SHERIFF APPEAL COURT

[2024] SAC (Crim) 10
SAC/2024/319/AP

Sheriff Principal N A Ross
Sheriff Principal C Dowdalls KC
Sheriff Principal G A Wade KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL G A WADE KC

in

Crown Appeal by Stated Case

by

PROCURATOR FISCAL, EDINBURGH

Appellant

against

STEVEN HARPER

Respondent

Appellant: Harvey AD; Crown Agent
Respondent: Collins, (sol adv); CN Defence Ltd, Edinburgh

23 October 2024

[1] On Christmas Eve 2022 the respondent was in the Argyle Bar in Edinburgh drinking with his partner and his friend. He had been there for some time and had consumed between six and eight pints. The group were seated at the bar on stools. The complainer, YZ, was also in the premises with her relatives. She went up to the bar to order some drinks. In order to speak to the bar staff she moved into the gap between the two bar stools

on which the respondent's partner and friend were sitting. The respondent's friend was on her left and his partner was on her right. While standing there she felt someone touch the left cheek of her bottom with a degree of force. She felt outraged and humiliated. She immediately turned around and tried to identify whoever was responsible. Initially she was unable to do so and asked to view the CCTV of the bar area. This clearly showed the respondent as the perpetrator. He is seen to reach behind both his partner and YZ and then to touch YZ on the left cheek of her bottom, which was the side closest to his friend.

[2] The respondent maintained that due to his limited view and the amount of alcohol he had consumed he had mistakenly thought that YZ was his friend, LH, who regularly drank in the Argyle Bar and who, according to him, resembled YZ. His intention was to play a practical joke by touching the woman he thought to be LH on the bottom in such a way that his friend would get the blame. He therefore pinched the bottom of the woman he had mistakenly identified as LH on the side closest to his friend, so that she would think that his friend was responsible. It is fair to say that the so-called joke backfired.

[3] The respondent, having been identified by other customers and from the CCTV, was confronted by YZ's father, to whom he responded aggressively. The matter escalated causing upset to customers and staff. Eventually the respondent was persuaded to leave the pub. The matter was reported to the police and the respondent was subsequently charged.

[4] The complaint libelled two charges; however, the Crown's appeal by stated case is made only in relation to charge 1. As libelled, it stated:

> "(001) on 24 December 2022 at Argyle Bar, 15-17 Argyle Place, Edinburgh you STEVEN HARPER did sexually assault [YZ], c/o The Police Service of Scotland, in that you did handle her hinder parts; CONTRARY to Section 3 of the Sexual Offences (Scotland) Act 2009"

[5] Following trial, the sheriff convicted the respondent of charge 1, as amended by him, as follows:

> "(001) on 24 December 2022 at Argyle Bar, 15-17 Argyle Place, Edinburgh you STEVEN HARPER did assault [YZ], c/o The Police Service of Scotland, in that you did touch her hinder parts."

[6] As is evident from the above, the changes made by the sheriff to charge 1 led to a finding of guilt of assault at common law, rather than conviction of a sexual assault in terms of section 3 of the Sexual Offences (Scotland) Act 2009. The Crown contends that, given the nature and circumstances of the assault, the sheriff erred and the respondent ought to have been convicted of a contravention of section 3.

The stated case

[7] The sheriff poses five questions in the stated case:

i. Did I err, on the facts stated, in convicting the respondent of an assault upon the complainer at common law, rather than the statutory offence libelled in charge (001)?

ii. On the evidence led as hereinbefore stated by me, was I entitled to make finding in fact 10?

iii. On the evidence led as hereinbefore stated by me, was I entitled to make finding in fact 11?

iv. On the evidence led as hereinbefore stated by me, was I entitled to make finding in fact 23?

v. On the evidence led as hereinbefore stated by me, was I entitled to make finding in fact 24?

Facts

[8] The key facts directly challenged by the Crown are as follows:

> "10. The respondent decided, as a practical joke, to touch the woman he thought to be LH on the bottom, in such a way that his friend […] would get the blame.
>
> 11. [The respondent's] judgement was impaired by alcohol, both in mistaking [YZ] for LH and in deciding to do such a foolish thing. He put his hand round behind his partner's back and touched [YZ] on the left-hand buttock, being the side closest to [his friend].
>
> …
>
> 23. The touching of [YZ] on the bottom was deliberate and constituted an assault at common law. It was not sexual.
>
> 24. In all the circumstances, a reasonable person would not have considered the touching of [YZ's] bottom to be sexual."

