



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 45
HCA/2025/241/XC
HCA/2025/242/XC

Lord Justice Clerk
Lord Matthews
Lord Armstrong

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

appeal following a reference from the Scottish Criminal Cases Review Commission by

SHIVA MACKISON

Appellant

against

PROCURATOR FISCAL, PAISLEY

Respondent

Appellant: Kennedy; PDSO, Glasgow
Respondent: MacLeod, AD; Crown Agent

9 October 2025

Introduction

[1] The Scottish Criminal Cases Review Commission referred the appellant's convictions on two summary complaints. The appellant lodged notes of appeal. The basis of the referral and the grounds of appeal relate to the appellant's mental state when she committed the

offences and when she pled guilty on the two complaints in December 2021. The grounds of appeal proceed on the basis that there has been a miscarriage of justice for two reasons:

- First, that the appellant pled guilty under error or misconception as to the nature and legal implications of her mental disorder in that it was not known that she was not fit for trial, Criminal Procedure (Scotland) Act 1995 section 53F, such that she should be permitted to withdraw her pleas of guilty.
- Secondly, that there is fresh evidence concerning her mental state that was not available at the time of her trials that would have afforded her a defence of lack of criminal responsibility under the 1995 Act section 51A.

The Crown investigated and considered the circumstances and concede that there has been a miscarriage of justice on each complaint.

The convictions

[2] On 22 December 2021, at Paisley Sheriff Court, the appellant pled guilty at trial to the following charges on summary complaint PA21006043:

“(001) On 29th June 2021 at ..., Glasgow and elsewhere you did send, by means of a public electronic communications network messages to Michael Mackison ...your ex partner, that were grossly offensive or of an indecent, obscene or menacing character, in that you did repeatedly contact Michael Mackison via email and a social media app, namely Whatsapp and you did swear, repeatedly make abusive remarks, repeatedly make threats and repeatedly threaten to set his house on fire; CONTRARY to the Communications Act 2003, section 127(1)(a);

(002) On 8th October 2021 at ..., Glasgow and elsewhere you did send, by means of a public electronic communications network messages to Michael Mackison ..., your ex partner, that were grossly offensive or of an indecent, obscene or menacing character, in that you did repeatedly contact Michael Mackison via email, swear, repeatedly make abusive remarks, repeatedly make obscene remarks and damage his car; CONTRARY to the Communications Act 2003, section 127(1)(a).”

On 23 December 2021 the appellant pled guilty at first appearance, a bail undertaking, to the following charge on summary complaint PA21006841:

“(001) You being an accused person and having been granted bail on 13 October 2021 at Paisley Sheriff Court in terms of the Criminal Procedure (Scotland) Act 1995 and being subject to the condition inter alia that you do not approach or contact nor attempt to approach or contact Michael Mackison unless via a third party to make child care arrangements and you do not enter nor seek to enter [an address in Glasgow], did on 26 November 2021 ...fail without reasonable excuse to comply with said condition in respect that you did approach and contact the said Michael Mackison and did enter [an address in Glasgow]; CONTRARY to the Criminal Procedure (Scotland) Act 1995, section 27(1)(b).”

All of the charges were aggravated as involving abuse of a partner or ex-partner: section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

The circumstances of the offences

Charge 1

[3] The appellant and the complainer on the first complaint had been married since 2013 and had one child together, aged 3 at the time of these offences. The complainer had taken their child out on 29 June 2021 when the appellant began to send him threatening and abusive messages by email. By WhatsApp messaging, she threatened to set fire to their home, also implying that she would cause a gas explosion. He reported these events to the police, apparently out of concern for her wellbeing.

Charge 2

[4] On 8 October 2021 the appellant sent further abusive and threatening emails to her husband, in effect, telling him that she wished him dead. He again reported her to the police. On her arrest a few days later, she explained that she was unhappy with her husband for taking their child to see his parents.

Second complaint

[5] On 13 October 2021 the appellant breached special bail conditions by approaching, contacting and communicating with her husband, specifically by trying to pull their child away from him. He allowed her to do so to ensure the child was not upset by what was happening. She drove away with the child. The complainer reported events to the police who went to the appellant's home, found that the child was safe and arrested her. She said she just wanted her child to be safe.

