SHERIFF APPEAL COURT

[2026] SAC (Crim) 3
SAC/2025/291/AP

Sheriff Principal A Y Anwar KC
Appeal Sheriff I M Fleming
Appeal Sheriff D A C Young KC

OPINION OF THE COURT

delivered by APPEAL SHERIFF IAIN FLEMING

in

Appeal by Stated Case against Conviction

by

MXG

Appellant

against

PROCURATOR FISCAL, EDINBURGH

Respondent

Appellant: S Collins (sol adv); Collins & Co
Respondent: Harvey, AD; Crown Agent

30 January 2026

Introduction

[1] The issue before this court is whether the evidence led by the Crown, at a trial diet, of a statement made by a complainer to a witness can constitute a *de recenti* statement in the

absence of primary evidence from the complainer and in the absence of direct evidence as to precisely when the incident which gave rise to the statement took place.

[2] This case is an appeal against a decision of the sheriff at Edinburgh following a trial which concluded on 17 April 2025. The appellant was initially charged on summary complaint with a contravention of section 1 of the Domestic Abuse (Scotland) Act 2018, aggravated in terms of section 5 of the Act by involving a child.

[3] At the conclusion of the trial the sheriff convicted the appellant of assault, at common law, per Schedule 3, paragraph 14 of the Criminal Procedure (Scotland) Act 1995. The conviction is in the following terms:

> "Between 1 August 2023 and 8 June 2024, both dates inclusive, at… Edinburgh, and elsewhere, you [MXG] did act in an aggressive manner; on an occasion you did assault MG, punch her on the head and seize her on the neck and on 8 June 2024, at… Edinburgh, assault MG, repeatedly strike her on the head to her injury and did by means unknown damage a door there."

[4] Leave to appeal in relation to the conviction for assault arising from the incident on 8 June 2024 was refused. This appeal only relates to the conviction for the first incident which occurred between 1 August 2023 and 8 June 2024.

[5] The sheriff imposed a Community Payback Order with a 1-year supervision requirement and a requirement to perform 100 hours of unpaid work, together with a non-harassment order barring the appellant from approaching or contacting the complainer for 3 years.

[6] The appellant appeals his conviction by way of stated case.

Evidence

[7] The evidence which related to the incident which took place between 1 August 2023 and 8 June 2024 came from RB, a friend of the complainer, MG. The Crown did not lead evidence from MG.

[8] RB testified that she was friends with MG. She knew that the appellant is the husband of MG. She identified the appellant in court. One night in August 2023 MG came to RB's house between 9.00pm and 10.00pm. She was crying and asked to stay for a while in RB's house. RB was shocked that MG was crying. MG talked about trouble she had had with the appellant. MG had her small child with her. MG told RB that she was crying because the appellant was drunk, that the appellant had kicked her out of the house, and had "given her a punching." MG had bruising on her face and a bruise on her neck. In relation to the bruising to her neck, MG demonstrated a strangling motion to RB saying that it was "tight by the hand." She stayed with RB for one night.

The stated case

[9] The sheriff explained in the stated case that during the evidence, the solicitor acting for the appellant objected to RB's evidence. It was submitted that the evidence of MG's *de recenti* statement was available for corroboration of MG's evidence only. The Crown had not led evidence from MG. The *de recenti* statement could not be used as a primary source of evidence.

[10] The sheriff repelled the objection. The sheriff noted the terms of paras [230] and [237] of the *Lord Advocate's Reference (No 1 of 2023)* [2023] HCJAC 40; 2024 JC 140, from which he concluded that a statement made *de recenti* by a distressed complainer was available as proof of fact and indeed as corroboration of other evidence. It was real evidence

and all that was required was for it to be spoken to by a witness. The sheriff referred in his decision to *Ahmed* v *HM Advocate* [2009] HCJAC 73; 2010 JC 41, where the Appeal Court held that a *de recenti* statement spoken to by a witness, but denied by the complainer herself, was admissible. The sheriff determined that the incident and the *de recenti* making of the statement were two separate matters.

[11] The significant finding in fact of the stated case referable to the events in August 2023 is:

> "One night in August 2023 at… the appellant was drunk, was punching and strangling MG and threw her out of the house. Immediately afterwards, between 9 pm and 10 pm, MG went to RB's house nearby. She was crying and asked if she could stay for a while in her house. She had one of her children with her. MG had bruising on her face and bruising on her neck. MG stayed with RB one night"

Further, in his Note upon the evidence, the sheriff states at para [15] that he concluded that the injuries were described in such a way as if they had only just been inflicted.

