



SHERIFF APPEAL COURT

**[2024] SAC (Crim) 2
SAC/2024/000009/AP**

Sheriff Principal A Y Anwar
Sheriff Principal S F Murphy KC
Sheriff Principal D C W Pyle

OPINION

of

SHERIFF PRINCIPAL A Y ANWAR

in

Bill of Suspension

by

JASON BUCHANAN

Complainer

against

PROCURATOR FISCAL, HAMILTON

Respondent

**Complainer: I Paterson (sol ad); Paterson Bell
Respondent: A Prentice KC (sol ad), AD; Crown Agent**

11 April 2024

Introduction

[1] The complainer was found guilty following a trial diet on 23 October 2023, of the following charges:

“(001) you JASON BUCHANAN having been made the subject of an ANTISOCIAL BEHAVIOUR Order on 21 July 2021 at Hamilton Sheriff Court in terms of the Antisocial Behaviour Order etc. (Scotland) Act 2004 prohibiting you

inter alia from (1) Prohibits the defender from shouting, swearing, verbally abusing; intimidating, threatening or assaulting any person. (3) Carrying an offensive weapon as defined in S47 Criminal Law (Consolidation) (Scotland) Act 1995 in a public place, did on 24 September 2023 at Holmswood Avenue, Blantyre without reasonable excuse, breach said order in that you did repeatedly shout and swear, utter a threat, and carry an offensive weapon, namely a metal pole: CONTRARY to the Antisocial Behaviour etc. (Scotland) Act 2004, Section 9(1)

(002) on 24 September 2023 at Holmswood Avenue, Blantyre you JASON BUCHANAN did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did repeatedly shout and swear at Garry Whitton, c/o The Police Service of Scotland, pursue him, brandish a metal pole and utter a threat: CONTRARY to Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010

(003) on 24 September 2023 at Holmswood Avenue, Blantyre, being a public place, you JASON BUCHANAN did, without reasonable excuse or lawful authority, have with you an offensive weapon, namely a metal pole: CONTRARY to the Criminal Law (Consolidation) (Scotland) Act 1995, Section 47(1) as amended

(005) on 24 September 2023 at 26 Holmswood Avenue, Blantyre and in the course of a journey to Motherwell Police Office, 217 Windmillhill Street, Motherwell you JASON BUCHANAN did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did brandish a metal pole at police officers, and utter threats towards police officers: CONTRARY to Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010"

[2] Each charge was aggravated by having been committed while on bail. The offences libelled in charges (2), (3) and (5) were committed while the accused was subject to an anti-social behaviour order. In relation to charge (5), the sheriff determined that there had been a significant sexual aspect to the complainer's behaviour in terms of paragraph 60 of schedule 3 of the Sexual Offences Act 2003 ("the 2003 Act"). The complainer challenges that determination by Bill of Suspension.

The evidence at trial

[3] Put shortly, the facts established at trial were as follows. On the date labelled, the complainer was in possession of an offensive weapon, namely a metal pole. He was screaming and shouting in the street, brandishing the metal pole and threatening to kill the individual named in charge (2). Three police officers attended, two male and one female. The complainer continued his aggressive behaviour and was abusive to the police officers, shouting insults like "Fuck off, youse are arseholes". He was handcuffed. The complainer was placed into the back of a police van. The complainer began to direct his abuse at the female police officer. She was the only female in the van. The complainer repeatedly threatened to rape her shouting "I'm going to rape you". He made the threat of rape up to 15 times. The vehemence of the threat and the number of times it was made left the female officer feeling "uncomfortable" and "uneasy". The officer was 19 years old, but looked considerably younger. The sheriff described her build as "slight" or "petite".

The summary sheriff's decision

[4] Following the conviction, the summary sheriff advised the parties that he was considering the question of whether there had been a substantial sexual aspect to the complainer's behaviour in relation to charge (5). The summary sheriff continued for a criminal justice social work report, a restriction of liberty order assessment and an electronic monitoring order assessment advising parties that he would give them an opportunity to be heard on the issue of whether or not a significant sexual aspect had been made out at the adjourned diet.

[5] At the adjourned diet on 27 November 2023, the reports ordered were not ready. However, the summary sheriff invited submissions on the question of whether there had

been a significant sexual aspect to the complainer's behaviour. Submission were made on behalf the complainer. The diet was continued again for the completion of reports. At the continued diet on 19 December 2023, the summary sheriff again invited any further submissions. No further submissions were made on behalf of the complainer.

