APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 47
HCA/2024/476/XC

Lord Justice General
Lord Doherty
Lord Matthews

OPINION OF THE COURT

Delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

the Appeal from the Sheriff Appeal Court

under section 194ZB of the Criminal Procedure (Scotland) Act 1995

by

STUART MITCHELL KENNEDY

Appellant

against

PROCURATOR FISCAL, ABERDEEN

Respondents

Appellant: McCall KC, Adams; John Pryde & Co SSC (for Levy & McRae, Glasgow)
Respondents: A Prentice KC (sol adv) AD; the Crown Agent

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14 November 2024

Introduction

[1] This appeal concerns the conduct of a male stripper who was performing at a hen party. During the performance he touched, and had other physical contact with, members of the audience. The question is whether his touching and other physical contact with two

audience members, who did not consent to it, were "sexual" in terms of section 60(2), and whether they constituted sexual assaults in terms of section 3, of the Sexual Offences (Scotland) Act 2009.

Charges and sentence

[2] The appellant was convicted of two charges under section 3 of the 2009 Act relating to two complainers. In terms of the libel, the first charge concerned the appellant sitting on the complainer's lap and attempting to embrace her. The second involved the appellant rubbing his body against the complainer. The court imposed a community payback order with a supervision requirement of 12 months.

Facts

[3] The sheriff's findings in fact are set out in the stated case. The appellant was engaged to perform as a stripper at a hen party. Some of those invited to the hen party were forewarned of this. Others were not. The first complainer was not aware of the prospect of a stripper appearing until the performance had started. The second complainer became aware of this shortly before the appellant's performance.

[4] The appellant stripped so that he was naked apart from a small loincloth. During the performance he interacted with members of the audience. The act was ostensibly to check for "flammable substances" on those attending; this being said to be in character with the appellant's stage persona as a fireman. He moved his hands up and down the women's bodies; specifically over their breasts. He simulated sexual acts with them.

[5] When the appellant approached the first complainer, she held her arms and legs out in an attempt to prevent him from engaging with her. The appellant climbed over her legs and continued moving towards her. She picked up a glass of water to indicate that she

would throw it over him. The appellant persisted. He took the glass from her. He sat on her lap facing towards her and thrust his hips back and forth against her repeatedly to simulate sexual intercourse.

[6] When the appellant attempted to engage the second complainer, she said "no", moved behind a table and, being apprehensive that he would touch her breasts, crouched down with her arms around her chest. The appellant went behind the table, approached her from behind, placed his arms around her and thrust his body repeatedly against her back and buttocks.

[7] The only finding in fact in the stated case which is challenged is that, in terms of section 60(2), a reasonable person would regard the appellant's touching of, and physical contact with, the complainers to be "sexual". In his note, the sheriff recorded that each complainer had made it clear that she did not want to have any physical interaction with the appellant.

[8] The sheriff observed that the appellant's sole defence was that his conduct was not sexual. It was part of a performance which was too silly to be sexual. That was the only basis for the application for a stated case. It is the sole ground to which the questions in the case are directed. In holding that the appellant's conduct was sexual, the sheriff took into account (stated case para [50]) "the general context and content of the appellant's performance", notably its sexual theme and tone, "even if it was also intended as entertainment". The sheriff had regard (at para [52]) to the fact that the appellant was "virtually naked" at the time of his contact with the complainers. The appellant deliberately touched and had other physical contact with the complainers in a manner which a "reasonable person would consider sexual". The appellant's underlying motivation, that of providing entertainment, did not alter the underlying character of the conduct.

Sheriff Appeal Court (2024 SLT (SAC) 154)

[9] The Sheriff Appeal Court identified (at para [9]) the core issue as being whether the sheriff had been correct to find that a reasonable person would have considered the conduct to be sexual. The SAC considered sections 3 and 60(2) of the 2009 Act, along with section 45A of the Civic Government (Scotland) Act 1982; the latter providing a definition of "sexual entertainment." The SAC did not consider the 1982 Act to be of assistance in determining whether conduct was sexual in the context of the 2009 Act.

