SHERIFF APPEAL COURT

2021 SAC (Crim) 5
SAC/2020/303/AP

Sheriff Principal D Pyle
Appeal Sheriff S Murphy QC
Appeal Sheriff A L MacFadyen

OPINION OF THE COURT

delivered by APPEAL SHERIFF S MURPHY QC

in appeal by

PF SELKIRK

Appellant

against

A decision of the sheriff in the case of L M

Appellant: Edwards QC AD; Crown Agent
Respondent: Anderson, Advocate; Balfour & Manson

1 December 2020

[1] This is a Crown appeal by way of stated case against a decision of the sheriff at Selkirk on 14 July 2020 to uphold a submission of no case to answer in terms of section 160 of the Criminal Procedure (Scotland) Act 1995 in the case of L M who was being tried summarily on five charges of assault and one contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. This court was invited to hold that the sheriff had erred in upholding the defence submission and thereafter to grant authority for a new

prosecution to be brought in terms of section 183(1)(d) of the Criminal Procedure (Scotland) Act 1995.

[2] The case was one in which a teacher was accused of assault and of threatening or abusive behaviour towards children with additional support needs who were in her care in a specialist support unit within a primary school. The charges were in these terms:

> "(01) On various occasions between 16 August 2016 and 31 October 2017, both dates inclusive, in the course of your employment at Tweeddale Support Unit, Halyrude Primary School, Rosetta Road, Peebles, Scottish Borders, you L M did assault M M, born 23 April 2011, then a pupil there and did place your hand over his mouth, pin him to the ground with your body and brush his hair, seize him by the body and push and pull him about;
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> (02) On various occasions between 16 August 2016 and 31 October 2017, both dates inclusive, in the course of your employment at Tweeddale Support Unit, Halyrude Primary School, Rosetta Road, Peebles, Scottish Borders, you L M did assault M H, born 22 February 2012, then a pupil there and did seize him by the body, shake him and push him onto a chair;
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> (03) On various occasions between 16 August 2016 and 31 October 2017, both dates inclusive, in the course of your employment at Tweeddale Support Unit, Halyrude Primary School, Rosetta Road, Peebles, Scottish Borders, you L M did assault L R, born 5 November 2012, then a pupil there and did seize her by the body and push her onto a chair;
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> (04) On various occasions between 16 August 2016 and 31 October 2017, both dates inclusive, in the course of your employment at Tweeddale Support Unit, Halyrude Primary School, Rosetta Road, Peebles, Scottish Borders, you L M did assault L S, born 4 June 2010, then a pupil there and did seize him by the body, push him onto a chair and seize him by the head;
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> (05) On various occasions between 16 August 2016 and 31 October 2017, both dates inclusive, in the course of your employment at Tweeddale Support Unit, Halyrude Primary School, Rosetta Road, Peebles, Scottish Borders, you L M did assault L S, then aged 6 and 7, then a pupil there and did seize him by the head and body, pull him by the same and push him onto a chair;
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> (06) On various occasions between 16 August 2016 and 31 October 2017, both dates inclusive, in the course of your employment at Tweeddale Support Unit, Halyrude Primary School, Rosetta Road, Peebles, Scottish Borders, you L M did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did shout, scream and swear, make abusive and offensive comments, and act in an aggressive manner towards children

> who were in your care; CONTRARY to Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010."

Submissions for the appellant

[3] The learned advocate depute made short oral submissions to the court and adopted the written submissions which helpfully had been provided in advance. She argued that the sheriff had erred in holding that there had been insufficient evidence to establish mens rea, essentially because he had failed to consider the Crown case at its highest. Had he done so, it would have been seen that there was evidence from which an intention to cause harm to each complainer might be inferred. He had also erred in holding that there had been insufficient evidence to establish an offence under section 38 of the 2010 Act by failing to take proper account of the evidence.