[6] The summary sheriff considered the intense, persistent and repeated threat to rape a young looking female officer demonstrated a significant sexual aspect to the complainer's behaviour. He considered that registration was necessary to protect the public and to keep the complainer and his future conduct within the purview of the relevant authority. He considered it important that the complainer was an individual who denied any wrongdoing and has limited insight into his mental health, impact of substance misuse, offending behaviour and potential harm.

[7] The complainer was sentenced to a *cumulo* sentence of seven months imprisonment. He was made subject to the notification requirements of the 2003 Act for a period of 10 years, in terms of section 82 of the Act.

Submissions

[8] As drafted, the Bill challenged the absence of any reference to a sexual aspect to the complainer's behaviour in the libel. However, before us, it was conceded that the summary sheriff had advised the complainer that he was considering applying paragraph 60 of schedule 3 of the 2003 Act and he had provided the complainer with two opportunities to make submissions on the point. That concession was properly made. The sheriff had followed the guidance provided by the Lord Justice Clerk in *Hay v HM Advocate* 2014 JC 19 (at paragraph [46]). The advocate depute accepted that the Crown ought to have given fair notice of its intention to rely upon paragraph 60, had it intended to do so. He was correct to

do so. As noted by the Lord Justice Clerk in *Hay*, while a sentencer is entitled to raise the question of paragraph 60 *ex proprio motu*, such cases should be rare. Of necessity, if the sentencer does not raise the issue until the conclusion of the trial, the defence is deprived of the opportunity of leading any evidence in rebuttal. There is no suggestion in the present case that the complainer wished to lead evidence in rebuttal.

[9] The gravamen of the submission made on behalf of the complainer was that his behaviour could not be said to have been important enough to merit attention as indicating an underlying sexual disorder or deviance from which society was entitled to be protected by way of the sexual notification requirements. The complainer's behaviour required to be considered in context. His other aggressive non-sexual behaviour had been committed in the heat of the moment and in light of the complainer's apprehension for other offences. He had made a series of bizarre threats. His aggression had included threats to murder. On behalf of the Crown, it was submitted that the complainer's threat was of the most serious sexual violence. It had been made immediately after the complainer was brandishing a weapon in the street, shouting and swearing at the police and other persons present and threatening to kill a specified person and his family. The threat of sexual violence had not been made in jest or "as an aside" and had been repeated up to 15 times. It was submitted that whether an accused's behaviour in committing an offence has a significant sexual aspect is a question of fact which the sentencer requires to decide on the facts and circumstances of each case (*Sorrell v Procurator Fiscal, Greenock* [2020] SAC (Crim) 2).

Decision

[10] While I accept that whether an offence contains a significant sexual aspect is a matter of fact, primarily for the determination of the court at first instance, the evidence led before

the sheriff was in short compass, is summarised in his report and no issue is taken with it.

This case does not fall into that category of cases where having regard to the particular benefit enjoyed by the first instance decision-maker, an appellate court might be slow to interfere.

[11] The complainer's conduct set out in charge (5) was criminal. For that he has been convicted and sentenced to a period of seven months imprisonment. The purpose of registration as a sex offender is not punitive. It is protective. As explained by the Lord Justice Clerk in *Hay*, registration enables the police to keep tabs on a sex offender who is, or who may be, a continuing danger to others, and particularly to women and young people. Since the purpose of registration is to protect the public against a perceived danger, the question whether a sexual aspect of the accused's behaviour was significant should be assessed in that light. The accused's behaviour requires to be considered in the context of the purpose and the effects of registration, with sentencers keeping a sense of proportion and using their common sense.

[12] I agree with the summary sheriff that the court in *Hay* did not go so far as to suggest that there required to be an underlying sexual disorder or deviance from which society is entitled to be protected for a sexual aspect to an accused's behaviour to be found to be significant; that was one way to approach the question. However, the dicta in *Hay* and the subsequent observations in *McHugh v Harvie* 2015 SCCR 430 (citing *Heatherall v McGowan* 2014 JC 8 and *Thompson v Dunn* 2014 JC 16) make it plain that motivation is a factor of importance.