Legislation

[9] The following parts of the 2009 Act which are relevant to this appeal are:

> "**Section 3 – Sexual Assault**
>
> 1) If a person ('A') –
> (a) Without another person ('B') consenting, and
> (b) Without any reasonable belief that B consents,
>
> does any of the things mentioned in subsection (2), then A commits an offence, to be known as the offence of sexual assault.
>
> 2) Those things are, that A-
> …
> (b) intentionally or recklessly touches B sexually,
> (c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact with B (whether bodily contact or contact by means of an implement and whether or not through clothing) with B"
>
> **"Section 60 - Interpretation**
>
> (2) For the purposes of this Act-
> (a) penetration, touching or any other activity,
> …

> is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual."

Submissions for the Crown

[10] The sheriff held that the assault was not sexual because: (i) it was a practical joke; and (ii) it was relevant that the accused was intoxicated. Neither of those factors was, however, relevant to determining whether there was a contravention of section 3. The sheriff had approached matters subjectively and had also had regard to matters that did not impact on the objective consideration of whether or not the touching of YZ was sexual.

[11] The respondent's motivation was irrelevant. The fact that he meant the touching as a practical joke and that he meant to touch someone else did not mean there had been no sexual assault. What was relevant was whether the touching of the respondent's bottom was intentional. If so the question of whether the touching is sexual is determined on the application of the objective test in section 60(2). If, on that objective test, the touching is found to be sexual, the respondent was guilty of sexual assault, irrespective of motive: *Kennedy* v *Procurator Fiscal, Aberdeen* 2024 SLT (SAC) 154 at para [14]. In any event, committing a crime for a joke is no defence to a charge of assault, because that goes to motive not intent: *Lord Advocate's Reference (No 2 of 1992)* 1992 JC 43 at p 48C-D. The same must be true for sexual assault, otherwise the objective test would become entirely subjective.

[12] The sheriff had erred in taking account of the respondent's impairment through alcohol. Touching that is objectively sexual does not become non-sexual because the accused was intoxicated: *Ferguson* v *HM Advocate* 2022 SCCR 26 at para [22].

[13] The fact that the respondent had no interest in the complainer before he touched her bottom was of no relevance. Although prior interest in a complainer might be good

evidence that touching her was sexual (for instance, rebutting a defence that the touching was accidental), the converse is not true. An absence of prior interest is no more relevant to assessing whether a touch is sexual than prior sexual activity is to whether a sexual act was consensual. The nature of the touching has to be examined in light of the circumstances at the time of the offence: what was done, where and how the complainer was touched.

Submissions for the respondent

[14] The application lodged by the Crown for a stated case proceeded on the basis that no reasonable sheriff, properly directing themselves in law, would have made the decision that the sheriff here did. The Crown was wrong to contend that the sheriff had not properly directed himself in law. The stated case makes clear he had applied section 60(2). That was evident from paras [72], [78] and [80] of the stated case, where the sheriff set out his reasoning. Instead, the Crown now sought to argue that the sheriff had erred in law in the manner in which he applied section 60(2), contrary to the basis upon which their application had been made. For that reason alone, the appeal ought to be refused.

[15] The sheriff did not err in taking into account: (i) that the respondent's act was a practical joke; and (ii) that the respondent was intoxicated. The evidence as to the respondent's intent to play a practical joke was relevant insofar as explaining why he had done what he did. Contrary to the Crown's interpretation of para [22] of *Ferguson*, the Appeal Court did not state that the fact an accused was intoxicated was irrelevant in determining whether there was a contravention of section 3; what it said was that it would be unlikely to be of any great significance in determining that question. Finally, in order to apply the objective test at section 60(2), the sheriff could not be said to have been in error in taking account whether or not there had been previous interactions between the complainer

and the respondent. That could be useful evidence that would assist a sheriff or jury in their application of section 60(2) in assessing, objectively, whether the touching had been sexual.

Decision

[16] In oral submissions the respondent's first challenge to the appeal was that the argument now advanced by the Crown differed from that in the application for a stated case and for that reason alone, the appeal ought to be refused. We take this opportunity to remind parties once again that in appeals by stated case the scope of the appeal is determined by the stated case itself and the questions posed (*B* v *Murphy* 2015 SLT 214 per Lord Justice Clerk (Carloway) at paras [6], [7] and [14]).