Procedure and defence mental state investigations at first instance

[6] When the appellant was first arrested for the offence in charge 1 on the first complaint, she was examined by a community psychiatric nurse who did not consider that she needed further evaluation. The Crown remained concerned about her vulnerability and sought further information on her mental health, to be told that there had been no concerns whilst she was in police custody in October 2021.

[7] Sentence was adjourned initially to 19 January 2022 for a justice social work report and then again to 16 February 2022 for the defence to provide a psychiatric report from Dr Karen Bett that was available to the court on that date. On 16 February 2022 the court appears to have made a request for a psychiatric report to the Douglas Inch Centre but it does not appear that any report was prepared or that the request was further followed up. On 9 March 2022, the appellant was sentenced on the first complaint, *in cumulo*, to imprisonment for 5 months and, concurrently, on the second complaint to 11 weeks' imprisonment. The court minute records that she had refused to perform supervised unpaid work and that the court found no alternative to a prison sentence.

[8] Dr Karen Bett, locum consultant psychiatrist, reported on 14 February 2022 that she found no evidence of psychosis and concluded that the appellant was fit to participate in her trial and did not have a defence under section 51A. Dr Bett referred to seeing unspecified medical and psychiatric notes and summarised the appellant's medical and psychiatric history, noting her first contact with psychiatric services in 2020. The appellant had explained on assessment on 15 June 2020 that she had damaged her husband's car because he made her feel like hell. Dr Bett noted that she had been observed as being very agitated and worried about her son. There was a note of a further review on 29 June 2020 when the appellant had reported that her husband had made her feel incarcerated for a few years but there was no clear evidence of psychosis. Dr Bett proposed that she had mild to moderate depression with no evidence of psychosis, adding: "She has no delusions of possession of thought or delusions of reference and there is no perceptual disturbance." Although the appellant had an odd outlook and way of thinking, and a somewhat paranoid feeling about her presentation, it was not so extreme as to reach the level of illness. She may well have paranoid personality traits. Any mental disorder was probably at the milder level of the scale but changes in function raised concerns that she may be developing an illness or in the prodrome of an illness.

[9] The reporting social worker found that the appellant was not looking after herself and had lost a lot of weight. She had expressed suicidal thoughts. There had been a GP referral in 2020 when she was diagnosed with acute stress and had 8 crisis assessments from the Mental Health Team but on each occasion no mental health input was deemed necessary. She was known to social work and supported as an adult at risk. She showed no insight into the implications of her behaviour. The court may wish to obtain a psychiatric report to consider how the appellant might manage to comply with any court order given

her refusal to comply with community-based disposals. The social worker expressed:

“strong reservations regarding the extent to which Mrs Mackison is fully able to rationally analyse the outcomes of her decision.”

Previous appeal procedure

[10] On 5 September 2023, the appellant sought an extension of time within which to lodge a note of appeal against sentence, explaining that:

“her psychosis had gone undetected until she underwent a psychiatric assessment in prison (the day before her release), in which a professional finally recognised that she was suffering from some form of mental illness and consequently she was treated in the community by adult mental health services.”

She also explained that she was under treatment in the community from her release until October 2022 when, following a routine visit to a community psychiatric nurse, she was made subject to a compulsory treatment order.

[11] The Sheriff Appeal Court refused her application. The SAC noted that it was incompetent to appeal against sentence by stated case, and that the appellant had offered insufficient reasons for allowing so long to lapse before seeking to appeal. The SAC noted that she had been legally represented and that there was psychiatric information before the sentencing sheriff.

The SCCRC's reasons for referral

[12] The appellant contended that it was now known that she had been suffering postpartum psychosis that had included paranoid and delusional beliefs, including that her son was in danger of his life from her husband. Following release from prison she had been detained in hospital for treatment under a compulsory treatment order. She provided a

letter dated 26 September 2023 from Dr Alex Thom, Consultant Psychiatrist, to the effect that she had been detained in hospital from 9 November 2022 to 15 March 2023 when compulsory treatment was revoked. She was treated with the antipsychotic drug Olanzapine and received significant nursing and therapeutic input.

