SHERIFF APPEAL COURT

[2025] SAC (Crim) 1
SAC/2024/000385/AP

Sheriff Principal G A Wade KC
Appeal Sheriff W A Sheehan
Appeal Sheriff B A Mohan

OPINION OF THE COURT

delivered by APPEAL SHERIFF BRIAN MOHAN

in

Appeal by Stated Case against Conviction

by

ELAINE MURPHY

Appellant

against

PROCURATOR FISCAL, PERTH

Respondent

Appellant: Collins (sol adv); Collins & Co (for McKennas Law Practice, Glenrothes)
Respondent: Harvey, AD; the Crown Agent

11 March 2025

Introduction

[1] The appellant was convicted at Perth Sheriff Court on 16 September 2024 of assaulting JM, an 88-year-old resident of a care home on 15 March 2023. She appeals against conviction and contends that the sheriff erred in (i) repelling her no case to answer

submission upon conclusion of the Crown case and (ii) convicting her of the assault on the evidence.

Facts

[2] The sheriff held the following facts admitted or proved after trial:

i. The complainer is [JM]. At the date of the incident, he was 88 years of age. He suffers from dementia and he is a resident at [the care home]. His behaviour can be challenging and he frequently shouts, bangs his mug on the table and is known to lash out from time to time.

ii. At the time of the incident, JM was in his bedroom, sitting in his chair. He is unable to mobilise alone and he requires assistance. Furniture in the room comprises a single bed, a storage unit and a chair. Each bedroom is equipped with an emergency alarm.

iii. On 15 March 2023, the appellant had attended the care home in order to cut various residents' hair, of which JM was one. She had been doing so since in or about 2018. She had frequently cut JM's hair in the past.

iv. On 15 March 2023, the staff on duty included [CS and MH, both staff at the care home]. At or about 11.30am, MH had been working on the computer at a workstation in the corridor adjacent to JM's bedroom. She had heard JM banging and shouting "go away", but this was not out of the ordinary. She had seen JM sitting in his chair, with the appellant attending to his hair. The appellant had been standing in front of him, slightly to the left. JM had attempted to spit at the appellant. The appellant had said "Don't lash out at me again" and "Don't spit at me". JM had swung his arm at the appellant.

v. At or about 12.30pm, the appellant had attended at CS's office to be paid. MH had also been present. The appellant had said that she had had a problem with JM. She said that his behaviour had been "challenging and behavioural"; he had been "spitting and hitting". The appellant had, in the course of that conversation, volunteered that "he hit me, so I hit him back". CS had asked if she was joking and the appellant had responded, "No, I'm not" and she had made a gesture of a sideways punch or jab.

vi. The appellant made no reference at that time to having put her hands up towards JM in self-defence.

vii. Shortly after that, the appellant had left. CS had gone to see JM but she was not surprised that he recalled nothing of that incident. JM appeared calm and relaxed with nothing out of the normal.

viii. JM being unable to move from his chair, there was a means of escape available to the appellant.

ix. On Friday 31 March 2023, the appellant had been cautioned and interviewed by police officers. She had confirmed her name and that she had worked for 10 years in her capacity as a hairdresser and made the comment:

> "Basically, [JM] punched me a couple of times, really hard. After the first punch, I asked [JM] not to punch me again as it was sore. When he punched me for the second time, I put my hands up in self-defence to stop the punch from hitting my body again. With reference to the conversation in the office, I cannot remember what I said or what the conversation was about. I was in complete shock after the incident and wanted out of the situation."

x. On 15 March 2023 at [the care home] the appellant assaulted JM by punching him on the body.

The trial

[3] Upon conclusion of the Crown case, the appellant submitted, in terms of section 160 of the Criminal Procedure (Scotland) Act 1995, that there was no case to answer due to the lack of any eyewitness testimony of any assault or any evidence from JM.

[4] The sheriff held that there was a case to answer. CS and MH had given evidence of an unequivocal and uninvited admission by the appellant within CS's office, which the latter had confirmed when challenged by CS. CS also gave evidence of the appellant's gesture as to how she had struck JM. In addition, MH had witnessed an interaction earlier between JM and the appellant.

[5] Even if those adminicles of evidence were not sufficient on their own, the sheriff considered that the appellant's later statement to the police (quoted at finding in fact (ix)) was an admission of some interaction, albeit by way of self-defence, and that there had been some physical exchange for which she had to account: *Gilmour* v *HM Advocate* 1994 SCCR 133. That evidence could corroborate the appellant's earlier admission to CS and MH.

[6] Subsequent to the sheriff repelling the "no case to answer" submission, the appellant gave evidence in her defence. She led no other witnesses. After considering the evidence, the sheriff convicted the appellant of assault.