[4] In considering a submission under section 160 of the 1995 Act the sheriff required to consider the Crown evidence at its highest: *Williamson* v *Withers* 1981 SCCR 214. The applicable test was not whether an inference *should* be drawn but whether it *could* be drawn: *Du* v *HMA* 2009 SCCR 779. A submission of no case to answer should not be sustained unless on no legitimate view of the evidence, taken at its highest, could it be open to a reasonable jury, properly directed, to convict: *Wang* v *HMA* 2011 HCJAC 114.

[5] The sheriff had based his decision on the inferences which he considered should have been drawn and so had decided that the mens rea for assault had not been established by the evidence. Having come to a view that physical contact was essential to manage the children and control the classroom, he reached an inference that everything done by the respondent had been done for such purposes. Such an inference was disputed by the Crown under reference to *Barile* v *PF Dundee* [2009] HCJAC 88. The defence position had been that

the respondent's actions amounted to instructions which negated the mens rea for assault. This was incorrect, applying the logic of the decision in *Barile.*

[6] At paragraphs 4.1 to 4.5 of her written submissions the advocate depute summarised the evidence which indicated that there was evidence from which the necessary intention to assault could be inferred in relation to each of charges 1-5. Mens rea for assault should be inferred from all the circumstances: *Graham* v *HMA* 2017 SCCR 497. This included the evidence of the respondent's general manner towards the vulnerable children and the time period during which the conduct had taken place. There was also evidence to indicate a sudden loss of temper by the respondent which had been followed by hasty and reflexive physical actions from which the necessary evil intention could be inferred.

[7] The language used by the sheriff in the stated case indicated that he had misdirected himself over the correct test. At paragraph 18 he referred to "the facts particularly relevant to charges 1-6" at a stage prior to the determination of findings in fact. Question 1 was framed in terms of "whether there was insufficient evidence from which evil intent should be inferred" rather than could be inferred.

[8] With regard to charge 6 there was also an objective basis to support the Crown case that fear and alarm had been caused to the children by the respondent's actions. This evidence was also sufficient to create an inference that fear and alarm was likely to have been caused to a reasonable person.

Submissions for the respondent

[9] Mr Anderson urged the court to refuse the Crown appeal. He accepted that the correct test had been set out by the Crown and argued that it was clear from paragraph 17.1 of the stated case that the sheriff had taken the prosecution case at its highest. There was

some force in the advocate depute's criticism of the sheriff's use of the word, "should" in paragraph 19.1 which was unfortunately repeated in the questions stated for the consideration of the appellate court. However, when the case was looked at as a whole it was clear that the sheriff had applied the correct test: for example matters were correctly stated at paragraphs 19.4 and 19.10.

[10] There was an insufficiency in the evidence. It was clear from paragraphs 19.5 and 19.6 of his report that the sheriff had correctly considered the test in relation to mens rea as set out in the case of *S* v *Rptr* (*infra*). It was important to recognise as the sheriff had done at paragraph 19.4 that the context in which the test fell to be applied in this case related to moving the children for the purposes of classroom management. This context meant that the case should be distinguished on its facts from the situation in *Barile* where the findings in fact related to the appellant threatening to put one pupil "through the blackboard" and pinning another against a wall to prevent him leaving a classroom. The present case concerned events within an additional support needs unit where physical contact with the children was routine.

[11] No issue was taken with the rehearsal of evidence set out within the Crown's written submissions at para 4.1 – 4.5. The question was whether it could be inferred that the respondent had intended to cause physical injury or the threat of it to the complainers, following Lord Bonomy's definition of deliberate assault in *Clark* v *Service* 2011 SCCR 457, at paragraph 29. By deciding this was not an option open to him on the evidence the sheriff reached the correct conclusion. The appeal raised no novel point of law: the issue was the application of the law to the particular facts of this case. At worst the respondent may have acted carelessly or recklessly, if the sheriff was entitled to go that far, but that could never constitute the crime of assault.

[12] It followed that the no case to answer submission had been correctly upheld and the appeal should be refused.