[17] In this case the first question asks whether the sheriff erred, on the facts stated, in convicting the respondent of an assault upon the complainer at common law, rather than the statutory offence libelled in charge 1. That question necessarily involves consideration of the legislation and subsequent case law. Accordingly there is no merit in the submission that the terms of the application constrain this court from doing precisely that.

[18] Turning to substance of the appeal, there is no challenge to the finding that what occurred was an assault. The question is whether that assault was sexual and therefore a contravention of section 3 of the 2009 Act. The sheriff made findings in fact in relation to the respondent's state of intoxication, his intention to perpetrate a practical joke, and the lack of any previous interest in YZ, but only as factors relevant to assessing whether or not the assault was sexual. In our view, however, the test under section 3(2)(b) does not admit of these factors. The question is whether the respondent intentionally or recklessly touched YZ sexually.

[19] The starting point is the entitlement to sexual autonomy. As the Lord Justice Clerk (Carloway) recently made clear in *PF Edinburgh* v *Faisal Aziz* 2023 SCCR 55 at para [20-22]:

> "[20] The common law has always criminalised certain conduct which interferes with the sexual autonomy of others, notably, but not exclusively, females. It did this in two ways. First, it rendered criminal acts which involved the physical invasion of the body of another in the form of, for example, rape and indecent assault.
> …
> [22] It was against that background, and the redefinition of rape in Lord Advocate's Reference (No. 1 of 2001) [2002 SLT 466], that the Scottish Law Commission produced its Report 9 on Rape and Other Sexual Offences [no 209] in 2007. This examined how, what it described as, 'the most fundamental principle' of '[r]espect for sexual autonomy' might find its way into the criminal law. This respect was described as operating (para 1.25): 'Where a person participates in a sexual act in respect of which she has not freely chosen to be involved, that person's autonomy has been infringed, and a wrong has been done to her. This generates a fundamental principle for the law on sexual offences, namely that any activity which breaches someone's sexual autonomy is a wrong which the law should treat as a crime.
> [23] The most obvious breaches of sexual autonomy, in the context of participating in a sexual act, involve some form of physical interference with the person of another…"

[20] Certain parts of the anatomy are inherently sexual. Touching on such an area would more readily be considered intimate and indeed sexual. Physical interference with such areas, absent consent, is precisely what the Scottish Law Commission had in mind when considering how to address breaches of sexual autonomy in what became the Sexual Offences (Scotland) Act 2009. At paragraphs 3.42-3.44 of its Report, the Scottish Law Commission considered the appropriate means by which to determine what constitutes "sexual" conduct. It concluded that an objective test was appropriate, and observed:

> "…adopting purely subjective approaches could lead to odd results (for example an accused could not be convicted of a sexual assault where he genuinely believed that touching a woman's vagina or breasts was not sexual in nature)."

[21] In *Ferguson* v *HMA* 2002 SCCR 26 at para [21] the court, in disapproving the earlier case of *PF Edinburgh* v *Scott Dunn* 2015 SCCR 449 said:

> "A reasonable person would be likely to have in mind that a woman's buttocks are among the more private parts of her anatomy and that another person might well have a sexual interest in observing or touching them. Each case will turn on its own particular facts and circumstances. In our view, on the facts in *SD* it was open to the sheriff to conclude that the grabbing of the complainer's buttocks was sexual. We find it unsurprising that he reached that conclusion."

That being so the requirements of section 3 are *prima facie* met in this case and a sexual assault was committed. The respondent did, without YZ's consent, intentionally or recklessly touch her on the buttock which, following *Ferguson,* is a part of the body which is objectively considered private, and the interference with which is a breach of sexual autonomy. The requirements of section 3 are satisfied.

[22] The questions posed and the submissions made oblige us, however, also to consider section 60(2)(a) and the test for determination of what is "sexual". The sheriff was prepared to place weight on certain factors which in his view negated the sexual nature of the assault. He approached matters on the basis that the respondent's actions were the result of a mistake rather than sexual intent. He accepted that the motivation had been to perpetrate a practical joke and that the lack of previous attention paid by the respondent to YZ was relevant. He considered that the mistaken identity arose from the respondent's state of intoxication. Having accepted that this was a mistake, the sheriff was persuaded to follow *Dickson* v *PF Kilmarnock* 2023 SAC (Crim) 3 at paragraph 29 and convict of a common law assault only.