Submissions for the appellant

[7] The appellant accepted that finding in fact (v) – the appellant's admission to CS and MH - was one source of evidence for the purposes of sufficiency. The issue, however, was what other evidence was available to corroborate that admission.

[8] Neither the appellant's physical demonstration to CS of how she struck JM nor her statement following caution and charge could corroborate the admission made to CS and

MH. A second confession, or multiple confessions, made by an accused, even if in different terms and made to other persons, is not sufficient for the purpose of corroborating an offence, since both - or all - confessions emanate from the same source: *Callan* v *HM Advocate* 1999 SLT 1102.

[9] The only adminicle of evidence left for the Crown to rely upon was MH's evidence as set out at finding in fact (iv). There was nothing within that finding to suggest any aggressive behaviour by the appellant at the point MH saw them. MH's evidence simply confirmed the appellant was cutting the complainer's hair and that he was spitting and lashed out at the appellant. Significantly, the appellant was not seen to strike JM by MH.

[10] As to whether the sheriff was entitled to convict, it was conceded that if the sheriff was held to have been correct to repel the no case to answer submission, he had been entitled to convict the appellant. Conversely, if the no case to answer submission ought to have been upheld, then the sheriff was not entitled to convict the appellant.

Submissions for the Crown

[11] There was a sufficiency of evidence based on (1) the appellant's admission to CS and MH (2) MH's evidence of having heard and seen an exchange between the appellant and JM and (3) the terms of MH's reply to caution and charge. The appellant took no issue with the proposition that the appellant's admission in the office provided a source of evidence. Thereafter, all that was required was a second source of evidence that supported or confirmed the account of the crime provided by the admission: *Lord Advocate's Reference No. 1 of 2023* 2024 JC 140 at paragraphs [235] and [239]. That second source of evidence did not require to be more consistent with guilt than with innocence.

[12] MH's observations of the appellant in JM's room demonstrated an altercation between JM and the appellant. The appellant's verbal response to JM could be inferred to be an altercation. It suggested a mutuality in the interaction between the appellant and JM. It could therefore support or confirm the appellant's admission to CS and MH: *Gilmour* v *HMA* 1994 SCCR 133 at 135D-E.

[13] Initially, it was suggested by counsel that the appellant's comments in the police station also provided corroboration. However, after considering *Callan*, counsel accepted that the statement by the appellant in response to her caution and charge could not corroborate the assault. However, it was an adminicle of circumstantial evidence, in addition to MH's evidence of an altercation which was available to the sheriff when assessing the evidence as a whole. While the statement the appellant gave to the police did not contain any admission of an assault, it provided further evidence of an altercation between the appellant and JM.

[14] Whether approached from the basis of considering whether there was sufficient evidence to corroborate the appellant's admission to CS or MH, or whether one regarded the case as a circumstantial one in which the admission was an essential ingredient, there was a sufficiency of evidence: *Greenshields* v *HM Advocate* 1989 SCCR 637 at 643D and 644D-E.

[15] As to the question of conviction, there was sufficient evidence to entitle the sheriff to convict the appellant of the assault.

Decision

[16] This was an unusual case. The "complainer" JM was an elderly man with dementia who resided in a care home; he did not report an assault and did not give evidence in the

trial. There was no eyewitness or recorded evidence of an assault, no injury or distress attributed to the allegation, and no *de recenti* statement to be considered.

[17] The complaint of assault arose from comments made by the appellant to staff in the care home. The appellant was a mobile hairdresser who visited the home on a regular basis to provide her service to various residents, including JM. She had cut his hair on several previous occasions. Because of his dementia, JM's behaviour could be difficult; he would shout and lash out at staff and others. The accusation against the appellant was that, while cutting his hair on the date libelled and in response to JM's challenging behaviour, she committed an assault by punching him on the body.

[18] The evidence of the admission by the appellant consisted of her attending at the staff office on the late morning of 15 March 2023, complaining about his behaviour and then saying "[J] hit me and I hit him back." When a manager asked if she was joking, she responded "No, I'm not." and made a gesture indicating a punch. She said nothing about defending herself. Those comments were capable of being regarded by a fact-finder as an admission of an assault. However, no matter how many people heard the admission, it remained only one source of evidence: *Callan* v *HMA* 1999 SLT 1102 (at p.1105, G – I); Davidson on Evidence (W Green, 2007) at p.701; Walker and Walker on Evidence (5th edition, Bloomsbury 2020) at para 6.9.1.

[19] The sheriff took the view that, as an admission was made by the appellant to two care workers who both gave evidence to that effect, that represented two sources of evidence. In so deciding, the sheriff erred. However, notwithstanding that error by the sheriff, the first question before the court remains: was there a sufficiency of evidence against the appellant in relation to the charge?

