SHERIFF APPEAL COURT

[2020] SAC (Crim) 3
SAC/2019/000734/AP

Sheriff Principal M M Stephen QC
Sheriff Principal C D Turnbull
Appeal Sheriff P J Braid

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the

APPEAL

by

CB

Appellant

against

PROCURATOR FISCAL, DUMFRIES

Respondent

Appellant: Macleod QC; MTM Solicitors
Respondent: Gillespie AD; Crown Agent

3 June 2020

[1] Following a trial which took place over 3 days in Dumfries Sheriff Court, the appellant was convicted of two charges, namely, an assault upon the complainer, his former partner, MB, committed on 21 April 2018 (charge (002)); and a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 committed on 29 May 2018 (charge (003)). Both charges were aggravated by involving abuse of MB (in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016). The sheriff found

that the assault was committed under provocation. The appellant was admonished in respect of both charges.

[2] In the course of considering his verdicts on the charges, the sheriff examined all of the productions and labels led in evidence, including Crown label number 2, which comprised two pieces of video footage from the complainer's mobile phone. The sheriff noted that, in evidence, the complainer had agreed with the suggestion that these recordings were both from the incident on 29 May 2018 (that is, the date of the section 38 charge). The sheriff's assessment of the two pieces of footage was that they could not have been of the same incident. His assessment of the first piece of footage was that it bore no relation to the circumstances of the incident alleged on 29 May 2018, but was consistent with the circumstances spoken to by the witnesses in relation to the incident of 21 April 2018 (that is, the date of the assault charge).

[3] Having reached that conclusion in relation to the first piece of footage, the sheriff proceeded to attach weight to it, stating that it "was available as further corroboration of the assault" (libelled in charge (002)). Prior to delivering his verdicts, the sheriff did not advise parties of the conclusion he had reached in relation to the first piece of footage nor did he afford parties the opportunity to address him in relation to his assessment of the first piece of footage.

[4] The sheriff's consideration and assessment of the mobile phone footage gave rise to five specific questions in the appeal. The parties were agreed upon the answer to the first four questions. Question one posed by the sheriff is, "During my deliberations on the evidence was I entitled to view privately the documentary productions which had been led in evidence?" Underlying this question is the proposition that a sheriff ought to view

productions and labels in open court in the presence of the accused and tell parties why he proposes to do so.

[5] A similar issue was considered by the High Court of Justiciary in *Hunt* v *Aitken* 2008 SCCR 919, in which Lord Reed, delivering the opinion of the court at para [15], said this:

> "The assessment of evidence is a proper and essential function of a judge. The justice cannot be criticised for performing that function. Since the assessment of evidence is a mental process, the justice cannot be criticised for performing that function 'in private' ..."

Nothing more requires to be said on this issue. Parties were agreed that question one falls to be answered in the affirmative. We agree.

[6] Question two posed by the sheriff is in similar terms, namely, "During my deliberations on the evidence was I entitled to view privately the contents of Crown label 2 which had been led in evidence?" For the reasons given in relation to question one, this question also falls to be answered in the affirmative, as parties proposed.

[7] Question three posed by the sheriff is, "Did I err by concluding that the mobile phone footage in which the appellant admitted slapping the complainer was recorded on 21 April 2018, notwithstanding the evidence of the complainer?"

[8] From the terms of the stated case, it would appear that the only evidence in relation to the provenance of the mobile phone footage came from the complainer and was that the footage was captured on 29 May 2018. It was, of course, a matter for the sheriff as to whether or not he accepted that evidence. It is clear that the sheriff did not accept the complainer's evidence as to the date upon which the first of the two pieces of footage was taken. For the reasons given by the sheriff that is unsurprising. There was, however, no evidence before the sheriff that the footage was of the events which took place on 21 April 2018. There was evidence before the sheriff that the parties' relationship was tempestuous

and volatile and that there had been incidents on dates other than those libelled in charges (002) and (003). In such circumstances, the sheriff was not entitled to make the leap of logic which he did and conclude that because the first footage did not show events of 29 May 2018, it must depict events of 21 April 2018. That proposition had not been put to the complainer in evidence, and there was therefore no evidence to support the conclusion which the sheriff reached. Having rejected the evidence of the complainer as to the date of recording of the first piece of footage, that evidence ought simply to have played no further part in the sheriff's deliberations, and certainly should not have been used to found an inference of any sort that the footage could relate only to 21 April 2018. Accordingly, question three falls to be answered in the affirmative, as parties proposed.

