SHERIFF APPEAL COURT

[2026] SAC (Crim) 12
SAC/2026/260/AP

Sheriff Principal Gillian A Wade KC
Appeal Sheriff I H Cruickshank
Appeal Sheriff W A Sheehan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL GILLIAN A WADE KC

in

Appeal by Stated Case against Conviction

by

RICHARD JAMES GREENHOWE

Appellant

against

PROCURATOR FISCAL, ABERDEEN

Respondent

Appellant: G Reid, advocate; Faculty Services Limited
Respondent: Macintosh, AD; Crown Agent

3 November 2026

Introduction and factual background

[1] This appeal considers what it means to disturb sea mammals such as dolphins and pilot whales in order to establish that there has been a contravention of regulation 39(2) of the Conservation (Natural Habitats, etc) Regulations 1994 ("the regulation").

[2] The appellant is the owner of the sailing vessel "Seacab" which he used to run sea life tours at Torry Battery, Aberdeen. On 21 April 2026, following a trial which took place on 17 and 18 September, 31 October, 17 November 2025 and 19 and 20 February 2026 the sheriff at Aberdeen convicted the appellant of charges 3 and 4 on the summary complaint as amended in the following terms:

> "(003) On 22 July 2023 at Torry Battery, Greyhope Road, Aberdeen you RICHARD JAMES GREENHOWE, being the skipper and master of vessel Seacab did deliberately or recklessly disturb a dolphin in that you did drive through and over the top of a pod of dolphins;
>
> CONTRARY to the Conservation (Natural Habitats, etc.) Regulations 1994, Regulation 39(2)"

And separately:

> "(004) On 30 July 2023 at Aberdeen Harbour Area, Torry, Aberdeen, you RICHARD JAMES GREENHOWE, being the skipper and master of vessel Seacab did deliberately or recklessly disturb a pod of PILOT WHALES (CETACEAN) in that you repeatedly went close to the pod and split the pod;
>
> CONTRARY to the Conservation (Natural Habitats, etc.) Regulations 1994, Regulation 39(2)"

[3] In sentencing, the learned sheriff imposed a fine of £1,000 in respect of charge 3 and a fine of £1,500 in respect of charge 4 with the appropriate victim surcharge also being applied. Leave to appeal against sentence was refused. However leave to appeal against conviction was granted on a restricted basis on 7 August 2026.

[4] The appeal proceeded by way of stated case. The sheriff narrated the facts upon which he found the appellant guilty. In short, the sheriff found that on 22 July 2023 dolphins were feeding around the north breakwater at Aberdeen Harbour. The Seacab came out of the harbour, passed the feeding area, turned 180 degrees and travelled back through it, then turned again and passed through the area a second time. At times it was found to be 5 – 10 metres from the dolphins. The dolphins head-slapped and then left the feeding

area, swimming out to sea. The sheriff found that the vessel's movements disturbed the dolphins and that the skipper's conduct was at least reckless.

[5] In relation to charge 4 the sheriff also found that on 30 July 2023 up to 25 pilot whales, divided into a larger and smaller pod, were close to the coast. The larger group was moving out to sea. The Seacab travelled directly towards the larger pod at speed, slowed when close, and positioned itself between the whales and open water. It then turned towards the pod and continued its approach. The larger pod changed direction and moved toward the beach, while the smaller pod became separated. The sheriff found those movements disturbed the whales which was of particular concern because pilot whales close to shore faced a risk of stranding or beaching.

[6] The sheriff's findings were based on eyewitness evidence, video footage, and expert evidence. The sheriff accepted that moving away from the vessel was an obvious behavioural change showing disturbance; expert evidence also supported his conclusion that the boat's approach, which blocked the seaward route and caused a change in the whales' direction of travel, coupled with the separation of the pod were clear signs of disturbance.

[7] The sheriff rejected the appellant's explanations for the manoeuvres, including that he was surveying the breakwater on 22 July 2023 or initially could not see the whales on 30 July 2023. The vessel was driven through a known dolphin-foraging area and directly toward the pilot whales, without regard to the resulting disruption to the animals' behaviour. He considered that the actions of the appellant were at least reckless and convicted him accordingly.