Decision

[13] We note that after the close of the Crown case the sheriff referred parties to the case of *S* v *Authority Reporter* 2012 SLT (Sh Ct) 89 and invited defence counsel to make a submission of no case to answer. Consideration was given in that case to the definition of the common law crime of assault in Scotland at paragraphs 115-117 in these terms:

> "[115] The central issue in this appeal is the second part of this question – did AS have the necessary *mens rea* to commit the common law crime of assault. Without *mens rea* there can be no assault and thereby the grounds of referral could not be established as regards the common law crime of assault.
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> [116] Juries every day are directed on the offence of assault in the following manner: 'The crime of assault consists of a deliberate attack on another person with evil intent. Proof of evil intention, in the sense of intending to cause physical injury or fear of physical injury, is essential. Injuries caused accidently or carelessly are not assaults …
> Intention is a state of mind to be inferred or deduced from what's been proved to have been said or done' (Judicial Studies Committee for Scotland, *Jury Manual,* para 32.2
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> [117] It is unsurprising that the definition of assault given to juries finds common ground with the modern authority on criminal law, Gordon on *Criminal Law,* who affirms that assault is a crime of intent and cannot be committed recklessly and negligently. He states: 'Unintentional infliction of personal injury is in certain circumstances criminal, but it is not assault'"

We shall return to the definition of assault once we have considered the test which should be applied in relation to a submission of no case to answer.

[14] There was no dispute between the parties about the correct test. In *Williamson* v *Wither* the High Court considered what was required in this way:

> "It is important to see what the section says. It provides that the evidence led by the prosecution is insufficient in law to justify the accused being convicted. It is not whether or not the evidence presented is to be accepted and therefore the only

> question before the court at that stage is whether there is no evidence which if accepted will entitle the court to proceed to conviction."

This question and the issue of drawing an inference from the evidence at the stage of a no case to answer submission was considered in *Xiao Pu Du* v *HMA* 2009 SCCR 779 where the court stated, at paragraph 3:

> "Any judge hearing an argument that the prosecution evidence is insufficient, and that there is no case to answer, is not concerned with the credibility or reliability of the prosecution evidence. That is a matter for the jury to decide in due course, and thus the judge has to take the evidence at its most favourable for the prosecutor. Similarly, if there is a question of drawing inferences from the circumstances disclosed in the prosecution evidence, the judge simply has to consider whether a particular inference could be drawn and not whether that inference ought to be drawn."

These issues were considered by the Lord Justice General when he delivered the Opinion of the Court in the case of *Guo Xin Wang and Anr* v *HMA*. At paragraph 10 he stated:

> "At the stage of a submission of no case to answer, the trial court is not called upon to decide whether evidence *should* be accepted, or any inference drawn, by the jury in due course. The question is simply whether there is sufficient evidence (if accepted) to establish guilt directly, or from which an inference of guilt, beyond reasonable doubt, *could* be drawn. "

After quoting the passage from *Xiao Pu Du* set out above, his Lordship continued:

> "In considering such issues, moreover, it is trite law that the trial court must take the available evidence "at its highest" for the Crown, and a submission of no case to answer should not be sustained unless the court is persuaded that, on no legitimate view of the evidence, taken at its highest, could it be open to a reasonable jury, properly directed, to convict the relevant accused"

[15] These principles must be applied to the available evidence in the present case. Charges 1-5 related to the crime of assault. As was observed in *S* v *Reporter* this is a crime which can only be committed deliberately which means that the necessary *mens rea* is always required. At paragraph 19.9 of the stated case the sheriff tells us that this is the test which he applied. The definition given by Lord Bonomy in *Clark* v *Service* is particularly helpful in the present context because in that case the issue was whether a police officer had gone beyond

the scope of his lawful authority to commit assault which has certain parallels with the situation of a teacher seeking to control classroom activities. The passage at paragraph 29 quoted by Mr Anderson is in these terms:

> "The requirement that to be convicted of assault an accused person must act with evil intent requires quite simply that he acts deliberately, meaning to harm the victim. When a police officer deliberately manhandles a civilian without any reasonable grounds for doing so, his conduct amounts to an attack upon the victim with evil intent and therefore to assault him."