[10] The test contained within section 60 of the 2009 Act was an objective one of what a reasonable person would consider to be sexual "in all the circumstances of the case". The sheriff had been entitled to conclude that the conduct was sexual. If all components of section 3 of the Act were met, the offence was proved. In relation to each complainer there had been actual physical contact; not merely simulated touching or gesturing. The SAC reasoned (at para [14]) that "sexualised entertainment is sexual in nature by definition ... The ... motivation behind these deliberate acts is not a relevant consideration in relation to ... dole or *mens rea*". The 2009 Act was designed to protect the sexual autonomy of a complainer. The centrality of consent marked the boundary between criminal and non-criminal sexual conduct. The appeal was refused.

Compatibility issue

[11] In the Note of Appeal to this court, there is mention of the appellant's right to freedom of expression under Article 10 of the European Convention. It is argued that the Sheriff Appeal Court's decision involved an "absolute prohibition of touching of audience members without their express consent" and that this was disproportionate. It was not that

section 3 of the 2009 Act was incompatible with Article 10; only that the SAC's interpretation of it, along with section 60(2), rendered it incompatible.

[12] The court declined to entertain the issue. If it were to be argued that criminalising the appellant's conduct amounted to a breach of his Article 10 right, this ought to have been raised as a compatibility issue in advance of trial (Act of Adjournal (Criminal Procedure Rules) 1996, rules 40.3(2) and (3)). That was not done; nor was such an issue raised in the stated case, which governed the scope of the appeal before the SAC. It was not raised before the SAC. No cause has been shown as to why such an issue should be raised in this second appeal process (rule 40.6(1)). The contention is not one which appeared to have substantial merit. The right to freedom of expression is a qualified one. It does not entitle a person to engage in non-consensual sexual activity with others. The complainer's Article 8 rights, including that of sexual autonomy, are engaged. It is not correct to say that the SAC decision constitutes an absolute prohibition on touching without express consent during sexual performances. There is no basis for saying that anything that the SAC determined gave rise, for the first time, to a compatibility issue.

Submissions

Appellant

[13] In considering "sexual conduct" it was relevant that the host of the hen party had hired the appellant. He was registered with Equity and held public liability insurance. The event took place in a private function room of a pub. The performance was a comedy strip show. The physical interactions were intended to be amusing. The host found them to be amusing and not offensive.

[14] The Sheriff Appeal Court failed to consider the context of the conduct. The SAC had erred in holding "motivation" to be irrelevant. This was considered under reference to the requisite *mens rea* (cf *Lord Advocate's Reference (No.2 of 1992)* 1992 JC 43). The appellant had intentionally touched and otherwise had physical contact with the complainers. The mental element required in section 3 was met. The *actus reus* of section 3 was not met. The interactions with the complainers had not been "sexual". Section 60(2) provided an objective test and that necessitated a consideration of "all the circumstances." The appellant's motivation was one of these circumstances. A person's motivation could be highly significant; one example being the motivation of a paramedic who required to touch a sexually sensitive part of an unconscious patient to provide necessary treatment. The SAC erred in considering that "sexualised entertainment is sexual in its nature by definition". A reasonable person would recognise that a stripper was a paid performer, who was hired to entertain.

[15] For "sexual entertainment" to become criminal, the Crown had to prove that the actions were sexual rather than those of someone engaging in the normal course of a performance for which they were employed. The correct analysis was to consider whether the behaviour was sexual, not to presume that it must be. This included consideration of it being a performance, which was not sexually motivated, and not for the performer's sexual gratification (cf *Wightman* v *HM Advocate* 2017 SCCR 437). Both the sheriff and the SAC failed to take account of the appellant's motivation, and that he was performing at the material times. In *Procurator Fiscal, Edinburgh* v *Harper* [2024] SAC (Crim) 10, the SAC, again erroneously, treated the respondent's motivation as being irrelevant.