[8] The question posed by the sheriff for this court to answer consisted of several parts. The parts in respect of which leave to appeal was granted are:

1. Did I err in convicting the appellant of the charges on one or more of the following grounds:

"(a) in determining that the word 'disturb' in Regulation 39(2) ought to be given its ordinary everyday meaning;

(b) in rejecting the submission that only someone possessed of skill and qualifications could comment on whether the sea mammals referred to in the charges were disturbed;

…

(d) in determining that a disturbance could be concluded from the relevant footage and from the eyewitnesses…"

[9] All of these matters relate in one way or another to the meaning to be given to the word "disturb" in the regulation and whether it was open to the sheriff to determine as a matter of fact, based on all of the evidence adduced before him, that the dolphins and pilot whales had been "disturbed" in contravention of regulation 39(2).

[10] At both first and second sift it was noted that there were no questions directed at the findings in fact upon which these grounds depend. We note that at the adjustment stage the appellant sought to have the sheriff delete certain findings in fact which were material to his decision. He declined to do so on the basis that these were the findings he made on his assessment of the eyewitnesses, expert evidence and his own assessment of video footage which had been played in the course of the trial.

The appellant's submissions

[11] The appellant submitted that the critical issue in proving the charge in terms of the regulation is that an animal was disturbed. That is, the gravamen of the offence. If the Crown cannot establish disturbance, the charge cannot be proved. The appellant argued that the convictions should be quashed because the sheriff applied the wrong legal and

evidential approach to whether the dolphins and whales were "disturbed". He submitted that "disturb" in the regulation should not have been given an ordinary dictionary meaning such as distracting, interrupting, or disrupting. On the contrary he submitted that marine-animal disturbance is a specialist behavioural issue, potentially ranging from trivial momentary reactions to conduct affecting welfare, survival, feeding, breeding, communication, or habitat. It was not within judicial knowledge and could not be assessed by a lay observer.

[12] NatureScot's guidance defines disturbance as an interaction that changes behaviour or environment in a way that affects an animal's well-being or survival in the short, medium, or long-term. The appellant submitted that the sheriff failed to give this specialist guidance proper weight. Because the regulations created a criminal offence carrying a record and penalty a low threshold based on a lay impression of momentary distraction was inappropriate and insufficiently certain. The appellant argued that in such circumstances the evidence of a skilled witness was required and that witnesses without such expertise could only describe what they saw but could not reliably decide whether animal behaviour amounted to "disturbance" in a legal sense to constitute a contravention of the regulation.

[13] The appellant placed particular emphasis on guidance documents produced by NatureScot and in particular documents entitled A Guide to Best Practice For Marine Wildlife ("the Guide") and the Scottish Marine Wildlife Watching Code ("the Code") which both made clear that the issue of disturbance is not straightforward. At p 5 of the Guide disturbance is dealt with under the heading "What is disturbance?" and states:

> "The Scottish Marine Wildlife Watching Code is primarily concerned with minimising disturbance. Different people interpret the term 'disturbance' differently. A working definition has therefore been developed based on a review of the literature and discussions with scientists, wildlife operators and other user groups.

The term 'disturbance' as used in the Code means:

'The result of direct or indirect interaction with people that changes the behaviour of an animal or changes the environment, which in turn affects the well-being or survival of an animal in the short, medium or long term.'

This might include, for example:

- Direct injury (e.g. collisions, propeller damage).
- Changes in distribution.
- Disruption of communication, migration, breathing, breeding, nursing, feeding or resting.
- Excessive use of energy and eventual loss of condition caused by continual or repeated avoidance or fight.
- Increased vulnerability of an individual or population to predators.
- Damage to habitat.
- Chronic stress which can impact on an animal's health (e.g. immune, digestive and reproductive functions).

Indicators of disturbance are discussed in each of the speciesgroup sections below, but typically include signs of being startled (e.g. heads up, freezing, sudden diving and swimming or flying away).

Many forms of disturbance will have little detectable impact on marine wildlife.

However, several factors can transform what appears to be minor into significant disturbance which can have serious long-term impacts:

- Repeated disturbance (which can also constitute harassment).
- Disturbance associated with large numbers of people watching.
- Disturbance at sensitive times or in sensitive places."