It follows that the crime would be committed in this case if there was evidence to indicate that the respondent had deliberately manhandled the children without reasonable grounds for doing so.

[16] The sheriff helpfully sets out the evidence led by the Crown within paragraph 18 of the stated case and the advocate depute summarized it within paragraph 4 of her written submissions. We note that with regard to charge 1 the Crown led four witnesses who testified to seeing the appellant being forceful and rough in her handling of the complainer, M M, on several occasions when she seemed to be angry with him. In relation to charge 2, six witnesses spoke of rough handling of M H, four of whom spoke of her grabbing him by the shoulders and shaking him and two of whom described her pulling him up from the floor by his arm. For charge 3, three witnesses described the appellant taking the complainer, L R, by the upper body or shoulders and pushing her back into a chair, one of whom described the appellant as appearing to be annoyed or fed up with the child. Three witnesses described the appellant dragging the complainer in charge 4, L S, across a room and a further witness testified that after dragging him from the room she pushed him to the wall outside with both hands on the child's shoulders while she seemed to be agitated. A separate alleged incident relating to the same child formed charge 5. Three witnesses spoke to the appellant shouting at the child for taking some chocolate and pushing or dragging

him to his seat with force. As we understand the defence position, it was accepted that each of these incidents had taken place but none demonstrated any intention to harm a child; in context the actions of the respondent had been responses to the actions of children with behavioural difficulties who required to be managed physically at the time for their good and that of others in the classroom.

[17] At the stage of the section 160 submission the sheriff required to consider the Crown case at its highest. In our view the evidence summarized above, taken at the highest, was clearly capable of giving rise to an inference that harm was intended in relation to each charge. The witnesses described the children being "grabbed", "pushed" and "forced" by the respondent. She was described as being "angry" and "shouting" during some of the incidents and of "using quite a bit of force" or employing a "rough manner". Each incident had made such an impression on the respondent's colleagues, who were used to dealing with the same children daily, that they had discussed matters and resolved to report the incidents to their superiors. It follows that there was evidence which was capable of supporting an inference that the respondent had manhandled each child without reasonable grounds for doing so, with the result that what she had done could be construed as an assault. In reaching that conclusion we derived limited assistance from the case of *Barile* which in our view was based on a very different set of facts from which the mens rea of assault could be inferred without difficulty even if the defence argument there had some similarities with the present case.

[18] The language used by the sheriff within the stated case is not consistent throughout and seems to reflect some degree of confusion in relation to the test to be applied at the point of deciding a submission of no case to answer. In paragraph 19.9 he states that "I was of the view that no evidence of evil intent could be inferred from the accused's actions…" (our

emphasis) which is the correct approach. Unfortunately at paragraph 19.1 he had said that "the question is essentially whether evil intent should be inferred from the actions of the accused" and at 19.4 it is said that the "question is whether … one can infer that evil intent which is essential for the *mens rea* of assault". The first question stated for this court speaks of "insufficient evidence from which evil intent should be inferred" (our emphasis in each instance). Although the sheriff correctly speaks of treating the Crown case it its highest, the language of these latter passages from the stated case suggests that the proper approach as set out in *Williamson* v *Wither*, *Du* v *HMA* and *Wang* v *HMA* has not been followed. Accordingly we cannot agree with the sheriff's decision in relation to charges 1-5 on the complaint.

[19] At paragraph 17.1, which reproduces the reasons given at the time for upholding the section 160 submission, the sheriff says that there was "no evidence of a sudden loss of temper, followed by a hasty and reflexive physical action, which would be relevant in allowing the court to infer evil intention". He repeats that position at paragraph 19.4 of the stated case when discussing evil intention. Before us, the Crown submitted that a hasty and reflexive action was not required to demonstrate the *mens rea* of assault. While we agree with that submission as a general proposition, in our view the sheriff in each of these passages was simply stating that loss of temper followed by a hasty and reflexive action was one way in which *mens rea* might be demonstrated but such features were not present in the evidence in this case.

