SHERIFF APPEAL COURT

[2017] SAC (Crim) 5
SAC/2016-000848/AP

Sheriff Principal M M Stephen QC
Sheriff M G O'Grady QC
Sheriff Principal R A Dunlop QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

BILL OF SUSPENSION

by

TARIQ CHAUDHRY

Complainer

against

PROCURATOR FISCAL, HAMILTON

Respondent

Complainer: Findlater, John Pryde & Co
Respondent: J Keegan, QC, Sol Ad. A.D, Crown Agent

28 February 2017

[1] The complainer (59) is a newsagent. On 28 October 2016 he was convicted after trial at Hamilton Sheriff Court of three separate contraventions of section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995 – lewd, indecent and libidinous practices and behaviour towards young female employees between the ages of 13 and 16 as follows,

"(001) between 1 April 2008 and 30 November 2008, both dates inclusive at Darroch's Newsagents, Main Street, Bothwell you TARIQ CHAUDHRY did use lewd, indecent and libidinous practices and behaviour towards N.F., care of Police Service of Scotland then an employee born 2 May 1994, a girl then of or over the age of 12 years and under the age of 16 years, and did make remarks of a sexual nature, cause her to view images of a sexual nature, handle her breasts and vagina and handle her body;
CONTRARY to the Criminal Law (Consolidation) (Scotland) Act 1995, Section 6

(002) between 1 October 2005 and 24 June 2007, both dates inclusive at Darroch's Newsagents, Main Street, Bothwell you TARIQ CHAUDHRY did use lewd, indecent and libidinous practices and behaviour towards L.M., care of Police Service of Scotland then an employee born 23 June 1991, a girl then of or over the age of 12 years and under the age of 16 years, and did make remarks of a sexual nature, handle her body; and cause her to view images of a sexual nature.
CONTRARY to the Criminal Law (Consolidation) (Scotland) Act 1995 Section 6

(003) on various occasions between 1 October 2007 and 30 December 2007, both dates inclusive at Darroch's Newsagents, Main Street, Bothwell you TARIQ CHAUDHRY did use lewd, indecent and libidinous practices and behaviour towards L. I., an employee born 26 July 1994, then aged 13, a girl then of or over the age of 12 years and under the age of 16 years, and did make remarks of a sexual nature.
CONTRARY to the Criminal Law (Consolidation) (Scotland) Act 1995, Section 6"

On 30 November 2016 he was sentenced to 9 months imprisonment (3 months on each charge consecutive to each other).

[2] In this bill he argues that his conviction and sentence should be quashed as he was denied a fair trial. He bases that argument on remarks made by the sheriff at the conclusion of the evidence of the complainer in charge 1 N.F. Charge 1 is clearly the most serious of the three charges. N.F. is a vulnerable witness and the court allowed her to give evidence with the use of screens (in terms of 271K of the Criminal Procedure (Sc) Act 1995) and in the presence of a supporter from the witness service (in terms of section 271L of the same Act). The sheriff reports that the witness became significantly distressed during her evidence. Statement of fact 2 in the bill is in these terms:-

"That on 28 October 2016 the first witness called by the respondent's depute in court at the trial was the said N.F. At the conclusion of her evidence the sheriff presiding

> *over the trial thanked the witness. The sheriff then told the witness that she had been very brave in giving her evidence."*

[3] The sheriff accepts that he made that comment and that it was an instinctive remark. He explains the context in which it was made adding "*for the avoidance of doubt I had not made up my mind on the credibility and reliability of the witness when I made the comment*." N.F. was the first crown witness and the first complainer to give evidence. Three female complainers gave evidence in support of the charge in which they featured. The *Moorov* doctrine applied. The sheriff found that the complainer had systematically abused young girls who were working for him in what was their first job.

[4] Statement of fact 4 in the bill of suspension is in the following terms:-

> "*That the sheriff acted erroneously, oppressively, unjustly and contrary to law in stating to the first crown witness, at the conclusion of her evidence, that she had been very brave in giving her evidence. Such a comment would create a suspicion in the mind of the reasonable man that the sheriff was not impartial. The sheriff thereby denied the complainer the appearance of a fair trial*".

