

**PLEASE NOTE: THIS OPINION SUPERSEDES THE OPINION
ISSUED ON 31 JULY 2026, [2026] HCJAC 30**



APPEAL COURT, HIGH COURT OF JUSTICIARY

**[2026] HCJAC 33
HCA/2026/000118/XC**

Lord Justice Clerk
Lord Matthews
Lord Clark

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

appeal under section 194ZB(1) of the Criminal Procedure (Scotland) Act 1995

by

MICHAEL STACHAN

Appellant

against

PROCURATOR FISCAL, EDINBURGH

Respondent

Appellant: Collins (Sol Adv); Collins and Co (for CSG Solicitors, Edinburgh)

Respondent: Harvey AD; the Crown Agent

31 July 2026

Introduction

[1] The appellant was convicted on summary complaint at Edinburgh Sheriff Court of the following charge of domestic abuse:

“(001) between 15 September 2020 and 20 November 2022, both dates inclusive, at [an address in Edinburgh] you ... did engage in a course of behaviour which was abusive of your partner or ex-partner [AA] in that you did repeatedly shout and utter derogatory remarks towards her; punch walls there and damage same; throw a glass of water over her; seize her by the body and throw a purse and cause it to strike her on the head; seize her by the clothing; and pull her to the ground, lift a bed she was lying on and cause her to fall to the ground and said bed to strike her on the body, push her on the body and cause her to fall to the ground, pin her on the ground and repeatedly kick and strike her on the body with your leg and punch her on the head, throw a vacuum cleaner towards her and cause it to strike her on the body and damage same all to her injury;

CONTRARY to the Domestic Abuse (Scotland) Act 2018, Section 1”

The offence was aggravated by its occurrence when the appellant was on bail.

[2] On 9 June 2025 the sheriff imposed a community payback order with supervision and conduct requirements for a period of 3 years and an unpaid work requirement of 300 hours to be completed within 18 months. The sheriff also imposed a non-harassment order concerning AA, for 3 years.

[3] The appellant appealed to the Sheriff Appeal Court. He maintained that hearsay evidence, in statements made by the complainer to a police officer, ought not to have been admitted at his trial under section 259 of the Criminal Procedure (Scotland) Act 1995. The SAC found that the sheriff erred in admitting the hearsay evidence but concluded there was no miscarriage of justice given the sheriff’s careful and discerning approach to the totality of the evidence led.

[4] The appellant challenges the SAC’s disposal. He argues that while the SAC was correct to hold that the hearsay evidence should not have been admitted, it erred in finding that there was no miscarriage of justice.

Background

[5] The appellant first appeared to answer the complaint on 27 June 2023. The charge as initially libelled included the following additional conduct which the sheriff ultimately deleted:

- taking AA's bank card, car keys and car from her without her permission;
- threatening to send sexual images and videos of AA to others;
- throwing AA out of a house; and
- seizing AA by the hair.

[6] The appellant pled not guilty and an intermediate diet was fixed for 20 September 2023. It was discharged on the appellant's motion to allow him to obtain funding for his defence with a new IM diet fixed for 19 January 2024 and trial for 9 February 2024 when the prosecutor was allowed to adjourn because of the absence of an essential Crown witness. The new trial diet on 14 May 2024 was then adjourned because of the absence of essential Crown witnesses. A new trial diet was fixed for 14 August 2024.

[7] The Procurator Fiscal Depute first lodged an application under section 259 on 9 May 2024 and a diet of debate on it was fixed for 30 May 2024. The application sought to admit evidence of AA's statements to Constable Stephen Gallagher on 12 and 23 June 2023. The reason for the application was that AA suffered from post-traumatic stress disorder, severe anxiety and anorexia nervosa such that she was not fit to give evidence at trial or otherwise give her evidence in any other competent manner.

[8] This application was supported by a letter from AA's Community Mental Health Nurse, Liz Temple, dated 17 April 2024 and a letter from AA's GP of 10 years standing, Dr McRorie, dated 19 January 2024. Ms Temple's role is that previously referred to as a Community Psychiatric Nurse. She confirmed that AA presented with signs of complex post-traumatic stress with severe anxiety together with some evidence of dissociation,

obsessive-compulsive disorder and an eating disorder, all of which were aggravated by increased stress. Ms Temple opined that questioning of AA in court would lead to high levels of stress likely to trigger dissociation:

“In this event, she would have little control of what she is taking in and her ability to function and respond accurately in the questioning would be curtailed.”

Dr McRorie confirmed that the prospect of appearing as a witness in court had worsened AA’s mental health.

