**SHERIFF APPEAL COURT**

**[2016] SAC (Crim) 17**
**SAC/2017/000573/AP**

Sheriff Principal M M Stephen QC
Sheriff Principal C D Turnbull
Sheriff M G O'Grady QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

APPEAL BY STATED CASE BY

JOHN MONEAGLE

Appellant:

against

PROCURATOR FISCAL, ELGIN

Respondent:

**Appellant: J Keenan, (sol adv.) The Cruickshank Law Practice**
**Respondent: W McVicar (sol adv), AD; Crown Agent**

24 October 2017

[1] The appellant was convicted after trial at Elgin Sheriff Court of charges 1 and 3 on the complaint. He appeals by stated case his conviction on charge 3 which is in the following terms:-

> "(003) On 27 June 2014 at 38 Church Street, Dufftown, Moray you JOHN WRIGHT MONEAGLE 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 in the course of repeated text messages to SG, c/o the Police Service of Scotland, you did utter sexually inappropriate remarks; CONTRARY to Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010."

[2] Two questions in the stated case are directed to the appellant's conviction on that charge:

> "(1) Did I err in repelling the submission in terms of section 160 of the Criminal Procedure (Scotland) Act 1995 (in so far as it related to charge 3)?
>
> (2) Was I entitled to convict?"

[3] A further question is posed with regard to the sheriff certifying on 14 June 2017 that a conviction on charge 3 was one to which Part 2 of the Sexual Offences Act 2003 applied and issuing a certificate to that effect in respect of the appellant. The sheriff poses the following question in that regard:

> "(3) Did I err in issuing a certificate under part 2 of the Sexual Offences Act 2003 *ad interim*?"

**Background**

[4] The complainer is 25 years of age and is a drummer with the Dufftown pipe band. At the material time the appellant was the complainer's drumming tutor. The appellant, who was then 59 was not only a prominent figure in the pipe band world but also a person of authority in that community (Findings in Facts 6 and 12). The complainer gave evidence in support of charge 3 which relates to an exchange of text messages between her and the appellant during the evening prior to the European Pipe Band Championships. The complainer had been a drummer since she was very young and had been playing in pipe bands from the age of 9. The appellant was known to her. The appellant was not only her

drumming tutor but he was also a well-known judge of pipe band competitions. The appellant had the complainer's mobile telephone number and email address. Communications between them generally related to the pipe band and drum scores. The exchange of text messages is set out in paragraph [38] of the stated case which is incorporated into the findings in fact by paragraph [8].

**Submissions**

[5] The solicitor advocate for the appellant addressed us on the requirements to prove the offence. He examined the exchange of text messages set out at paragraph [38] of the appeal print. Up to the point where the appellant mentions "*after I give u the medical"* it is largely a discussion about travelling arrangements for the following day. After that, accepting that the expression "*munch*" was intended to be offensive or derogatory, the text conversation indicated that the complainer herself took a robust approach and used a derogatory expression towards the end of the exchange. The entire text conversation should be considered as a whole. The appellant and complainer were both adults and even if the appellant's language and behaviour could be viewed as insulting it was not such that was likely to cause fear or alarm to the hypothetical reasonable person. We were invited to answer question one in the affirmative and question two in the negative. The third question should also be answered in the affirmative. The sheriff at paragraphs [95] to [100] of the stated case considers the consequences of the conviction and gives her reasoning on the issue of whether there was a significant sexual aspect to the appellant's behaviour in committing the offence. The sheriff expresses herself not in the statutory language but takes the view that an order in terms of the Sexual Offences Act 2003 for registration would be disproportionate.

[6] The advocate depute invited us to answer question of law one in the negative and question two in the affirmative. The question of whether there was significant sexual aspect was one for the court however if the sheriff found that there was not a significant sexual aspect then no certificate should be issued under Part 2 of the Sexual Offences Act 2003. There was no statutory provision which allowed a certificate to be made on an interim basis.

[7] The proper interpretation of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2011 was authoritatively determined in the case of *Paterson* v *Harvie* 2015 JC 118. The section sets out three clear and concise constituents of the offence. The Lord Justice General (Gill) in *Harvie* emphasised that whether the accused has behaved in a threatening or abusive manner and whether that behaviour would be likely to cause a reasonable person to suffer fear or alarm are straightforward questions of fact. The accused's conduct is to be judged by an objective test and there is no requirement to show actual fear or alarm.

[8] In these proceedings the sheriff records in the stated case that the complainer considered the reference to a "*medical*" to be something of a sexual nature and something she did not want to be happening. The word "*munch*" did not hold any significant meaning for her however she considered it had to relate to something inappropriate. The conversation was not the usual type of conversation which would take place between the appellant and the complainer. The complainer did not consider that it was simply banter or a good natured exchange. However, she stated that she did not want to get on the wrong side of the appellant who she described as a powerful person in the piping world and she did not want her prospects to suffer. On the other hand the appellant considered it was good natured banter on both sides. However, the sheriff considered that the appellant's justification for the text exchange was bizarre and he knew the term "*munch*" was an

insulting sexual expression which he used with the intention of being offensive to the complainer (para [47]). The sheriff reports that the complainer found recounting the text conversation an uncomfortable task, as observed from her demeanour. Of course, it is not necessary that there be evidence of actual fear and alarm as the test is an objective one whether the accused's behaviour would be likely to cause fear and alarm to the hypothetical reasonable person.