[13] I do not consider the offence nor the motivation for the offending behaviour to involve a significant sexual aspect, notwithstanding the threat was of a sexual nature. The threats were particularly vile and nasty and were clearly intended to cause alarm and

offence. They require however to be considered in context. The same threat made to a lone female would form a very different context and might readily lead to the conclusion that there was a significant sexual aspect to an accused's behaviour. Here, the conduct in charge (5) came at the end of a course of conduct during which the complainer unleashed a torrent of abusive and threatening language at several complainers with an intention to cause offence. That included a threat to murder the complainer in charge (2). The true essence and purpose of the offending behaviour here was to insult, verbally abuse and threaten the police officer as part of an ugly and unjustifiable reaction to being apprehended by the police. The threat of sexual violence was undoubtedly and understandably unpleasant and made the officer feel uncomfortable. For that the complainer has been sentenced. However, there does not appear to have been any evidence before the summary sheriff permitting the conclusion that the complainer's behaviour was motivated by any sexual purpose, in respect of which the female officer and the general public required to be protected, beyond reference to the terms of the threat and the youthful appearance of the female officer. It is of note that the threats had been directed at a female officer in the presence of two male officers in a police vehicle, while the complainer was handcuffed in police custody. The nature and circumstances of the offending conduct do not disclose that there was a significant sexual aspect to the complainer's behaviour which would warrant the additional measures of registration to protect the public from the risk posed by the complainer.

[14] In all of the circumstances, I consider the Bill must be granted. The certification and notices issued by the summary sheriff on 19 December 2023 should be recalled.



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[15] I concur with the Opinion of Sheriff Principal Anwar on all matters and consider that this Bill should be granted.



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[16] I am grateful to Sheriff Principal Anwar for setting out the background circumstances to the Bill and the submissions made before us.

[17] In *Hay v HM Advocate* 2014 JC 19, Lord Justice Clerk Gill (as he then was) (at para [52]) emphasised that the “difficult” task of deciding whether there was a significant

sexual aspect to the offender's behaviour was best left to the judgement of the sentencer. In this Bill, the summary sheriff made his decision after trial. While it is true that most, if not all, of the relevant matters were before this court, this is not a case where the opinion of the summary sheriff can be easily put to one side. He had the benefit of seeing and hearing the evidence of the young female police officer. I accept, of course, that the personal effect on her is not decisive of the significance of the sexual element, but her reaction as described by the summary sheriff is illustrative of the serious nature of such a threat and the fear that it can cause to women generally. The motivation of the offender is a relevant consideration (*Thompson v Dunn* 2014 JC 16; *Heatherall v McGowan* 2014 JC 8). At no point has the complainer offered any insight into his motivation for making the threat, whether by way of a plea in mitigation or in response to inquiries by the social worker. Indeed, from the criminal justice social work report, as the summary sheriff records, he continues to deny the offences. He was under no obligation of course to offer such insight and his not doing so is not of itself proof of an underlying sexual disorder or deviance. But its effect is to leave open the possibility that the threat of rape was because of an underlying desire to exercise power and control over a woman, a common reason for sexual offending.

[18] There can be many situations where a threat to kill someone or otherwise to inflict bodily harm can be very serious, but often as not it is said in the heat of the moment, usually under the influence of drink or drugs, with no real intent. But to direct a threat of rape (up to 15 times) at a young female police officer at the very least is a cause of concern, different from a threat of general violence.

[19] In the passage from *Wylie v M* 2009 SLT (Sh Ct) 18 which was approved in *Hay*, I was careful to state that registration may be appropriate where the behaviour is *indicative* of an underlying sexual disorder or deviance from which society is entitled to be protected. In

such cases, there is no proof. All the sheriff or summary sheriff can do is to consider the material before the court.

[20] In a very carefully drafted and comprehensive report, the summary sheriff in his reasoning for the need for registration includes the following:

“... it is a matter of common sense that [the complainer] be kept within the purview of the relevant authorities to ensure continuing public protection once he has served his prison sentence and has been released back into the public sphere.”

[21] In my opinion, the reasons he gives are deserving of respect. His conclusion is one which on the material before him he was well entitled to reach. While the summary sheriff does not go this far, for my part I consider that, in accordance with the illustrative test in *Wylie*, the complainer's behaviour was indeed indicative of an underlying sexual disorder or deviance.

[22] For these reasons, I am unable to adhere to the view of the majority and I would refuse the Bill.