[9] On 17 June 2024, the sheriff refused the application and fixed a further trial diet for 14 August 2024. The SAC records that the application was refused on the basis that the potential for AA to give evidence using special measures had not been addressed in the application or the accompanying letters.

[10] At the trial diet on 14 August 2024 the PFD renewed the application under section 259. The PFD reported that Dr McRorie had been contacted further and the range of available special measures including a screen, a supporter, a live television link and evidence by commissioner were explained to her. Dr McRorie had provided an updated report in a detailed letter dated 25 July 2024. AA had lost a dangerous amount of weight between February 2023 and April 2024, such that hospital intervention was almost necessary. AA was known to have atypical anorexia nervosa eating disorder.

[11] Dr McRorie explained in relation to special measures that:

“I understand that [AA] has declined special measures proposed to avoid her seeing the perpetrator directly in court. Her PTSD is related to incidents of a sexual nature. Because of the nature of her PTSD, her awareness that her perpetrator would see her projected via screen whether she is behind a screen, in another building or more remotely would not offer sufficient protection to her to offset the stress which would, through no choice and outwith her control trigger her PTSD as the case is of a sexual nature.”

[12] She added that the sexual nature of AA's PTSD meant that she was not able to face the appellant. The stress of doing so would give her visual triggers. Stress and PTSD caused AA to alter her behaviour by disordered eating due to her atypical anorexia nervosa. The predictable association of PTSD being more active and the recurrence of the worsening of AA's anorexia had been observed reliably in the past. To comply with any of the special measures would reliably predict a worsening of AA's PTSD and anorexia nervosa as a recurrent pattern of behaviour. AA's conditions were longstanding, interconnected and of intermittent severity. Her weight, BMI and disordered eating was physical evidence that AA was not in a recovery phase or at a safe baseline to tolerate further stressors such as attendance at court. The time frame for her to recover sufficiently to be able to give evidence in person or under special measures was to be measured in years and not months. Dr McRorie concluded on soul and conscience that, in her medical opinion, AA could not give evidence in person nor using special measures. To do so would be detrimental and possibly dangerous to her physical and mental health.

[13] The sheriff granted the application, explaining in her stated case that:

"More detailed medical evidence on soul and conscience was presented by the Crown which confirmed that [AA] would be unable to give evidence irrespective of whether special measures were employed.

I was satisfied that [AA] was a competent witness whose oral evidence would have been admissible and that she was, by reason of her bodily or mental condition, unfit or unable to give evidence in any competent manner, all options having been considered and deemed by her GP to pose an intolerable level of risk to her physical and mental health."

[14] After hearing evidence at trial, the sheriff convicted the appellant. The Crown adduced evidence from AA's sons, aged 16 and 11, and from two of the parties' neighbours in addition to the hearsay evidence permitted under section 259, in support of the charge. The sheriff found the parole evidence to be wholly credible and reliable and accepted it. She

adopted a more restrictive approach to the hearsay evidence. She relied on AA's hearsay statements only where consistent with the evidence of witnesses. Where it was not, she deleted the relevant averments from the charge including that the appellant threatened to send sexual images and videos of the complainer to others.

Decision of the Sheriff Appeal Court

[15] The sheriff erred in allowing the application under section 259. The medical information relied upon by the PFD to support the second application was insufficient. It was not clear whether AA had received any formal diagnosis of the conditions referred to. The report from the CMHN was not provided on soul and conscience and did not address whether any special measures could assist AA to testify. The more detailed letter from the GP did not expressly state whether the use of special measures had been discussed with AA. There had been no familiarisation visit offered to AA to put her at ease and to explain the process of giving evidence, either on commission or by live television link. No thought had been given to the possibility of conducting a commission in a place familiar to AA where she might have felt better able to participate. Evidence of opinion on the likelihood of AA suffering a trigger of her PTSD was ordinarily spoken to by a CMHN or a psychiatrist rather than a GP. In any event, the GP's opinion was based on an assumption as to the sexual nature of the evidence AA was likely to provide. Moreover, it had been noted that AA was not in receipt of any specialist therapeutic measures. There was no explanation as to when such measures might become available, nor how they might assist AA to give evidence.

[16] Nevertheless, there had been no miscarriage of justice. The sheriff had correctly exercised caution in accepting the hearsay evidence. She analysed carefully those elements which could be corroborated by, and were consistent with, the evidence of others and took a

discerning approach. The sheriff did not consider the hearsay evidence to be the sole or decisive evidence before her.

