SHERIFF APPEAL COURT

[2022] SAC (Crim) 7
SAC/2022-99/AP

Sheriff Principal Lewis
Sheriff Principal Ross
Sheriff A L MacFadyen

OPINION OF THE COURT

delivered by SHERIFF A MACFADYEN

in

STATED CASE

by

FAISAL AZIZ

Appellant

against

PF EDINBURGH

Respondent

Appellant: Hay; John Pryde & Co
Respondent: Edwards QC; Crown

30 August 2022

Introduction

[1] This appeal turned on whether it had been established that in making a sexual communication the appellant did so with the purpose of obtaining sexual gratification.

[2] The appellant was convicted in the following terms of contravening section 7(1) of the Sexual Offences (Scotland) Act 2009 ("the 2009 Act"):

> "On 5 October 2019 at South College Street, Edinburgh within a motor vehicle there you FAISAL AZIZ whilst acting in the course of your employment as a taxi driver did intentionally and for the purpose of obtaining sexual gratification or of humiliating, distressing or alarming TM, then aged 18 years, and TE, then aged 21 years both persons then unknown to you…did direct a sexual verbal communication to them without their consent in that you did make a sexual remark to them; CONTRARY to section 7(1) of the Sexual Offences (Scotland) Act 2009."

[3] The sheriff in his stated case posed two questions:

1. Did I err in rejecting the no case to answer submission made under section 160 of the 1995 Act?

2. On the facts stated, was I entitled to convict the appellant?

[4] The relevant proven facts insofar as based on the evidence led during the prosecution case, are shortly stated and are as follows:

[5] Two young women ("the complainers") aged 18 and 21 years had been on a night out in Edinburgh City Centre. They had both consumed alcohol.

[6] They were short of money but required to get home, a relatively short bus or taxi ride away.

[7] They hailed what they thought was a taxi. It was in fact a private hire vehicle being driven by the appellant. It passed them, turned around, returned and stopped.

[8] The appellant was the driver of that vehicle.

[9] The complainers thought that the appellant had stopped in order to pick them up.

[10] A verbal exchange took place between all three parties in the following terms:

[11] The complainers asked the appellant if he could take them home and told him that they did not have any money.

[12] The appellant said: "What else can you offer?"

[13] He was asked what he meant by that and he replied "sex".

[14] The women's respective responses were that TM felt unsafe and uncomfortable and TE was frightened.

[15] The defence submitted in terms of section 160 of the Criminal Procedure (Scotland) Act 1995 that there was no case to answer on the charge of contravention of section 7 of the 2009 Act. The Crown opposed the section 160 submission and invited the sheriff to find that there was a case to answer.

[16] The submissions made to the sheriff by defence and Crown were similar to those made before us. Those are summarised below.

[17] In deciding that there was a case to answer the sheriff found that all of the component parts of the charge had been satisfied, if the prosecution evidence were believed. On the issue in dispute in this appeal, namely whether it had been proved or evidence led from which the inference could be drawn that the appellant's purpose in making the sexual communication had been to obtain sexual gratification, he considered that the inference could be drawn that the appellant's intention had been to obtain immediate sexual gratification by asking for sex and seeing the reaction of the complainers. It could also be inferred that he intended to obtain deferred sexual gratification by later engaging in sexual activity with either or both of the complainers and he had the intention to humiliate, distress or alarm the complainers.

[18] The appellant gave evidence. The sheriff preferred the evidence of the prosecution witnesses to that of the accused and convicted him in the terms noted above. The sheriff adjourned the diet for preparation of a criminal justice social work report and at the adjourned diet imposed a community payback order. Given the nature of the charge on which the appellant was convicted the sheriff announced that he was thereby subject to the

notification requirements under part 2 of the Sexual Offences Act 2003 for the duration of the community payback order.

[19] No issue has been taken with the disposal other than the question of the notification requirement if the appeal succeeded but the conviction were replaced with conviction on another charge.

Submissions for the appellant

[20] Before us, counsel for the appellant submitted that the utterance by the appellant could not amount to a contravention of section 7(1). In order for the appellant to be convicted of an offence under that section the sheriff required to have found that the communication was intentional and made for a purpose specified in section 7(3).