[13] The appellant's husband (the complainer on all offences) provided a letter dated 8 October 2023 describing his wife's mental deterioration from early 2020, explaining that by 2021 she was very challenging, plainly ill and had become a different person. He had raised his concerns with the Procurator Fiscal and social work. In July 2021, he had written to the Procurator Fiscal to explain his wife's significant mental deterioration and her lack of insight in that regard. He supported his wife's application to the SCCRC.

[14] The SCCRC commissioned a report from Professor John Crichton, consultant forensic psychiatrist. He provided a comprehensive report, detailing the appellant's medical history and explaining his view that she had suffered from a psychotic illness following the birth of her son that persisted until she was treated with antipsychotic medication at the end of 2022 whilst compulsorily detained. Her symptoms included delusional beliefs. Her presentation was such that she could deceive professionals about her decision-making ability. There was a very stark difference in her presentation before and after treatment. These circumstances effectively excluded a personality disorder as she would not have responded as well as she did to antipsychotic treatment if that was all that underlay her behaviour and condition.

[15] Dr Crichton found it significant that her husband had been concerned about his wife's mental illness from 2019, but no one had noted collateral information from him until November 2022. The appellant should have been diverted away from court proceedings for treatment for her mental health. Dr Bett could not have had all the information that was available to Dr Crichton from medical and social work records because, if she had, she

would have interviewed the appellant's husband. Since Dr Bett did not work with the local health board, she could not make a recommendation by herself for any psychiatric disposal.

[16] Dr Crichton found overwhelming evidence that at the time of the charges and first instance proceedings the appellant had delusional disorder, a major psychotic illness. There was sufficient evidence to say that she was unable to appreciate the nature and wrongfulness of her actions because of delusional disorder. Her mental state in January 2023 was such that a *curator ad litem* was appointed for her at the Mental Health Tribunal at that time. She was unable to instruct her solicitors and it appeared that she was unable to understand the court process. She was not able to participate effectively because of delusional disorder. Whilst some such evidence was available at the time of her trial, there was significant new evidence from her husband together with her diagnosis and successful treatment and recovery from delusional disorder. There were also material findings of fact by the Mental Health Tribunal. This all supported the conclusion that she was seriously unwell at the time of her offending and during proceedings at first instance.

[17] The SCCRC recovered from Police Scotland a record of 38 telephone calls from the appellant and her husband between 2019 and 2022. The Mental Health Tribunal made the following findings in fact on 6 January 2023:

- [The appellant] was presenting with symptoms consistent with a delusional disorder. She has prominent delusional thinking and has been expressing delusional beliefs for about 5 years that her husband and his family intended to harm her and their son.
- As a consequence of her delusional beliefs that she is being persecuted by her husband, [the appellant] has sent a large number of abusive and threatening texts to her husband...

- [The appellant] does not believe that she is suffering from a mental illness...
- The CTO is necessary as [the appellant] has no insight into her current circumstances...Previous attempts to treat her in the community were unsuccessful due to her lack of insight.

[18] The SCCRC concluded that, on a balance of probabilities, the appellant was not capable of participating effectively in a trial and had open to her a defence under section 51A of the 1995 Act.

Note of appeal

[19] There is now evidence, namely psychiatric opinion in Dr Crichton's report, that was not reasonably available at the time of the trial establishing that the appellant lacked criminal responsibility and was unfit for trial because of her mental condition. She was unable to participate effectively in the trial, was not in a position to tender a plea and her convictions are a miscarriage of justice. This is a case where the court would be entitled to allow the appellant to withdraw her pleas of guilty. This was not a case like *Duzgun v HM Advocate* [2020] HCJAC 13, 2020 JC 183 where an appellant of sound mind instructed her solicitors not to explore a section 51A defence. The convictions should be quashed.

Submissions

Crown

[20] We outline first the Crown submission proposing that the appeal should be sustained. The Crown precognosced (interviewed) Dr Bett in preparing for this appeal and she confirmed that, in preparing her report, she did not have access to:

- the appellant's GP records;

- social work records;
- criminal case productions which included the emails and text message sent by the appellant.
- She did not interview the appellant's husband as he was a complainer in the case.

Dr Bett was not aware of an Adult Support and Protection Meeting held on 18 January 2022 when participants identified the appellant having fixed false beliefs relating to the complainer and, having identified this as a feature of delusional disorder, asked for a referral to the mental health services to be made.