Grounds of appeal

[17] The SAC erred in holding that there had been no miscarriage of justice. The safeguards contained within section 259 could only be effective in ensuring a fair trial where the requirements of section 259 were met. Where they were not met, as held by the SAC in this case, the statutory safeguards were ineffective in ensuring a fair trial.

Submissions to this court

Appellant

[18] The SAC was correct to hold that the sheriff had erred in permitting the hearsay evidence to be admitted. The information gathered by the Crown was insufficient to meet the statutory conditions. It was not clear that AA's GP had adequately considered whether evidence by commissioner was a viable option. While the procedural scheme behind evidence by commissioner permitted an accused to watch a commission diet live, it was possible for this to be waived. It was accepted that the term "unfit" within section 259(2)(a) included unfitness by reason of a mental health condition, but the second GP's letter was insufficient to meet the requirements of section 259 where the Crown ought to have produced a report from a mental health specialist.

[19] The SAC erred in holding that there had been no miscarriage of justice, based on the cumulative value of the parole evidence led at trial together with the hearsay evidence. Had the sheriff refused to admit the hearsay evidence, as the SAC held she ought to have done, it could not be known whether she would have convicted the appellant on the parole evidence

alone. The SAC ought to have considered the sheriff's approach to the parole evidence in absence of the hearsay evidence. In carrying out that assessment, the SAC ought to have found that the sheriff's assessment of the parole evidence was so intertwined with the hearsay evidence that it could not properly be separated. To do so would be wholly speculative. In such circumstances, the conviction should have been quashed. This court should now quash the conviction.

Crown

[20] The SAC erred in holding that the hearsay evidence ought to have been excluded.

The sheriff gave close consideration to the renewed section 259 application and the medical evidence provided. It fully and properly addressed whether the complainer was able to give evidence, including whether she could do so with the assistance of special measures.

[21] The application was required to be supported by proper medical evidence vouching for the witness's unfitness or inability to give evidence on medical grounds: *Inglis v PF*

Edinburgh, 27 August 2019, unreported. Before granting the application, the court had to be satisfied that there were no other measures by which the witness's evidence could be taken:

Glass v HM Advocate [2018] HCJAC 70, 2019 JC 17. The sheriff properly considered both of those requirements and was entitled to find, on the balance of probabilities, they had been met.

The circumstances were different to those in *Inglis* and *Glass*. In *Inglis*, the medical information provided was not stated on soul and conscience and it was clear that the

supporting GP's letter did not exclude the possibility of the complainer giving evidence on commission from home. The medical evidence was clear as to why AA could not give

evidence, the effect giving evidence would have on her and that special measures would not assist or alleviate the risk to the complainer. There was nothing in the provisions or caselaw

suggesting that the sheriff could not take into account the effect of giving evidence on a witness's medical condition.

[22] The SAC erred in considering that it was unclear whether AA had received any formal diagnosis of the conditions described in the medical letters. The letters proceeded on the basis that AA had anorexia nervosa and PTSD.

[23] While the nurse did not address special measures in her letter, the purpose of the second GP's letter was to address that very issue. It was unclear why it was considered that AA's GP was not in an adequate position to form the view she did. Fairly read, the GP appeared to be explaining that there was not likely to be an improvement in AA's condition and that it was likely to be years rather than months before she could give evidence.

[24] In all the circumstances, the sheriff was entitled to be satisfied on the basis of the second GP letter and the information in the CMHN's earlier letter that the requirements of section 259 were met.

[25] In any event, there was no miscarriage of justice. There was ample evidence in addition to the hearsay evidence on which the sheriff relied in convicting the appellant. Even without the hearsay evidence, there was a strong corroborated case. The sheriff, correctly, had taken a discerning approach to the evidence. The SAC properly concluded that there was a fair trial.

Decision

[26] The common law prohibition against hearsay is commonly expressed as meaning that any statement other than one made by a (living) person while giving oral evidence in proceedings is inadmissible as evidence of any fact or opinion asserted: *Morrison v HM Advocate* 1990 JC 299 at page 312, opinion of a Full Bench of 7 judges delivered by the

Lord Justice Clerk (Ross) approved in this respect by a Full Bench of 9 judges in *McCutcheon v HM Advocate* 2002 SLT 27 at [16]. We have added the word “living” in parentheses as there was a common law exception in the case of utterances made by a person who had died, now replaced within section 259. There has always been a further exception in the case of statements made as part of the *res gestae*. Following the *Lord Advocate’s References (Nos 2 and 3 of 2023)* [2024] HCJAC 43, 2025 JC 200, there is now a further exception in the case of statements made *de recenti*.