Respondent

[16] The test of whether touching, or other physical contact, was sexual was an objective

one to be reached after consideration of all the relevant facts and circumstances. The nature of the touching or physical contact itself may be a factor pointing to it being sexual. The sole question for the sheriff was whether, objectively viewed, the touching and physical contact were sexual as defined in the 2009 Act.

[17] The appellant's performance had an explicit sexual theme and tone. The performance was described by the hen party host as "adult", "sexy" and "raunchy." The appellant's interaction with members of the audience involved touching their breasts and the simulation of sexual acts. The appellant approached the second complainer from behind and thrust his body against her back and buttocks. The appellant simulated sexual intercourse on the lap of the first complainer. On each occasion he was naked apart from a loincloth.

[18] The 2009 Act protected the sexual autonomy of the individual. It recognised that those who commit sexual assault may do so for reasons other than sexual gratification. As with every type of sexual activity, the touchstone was autonomy and consent. The appellant had not respected the choice of the complainers not to participate in his performance. He knew that they did not consent, yet continued. It was the lack of consent and the absence of any reasonable belief of consent which rendered the appellant's conduct unlawful. The sheriff and the SAC considered all the circumstances, including that the conduct occurred during the appellant's performance and that his motivation had been to amuse and entertain the audience.

Decision

[19] Section 3 of the Sexual Offences (Scotland) Act 2009 provides that it is an offence, intentionally or recklessly, to touch someone else sexually (s 3(2)(b)) or to engage in any

other form of sexual activity involving physical contact with them (s 3(2)(c)) . Section 60(2) provides that touching or any other activity is sexual if a reasonable person would, in all the circumstances, consider it to be sexual. The touching must be deliberate or reckless; that is the mental element of the crime. When looking at whether the crime has been committed, it is important to look at the words of the statute, notably the terms of what is defined as "sexual" in section 60(2). This requires the fact finder to look at "all the circumstances" in order to predict the mindset of the reasonable person. There is no reason to exclude an accused's motives from this equation, although what weight ought to be given to them will vary according to the particular facts. Equally, as the sheriff correctly acknowledged, the context of the conduct will be a relevant factor to be weighed in the balance.

[20] One obvious example where touching or other bodily contact is usually sexual is where it occurs on sexually sensitive parts of the body, such as female breasts, buttocks or the genital area. Less usually, the context may indicate that touching such parts is not sexual (cf the paramedic, *supra*). An example in which contact is almost always sexual is where the male intentionally touches the female with the area of his genitalia or in a manner which emulates a sexual act. The appellant used both of these methods during his performance, but he maintained nevertheless that the conduct was not sexual because he was acting a part. His motive was entertainment and was not for sexual gratification. These were all relevant circumstances. In so far as the opinions of the Sheriff Appeal Court both in this case (at para [14]) and in *PF Edinburgh* v *Harper* [2024] SCA (Crim) 10 (at paras [26]-[28]) suggest otherwise, they are in error. However, something which is part of a performance, and the motivation for which is entertainment, may still be sexual. In this case, other circumstances pointed strongly to that being the correct conclusion.

[21] An essential point to stress is that sexual touching or other sexual bodily contact is not criminal *per se*. It constitutes a contravention of section 3 only if it is done without the consent of the person with whom there is touching or bodily contact or without any reasonable belief that they are consenting. A performer does not have a licence to invade the sexual autonomy of audience members. Any such invasion requires the free agreement of the person affected.

[22] In respect of both complainers, there was neither consent nor reasonable belief that they were consenting. They made it clear to the appellant that they did not wish him to touch or have bodily contact with them. The nature of what took place involved intimate physical contact and the simulation of sexual acts. Their sexual autonomy was invaded. These were weighty circumstances pointing to the conduct being sexual.

[23] The sheriff applied the correct test. He had regard to all the circumstances. The SAC were correct to refuse the appeal. In all the circumstances, there is no doubt that the appellant did sexually assault the complainers in terms of section 3(1) and (2)(b) and (c) of the 2009 Act. The appeal is therefore refused.