[14] The working definition which had been developed by NatureScot was based "on a review of literature and discussions with scientists, wildlife operators and other user groups." *The Guide,* p 5. While the guidance was not law, it was of assistance. At trial it was not for the defence to establish how disturbance should be defined and applied, given the burden and standard of proof in a criminal case. However, there was a complete absence of an agreed and legally supported definition which could establish the charge on the evidence available.

[15] The content and tone of the report and evidence of the Crown's skilled NatureScot witness Karen Hall, who was qualified to assess marine wildlife behaviour, was cautious. For charge 4, her report said disturbance was "likely"; for charge 3, it said behavioural changes "may" have been caused by the vessel. Her qualified but tentative conclusions did not meet the criminal standard of proof beyond reasonable doubt. The sheriff had erred in placing greater weight on the eyewitnesses and their interpretation of what they saw which could also have had benign explanations such as play or feeding.

[16] Finally in relation to the third question it was submitted that if due regard to the specialist definition of disturbance was applied, the video footage and lay eyewitness accounts could not establish disturbance beyond reasonable doubt. The availability of video footage did not remove the need for expert interpretation; rather, it enabled the NatureScot experts to assess the events, and their assessment remained qualified. The sheriff's finding that the appellant's conduct was at least reckless was challenged as resting on the same allegedly incorrect approach to defining and proving disturbance. Accordingly, a miscarriage of justice had arisen and the convictions ought to be quashed.

[17] In oral submissions before us it was accepted that if the answer to the first part of the question was in the negative and the definition of the word "disturb" was to be given its ordinary English dictionary definition then the remaining two parts of the question would also fall to be answered in the negative and the appeal could not succeed.

The respondent's submissions

[18] The respondent invited the court to answer each question in the negative. The sheriff was correct in concluding that the word "disturb" was to be given its ordinary meaning and correct to reject the submission that the question of disturbance could only be determined by

a skilled witness. The word "disturb" was not defined in the regulation as it had been in relation to a number of other pieces of legislation designed to protect wildlife.

[19] Where a particular definition of a word or phrase has not been specified in primary or secondary legislation, it should be given its ordinary English meaning. There is no need to look beyond that unless the language is ambiguous or productive of absurdity: *Samuel Stewart* v *PF, Lanark* [2025] SAC (Crim) 3, paragraphs 39 and 40, citing *Pepper* v *Hart* [1993] AC 593. The Oxford English Dictionary defines the word "disturb" with reference *inter alia* to agitation, intrusion, the causing of worry or anxiety, interference with a settled course, frustration, or interruption. Such a meaning, interpreted and applied in the context of the regulation, is neither ambiguous nor productive of absurdity. The offence required proof of deliberate or reckless conduct. Accidental disturbances in the course of otherwise lawful marine activity are not criminalised.

[20] In relation to the requirement for a skilled witness, it was submitted that the role of such a witness was to assist the analysis of the fact finder by explaining matters which are within the experience and expertise of the witness, but likely to be outwith the general knowledge and experience of the fact finder. However, it remained for the fact finder to form their own independent judgement by an application of that explanation to the facts proved in evidence. It is not the role of a skilled witness to carry out that analysis himself and make a judgment on the issue for trial: *Mitchell* v *HM Advocate* 2018 JC 67, per Lord Brodie, para [30]; *Meighan and others* v *HM Advocate* [2021] HCJAC 38 per the Lord Justice General (Carloway), para [68].

[21] The appellant's position was that because the skilled witness expressed her opinions in terms which indicated the animals had "possibly" or "probably" been disturbed by the appellant, the sheriff was bound to accept that evidence and could not go further and

convict on the criminal standard of proof. That was based on a substantial misconception as to the role of a skilled witness.

[22] In any event, the expert's evidence in this case did not favour the appellant. In respect of charge 4 her report identified the appellant's boat as being "in clear breach" of the Code, which identified the splitting of the pod as a "clear sign of disturbance" and identified "clear changes in the whales' behaviour" on the basis of the video evidence. The opinion was given that it was "extremely fortunate that a stranding event did not occur as a result of the vessel activity".

[23] In respect of charge 3, the expert report identified the vessel being at closer than the recommended minimum distance, appearing to speed up and change direction close to the dolphins, all of which she opined increased the risk of disturbance. Breaching, tail slaps and head slaps were observed - all of which could be a sign of disturbance. The fact that the event relevant to charge 3 took place in a "key foraging area" was also relevant.