[20] The first source of evidence regarding the commission of the assault was the admission made by the appellant in the staff office. For corroboration, we were directed by the Advocate Depute towards the sheriff's Finding in Fact (iv). The source of this was the oral evidence of MH regarding her observation of the interaction between the appellant and JM while he was having his hair cut. We are bound to say that we did not consider that all of the facts highlighted there were capable of corroborating the allegation of assault.

[21] The context here is important. The complainer was an elderly resident in a care home and had dementia. MH told the court that he shouted at both her and the appellant when she checked in his room, having been alerted by his shouting. So the findings that JM: banged the table; shouted "Go away"; tried to punch the appellant and spat at her were not, in the context of this case, facts which were capable of supporting an allegation of assault by the appellant on him. The appellant had good reason to be there (to cut his hair). He suffered from dementia. Sadly, difficult, aggressive and unpredictable behaviour by him was the norm. In those circumstances, the aspects of his behaviour listed immediately above could not be seen as evidence of his reaction to an assault on him.

[22] *Gilmour* v *HMA* 1994 SCCR 133 provides authority that, if there is evidence of an altercation between an accused and a complainer, this can corroborate an allegation of assault. In that particular case, the reply noted by the accused to caution and charge was "Honest, she stung me wi' a stick." In the judgment of the court at p.135D Lord Hope observed:

> "The appellant's response to caution and charge made it clear that he was involved in some kind of an altercation with the complainer in the course of the incident to which the charge referred."

[23] The supporting evidence does not need to corroborate the actual assault. It merely needs to be supportive of, or to fit with, the main source of evidence about an essential fact:

Lord Advocate's Reference No.1 of 2023 [2023] HCJAC 40; 2024 SCLR 140 (approving the line of authority which followed from *Fox v HMA* 1998 JC 94). At para [220] of *Lord Advocate's Reference No.1*, their Lordships observed:

> "Of critical importance, the corroborating circumstances do not require to be incriminating in themselves."

[24] In our view an 'altercation' which provides corroboration is not a one-sided event. There has to be a degree of mutuality, a bilateral exchange. In this regard, the evidence of the appellant's comments towards JM are relevant. The evidence from MH was that the appellant leaned into the complainer's "personal space" and said "don't lash out at me again." and "don't spit at me" in circumstances where matters had become heightened by the elderly complainer's outbursts.

[25] In her reply to caution and charge the appellant accepted that there had been an incident. Her comments to the police described an assault on her; plainly that part of her reply cannot be taken as an admission of an assault by her, since her description was that JM punched her, and she "put [her] hands up in self-defence". However, her comment "after the first punch I asked [JM] not to punch me again as it was sore." supports the evidence of MH about there having been an altercation i.e. that there was some mutuality in the exchange.

[26] While the evidence of those comments regarding an altercation is not *per se* evidence of an assault by the appellant, we have concluded that, following the authorities cited above, it was capable of providing corroboration of the appellant's admission in the staff office. Consequently, we have concluded that, while the sheriff erred in deciding that corroboration came from two witnesses hearing the appellant's admission, he did not err in repelling the submission of no case to answer. There was corroborated evidence of an assault. The first

piece of evidence was the admission by the appellant made to CS and MH that she had hit the complainer. Corroboration came from the separate evidence of an altercation. That evidence came from, firstly, MH's observations of the interaction between the appellant and the complainer and, secondly, the appellant's own comments to the police in reply to caution and charge. Taken together, these pieces of evidence amounted to a sufficiency.

[27] After the sheriff refused the submission, the appellant gave evidence on her own behalf. The sheriff notes the detail of this at paragraphs [21] and [22] of the stated case. She told the court that she had been punched by the complainer. She denied that she had hit him and denied that she had said so to CS and MH. She could not explain where that suggestion may have come from. She did not say to the court that she acted in self-defence.

[28] The assessment of the credibility and reliability of the witnesses was a matter for the sheriff as the fact-finder. He was entitled to believe the Crown evidence about the assault and to reject the appellant's account. In particular the sheriff noted that, on the evidence before him, the appellant told care home staff that she had struck the complainer, then told police that she only put up her hands in self-defence to stop blows, but then in evidence said that she had "put her hands up to squeeze past him" (paragraph [22] of the stated case). The sheriff was entitled to consider those different accounts when assessing credibility and reliability. He did so and was therefore entitled to convict.

[29] After convicting the appellant of the charge, the sheriff admonished her on the complaint. There is no appeal against sentence.

[30] The questions posed in the stated case were

i. Did I err in rejecting the submission by the appellant's agent in terms of section 160(1) of the Criminal Procedure (Scotland) Act 1995?

ii. On the facts stated, was I entitled to convict the appellant?

For the reasons given we answer the first question in the negative and the second in the affirmative. In doing so, we accordingly refuse this appeal against conviction.