SHERIFF APPEAL COURT

[2018] SAC (Crim) 15
SAC/2018/000295/AP

Sheriff Principal M M Stephen QC
Sheriff Principal C D Turnbull
Appeal Sheriff S F Murphy QC

OPINION OF THE COURT

delivered by

SHERIFF PRINCIPAL C D TURNBULL

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

KT

Appellant

against

PROCURATOR FISCAL, FALKIRK

Respondent

Appellant: J.Keenan (sol adv); Capital Defence Lawyers (for Dalling, Stirling)
Respondent: A.Prentice QC (sol adv), AD; Crown Agent

11 September 2018

[1] Following trial, the appellant was convicted of two charges. First, a contravention of section 9 of the Sexual Offences (Scotland) Act 2009. Second, a contravention of section 39 of

the Criminal Justice (Scotland) Act 2010. Questions 1 and 2 in the stated case relate to the appellant's conviction under the 2009 Act. That charge is in the following terms:

> "(001) on various occasions between 20 June 2014 and 1 October 2015 both dates inclusive at 12 Grahamshill Terrace, Fankerton, Denny and elsewhere you [KT] did commit the offence of voyeurism in respect of SF, your former partner, c/o Police Service of Scotland and, without their consent, observe and record her doing a private act with the intention of enabling yourself or another to look a t the image of her, and did take photographs of SF while she was sleeping, while she was wearing her underwear and did take photographs of her breasts whilst she was asleep;
> CONTRARY to Section 9(1), (2) and (4) of the Sexual Offences (Scotland) Act 2009"

[2] Section 9(1) of the 2009 Act provides that a person commits an offence, known as the offence of voyeurism, if that person does any of the things mentioned in subsections (2) to (5). Charge 1 in the present appeal alleges that the appellant did two of the things set out in section 9. First, he is alleged to have observed the complainer doing a private act (see sub-section 9(2)) for the purpose of obtaining sexual gratification. Second, he is alleged to have recorded the complainer doing a private act with the intention that he or another person, would subsequently look at an image of the complainer doing the act for the purpose of obtaining sexual gratification (see sub-section 9(4)). In each case, the offence is only committed if the complainer did not consent, and the appellant had no reasonable belief that the complainer consented.

[3] Dealing firstly, with the offence created by section 9(2) of the 2009 Act, it is clear from the evidence before the summary sheriff that the "observing" was in the context of the appellant taking the photographs which give rise to the separate offence created by section 9(4). It is clear from the evidence before the summary sheriff, namely, the appellant's police interview, that he was aroused when seeing the complainer asleep and partially naked. The question for determination is whether or not the appellant observed the complainer for the

purpose of obtaining sexual gratification. At the relevant time, the parties were in a relationship; lived together; and shared a bed. In that context, on the limited evidence before the summary sheriff, there was insufficient material which would have entitled him to conclude that the appellant observed the complainer for the purpose of obtaining sexual gratification. The appellant's observation has to be considered in the circumstances in which it occurred. In circumstances such as those which arose in this case, viewing one's partner clothed or unclothed is not a criminal act. The Crown accepted that it was not appropriate to convict of the "observing" element of the charge in the circumstances of this case. We shall answer question 1 in the negative.

[4] Dealing next with the offence created by section 9(4) of the 2009 Act, there was no dispute that the appellant had taken the photographs in question. It was conceded, before the summary sheriff, that the complainer could not have consented to the taking of the photographs, as she was asleep at the time. Those circumstances are also determinative of the appellant's argument relating to reasonable belief of consent. The stated case suggests that the summary sheriff was neither directed to, nor considered, the terms of section 14 of the 2009 Act. It is, in our view, axiomatic that if the law provides (as it does by way of section 14(2) of the 2009 Act) that a person is incapable, whilst asleep or unconscious, of consenting to any conduct, there can never be a reasonable belief of consent in such circumstances.

[5] Whilst the proper application of the terms of section 14 of the 2009 Act is, in our view, determinative of the appeal against conviction on charge 1, it is appropriate that we also address the argument advanced by the appellant in relation to the question of corroboration. No such point was raised before the summary sheriff. A submission of no

case to answer was not made. The summary sheriff's interpretation of the appellant's police interview is not one we can support. The terms of that interview were a matter of agreement between the parties, by way of joint minute, and formed part of the Crown case. The conclusions purportedly reached by the summary sheriff in relation to the interview are plainly wrong. The appellant's interview contains corroborative evidence of the complainer's clear and unequivocal account. In that interview, shortly put, the appellant accepted taking the photographs in question and at no time suggested that the complainer consented to them being taken.

[6] The summary sheriff considered the evidence before him and rejected the evidence of the appellant; preferring the evidence of the complainer as he was entitled to do. That evidence, taken with the appellant's police interview, gives a sufficiency. The second question is poorly framed; it does in fact pose two separate questions – which we shall re-number as 2(a) and 2(b) respectively. We shall answer question 2(a), did I fail to take account of the evidence supporting the defence of reasonable belief in consent in respect of the charge of voyeurism, in the negative; and question 2(b), was I entitled to convict the appellant of the voyeurism charge, in the affirmative.

[7] The cumulative effect of the court's answers to questions 1 and 2 in the stated case is to allow the appeal to the limited extent of deleting "observe and" in line 4, and ", (2)" in the final line of charge 1.

[8] Turning to the question of sentence, question 4 in the stated case, the summary sheriff has fairly conceded that the circumstances of the offences of which the appellant was convicted, coupled with him having no previous convictions and no matters arising

subsequent to the commission of the offences, did not amount to circumstances which would merit a custodial sentence. Notwithstanding the amendment to the conviction on charge 1, the offences are nonetheless concerning. In our view, it is appropriate to reduce the number of hours of unpaid work to the maximum available at level 1, namely, 100 hours and to otherwise leave the sentence imposed by the summary sheriff undisturbed. To give effect to this, question 4 will be answered in the affirmative and we shall quash the community payback order imposed by the summary sheriff, substituting therefor a community payback order under section 227A(4) of the 1995 Act with an offender supervision requirement of 12 months and a level 1 unpaid work or other activity requirement of 100 hours.