[24] The sheriff did not disregard the evidence of the expert. On the contrary he relied upon it in coming to his decision that the sea mammals had been disturbed. He correctly pointed out that movement and a change of direction was something which could be observed by a lay witness. In accepting the eyewitness evidence of the cetaceans moving away and changing direction, and in concluding that the movement observed amounted to disturbance, the sheriff was doing precisely what a fact finder in this scenario ought to do: applying the explanation offered by the skilled witness in assessing the whole of the evidence.

[25] Further it was noted but not pressed that the absence of a properly framed question ought to be fatal to an appeal: *PF, Edinburgh* v *Aziz* 2023 JC 51.

Discussion and decision

[26] The appellant was prosecuted in terms of regulation 39(2) of the regulation. The regulation makes it an offence to deliberately or recklessly disturb any dolphin, porpoise or whale (cetacean). The parties were unable to identify any relevant reported authorities.

[27] The regulation provides:

> **"39.— Protection of certain wild animals**
>
> (1) It is an offence—
> (a) deliberately or recklessly to capture, injure or kill a wild animal of a European protected species;
> (b) deliberately or recklessly—
> (i) to harass a wild animal or group of wild animals of a European protected species;
> (ii) to disturb such an animal while it is occupying a structure or place which it uses for shelter or protection;
> (iii) to disturb such an animal while it is rearing or otherwise caring for its young;
> (iv) to obstruct access to a breeding site or resting place of such an animal, or otherwise to deny the animal use of the breeding site or resting place;
> (v) to disturb such an animal in a manner that is, or in circumstances which are, likely to significantly affect the local distribution or abundance of the species to which it belongs; **[**…**]**
> (vi) to disturb such an animal in a manner that is, or in circumstances which are, likely to impair its ability to survive, breed or reproduce, or rear or otherwise care for its young; **[** or**]**
> (vii) to disturb such an animal while it is migrating or hibernating; **]**
> (c) deliberately or recklessly to take or destroy the eggs of such an animal; or
> (d) to damage or destroy a breeding site or resting place of such an animal.
>
> (2) Subject to the provisions of this Part, it is an offence to deliberately or recklessly disturb any dolphin, porpoise or whale (cetacean)."

[28] In terms of regulation 3(1):

> "The Scottish Ministers, the appropriate conservation body and, in relation to the Scottish marine area, a competent authority must exercise their function which are relevant to nature conservation, including marine conservation so as to secure compliance with the requirements of the Directives."

The appropriate conservation body in Scotland is identified as being Scottish Natural Heritage. NatureScot is the new name for Scottish Natural Heritage.

[29] In terms of section 51 of the Nature Conservation (Scotland) Act 2004 Scottish Natural Heritage was required to produce a document called the Scottish Marine Wildlife Watching Code. The provision sets out:

> "(1) SNH must prepare and issue a code, to be known as the Scottish Marine Wildlife Watching Code, setting out recommendations, advice and information relating to commercial and leisure activities involving the watching of marine wildlife.
>
> (2) The Code may, in particular, contain information on–
> (a) activities which are likely to disturb marine wildlife,
> (b) circumstances in which marine wildlife may be approached, and
> (c) the manner in which marine wildlife may best be viewed with minimum disturbance."

[30] The questions before this court are: firstly, whether the learned sheriff erred in determining that the word "disturb" is to be given its ordinary meaning; secondly, whether the sheriff erred in rejecting the submission that only a skilled witness could comment on whether cetaceans had been disturbed, and; thirdly, whether the sheriff erred in determining that a disturbance could be concluded from the video footage and eyewitness evidence before the court. These questions are inextricably linked.

[31] Before turning to answer each question in turn it is important to note that the stated case, which defines the parameters within which this court must consider the appeal includes no questions to the court challenging the findings in fact relevant to disturbance. This court is therefore constrained to proceed on the basis of findings in fact 22 and 31. Which are in the following terms:

> "22. The movements of the Seacab on 22nd July 2023 disturbed the dolphins and they moved away from the end of the breakwater where they had been foraging or feeding and swam out to sea."

> "31. The movements of the Seacab on 30th July 2023 in approaching and turning the pilot whales disturbed them in that the larger pod stopped their movement out to sea, turned around and moved towards the coast. The smaller pod was separated from the larger pod."

