



**SHERIFF APPEAL COURT**

**[2021] SAC (Crim) 3  
SAC/2020-355/AP**

Sheriff N McFadyen  
Sheriff L A Drummond QC  
Sheriff F Tait

**OPINION OF THE COURT**

delivered by SHERIFF L A DRUMMOND QC

in

APPEAL UNDER SECTION 174 OF THE CRIMINAL PROCEDURE (SCOTLAND)  
ACT 1995

by

MK

Appellant

against

PROCURATOR FISCAL, KILMARNOCK

Respondent

**Appellant: Brown, sol adv, Bridge Legal Ltd, Glasgow**

**Respondent: Edwards QC, AD; Crown Agent**

12 January 2021

[1] The appellant was charged by the respondent at Kilmarnock Sheriff Court with three charges under the Sexual Offences (Scotland) Act 2009. Charges 1 and 2 are charges under section 8 of the 2009 Act (sexual exposure in the course of a video call via online social media platform) with an alternative charge under section 35 (sexual exposure to an older child in the course of a video call via online social media platform ). Charge 3 is a charge

under section 7 of the 2009 Act (communicating indecently via an online social media platform) with an alternative charge under section 34(1) of the 2009 Act (communicating indecently with an older child via an online social media platform).

[2] Each of the three charges (including the alternative charges) as originally framed stated:

“on an occasion between 1 October 2019 and 30 November 2019, both dates inclusive at an address known to the Prosecutor within the jurisdiction of Kilmarnock Sheriff Court, you MK, ...”

[3] On 4 November 2020, at a diet of debate before Sheriff Jamieson, the appellant argued that the charges on the complaint were incompetent and irrelevant. The Sheriff allowed the Crown to amend the libel in each charge inserting the words “in Irvine” in charges 1 and 3 (and the alternatives) and “in Saltcoats” in charge 2 (and the alternative) so that the libels read “at an address in Irvine” or “at an address in Saltcoats” respectively. The Sheriff thereafter repelled the appellant’s preliminary pleas to the relevancy and competency of the complaint and gave leave to appeal that decision to this court. The appellant appeals against the Sheriff’s decision.

[4] The appellant submitted that the complaint as originally drafted was incompetent because the libel in each charge contained no specific locus only generally stating that the offences were committed “at an address known to the prosecutor to be within the jurisdiction of Kilmarnock Sheriff Court”. Since no locus had been specified, the complaint as originally libelled was fundamentally null and incapable of being cured by amendment. Reference was made to the caselaw set out at paragraph 11 of the Sheriff’s report. The Sheriff had agreed that it was unsatisfactory that the appellant had been deprived of information on the face of the complaint which would satisfy him there was jurisdiction. The Sheriff had also been deprived of that information and had erred in failing to find the

complaint fundamentally null and incapable of amendment. The appellant no longer sought to argue on grounds of relevancy.

[5] The Crown submitted that the complaint as originally libelled was both competent and relevant. Each charge as originally framed averred the locus was within the jurisdiction of Kilmarnock Sheriff Court. In terms of paragraph 4(3) of schedule 3 to the 1995 Act the Crown can take exceptional latitude in regard to libelling the locus where the circumstances of the offence make this necessary and there is no need to specify these circumstances in the libel. The prosecutor may in certain classes of case take in the whole district (*Gold v Neilson* 1908 SC (J) 5). The locus was not the essence of the charges on this complaint. Disclosing the complainers' addresses in a case such as this was unnecessary and could in some circumstances be harmful to the complainers and impact on their Article 8 rights. In these types of cases it is often not known where the accused was at the time of the offence, and therefore necessary to found jurisdiction on the receipt of communication. There are sound policy considerations behind the decision to libel the charges in this manner. There is nothing inherently unfair about the manner in which the charges have been libelled and no prejudice to the appellant arises. If the court is satisfied that it was not reasonable to take exceptional latitude in the circumstances, a remedy is available under paragraph 4(4) of Schedule 3, by adjournment of the trial or by doing otherwise as shall seem just.

[6] It is important to distinguish between objections to competency and relevancy. As explained in Renton and Brown's *Criminal Procedure* (sixth edition), paragraph 9-02, if a plea to the competency is upheld it puts an end to the whole proceedings. An objection to relevancy implies that the terms of the libel are not in accordance with the requirements of law and potentially may be cured by amendment. Objections to competency may arise where the court has no jurisdiction to try the crime charged. However, in our view, the

court does have jurisdiction to try the crimes charged on this complaint. As the Sheriff points out in his report, under section 4 of the Criminal Procedure (Scotland) Act 1995 jurisdiction is fixed by reference to the Sheriffdom and the prosecutor had the option of trying the case in any district within the Sheriffdom.

[7] We acknowledge that failure to specify a locus may render a complaint fundamentally null and that cannot be cured by amendment (*Stevenson v McLevy* (1870) 6R (J) 33; *Macintosh v Metcalfe* (1886) 13 R (J) 96; *Herron v Gemmell* 1975 SLT (Notes) 93; *Yarrow v Shipbuilders Ltd v Normand* 1995 SCCR 224; *Caven v Cumming* 1998 SCCR 313 and *Strawbridge v Harvie* 2015 JC 7.) However, we take the view that the charges on this complaint did sufficiently specify the locus. As originally drafted, the complaint contained sufficient information to establish that the locus was within the court's jurisdiction. The locus was specified as an address known to the prosecutor within the jurisdiction of Kilmarnock Sheriff Court. It is a district wide locus. It is open to the prosecutor, under Schedule 3, paragraph 4(3) to take exceptional latitude where the circumstances of the case make it necessary to do so. There is no need to specify the circumstances in the libel. Where the court is satisfied that exceptional latitude is not reasonable in the circumstances of the case, it can give such remedy to the accused whether by way of adjournment of the trial or otherwise as shall seem just under paragraph 4(4) of Schedule 3. In our view, exceptional latitude is reasonable in the circumstances of the present case. The loci of where the complainers reside is not the essence of the charges which are alleged offences committed via social media. Disclosure of the complainers' addresses could be harmful to the complainers and may potentially breach their rights under Article 8 of the European Convention on Human Rights. We are unable to identify any prejudice to the appellant by not knowing the complainer's addresses within the Sheriffdom. We note that the appellant

in the grounds of appeal states that “Neither the appellant nor those representing him have any desire to know the particular addresses of the complainers.” If the appellant does not seek specification of the complainers’ addresses, it is unclear what the appellant’s complaint is in this appeal. For these reasons, we hold that the complaint as originally libelled was competent. We refuse the appeal on this basis.