



APPEAL COURT, HIGH COURT OF JUSTICIARY

**[2026] HCJAC 32
HCA/2026/89/XC**

Lord Matthews
Lord Clark
Lord Ericht

STATEMENT OF REASONS

delivered by LORD MATTHEWS

in

Application by Stephen Stewart under section 107(8) of the Criminal Procedure
(Scotland) Act 1995

by

STEPHEN STEWART

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

**Appellant: Shand; Faculty Appeals Unit
Respondent: Prentice KC AD; the Crown Agent**

29 July 2026

[1] This is an application under section 107(8) and (9) of the Criminal Procedure (Scotland) Act 1995 [1995 Act] for leave to argue grounds of appeal which were refused at the first sifting stage. Section 107(8) provides that such grounds may not be argued except “by leave of the High Court on cause shown”. The application itself does not contain any reasons why it should be granted, nor does it state which particular grounds are concerned.

These were revealed for the first time in written submissions. The application is a letter from the Faculty Appeals Unit, which contains the following sentences.

“We refer to the above matter in which leave to appeal was part granted on restricted grounds...We write to indicate that we wish to appeal this matter by way of section 107(9) of the Criminal Procedure (Scotland) Act 1995. We would be grateful if a hearing could be assigned to deal with this matter in place of written submissions.”

[2] No particular form is provided for an application, which may be written or oral (for example, in the course of an appeal hearing - 1995 Act, section 114) but it is essential, as well as being good practice, for it to set out the basis upon which it is contended that it should be granted. These grounds may be amplified by submissions, oral or written. In this case we have the benefit of written submissions and have heard counsel. As should be well known by now, and as we shall repeat, such an application is not an appeal against the decision at the sifting stage. We are prepared to deal with it but in future the grounds should be contained in the application.

[3] The appellant was convicted, along with others, of culpable homicide, as well as other charges, notably charge 2 (abduction) and charge 3 (extortion). He was also convicted, on his own, of two charges under the Misuse of Drugs Act 1971.

[4] His Note of Appeal contains the following grounds:

“(1) That there was insufficient evidence on charge 1, such that the learned trial judge erred in repelling the submission of no case to answer. The Crown case required too many inferences to be drawn from other inferences. An assault was too speculative and the cause of death, too remote. That is particularly so against the first accused, who was not present at the locus, and the case against him had to also be based on concert.

(2) That there was a miscarriage of justice in that the learned trial judge materially misdirected the jury: -

(a) The Crown case (on charge 1) was predicated on the assumption that the jury had to convict of charges 2 and 3, the abduction and extortion. It also had to be predicted that those crimes were ongoing (*sic*).

Consequently, there was a failure to direct, that in order (*sic*) consider proof of charge 1, they had first to convict of charges 2 and 3.

- (b) Given that words alone cannot be an assault, and there was no evidence of a physical assault on the deceased in charge 1, the learned trial judge does not explain how the assault is to be proved.
- (c) There ought to have been a direction on the 'but for' test in respect of causation of death in charge 1.

- (3) That in terms of section 106(3)(b) 1995 Act, the verdict on charge 1, was one which no reasonable jury properly directed could have returned. The conviction was based on speculation, rather than on reasonable inference."

[5] Leave to appeal was granted in respect of grounds 1 and 2(a) and the appellant now seeks to reinstate grounds 2(b) and 3.

[6] Grounds have, of course, to be arguable and the appellant has to pass the tests set out in *Beggs v HM Advocate* 2006 SCCR 25, [2005] HCJAC 131 and *Birnie v HM Advocate* 2015 JC 314, [2015] HCJAC 54.