[20] Charge 6 libels an offence under section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. For present purposes the essential aspects of that provision are:

> "(1) A person ("A") commits an offence if—
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> (a) A behaves in a threatening or abusive manner,

(b)the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and

(c)A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.

(2) It is a defence for a person charged with an offence under subsection (1) to show that the behaviour was, in the particular circumstances, reasonable.

(3) Subsection (1) applies to—

(a) behaviour of any kind including, in particular, things said or otherwise communicated as well as things done, and

(b) behaviour consisting of—

(i)a single act, or

(ii)a course of conduct."

[21] We have concerns over the sheriff's approach to this charge. At paragraph 17 of the stated case the sheriff finds there to be "insufficient evidence of threatening and abusive behaviour to support this charge, taking the Crown case at its highest". He continues: "There is no evidence of threatening behaviour, nor any evidence, in the context of managing children with complex needs, of any actions by the accused that would be likely to cause a reasonable person fear and alarm." Section 38(1)(a) is concerned with "threatening *or* abusive" behaviour (our emphasis) and there is no indication that the sheriff took the latter aspect into account. There was evidence that one child was "distressed" and that two others were crying as a result of the respondent's behaviour. It was said that another child's head was banged against a table. Two of the adult observers, who were experienced in dealing with children with complex needs, described themselves as "shocked" at the respondent's actions, and, as we observed above, they raised their concerns with the principal teacher at the school. In these circumstances it cannot be said that there was no evidence capable of supporting a conclusion that the respondent's behaviour had been threatening or abusive. There was evidence of distress exhibited by some of the children which was capable of being construed as a sign of fear or alarm and the reaction of

the adults who saw what happened was capable of supporting the contention that the behaviour would be likely to cause fear or alarm to a reasonable person.

[22] The sheriff concluded, "In these circumstances charge 6 was not proved." Once again we are concerned at the language used in the context of a section 160 submission. The question was whether there was sufficient evidence for the Crown case to be capable of proof. Whether a charge is proved or not is a question which would depend upon the quality of that evidence, not its sufficiency; and that is a separate question to be addressed in the light of a different type of submission at a later stage.

[23] In relation to each charge on the complaint the sheriff appears to have decided that in the particular context of the requirements for controlling a class of children with complex needs the actions of the respondent did not amount to any deliberate assault or to an offence under section 38(1) of the 2010 Act. It would be open to him to draw such conclusions from the evidence in due course, depending on his view of it, but only by way of a qualitative evaluation which would fall to be determined at a later stage. The Crown case, taken at its highest, provided a technical sufficiency for each charge to proceed at the time when the no case to answer submission was made.

[24] It follows that we must answer the first and second questions in the affirmative and sustain the appeal.

Disposal of the appeal

[25] In the event of the appeal being granted, the advocate depute invited us to grant the Crown authority to bring a new prosecution in accordance with section 185 of the 1995 Act and the case of *PF Paisley* v *McLean* [2019] SAC (Crim) 2. Mr Anderson submitted that we should issue a direction to the sheriff and remit the case to him.

[26] We consider that the case of *McLean* is readily distinguishable from the present one. In that case the Crown was unable to present its case in full as a result of certain decisions taken by the sheriff in the course of the leading of evidence. As a result the fair and proper recourse which had to follow from a successful Crown appeal was to grant authority for a fresh prosecution. In the present matter the Crown presented its complete case before the sheriff took the decision which we have decided to reverse. In *McLean* the appellate court considered that the sheriff had strayed beyond reasonable bounds in her comments during the presentation of the Crown case; no such issue arises here. There would be no prejudice to the Crown if we were to remit the matter to the sheriff. We are also mindful that six specialist staff would require to be taken from their duties to testify for a second time if a fresh prosecution were to be ordered. We are told that some of them heard the testimony of others at the first trial. The respondent's professional future is on hold pending a final decision in relation to the complaint and a fresh prosecution would delay that decision for longer than needs to be the case.

[27] Accordingly we consider that the appropriate course is for the case to be remitted to the sheriff in terms of section 183(6)(c) of the Criminal Procedure (Scotland) Act 1995 as amended.