[21] The purposes in section 7(3) were (a) obtaining sexual gratification and (b) humiliating, distressing or alarming the complainer. It was submitted that there had been no evidence from which an inference could be drawn that the appellant had possessed such a purpose when making the communication.

[22] The fact of the making of the communication, referred to by counsel as an invitation, of itself was not sufficient to allow the drawing of an inference that it had been made for the purpose of obtaining sexual gratification. That was because of the incomplete nature of the communication. The section was designed to criminalise communications which were completed acts. What was required for conviction was, as proposed by the Scottish Law Commission in its Report on Rape and other Sexual Offences (December 2007) at paragraph 3.62 that the consequence of the making of such a communication should be that the victim was "involved in an invasion of his or her sexual autonomy".

[23] Intentional behaviour for purposes specified in section 7(3) being an essential element of the charge not having been made out, the sheriff ought to have sustained the section 160 submission.

[24] Counsel for the appellant conceded before us that the remark, made in the context of where, when and to whom it was uttered, was capable of amounting to a breach of the peace. However, she submitted that if we were to quash the conviction under section 7 and substitute a conviction of breach of the peace, we should not make any notification requirement under the Sexual Offences Act 2003. The offence of breach of the peace, not automatically attracting the notification requirement under the 2003 Act, did not in this case have about it a serious sexual element in the appellant's behaviour when committing it and accordingly no notification requirement should be made.

Submissions for the respondent

[25] In reply the Crown invited the court to answer the first question in the negative and the second question in the affirmative and to refuse the appeal. The advocate depute submitted that context was important and that the sheriff had been entitled to consider that in the circumstances and context the remark was a communication for the purposes of section 7. It was a completed act and the sheriff was entitled to infer that it had been made for the appellant's sexual gratification or to humiliate, distress or alarm the complainers. Any sexual gratification did not have to be simultaneous with the making of the communication; *Robinson* v *Cassidy* [2013] HCJAC 43.

[26] The sheriff had been correct to refuse the submission of no case to answer.

[27] However, if the court were to quash the conviction and replace it with a conviction of breach of the peace, the advocate depute submitted that the appellant's behaviour in

committing it had a significant sexual element and we should re-impose the notification requirement under the 2003 Act.

Decision

[28] For the purposes of this appeal the salient terms of the relevant sections, that is sections 7, 49 and 60, of the 2009 Act are as follows:

> "**7 Communicating indecently etc.**
> (1) If a person ('A'), intentionally and for a purpose mentioned in subsection (3), sends, by whatever means, a sexual written communication to or directs, by whatever means, a sexual verbal communication at, another person ('B')—
> (a) without B consenting to its being so sent or directed, and
> (b) without any reasonable belief that B consents to its being so sent or directed, then A commits an offence, to be known as the offence of communicating indecently.
>
> (3) The purposes are—
> (a) obtaining sexual gratification,
> (b) humiliating, distressing or alarming B.
>
> **49 Establishment of purpose for the purposes of sections 5 to 9, 22 to 26 and 32 to 36**
> (1) For the purposes of sections 5 to 9, A's purpose was—
> (a) obtaining sexual gratification, or
> (b) humiliating, distressing or alarming B,
> if in all the circumstances of the case it may reasonably be inferred A was doing the thing for the purpose in question.
>
> (2) In applying subsection (1) to determine A's purpose, it is irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A.
>
> **60 Interpretation**
> (1) In this Act—
>
> (b) a communication
> is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual."

[29] Looking at those provisions and the sheriff's findings in fact, there was no dispute that the appellant had intentionally made a verbal communication, that a reasonable person

might consider it to have been sexual, or that it had been made without the consent of the complainers or a reasonable belief that they had consented.

[30] The issue was whether, as required by section 49 it could be reasonably inferred that the appellant made the communication for the purpose of obtaining sexual gratification, either immediately or at some later stage, or for the purpose of humiliating, distressing or alarming one or both of the complainers. In *Raza* v *Procurator Fiscal Glasgow* 2017 SAC (Crim) 6 (which was concerned with whether the making of the communication in question had been corroborated) the comments made by the accused to a young girl were graphic and specific, and uttered in circumstances and a location from which the sheriff was able to infer that the accused had contravened section 7(1). The words uttered, in all the circumstances of the case, supported a reasonable inference that the intention had been to obtain sexual gratification from the making of the remark.