[32] Whether the absence of a properly framed question ought to be fatal to an appeal appears to depend on whether the argument presented goes to the root of the conviction to such an extent that it would render it a fundamental nullity: *Robertson* v *Aitchison* 1981 SCCR 149. Without more, Renton and Brown, *Criminal Procedure* (6th Edition) para [31-23-.3] simply states: "In such circumstances the Sheriff Appeal Court will supersede the questions proposed in the stated case."

[33] The position differs if the appellant is contending that the sheriff had no material before him to enable him to make a particular finding in fact. In that case there must be a question specifying that issue *Prentice* v *Skeen* 1977 SLT (Notes) 21. The matter was expressly dealt with in *PF, Edinburgh* v *Aziz* 2023 JC 51, para [9] where, in relation to a particular material finding in fact, it was stated:

> "There is no challenge to that finding in the stated case. A request at the adjustment stage that the finding be deleted does not constitute such a challenge. It ought to have been posed in the question: 'On the evidence, was I entitled to make finding in fact 15?' (*Prentice v Skeen.)* The absence of such a question ought to have been fatal to the appeal to the Sheriff Appeal Court. The SAC were not entitled, in the absence of a properly directed question, to go behind the findings in fact and look directly at the evidence. The appeal from the sheriff ought to have been refused on that basis. That said, the sheriff, having considered the application for a stated case, might have framed an appropriate question relating to the findings in fact given the nature of the respondent's complaint. The court will therefore consider the merits of that complaint."

[34] The appellant in this case finds himself in a similar situation. If findings in fact 22 and 31 remain intact the appeal must fail. The matter could have been easily resolved at adjustment if the sheriff had either been invited to or *ex proprio motu* added a question "On the evidence was I entitled to make finding in fact 22/31?". However we consider that the

issue of the meaning to be given to the word "disturb" for the purposes of the regulation is of some importance. It is contended that on the basis of the sheriff's interpretation of the word "disturb" he placed the bar for conviction under the regulation at too low a level. That criticism is more akin to an argument that the conviction is, as a matter of law a fundamental nullity. Accordingly, while observing that a question in the suggested terms would have been preferable, we shall nevertheless proceed to deal with the appeal.

[35] The word "disturb" is not defined in the regulations. Although the Guide prepared by NatureScot sought to establish a working definition that cannot trump the primary legislation. It is no more than a guide to what sort of behaviours in sea mammals might amount to a disturbance. The appellant referred to the evidence and report of Karen Hall from NatureScot which contained references and links to guidance documents produced by her organisation, amongst others. As noted above, the Guide and the Code were lodged by the defence and referred to in the course of the trial. The appellant argues that the Guide makes clear that the issue of disturbance is not straightforward. The relevant section of the Guide is set out at para [13] above.

[36] The Guide then goes on to provide a number of different examples of the sort of changes in animal welfare or behaviour which might amount to disturbance.

[37] It is clear that the definition in the Guide is directed at defining what constitutes disturbance from the point of view of the effect on the animal concerned. The scientists responsible for the drafting of the guidance are approaching matters from the standpoint of identifying whether the marine mammals have been disturbed in the sense of being injured, dispersed, disrupted or stressed or otherwise affected. That may well be a matter upon which marine experts are best placed to give evidence but even they do not appear to have a

consensus as to what behaviours unequivocally demonstrate disturbance in the sense of the effect on the animal.

[38] The approach of the regulation is different. It is directed at the *actus reus* of the perpetrator. If we consider the terms of the charges upon which the appellant was convicted, it is clear the allegation is that by doing certain things he either deliberately or recklessly disturbed the dolphins and pilot whales.

[39] The charge is made relevant by explaining the manner in which the appellant is said to have disturbed the sea mammals for instance by driving through and over the dolphins or going close to the pod of pilot whales and splitting them up. While indicators of what might constitute disturbance of sea mammals might be something on which an expert can opine, the question of whether the actions of a person such as the appellant can be said to have disturbed them is judged not by the effect on the animals themselves but by what the accused person did.

[40] While findings in fact 22 and 31 are essential to the sheriff's decision to convict he could not have done so but for findings in fact 21 and 23 in relation to the dolphins and findings in fact 27-30 and 32 which specify what the appellant did to disturb the pilot whales.