[7] In *Beggs*, at para [5], the court said the following:

"it is understandable that, if an appellant has already been granted leave to appeal, he should be required to show cause as to why he should be able to rely on a ground of appeal which has not been specified under subsection (7). In our opinion he requires to satisfy the court that there is a good reason why he should be given leave to rely on it. No doubt it is implicit that such a ground of appeal would have to be arguable. However, it is plain that this of itself is not the test: it is not simply a matter of asking the court to reconsider the question of the arguability of the ground of appeal. What may constitute a good reason will depend on the circumstances of the case. It might, for example, be founded on a change of circumstance or on some patent error or misunderstanding of the grounds of appeal on the part of the sifting judge or judges. It might be founded on the fact that a ground of appeal not specified as arguable was properly to be seen as inextricably bound up with one which was so specified. It might, in a case where leave was granted at second sift, be founded on an appearance that the second sift judges had not taken into account additional material submitted at the second sift stage bearing on the reasons given by the first sift judge for not specifying the ground in question as arguable. It might be founded on the consideration that the ground of appeal is of such significance that it would not be in the interests of justice for it to be excluded from consideration in the appeal".

[8] In *Birnie*, the Lord Justice Clerk (Carloway), delivering the opinion of the court, explained the position thus, at para [8]:

“An application under section 107(8) of the 1995 Act to argue a ground, for which not only has leave not been granted but has actually been refused at sift, is not to be seen as a form of appeal against the decision taken at sift. The sift decision is final at that stage of the proceedings. It is not simply a matter of asking the court to reconsider the question of the arguability of the ground of appeal. The appellant must show that there is ‘good reason’ for reinstating the ground, such as some change in circumstances, or a patent error or misunderstanding of the grounds of appeal by the sifting judge or court, or, indeed, that the point is of such significance that it would not be in the interests of justice to exclude it (*Beggs v HM Advocate* 2006 SCCR 25, LJG (Cullen) at para [5]).”

[9] It was argued before us that it was unfair that an appellant who had been wholly unsuccessful at first sift and could go straight to second sift, should be in a better position than an appellant who had been partly successful and who would then have to show cause for a ground to be reinstated. It was pointed out that in *Birnie* the appellant had been to the second sift.

[10] However, the 1995 Act demands that cause be shown where a ground has not been specified and makes no distinction between first and second sift. In both *Beggs* and *Birnie* it is made clear that the test applies to an appellant who has been partially successful at first sift as well as to one who has been partially successful at second sift. Indeed, the appellant in *Beggs* was partially successful at first sift. Counsel invited us nonetheless to take account of the fact that the matter had not been to the second sift, without specifying how we could or should do so.

[11] In short, the tests must be met by the appellant in this case.

[12] As far as ground 2(b) is concerned, the sifting judge said that the opening premise of it was wrong in law and pointed to part of the trial judge’s charge and para [74] of her report to this court in relation to her directions. It is argued that the first sifting judge and the trial judge were wrong in law in dealing with the definition of assault and pointed to a number

of authorities, including Gordon's *Criminal Law*, 4th Edition at paragraph 33.03 and chapter 48 as well as *Kenny v HM Advocate* 1951 JC 104.

[13] Ground 2(b) is primarily focussed on the trial judge's directions. Having considered her charge as a whole, we are satisfied that it cannot be said that she did not provide the jury with a clear route to verdict. The suggestion to the contrary is unarguable.

[14] As to the premise on which the ground is based, namely that "words alone cannot be an assault", that is a matter which can be argued in terms of ground 1 if the evidence discloses that no more than words were involved. In other words, in the context of an argument that there was insufficient evidence of the crime libelled.

[15] We are not persuaded that there is any good reason why ground 2(b) should be reinstated.

[16] As to ground 3 (no reasonable jury), it is submitted that the ground is inextricably linked to ground 1 (*cf Beggs*) and to some extent to ground 2(b). It is said that there is scope for a scenario where the court might find there was a technical sufficiency of evidence but that no reasonable jury could have convicted. The tests for sufficiency of evidence and for an argument that no reasonable jury could have convicted, while both based on a consideration of the evidence, are not the same and we are not persuaded that the grounds are inextricably linked in this case. The submissions anent this ground do not otherwise grapple with the tests we have outlined above and amount merely to a disagreement with the sifting judge's decision.

[17] The application is refused.