[12] The questions now posed for the Opinion of this court are:

i) Did [the sheriff] err in law in repelling the objections to the evidence of the witness RB as a *de recenti* statement of the complainer in the absence of primary evidence of the complainer?

ii) Did [the sheriff] err in law in treating that evidence as a *de recenti* statement in relation to the time between the incidents described and the time when the statement was made?

iii) Did [the sheriff] err in law in repelling the submission made on behalf of the appellant of no case to answer in terms of section 160 of the Criminal Procedure (Scotland) Act 1995?

iv) On the facts stated was [the sheriff] entitled to convict the appellant of assault?

Submissions for the appellant

[13] It was argued on behalf of the appellant that, even if statements are admissible absent primary evidence from the complainer, the statement in this case was not a not a true *de recenti* statement. It was recognised that leave to appeal was only granted upon the question of whether the statement made by MG to RB in August 2023 could be regarded as *de recenti*.

[14] It was submitted firstly that the statement given by MG to RB could not be truly said to be *de recenti* as there was no evidence as to when the event which gave rise to the giving of the statement was made. Further, it could not be said that the statement was truly *de recenti* as the complainer had not testified at the trial and MG had not advised RB as to when the events took place.

[15] While there was evidence that bruising was seen on the complainer, MG, that bruising could not be timed and was therefore of no assistance in determining when the events which had caused it took place. There was no evidence upon which the court could rely to establish the proximity of the incident on the one hand and the making of the statement on the other. The witness RB could speak to when the statement was made and to MG's injuries, but there was no evidence before the court as to when the incident complained of took place.

[16] It was recognised that in terms of the finding in fact within the stated case the sheriff had concluded that the account was given by MG to RB "immediately afterwards" (the incident), but it was submitted that there was no evidential basis for the sheriff to include the word "immediately" in the finding in fact. Similarly, the sheriff's observation within the Note that the "injuries were described in such a way as if they had only just been inflicted" had no basis in the evidence.

Submissions for the Crown

[17] The advocate depute submitted that the sheriff was entitled to treat the complainer's statement to RB as *de recenti*. It was submitted that "nothing turns" on the fact that the complainer did not give evidence.

[18] The sheriff made a finding in fact that that the complainer went to RB's house "immediately after" the appellant had punched and strangled her and had thrown her out of the house. No adjustment was proposed to that finding at the hearing on adjustments. There was no question in the stated case directed towards that finding in fact. The advocate depute referred to *Nicol* v *Procurator Fiscal, Inverness* [2025] SAC (Crim) 5; 2025 SLT (SAC) 75 at para [19] wherein the court stated:

> "In the absence of a properly directed question in the stated case related to these findings, the court is not able to look behind that finding and examine the evidence in support of it (*Buchan* v *Aziz* 2023 JC 51 [9]). As this court noted in *Dickson* v *PF, Kilmarnock* [2023] SAC (Crim) 3, the requirement for properly directed questions in a stated case is not a procedural technicality: specific and focussed questions both identify the issues for the appellate court and inform the content of the stated case, affording the sheriff the opportunity to set out and explain their findings in fact where those are challenged."

[19] The Crown submitted that in the absence of a proposed adjustment to the draft stated case, the court should accept the finding in fact as stated by the sheriff. In short, absent the proposed adjustment the finding in fact must be accepted.

[20] Thereafter, the Crown submitted that support for the finding in fact (and consequently the sheriff's finding that the statement was made *de recenti*) could be taken from: the timing of the complainer's arrival at RB's house between 9.00pm and 10.00pm; that she was injured; that she was carrying her child; the request of the complainer to stay with RB; and that her reason for being there was because the appellant had assaulted her

and thrown her out of the house. All the foregoing was accompanied by the distress of the complainer.

[21] It was submitted that the inference to be drawn was that the statement, made while the complainer was distressed, was a natural outpouring of feelings aroused by the recent injury which had still not subsided. The *Lord Advocate's Reference (No 1 of 2023)* at para [46] and the *Lord Advocate's References (Nos 2 and 3 of 2023)* [2024] HCJAC 43; 2025 JC 200 at paras [14] and [15] were relied upon. The statement of RB could be regarded properly as a *de recenti* statement accompanied by *de recenti* distress and injury. The sheriff had correctly concluded that the evidence of RB, was evidence to the first natural confidante to allow it to qualify as a *de recenti* statement. Indeed, not only was the statement properly categorised as *de recenti*, but the sheriff would also have been justified a treating it as a part of the res gestae.

Decision

[22] The appeal is refused. From the facts and circumstances led in evidence the sheriff was entitled to infer that the statement made to RB by MG was properly categorised as *de recenti*. The sheriff was entitled to have regard to the following; (a) MG's distress (as evidenced by her crying); (b) her request to stay at RB's house for a while; (c) her attendance at RB's house with her having small child; (d) her explanation that she was crying because her husband (the appellant) was drunk, had assaulted her and had kicked her out of the house; and (e) the injuries to MG namely the marks on her face and neck.