[41] The focus of the verb "disturb" in the regulation and consequently the charge is on what the appellant did and whether that could be assessed as deliberate or reckless. The legislation is directed at criminalising the conduct of the appellant by reference to his actions and his state of mind. It is not focussed on the effect of that conduct on the mammals concerned. On that basis the sheriff as fact finder and indeed any non-expert observer such as the witnesses on whose evidence the sheriff relied are well placed to determine the issue and expert opinion is not required.

[42] Karen Hall's evidence focused on the effect of the appellant's actions on the dolphins and pilot whales. To that extent her evidence was both admissible and of assistance to the sheriff. Beyond that he was entitled to and did approach the matter on the basis of whether the appellant's actions, which he considered reckless having viewed the footage and heard the eyewitness testimony, disturbed the mammals.

[43] Taking that approach the sheriff was correct to ascribe the ordinary English meaning to the word "disturb" rather than looking to a scientific meaning of what may or may not amount to a "disturbance" of marine mammals. The appellant's approach is predicated on the submission that Karen Hall could not say emphatically what effect the appellant's behaviour had on the dolphins and pilot whales. Even if that were correct it is nothing to the point. The sheriff was assessing whether the actions of the appellant in driving the boat in the manner libelled disturbed them and whether his actions were at least reckless.

[44] The sheriff explains his approach at page 26 under reference to the Opinion of Lord Hodge in *For Women Scotland Ltd* v *Scottish Ministers* 2025 UKSC 16 and *R (on the application of O, a child)* v *Secretary of State for the Home Department* 2022 UKSC 3, paras [29] and [30]. In the context of the legislation and the charge the appellant has fair notice that driving over or too near to the dolphins and whales was apt to disturb them in the sense of causing agitation, intrusion, the causing of worry or anxiety, interference with a settled course, frustration, or interruption all as the word disturb is defined in the *Shorter Oxford English Dictionary* (Oxford University Press, 5th Edition, page 717). This approach is in line with that recently taken in *Samuel Stewart* v *PF, Lanark* [2025] SAC (Crim) 3, at paragraphs 39 and 40, under reference to *Pepper* v *Hart* [1993] AC 593.

[45] On this analysis we are satisfied that the first part of the question posed by the appellant falls to be answered in the negative. That being so, and as conceded by the

appellant, the other questions effectively fall away. However, for the sake of completeness we shall address the other questions separately.

[46] The proposition that only someone possessed of skill and qualifications could comment on whether the sea mammals referred to in the charges were disturbed appears to us to fundamentally misunderstand the role of the skilled witness. The appellant is essentially inviting the court to find that the sheriff was not entitled to consider the eyewitness evidence and the video footage and make of it what he thought in light of the additional evidence provided by the expert witness. We reject that proposition on the basis that it is essentially an attempt to usurp the function of the fact finder and to suggest that the court should accept the evidence of the expert as to what could or could not constitute a disturbance of sea mammals.

[47] At trial no objection was taken to the admissibility of the expert witness and it must be assumed that the sheriff was therefore satisfied that the expert was giving evidence on a matter which was outwith his normal day to day experience, she was properly qualified to give the evidence and that the evidence she was giving was based on a recognised branch of knowledge. That being said, the role of an expert always has its limitations. It must be seen in its proper perspective and placed in its correct context. The expert's function is to guide the fact finder in a specialist area in which they may not have day to day experience. Here that related to the behaviour of marine mammals. However, that was only part of the evidence in the case and the sheriff was bound to have regard to the totality of the evidence adduced which included the eyewitness evidence, the footage which he was shown and, importantly the evidence of the appellant and any explanation he provided for his actions. He should and indeed did treat the expert's evidence in the same way as he treated the evidence of any other witness in the case. While her specialist knowledge was available for

his consideration he could choose to accept it, or not. The proposition that in a case such as this the evidence of what the expert said should displace the sheriff's own assessment of the evidence is quite wrong.

[48] The third question which asks whether the sheriff erred in determining that a disturbance could be concluded from the relevant footage and from the eyewitnesses flows directly from what has been said above. Both of these parts of the question fall to be answered in the negative. Accordingly the appeal is refused.