[27] The Scottish Law Commission was aware of common law exceptions and addressed them in its report but reasonably and pragmatically adopted the dictum from *Morrison* as a useful starting point in its *Report on Hearsay Evidence in Criminal Proceedings* SLC no 149 at 3.2. The SLC’s recommendations were given effect in section 259. It provides:

“259 Exceptions to the rule that hearsay evidence is inadmissible.

- (1) Subject to the following provisions of this section, evidence of a statement made by a person otherwise than while giving oral evidence in court in criminal proceedings shall be admissible in those proceedings as evidence of any matter contained in the statement where the judge is satisfied —
 - (a) that the person who made the statement will not give evidence in the proceedings of such matter for any of the reasons mentioned in subsection (2) below;
 - (b) that evidence of the matter would be admissible in the proceedings if that person gave direct oral evidence of it;
 - (c) that the person who made the statement would have been, at the time the statement was made, a competent witness in such proceedings; and
 - (d) that there is evidence which would entitle a jury properly directed, or in summary proceedings would entitle the judge, to find that the statement was made and that either—
 - (i) it is contained in a document; or

- (ii) a person who gave oral evidence in the proceedings as to the statement has direct personal knowledge of the making of the statement.
- (2) The reasons referred to in paragraph (a) of subsection (1) above are that the person who made the statement—
 - (a) is dead or is, by reason of his bodily or mental condition, unfit or unable to give evidence in any competent manner;
 - ...
- (8) For the purposes of the determination of any matter upon which the judge is required to be satisfied under subsection (1) above—
 - (a) except to the extent that any other party to the proceedings challenges them and insists in such challenge, it shall be presumed that the circumstances are as stated by the party seeking to introduce evidence of the statement; and
 - (b) where such a challenge is insisted in; the judge shall determine the matter on the balance of probabilities, and he may draw any reasonable inference—
 - (i) from the circumstances in which the statement was made or otherwise came into being; or
 - (ii) from any other circumstances, including, where the statement is contained in a document, the form and contents of the document...”

[28] Section 271I(3) provides:

- “(3) An accused—
 - (a) shall not, except by leave of the court on special cause shown, be present—
 - (i) in the room where such proceedings are taking place; or
 - (ii) if such proceedings are taking place by means of a live television link, in the same room as the witness, but
 - (b) is entitled by such means as seem suitable to the court to watch and hear the proceedings.”

The sheriff knew this. It is standard practice that an accused person will view a commission hearing remotely: High Court of Justiciary Practice Note No 1 of 2024 at para 13, fifth bullet (this PN replaced PN 1 of 2017 containing the same requirement); Criminal Courts Practice

Note No 1 of 2026, for the Sheriff Court, at para 20, seventh bullet, echoing the High Court Practice Notes.

[29] The SLC proposed at 6.10:

“At the hearing of the application it will be for the party tendering the statement to establish that it is admissible, if that is not conceded by the other side. Thus, in the absence of formal admission the party tendering the statement will have to prove, first, the unavailability of the maker's evidence as a fact. The fact that a witness's claim to privilege has been upheld or that he has refused to be sworn or to answer questions will be self evident. Death should normally be established beyond argument by the production of a death certificate, and unfitness by reason of a bodily or mental condition by the production of a medical certificate in appropriate terms. The conditions that a maker of a statement is abroad and that it is not reasonably practicable either to secure his attendance at the trial or to obtain his evidence in any other competent manner may be difficult to establish, if disputed, as may the conditions that a maker of a statement cannot be found and all reasonable steps have been taken to find him. There may also be dispute as to whether the unavailability of the evidence of the maker of the statement has been procured by or on behalf of the party tendering the statement. It is possible that evidence might have to be led at the pre-trial diet or an adjourned pre-trial diet or, in the event of an application at the trial diet, at a trial-within-a-trial. The nature of any evidence required to establish any disputed matters will depend on the circumstances of the case. The opponent of the party tendering the statement will be entitled to challenge any evidence led by that party and to lead evidence in contradiction of it. It is to be expected that unconvincing evidence on these issues will not be believed by the judge, and that an application supported by such evidence will be refused.”