[23] There is also one other factor which is referred to within para [1] of the findings in fact, which is the fact that RB lived "nearby." While the Crown did not specifically rely on this aspect of the evidence we are of the view that it is an important feature, particularly in

relation to the point raised by the defence about the lack of evidence referable to the timing of the incident.

[24] We consider that the accumulation of identified factors in paragraphs (b) to (e), coupled with the complainer's distress, entitled the sheriff to hold that the complainer's interaction with RB was a natural outpouring of her feelings aroused by the recent incident and recent injury articulated to the first natural confidante who resided nearby. The fact that RB allowed MG to stay the night emphasises her status as the first natural confidante.

[25] The fact that the complainer did not testify, that she did not specifically state when she was assaulted, or the inability of the court, in the absence of expert testimony, to attribute a specific timeline to the injuries sustained by the complainer were factors for the consideration of the sheriff. However, they are not, in and of themselves, necessarily determinative and such features need to be considered in the context of all the evidence led.

[26] The sheriff drew a distinction between the evidence of a complainer who testifies on the one hand and the *de recenti* statement of a complainer which is spoken to in evidence by a third party (as happened in this case) on the other. In our view, he was correct to do so. As explained in the *Lord Advocate's Reference (No 1 of 2023)* at para [227]:

> "…The fallacy is the legal construct whereby what a complainer says shortly after the event is treated in exactly the same way as her later testimony because it comes from the same 'source'. That might hold water if what was being considered was the complainer's own account of the distress which she felt and exhibited privately, or an account given by a complainer at a time remote from the event and after a period of reflection unless it could be brought within the statutory exceptions (Criminal Procedure (Scotland) Act 1995, secs 259, 260) or *Jamieson* v *HM Advocate (No. 2)*. That is where the further exception of the *de recenti* statement, when coupled with distress, comes into play. It is testimony from a third party who is speaking to what Dickson describes as a natural outpouring of feeling aroused by recent injury and 'still unsubsided'. As such, and following the approach of the Lord President (Normand) in *O'Hara* v *Central SMT Co Ltd*, at least when accompanied by distress to any degree, a *de recenti* statement should be regarded as a consequence and continuation of the *res gestae* and thus as proof of fact and hence corroboration. It is real evidence."

[27] Accordingly, direct evidence from a complainer is distinct from the evidence of a third party about that complainer's *de recenti* statement accompanied by distress. As such the sheriff was entitled to treat them separately and allow the evidence of the statement and the distress as distinct from the complainer's direct evidence. The *Lord Advocate's Reference (No 1 of 2023)* at para [234] disavows the proposition that a *de recenti* statement is a special type of evidence which is only available to corroborate the direct evidence of a complainer. The decision in the *Lord Advocate's Reference (No 1 of 2023)* to overrule *Cinci* v *HM Advocate* 2004 JC 103 confirms that position.

[28] As such, RB's evidence in this case about MG's *de recenti* statement is distinct from any other account of the incident that might have been given directly by MG. The *de recenti* statement can be considered as proof of fact independently. The sheriff was entitled to regard RB's evidence of: (i) the *de recenti* statement made by MG; and (ii) the distress exhibited by MG, as evidence that was independent of any account that might have been given directly by the complainer in evidence. That being the case, the absence of evidence from the complainer in this case is not critical. The court is entitled to consider other evidence to determine if a statement is *de recenti*, which is what the sheriff did in this case.

[29] As to timing, the advocate depute was correct to point out that no adjustments had been proposed in relation to finding in fact [1], nor had any question been directed at the sheriff's finding that MG had attended at RB's home "immediately" after the incident. In any event, for the reasons we have set out above, we consider that there was sufficient evidence for the sheriff to conclude that the evidence of RB provided sufficient evidence that the attendance of MG at RB's house was "immediately" after the assault upon her had taken place.

[30] The next matter to be considered was whether there was corroborated evidence of the assault. In this case corroboration came from the *de recenti* statement and the application of the doctrine of mutual corroboration. The *de recenti* statement provided real evidence that an assault was committed and that the appellant was the person who committed it; thereafter, mutual corroboration operated between that assault and the evidence led in support of the assault on 8 June 2024, there being obvious similarities in time, character and circumstance between the two assaults. For that reason, the sheriff did not err in repelling the no case to answer submission. The appellant did not dispute that if we held that the statement made to RB was de *recenti,* that there was a sufficiency of evidence before the sheriff to allow him to proceed to conviction.

[31] Further, we record that the Crown invited us to deal with the matter not only on the basis that the statement was *de recenti*, but indeed it was so closely connected to the incident that it could be categorised as being part of the *res gestae*. Given our findings in relation to the appeal that is not a matter which we need to address.

[32] We have considered the questions posed by the sheriff in the stated case and answer as follows; in relation to questions (i), (ii) and (iii) we answer in the negative and in relation to question (iv) we answer in the affirmative.