the first of these questions may be dealt with briefly. It was conceded at trial and before this court that there was evidence from two sources in relation to the incident on 16 November. Accordingly, a no case to answer submission could not have succeeded in relation to the whole charge and as a result of that we must answer the first question in the affirmative.

[3] The second question requires greater consideration. The principle complainer was the appellant's next door neighbour. She spoke to seeing him masturbating in his bedroom on two occasions in October 2017 and one in November 2017. On each of those occasions he had been standing at the bedroom window which he had tapped to attract her attention during one of the incidents when she was smoking at the back door of her own house. She told her partner what she had seen and he observed the final episode on 16 November from an upstairs window in their house. On that occasion the appellant had masturbated in the kitchen, after whistling to attract the attention of the first complainer. The summary sheriff accepted both complainers as credible and reliable witnesses and she had rejected the appellant's account of events as being "convoluted" and "incredible". The basis of the summary sheriff's decision was that she considered that the corroborated incident, being so close in time and character to the other incidents which were spoken to by the first

complainer alone, amounted to a course of conduct with the result that support for the first complainer's account could be provided by the other witness's account in relation to the final incident only.

[4] In our view, the circumstances of the present case represent a series of incidents, only one of which was corroborated. That is a different matter from a single incident in which not all details are corroborated and the Crown originally sought to secure a conviction by treating the different episodes as a single charge because they were said to form part of a single course of conduct. However, while they may be different manifestations of a single course of conduct, each episode in our view was in fact a separate incident which required to be corroborated of itself. A similar type of situation was considered by the High Court of Justiciary in the case of *Spinks* v *Procurator Fiscal, Kirkaldy* [2018] HCJAC 37 where the Crown argument was rejected. Today, the learned advocate depute submitted that the case of *Wilson* v *HMA*, 2017 J C 64, provided support for the Crown's position. In particular, she referred us to paragraph [15] of the decision of the court in the case of *Wilson*. It was argued that that aspect of the decision indicated that not all of the episodes required to be corroborated or to be spoken to by more than one witness, in effect under reference to the Moorov doctrine. We do not agree with the interpretation that has been placed by the Crown on paragraph [15] in the case of *Wilson*, a case which dealt with two separate charges and not with a single charge covering two episodes. The final sentence of the paragraph reads, "However, equally there is no need for the complainers in two or more charges to be different provided there are two sources of evidence to prove the crucial facts". In our view that must be construed as a reference to proving the crucial facts in relation to each of the charges. Following *Spinks,* in the present case it would mean that two sources would be required to prove each separate episode within the overarching charge.

[5] Accordingly, in our view the appropriate course for us to follow in the present case is the course taken by the High Court in the case of *Spinks*. It follows that we must answer the second question posed by the summary sheriff in the negative and we will allow the appeal to the extent of restricting the conviction to the events of 16 November 2017 only.

[6] Having thus limited the extent of the conviction we consider it appropriate that the matter of sentence be reconsidered. The summary sheriff indicated that the removal of the other episodes would not make a significant difference in relation to the sentence imposed. We respectively disagree because a significant number of incidents have been deleted from the charge and accordingly we consider it appropriate to reconsider the matter of sentence. In view of the reduced nature of the conviction as it now stands the appropriate course would be for us to reduce the period of the restriction of liberty order to one of three months and to reduce the period of unpaid work or other activity, the punitive element of the CPO imposed in the lower court, to one of 150 hours. In our view it would not be appropriate to reduce the period of supervision. This was a lengthy period to allow for attendance by the appellant on a programme which was identified by the summary sheriff in the course of passing sentence. In view of the nature of this conviction, and in the light of the appellant's previous convictions, this appears to us to be an appropriate course of action and accordingly we shall leave the other aspects of the CPO undisturbed.