[9] Question four posed by the sheriff gives rise to a similar issue as that addressed by question three, namely, "Having examined the evidence was I entitled to determine from the footage in label 2 that on 21 April 2019 (*sic*) the appellant admitted to assaulting the complainer?" (The question should, in fact, refer to "21 April 2018"). For the reasons given in relation to question three, this question falls to be answered in the negative, as parties proposed. Of course, the sheriff might not have fallen into this error had he allowed parties the opportunity to address him, which is the issue question five attempts to raise (although the question is not quite posed in that way).

[10] The fifth question posed by the sheriff is, "Having concluded that said footage related to 21 April 2018, did I err by failing to allow parties the opportunity to address me on that?" The appellant argues that, in the specific circumstances of this case, the sheriff erred; the Crown say he did not. It appears to us that the question should not be whether the sheriff erred in failing to allow parties to address him *after* concluding that the footage

related to 21 April 2018, but whether he ought to have allowed parties to address him *before* reaching any conclusion on that matter.

[11] Whilst, as observed by Lord Reed in *Hunt* v *Aitken* at para [17], a judge hearing a case is not obliged to provide parties with a list of his concerns about the evidence so that they can be addressed during submissions, the sheriff in this case went too far. He went far beyond harbouring a concern regarding the provenance of the first piece of mobile phone footage. He reached a conclusion he was not entitled to reach on the evidence; which neither party had invited him to reach; and upon which he had not been addressed. In a case, such as this, where there was no controversy between the parties as to the date upon which the relevant footage was recorded, before reaching a concluded view on what was essentially a frolic, the sheriff ought to have explained his thinking to parties and allowed them the opportunity to address him upon it. In the circumstances, having regard to the wording of question five, we are satisfied that the sheriff did err in his approach, however, we find it unnecessary to answer the question.

[12] There remains for this court questions six and seven, respectively, "Was I entitled to convict the appellant?" and "Has there been a miscarriage of justice?"

[13] Evidence of the assault in charge (002) came from MB and the witness ES. The first of the two pieces of mobile footage is described by the sheriff as "further corroboration". There was a sufficiency of evidence without that footage. The sheriff accepted the complainer's evidence and that of ES, which provided corroboration. Moreover, the sheriff did not accept the appellant's account of events. However, that decision was, at least in part, influenced by his erroneous assessment of the mobile phone footage.

[14] The case against the appellant, in relation to charge (002) was clearly a finely balanced one, in which the sheriff took into account the first piece of mobile phone footage.

Whilst rejecting the plea of self-defence advanced on behalf of the appellant, the sheriff concluded that the assault was committed under provocation. For the reasons outlined above, the sheriff erred in concluding that the mobile phone footage related to the incident in charge (002). We are satisfied that the sheriff's error amounts to a miscarriage of justice. Insofar as that charge is concerned, question six falls to be answered in the negative and question seven in the affirmative.

[15] The first of the two pieces of mobile phone footage played no part in the sheriff's decision in relation to charge (003). Again, the sheriff accepted the evidence of the complainer, MB, which was corroborated by ES. In relation to charge (003) there was further corroboration available by way of the second piece of mobile phone footage. Notably, the sheriff did not completely reject the appellant's account of the events which surrounded charge (003).

[16] In relation to charge (003) it cannot be said there was a miscarriage of justice. The sheriff's approach to the evidence on this charge was not vitiated by his assessment of the first piece of video footage. Accordingly, in relation to charge (003) question six falls to be answered in the affirmative and question seven in the negative.

[17] The appeal will accordingly be allowed in relation to the conviction on charge (002) and refused insofar as it relates to the conviction on charge (003). The conviction on charge (002) will be quashed.