[Emphasis added]

[30] In *Glass*, the appellant was convicted of four historic charges of lewd, indecent and libidinous practices against two complainers. Immediately prior to trial, the Crown lodged a section 259 application to adduce evidence of a statement made by a third complainer to a police officer. The Crown maintained that the third complainer was unfit and unable to give evidence in any competent manner by reason of a mental condition. The application was accompanied by a report from a consultant in rehabilitation medicine. The application was granted and evidence of the contents of the statement led, although the relative charge was subsequently withdrawn. The Crown conceded the insufficiency of the information on

appeal where parties agreed that the third complainer had permanent memory loss resulting from a road traffic accident and had no recollection of giving the statement or the events described in it. The Lord Justice General (Carloway) explained, at [19], that section 259 was aimed at witnesses who could not give evidence as a generality because of their mental condition. It was not available for witnesses who had simply forgotten about a particular event. There was a competent means of adducing evidence, by inviting the witness to adopt the statement. His Lordship also made observations about a lack of specificity in one material respect in the medical evidence available to support the application, but it does not read across to this case.

[31] Whether AA was unfit or unable to give evidence in any competent manner was a matter for the sheriff to determine on the balance of probabilities: section 259(8). Section 259 conferred a duty on the sheriff to make a finding in fact in that regard. To make such a finding, the sheriff required to have before her suitable medical evidence providing sufficient explanation why AA was unfit to give evidence in any competent manner, including with the assistance of the available special measures. Where the sheriff found, as she did, that the statutory conditions were met, she had no discretion to refuse to admit the hearsay evidence: *N v HM Advocate* 2003 JC 140 per Lord Justice Clerk (Gill) at [20] – [24]; *Renton & Brown's Criminal Procedure* (6th Edition) at 24-130.

[32] In her stated case to the SAC, the sheriff records that the PFD told the court that Dr McRorie had been informed of all of the special measures available, including a screen, a supporter, a remote video link and evidence by commissioner. The sheriff was entitled to take that information into account, and it is in that context that Dr McRorie's second letter must be read. Whilst the appellant now proposes that it was open to him to waive his

entitlement to view any commission hearing, (and we accept that it was) he made no such concession before the sheriff.

[33] Dr McRorie's second letter was intended to supplement the information already given in earlier correspondence by her and Liz Temple, AA's CMHN. Ms Temple confirmed that AA presented with signs of complex PTSD with severe anxiety and other mental health difficulties, all of which were aggravated by increased stress. Dr McRorie supported Ms Temple's view, adding detailed information about AA's mental health triggers together with her weight loss and lifestyle. She noted that AA's PTSD was related to incidents of a sexual nature, which was relevant since the charge included sexual averments. She specifically considered AA's ability to give evidence with the assistance of special measures, including the use of screens, or by being "in another building or more remotely" before concluding that "to comply with any of the special measures, would (*sic*) reliably predict a worsening of her PTSD and of her anorexia nervosa as a recurrent pattern of behaviour". The possibility of taking evidence by commissioner had been explained to Dr McRorie and it is plain that she had considered it as she made clear in the passage we have quoted above at para [11].

[34] We disagree with the SAC that the sheriff was not entitled to find that the conditions of section 259 had been met.

[35] The SAC appears to have read in evidential barriers that are not found in section 259 and erred in interfering without justification in a finding that the sheriff was entitled to make. There is nothing in section 259, or in any of the authorities referred to us, stipulating a requirement for a medical consultant or any other medical expert to provide evidence, on soul and conscience, to the effect that the conditions of section 259(2)(a) are met. No doubt evidence from a psychiatrist could be compelling, perhaps more compelling than that from a

GP, but it will not always be available. In this case there was evidence from a GP who knew the witness well and from a Community Mental Health Nurse.

[36] What was required to meet the statutory test of unfitness was evidence capable of being accepted by the sheriff and satisfying her on the balance of probabilities that the witness was unable or unfit by reason of her bodily or mental condition to give evidence in any competent manner.

[37] In this case, the letters by Liz Temple, a CMHN, and Dr McCrorie who had been the appellant's GP for 10 years (her second and more detailed letter being stated on soul and conscience), provided a sufficient basis to entitle the sheriff to make the finding she did. The letters addressed AA's ability to give evidence, either at trial or with the assistance of any special measures including evidence by commissioner, as the sheriff found in fact.

[38] Although we have disagreed with the SAC's reasoning, the effect of our respective decisions is the same. It follows that there has been no miscarriage of justice and the appeal is refused.

[39] Even if we had agreed with the SAC as to the application under section 259, we would have refused this appeal. While the hearsay evidence would have been inadmissible on this hypothesis, the sheriff made it clear that she found the Crown witnesses who gave evidence credible and reliable. Given her acceptance of that evidence, she would have been bound to convict to the extent she did, whatever she made of the inadmissible hearsay. The effect of the wrongful admission or exclusion of a particular piece of evidence will vary according to the circumstances and will not automatically give rise to a miscarriage of justice.