[21] The Crown confirmed that there was no opposition to the appeal which should be sustained, stating:

"The recurrent diagnosis by the many medical practitioners who spoke with the appellant was one of anxiety and depression. Professor Crichton confirmed that it is not unusual for someone with a delusional disorder to have symptoms of anxiety and low mood. The overwhelming evidence to which Professor Crichton refers in support of his diagnosis is the availability of a complete set of multi-disciplinary records and the in-depth background provided by the appellant's husband which was not provided prior to conviction and sentence. **Confirmation of his diagnosis is thereafter confirmed by the clinical story of recovery following treatment.** Others involved in the appellant's care would not have had such a complete body of information to consider prior to making any diagnosis and Dr Bett has confirmed that she did not."

[Emphasis added]

Founding on case law we examine below, the Crown considered that this is a case where the circumstances in which the appellant pled guilty constituted a miscarriage of justice. The circumstances in which the appellant pled guilty were exceptional and clearly prejudicial to her and there has been a miscarriage of justice.

Appellant

[22] In light of the Crown's concession, based on a range of material, including particularly the report by Professor Crichton, the court should quash the appellant's convictions. Professor Crichton had the advantage of access to a much wider range of relevant material than Dr Bett and the advantage of knowledge of the subsequent history of the appellant's mental condition. The appellant had no insight into her delusions and masked her condition from professionals. The court should quash the convictions recorded in the lower court and substitute verdicts of not guilty by reason of the defence in section 51A or make a finding that she was unfit for trial under section 53F as provided for in section 190 of the 1995 Act. At the hearing before us counsel accepted, following *Duzgun*, that the court should do no more than quash the conviction.

Decision

[23] Section 106 of the 1995 Act provides:

- (3) By an appeal under subsection (1) above a person may bring under review of the High Court any alleged miscarriage of justice, which may include such a miscarriage based on—
 - (a) subject to subsections (3A) to (3D) below, the existence and significance of evidence which was not heard at the original proceedings;
- ...
- (3A) Evidence such as is mentioned in subsection (3)(a) above may found an appeal only where there is a reasonable explanation of why it was not so heard.

[24] Section 51A provides:

51A Criminal responsibility of persons with mental disorder

- (1) A person is not criminally responsible for conduct constituting an offence, and is to be acquitted of the offence, if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct.

- (2) But a person does not lack criminal responsibility for such conduct if the mental disorder in question consists only of a personality disorder which is characterised solely or principally by abnormally aggressive or seriously irresponsible conduct.
- (3) The defence set out in subsection (1) is a special defence.
- (4) The special defence may be stated only by the person charged with the offence and it is for that person to establish it on the balance of probabilities.
- (5) In this section, "*conduct*" includes acts and omissions.

[25] Section 53F provides:

53F Unfitness for trial

- (1) A person is unfit for trial if it is established on the balance of probabilities that the person is incapable, by reason of a mental or physical condition, of participating effectively in a trial.
- (2) In determining whether a person is unfit for trial the court is to have regard to—
 - (a) the ability of the person to—
 - (i) understand the nature of the charge,
 - (ii) understand the requirement to tender a plea to the charge and the effect of such a plea,
 - (iii) understand the purpose of, and follow the course of, the trial,
 - (iv) understand the evidence that may be given against the person,
 - (v) instruct and otherwise communicate with the person's legal representative, and
 - (b) any other factor which the court considers relevant.
- (3) The court is not to find that a person is unfit for trial by reason only of the person being unable to recall whether the event which forms the basis of the charge occurred in the manner described in the charge.
- (4) In this section "*the court*" means—
 - (a) as regards a person charged on indictment, the High Court or the sheriff court,
 - (b) as regards a person charged summarily, the sheriff court.

[26] Whilst we suspect that the appellant was not fit for trial because she probably had a delusional disorder, matters are not particularly well focussed against the criteria in section 53F and we refrain from concluding, on a balance of probabilities, that the appellant was not fit for trial.