[31] In contrast, in the instant case the exchange was short and unspecific. Importantly, there was no evidence justifying the drawing of a reasonable inference that the appellant obtained sexual gratification from the making of the communication. There was no evidence justifying such an inference that he had the purpose of humiliating, distressing or alarming the complainers. While any sexual gratification may be deferred to a later time (*Robinson* v *Cassidy*, above), it is still necessary, before convicting under section 7(1), to establish that such gratification, or such intent, was directly connected to the making of the remarks.

[32] Hoping to be offered sexual favours, or the expression of such hope, is different from obtaining sexual gratification. Obtaining sexual gratification is, in our view, the satisfaction of a sexual urge by the making of the communication, and is apt to include satisfaction from observing the reaction of the person to whom the communication was made. In our view, in

order to justify a conviction under section 7, the sexual gratification must be intrinsically connected to the making of the communication. This case turns on the extremely limited nature of what passed from the appellant to the complainers. The making of the remark did not invade the sexual autonomy of either of the complainers.

[33] Nor did the evidence support the inference that the purpose of the communication was to cause humiliation, distress or alarm to the complainers. Again, this is due to the extremely limited nature of the communication. It may be that had the communication been in some manner persisted in, in the absence of a welcoming response, that this test would at that point be met. That did not occur in this case.

[34] Accordingly we were persuaded that the sheriff had erred in finding that all of the necessary components of the offence had been established and erred in finding the appellant guilty of the statutory charge.

[35] However, the matter does not end there. Paragraph 14(b) of Schedule 3 to the Criminal Procedure (Scotland) Act 1995 is in the following terms:

> "Where—
> (a) any act alleged in an indictment or complaint as contrary to any enactment is also criminal at common law; or
> (b) where the facts proved under the indictment or complaint do not amount to a contravention of the enactment, but do amount to an offence at common law,
> it shall be lawful to convict of the common law offence."

[36] Parties were agreed that the facts found proved by the sheriff amounted to the commission of the offence of breach of the peace, that is to say that the appellant's conduct when interacting with the complainers had been severe enough to cause alarm to ordinary people and threaten serious disturbance to the community, *Smith* v *Donnelly* 2001 SCCR 800. We have no difficulty in agreeing that to be the case. In that situation the sheriff was still

correct to repel the submission under section 160, because in terms of section 160(1)(b) the appellant could have been convicted on another offence under the complaint.

[37] However, for the reasons explained herein he erred in convicting the appellant under section 7(1). Given his clearly expressed assessment of the evidence and parties' position, we will substitute the conviction with a conviction of breach of the peace.

[38] Accordingly we answer both of the questions posed in the stated case in the negative, quash the conviction and substitute it with a conviction of the common law offence of breach of the peace.

[39] The appellant now standing convicted of breach of the peace, he would only be subject to the notification requirements of the Sexual Offences Act 2003 if the court determined that there was "a significant sexual aspect to the offender's behaviour in committing the offence." (Schedule 3, paragraph 60 of the 2003 Act).

[40] In deciding whether to make that determination we had regard to what the Lord Justice Clerk (Lord Gill) said in *HMA* v *Hay* 2014 JC 1952, at paragraph 52:

> "In my opinion it would be futile to attempt to define the word 'significant' as it is used in paragraph 60. That is a question best left to the judgment of the sentencer. Since the purpose of registration is to protect the public against a perceived danger, the question whether a sexual aspect of the accused's behaviour was significant should be assessed in that light. One way to approach that is to consider whether the sexual aspect is important enough to merit attention as indicating an underlying sexual disorder or deviance from which society is entitled to be protected (*Wylie* v *M 2009 SLT (Sh Ct) 18*, Sheriff Pyle at [13]). In this difficult exercise, in my view, sentencers should consider the accused's behaviour in the context of the purpose and the effects of registration, keep a sense of proportion and use their commonsense."

[41] Adopting that approach we decided that the appellant's behaviour, while alarming, did not disclose an underlying sexual disorder or deviance from which society should be protected. In that sense therefore there was not a significant sexual aspect to the offender's behaviour in committing the offence. Accordingly we do not order the appellant to be

subject to the 2003 Act notification requirements in respect of the new conviction, and the requirement imposed by the sheriff will be removed