[5] In support of the bill counsel for the complainer argued that the remark made by the sheriff was sufficient to raise a suspicion in the mind of a reasonable man that the sheriff was not impartial thereby denying the complainer a fair trial. Counsel made reference to *Hogg v Normand 1992 SLT* 736 which followed *Bradford v McLeod 1985 SLT 244*. In *Bradford v McLeod* the Lord Justice Clerk set out the test to be applied where it is alleged there had been a lack of impartiality or where a suspicion as to the judge's impartiality is raised. It was submitted that the case of *Hogg v Normand* is similar in facts and circumstances to the present appeal. In *Hogg* the sheriff commented to the mother of two young girls who had just given evidence that they could leave the court and that she should be proud of her daughters who were a credit to her. That remark was sufficient to raise a suspicion in the mind of a reasonable man that justice was not impartial. In this case, although it was

accepted that the remark made by the sheriff was made in good faith and with the best of intentions, it was likewise such as to raise in the mind of a reasonable man a suspicion that justice was not impartial. Even if there is no actual bias the appearance of bias or partiality is sufficient to lead to a miscarriage of justice and the conviction should be quashed. The comment by the sheriff could be interpreted as approval or acceptance of the evidence given by N.F.

[6] The advocate depute argued that the comment made by the sheriff would not create a suspicion in the mind of the reasonable man that the sheriff was not impartial. Nor would it create a suspicion that the sheriff had prematurely formed a concluded view on the credibility and reliability of the first crown witness. Plea in law 2 was erroneous. Under reference to *Richardson v Pirie 2011 SCCR 338* the reasonable, informed observer on whom the test is based is not an individual who is unduly sensitive or suspicious. Instead, that observer would take the view that the sheriff's comment was an attempt to comfort a witness who had been distressed when giving distressing evidence of a sexual and very personal nature. We should therefore refuse the prayer.

[7] The issue we have to decide is one of impartiality. An accused is entitled to the protection afforded by Article 6(1) of the European Convention of Human Rights which states: "*That in the determination of his civil rights and obligations or 'of any criminal charge against him' everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"*. The question is whether the conduct of the sheriff in making the remarks he did following the evidence of the first crown witness can be said to give rise to the appearance of a lack of impartiality standing the accused's right to a fair trial by an impartial tribunal.

[8] We were referred to Scottish cases which considered the issue of bias or lack of impartiality. In *Hogg v Normand* the High Court of Justiciary approved the test set out in *Bradford v McLeod* (supra) which in turn derived from the judgment of Eve J. in *Law v Chartered Institute of Patent Agents [1919] 2 ch.276* to the effect that: "*if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person's impartiality, those circumstances are themselves sufficient to disqualify although in fact no bias exists".* That principle has now been refined in *Porter v Magill [2001] UKHL 67* and applied in the Scottish criminal appeal *O'Neill and Another v HMA [2013] UKSC 36.* In *O'Neill* the U.K. Supreme Court approved the test in *Porter v Magill* which is: "*whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*". Would the fair minded observer informed as to the correct facts in this case conclude that there was a real possibility that the sheriff was biased? It has been said, and in our view correctly so, that this approach must be assessed in the light of the judicial oath and the ability of a professional judge to act in accordance with that oath also taking into account judicial training and experience.

[9] In this case the sheriff made the comments he did at the conclusion of the evidence of the first crown witness. The sheriff reports that the witness had been extremely distressed when giving her evidence, no doubt recalling the events when she was a teenager in the employment of the complainer. She spoke of behaviour being perpetrated towards her by the accused which was clearly of a sexual nature and which would be embarrassing and demeaning. The sheriff's intention was to try to be decent to a witness who had been very distressed. The words complained of are these – "*you have been very brave in giving evidence*". In our opinion, that comment is likely in the mind of a fair minded and informed observer to

relate to the distress she suffered in giving her evidence. In our opinion, the words do not betray the sheriff's view as to her credibility, reliability or the quality of her evidence. By contrast the sheriff's remarks in *Hogg* went further and may have given the appearance of a qualitative assessment when announcing to the mother that the girls were "a credit to her". Such comments could be construed as words of approval. Further, no conviction could follow in this case without there being evidence from more than one complainer as to the accused's behaviour towards them of a sexual nature which the sheriff could accept as credible and reliable. Another factor which can be taken into account and which is referred to by the sheriff in his report is this - the accused and his solicitor were present in court when the remark was made yet no objection was made at the time nor in submissions at the conclusion of the evidence. That is yet another factor which the fair minded and informed observer would have had regard to. For these reasons we cannot find any proper basis in the argument that the sheriff was apparently biased and we decline to pass the bill.