[27] The most compelling aspect of this appeal relates to events that occurred after the appellant was convicted. Such developments can be particularly important in allowing psychiatrists, and the court, to reach a sound conclusion on a person's earlier mental state as

this court has previously recognised. In *Reid v HM Advocate* [2012] HCJAC 150, 2013

SCCR 70 the court proceeded to quash a hospital order and instead impose a life sentence

for murder. Lady Paton in delivering the opinion of the court noted what was stated by

Lord Coulsfield in *Jackson v HM Advocate* 1998 SCCR 539 that:

“[First], a diagnosis of mental illness cannot always be made accurately on a single examination or a number of examinations within a short period of time. In addition, one of the factors which may point to mental illness rather than personality disorder is the extent to which a patient responds to treatment; and that can only be assessed over a period of time...”

In an unreported appeal, *Daly v HM Advocate*, 14 May 1997, the court quashed the appellant’s conviction for attempting to defeat the ends of justice on a fresh evidence ground. He had been convicted of falsely claiming that he was mentally ill and suffered auditory hallucinations such that he avoided imprisonment and was made subject to a hospital order. In delivering the opinion of the court, the Lord Justice Clerk (Cullen) explained that a significant part of the fresh evidence was evidence of the appellant’s illness, treatment with anti-psychotic medication and response to treatment following his trial.

[28] The defence made belated investigations after the appellant pled guilty, apparently with a view to considering whether to invite the court to allow the appellant to withdraw her pleas of guilty, that did not vouch that she could have had a section 51A defence or was unfit for trial. It is now known that, following her release from prison, the appellant was later compulsorily detained for treatment on account of mental disorder, assessed in hospital and treated with anti-psychotic medication to which she responded well. All of this has allowed an experienced forensic psychiatrist to conclude following an exhaustive analysis of a wide range of relevant information, and his own clinical examination and assessment of her in August 2024, that the appellant was, at the time of her committing the offences,

suffering from a delusional disorder the effect of which was that she was unable by reason of mental disorder to appreciate the nature or wrongfulness of her conduct.

[29] Had post-trial developments, notably the appellant's compulsory detention order and the provisional psychiatric diagnosis and findings underlying it, and Dr Crichton's opinion, been available prior to trial the appellant would have had a full defence under section 51A. It is likely that the Crown would have accepted it and she would have been acquitted by reason of lack of criminal responsibility and then disposed of under section 57 of the 1995 Act. Accordingly the sheriff could, depending on what psychiatric advice was available, have ultimately imposed a compulsion order that may or may not have included detention in hospital, a supervision and treatment order, or made no order. It seems unlikely that the sheriff would have made a restriction order or a guardianship order.

[30] When it comes to the fresh evidence aspect, the wording of section 106(3) refers to the original proceedings. Such an appeal will often follow conviction after trial but finding a miscarriage of justice on this ground is not limited to that situation. In *McGarry v HM Advocate* [2022] HCJAC 18, 2022 JC 148, in delivering the opinion of the court, the Lord Justice General (Carloway) explained, at para 72, with reference to *Healy v HM Advocate* 1990 SCCR 110:

"... in giving the opinion of the court, the Lord Justice Clerk (Ross) accepted the proposition that before the court would allow a plea of guilty to be withdrawn it would require to be satisfied that there were exceptional circumstances justifying such a course. It would have to be shown that the plea had been tendered under some real error or misconception or in circumstances which were clearly prejudicial to the appellant."

[31] The Crown accept that there are exceptional circumstances demonstrating that the appellant tendered pleas of guilty in circumstances that were clearly prejudicial to her and that a miscarriage of justice has occurred. The Crown point to what can be regarded as

evidence for a material part of which there is a reasonable explanation for its absence from proceedings at first instance, namely developments after trial and particularly after the appellant was released from her sentences of imprisonment.

[32] In light of the Crown's concessions, we accept that there has been a miscarriage of justice. Ordinarily, where a miscarriage of justice rests on evidence not available at the time of the original proceedings the court would authorise a new prosecution, but the Crown did not seek such authority. We note that the appellant spent months in prison when she was mentally ill for crimes in respect of which the Crown now accept that she bore no criminal responsibility. Following this court's analysis in *Duzgun*, at para 23 dealing with the power of disposal under section 118(5) (the solemn equivalent of section 190), we do not consider it appropriate to substitute a verdict by reason of the special defence in section 51A and make a disposal under section 57.

[33] Instead, in sustaining the appeals, we shall simply quash the appellant's convictions on both complaints.