[9] We consider this case to be unusual given the context and its own facts. We can fully understand why the complainer may have been uncomfortable when recounting or reviewing the text conversation. Essentially the exchange of text messages starts in a rather equal and perfectly anodyne fashion until the messaging from the appellant begins to adopt a rather different complexion. This begins with the text from the appellant which states "*after I give u the medical*". The sheriff considered that she was entitled to find that that was an expression of a sexual nature. However, as the text conversation proceeds what is beyond doubt is that the term "*munch*" used by the appellant was admittedly offensive and objectively abusive.

[10] At the stage of the section 160 submission the sheriff, of course, had to take the Crown case at its highest and draw the inferences most favourable to the Crown. As we have said the sheriff was entitled to draw the inference that the appellant's text messages involved both inappropriate sexual comment together with an offensive or abusive comment about the complainer's sexuality. The sheriff refers to the age and power imbalance between the parties which is a matter of fact. In these circumstances the first two elements or constituents of this offence are present. We have little difficulty in finding that the sheriff was entitled firstly to repel the section 160 submission for the reasons she gives from paragraph [70] to [75] in the stated case. She was entitled to form the view that the

accused clearly intended to send the text messages and the language is of his choosing. The sheriff is entitled to regard the appellant's words and behaviour as sufficient to cause fear and alarm. The third constituent element is, of course, the question of intention or *mens rea.* The sheriff considered this element and took the view that *mens rea* could be established by virtue of the recklessness of the appellant's text exchange. Accordingly, we propose to answer question one in the negative. Likewise the sheriff's reasoning for convicting is beyond reproach and we will answer question two in the affirmative.

[11] We now turn to the third question of law which relates to the Sexual Offences Act 2003 ("the 2003 Act") and the certificate made by the sheriff when convicting the appellant of this charge. Section 92 of the 2003 Act provides that the court may certify that an individual has been convicted of an offence and that the offence in question is an offence listed in Schedule 3 to the 2003 Act. That person then becomes subject to the notification requirements of section 80. Schedule 3 to the Act sets out a list of offences conviction of which result in notification for the period specified in the table set out in section 82. Paragraphs 36 to 59ZL of Schedule 3 set out the specific Scottish offences which are covered by the notification requirements of the 2003 Act; paragraph 60 provides for a residual category which invokes the notification requirement as follows:

> "If the court, in imposing sentence or otherwise disposing of the case, determines for the purposes of this paragraph that there was a significant sexual aspect to the offender's behaviour in committing the offence."

In this case the sheriff on conviction certified that the appellant was subject to the notification requirements in respect of paragraph 60 namely, for a non-specific offence where there required to be a *significant sexual aspect* to the offender's behaviour. At that stage the sheriff considered that there was *prima facie* a significant sexual aspect however following preparation of the Criminal Justice Social Work Report and further submissions

the sheriff was satisfied that the appellant posed a low risk of sexual harm to the public which taken along with the nature of the offending led her to the conclusion that the order previously made was disproportionate. However, the sheriff could find no mechanism for recalling the order.

[12] It appears to us that there is no such mechanism because there is no power to make an order *ad interim*. There being no significant sexual aspect to the offender's behaviour in committing the offence the purported interim order must be quashed. It is incompetent to make an order in respect of a non-specific offence under paragraph 60 of Schedule 3 without there, first of all, being a finding or determination by the court that there was a significant sexual aspect to the offender's behaviour in committing the offence. Without such a finding no notification order can be made in terms of paragraph 60 as that provision relates to any offence but only where there is a "*significant sexual aspect*" on the part of the offender in committing that offence. It was recognised in *Hay* v *HMA* [2012] HCJAC 28 that registration as a sex offender and its notification requirements does not constitute a sentence. Rather, it is designed to be a measure which protects members of the public and places restrictions and requirements on the offender. Of course in *Hay* the court gave general guidance to the sentencer in paragraph 60 cases and the correct approach to consideration of whether there had been a significant sexual aspect to the offender's behaviour in committing the offence. The issue which arises in this appeal and in another appeal which we heard today relates instead to the absence of any statutory provision to make an order *ad interim* and the stage in proceedings when the court considers whether on the facts and circumstances of the case a significant sexual aspect is established. The question of whether the offender's behaviour has a significant sexual aspect is a decision which will be based on the conviction and any relevant facts. How that is determined will vary depending on whether the accused is

convicted after trial or has pled guilty. In the latter circumstances, as noted in *Hay* "*If there is a dispute on the material issue of fact in such circumstances, the sentencer may have to hear evidence to resolve it*." There is, therefore, no specific stage on, or following, conviction when the question of whether there has been a significant sexual aspect must be resolved by the court. However that question must be determined before any certificate in terms of section 92 of the 2003 Act can follow. It occurs to us that there may be a misconception that certification must be determined on conviction otherwise the moment is lost. That is not correct. The import of section 92(2)(b) of the 2003 Act is that the court may certify that the person's conviction of the offence in question and that the offence is one listed in Schedule 3 may take place at the time ( of conviction ) or subsequently. There is no power and no requirement to make an order *ad interim* pending a proper determination of the issue. The question of whether there is a significant sexual aspect must be determined carefully on the facts and any certificate which follows will be a final order which may be remedied or challenged only on appeal.

[13] Accordingly, we have no difficulty in finding that the purported certification should be quashed. We will also refuse the appeal on its merits by answering question one in the negative; question two in the affirmative and in respect of question three that will be answered in the affirmative.