[23] The sheriff clearly had in mind the correct test in section 60(2)(a) of the Sexual Offences (Scotland) Act 2009, namely whether a reasonable person would, in all the

circumstances of the case, consider the touching to be sexual, judged objectively. In our view, however, he fell into error by assessing only the respondent's intention or motivation.

[24] Objectively, a person in the respondent's position would know very well that if a woman were touched on the bottom by an unknown person in a pub that would be likely to infringe her sexual autonomy and provoke a negative reaction. That was the whole point of the so-called joke. He could not, and did not, claim not to have known that it was wrong to touch a woman in such a way and knew that his friend would get into trouble if he was thought to be the culprit. YZ had every right to react as she did.

[25] The sheriff erred in placing undue weight on the respondent's motive, and insufficient weight on sexual autonomy. Committing a crime for a joke is no defence (*Lord Advocate's Reference No 2 of 1992* 1992 JC 43 at page 48C-D). In section 3 the issue of intent is related only to the touching itself, not the reason for the touching. In this case the respondent did intend to touch the bottom of a woman, albeit a different woman. He was at least reckless in relation to who it was he actually touched in this way. LH's evidence, about how she might or might not have reacted if it had been her bottom that was touched, was irrelevant. That evidence was both hypothetical and subjective and in our view ought not to have been admitted.

[26] The issue of motive was recently considered in *Kennedy* v *PF* Aberdeen 2024 SLT (SAC) 154 in the context of sexualised entertainment. At para [14] the court said:

> "The appellant's position that this was a form of sexualised entertainment is not a defence to either charge in our view. Sexualised entertainment is sexual in nature by definition. The acts described by the complainers were carried out deliberately in each case and the motivation behind these deliberate acts is not a relevant consideration in relation to the question of dole or mens rea. If the constituent elements of a contravention of section 3 of the 2009 Act are made out, the accused's motivation is irrelevant."

[27] If it were the case that the Crown required to prove that the accused intended the touching to be sexual, the deliberately framed objective test would become subjective. Provided it is established that an accused intended to touch the complainer at all and that the touching was objectively sexual, either because of where the complainer was touched or the manner of the touching, the crime is committed.

[28] It follows that touching which is objectively sexual does not become non-sexual because the accused was intoxicated, or intending a joke. Having regard to *Ferguson* (*supra*) (at paragraph 22, page 32A-C):

> "The fact that an accused was intoxicated at the time of an alleged offence is, of course, one of the facts and circumstances to which a decision-maker may have regard along with all the other facts and circumstances when deciding whether a reasonable person would consider the behaviour in question to be sexual. However, usually it is unlikely to be of any great significance. We see no error in the approach the sheriff took. We do not find the distinction which the court drew between 'drink-fuelled' and 'overtly sexual' assaults helpful or illuminating in this context, not least because the proposed dichotomy is a false one. The two categories are not mutually exclusive. Many sexual assaults are committed by assailants who are intoxicated to varying degrees with alcohol or drugs or both; and, in general, self-induced intoxication is no defence to a criminal charge (*Brennan* v *HM Advocate* 1977 J.C. 38, opinion of the court delivered by Lord President Emslie at 47; see also 50 and 51). In every case, if all of the other requirements of s.3 are satisfied, the question is whether in all the circumstances a reasonable person would consider the relevant activity to be sexual. That is the position whether or not the perpetrator was intoxicated."

[29] The sheriff considered that the excess alcohol led to the mistaken identity, not that it excused the respondent's behaviour. However, he erred in concluding that it could, in the circumstances of this case, negate the sexual act of touching someone on the bottom, in the manner which occurred. Similarly, the lack of previous interest did not remove the sexual nature of the touching.

[30] We answer the first three questions in the affirmative, and the fourth and fifth questions in the negative, and quash the respondent's conviction for assault. We will

substitute a conviction for a contravention of sexual assault by the reinsertion of the word "sexual" in line 2 of the charge and the reinsertion of the words "CONTRARY to section 3 of the Sexual Offences (Scotland) Act 2009" at the end of the charge.

[31] In relation to sentence the sheriff fined the respondent £300, and the sentence is not challenged. However as a consequence of his conviction in terms of section 3 of the 2009 Act the respondent must now be made subject to the notification requirements of the Sexual Offences Act 2003 for a period of 5 years.