



**SHERIFF APPEAL COURT**

**[2016] SAC (Crim) 20  
SAC/2016/000021/AP**

Sheriff Principal C A L Scott QC  
Sheriff S Murphy QC  
Sheriff Principal B Lockhart

**OPINION OF THE COURT**

delivered by the Vice President, SHERIFF PRINCIPAL C.A.L. SCOTT QC

in

**APPEAL AGAINST CONVICTION**

by

**ROBERT McBRIDE**

Appellant

against

**PROCURATOR FISCAL, AYR**

Respondent

**Appellant: Ogg, Solicitor Advocate, Paterson Bell  
Respondent: Brown QC, AD; Crown Agent**

21 June 2016

[1] The appellant stood trial at Ayr Sheriff Court on a single charge libelling a contravention of section 3 of the Sexual Offences (Scotland) Act 2009. It was averred in the charge that he had handled the complainer's private parts.

[2] The complainer spoke to the libel when she gave evidence. The sheriff found her to be a credible and reliable witness.

[3] There was also evidence of:

- (a) the appellant having apologised to the complainer;
- (b) the complainer being seen to be upset after the incident;
- (c) the appellant having been observed putting an arm round the complainer's shoulder;
- (d) text messages between the complainer and the witness LK in the early hours of the morning after the incident from which the sheriff inferred "that something untoward had happened to" the complainer.

[4] The appellant testified at trial that the only physical contact between himself and the complainer involved him putting his arm around her neck and shoulder. He accepted that he had apologised to the complainer but explained that he had done so in the context of expressing sympathy for the complainer's grandmother who was ill at the time. The appellant denied touching the complainer's private parts.

[5] Whilst the sheriff records that she did not accept the appellant's version of events, this appeal raises the question as to whether the Crown, at trial, had established a sufficiency of evidence against the appellant.

[6] Ms Ogg, for the appellant, submitted that the only evidence of a sexual assault of the nature libelled came from the complainer herself. Ms Ogg stressed that there had to be corroboration of a sexual assault. Nothing less than that would suffice for the purposes of sufficiency.

[7] In analysing the significance of the evidence apart from the complainer's testimony, Ms Ogg contended that none of it provided corroboration of the libel. The evidence of

distress could only amount to the occurrence of some sort of distressing event affecting the complainer in circumstances involving a lack of consent. The appellant's apology was of no moment and the text messages emanated from the same, single source, viz. the complainer.

[8] The advocate depute maintained that there was a sufficiency of evidence upon which the sheriff had been entitled to convict the appellant. He sought to rely upon the evidence of the witness LK. The advocate depute submitted that her evidence of physical contact between the complainer and the appellant, taken along with the complainer's distress, was apt to afford corroboration of the complainer's account involving a sexual assault. The advocate depute urged the court to uphold the conviction.

[9] In our view, the difficulty arising from the Crown's reliance upon the evidence of the witness LK is that the physical contact spoken to by that witness was a discrete form of physical contact from that which the Crown set out to prove under reference to the libel.

[10] As Ms Ogg submitted, the appellant had not been charged with a common law assault. Had that been so, the Crown case might have benefited from a degree of latitude. However, with a statutory libel, there was no latitude as far as the *actus reus* was concerned. There had to be corroborated evidence of an assault which was sexual in nature.

[11] The difficulty we identify involves, on the one hand, the Crown founding upon LK's testimony as corroboration of the sexual assault libelled and, on the other, the Crown's acceptance of the fact that the actual conduct specified by LK in her evidence amounted to nothing more than "an arm around the complainer's shoulder". It seems to us that it is not open to the Crown to "ride both these horses" in an attempt to establish corroboration for a sexual assault upon the complainer.

[12] Accordingly, we have reached the conclusion that the evidence in this case was insufficient to support a conviction. There was no corroboration of the complainer's account

to the effect that she had been sexually assaulted. We have answered the question posed in the stated case in the negative and quashed the conviction.