



SHERIFF APPEAL COURT

**[2019] SAC (Crim) 2
SAC/2019/000715/AP**

Sheriff Principal M M Stephen QC
Appeal Sheriff P J Braid

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL MHAIRI M STEPHEN QC

in

APPEAL AGAINST SENTENCE

by

BARRY SORRELL

Appellant:

against

PROCURATOR FISCAL, GREENOCK

Respondent:

**Appellant: Paterson, (sol adv); Paterson Bell for Keenan Solicitors, Greenock
Respondent: M McFarlane AD; Crown Agent**

12 February 2020

[1] The appellant pled guilty at Greenock Sheriff Court on 25 October 2019 to a contravention of section 2(1) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (“the 2016 Act”), an offence aggravated by involving abuse of his ex-partner.

The charge was libelled as follows:-

“On 7 October 2019 at [locus] you BARRY SORRELL did disclose a photograph which showed or appeared to show [complainer], c/o Police Service of Scotland, Rue End Street, Greenock in an intimate situation and

which had not previously been disclosed to the public at large, or any section of the public, by her or with her consent, in that you did publicly post an intimate photograph of [complainer] on Facebook, and in doing so you intended to cause her fear, alarm or distress;

CONTRARY to Section 2(1) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 and it will be proved in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 that the aforesaid offence is aggravated by involving abuse of your partner or ex-partner."

[2] The appellant had appeared on an undertaking on 25 October 2019 when the plea of guilty to this charge only was tendered and accepted by the prosecutor. The sheriff adjourned in terms of section 201 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") for a Criminal Justice Social Work Report and a restriction of liberty assessment before hearing from the respondent as to the facts and circumstances of the offence. At that stage the sheriff considered that the appellant should be placed on the Sex Offenders Register and certified in terms of section 92(2) of the Sexual Offences Act 2003 ("the 2003 Act") that the offence was a sexual offence to which part 2 of the 2003 Act applied. That certificate and associated notice are attached to the court minute of 25 October 2019. The sheriff reports that the appellant's agent and the prosecutor accepted that the appellant should be placed on the register. The appellant was released on bail with special conditions relating to the complainer and her address.

[3] When the case called on 27 November 2019 another sheriff, having heard from the prosecutor as to the circumstances of the offence and from the defence in mitigation, imposed a custodial sentence of six months which he reduced to four months due to the early plea; made a non-harassment order in respect of the complainer for two years and having regard to the certification already made on 25 October concluded that he had no *locus* in relation to the notification requirement other than to determine its duration having regard to the sentence imposed. The sentencing sheriff reports that the matter of

certification was not raised on 27 November but had he required to consider the matter he too would have concluded that certification was appropriate given the nature of the offence.

[4] The appellant has lodged a note of appeal challenging firstly the sentence imposed on 27 November 2019 and secondly the notification requirement made on 25 October. In support of the second ground of appeal it was stated that there was no 'significant sexual aspect' to the appellant's behaviour in committing this offence such as to justify the conclusion that there was an underlying sexual disorder or deviance from which the public required protection.

[5] At the appeal hearing the first ground of appeal against the custodial sentence was not insisted upon. The point of law argued before us was whether there was a significant sexual aspect to the appellant's conduct in committing the offence and therefore whether the sheriff erred in certifying in terms of section 92(2) of the 2003 Act that the offence was one to which the notification requirements of that Act applied.

The Sexual Offences 2003 Act – Statutory Notification

[6] Section 80 of the 2003 Act provides that a person is subject to the notification requirements of part 2 of the Act if he is convicted of an offence listed in schedule 3. That schedule places convictions in two categories. Firstly, convictions covered by the specific list of offences (paragraphs 36 – 59ZL) and secondly convictions covered by paragraph 60. Conviction of an offence on the specific list results in registration whatever the gravity or circumstances. Contravention of section 2 of the 2016 Act is not an offence on this specific list. Paragraph 60 of schedule 3, however, extends the ambit of the notification requirement to include other offences "...if the court, in imposing sentence or otherwise disposing of the case, determines for the purpose of this paragraph that there was a significant sexual aspect to the offender's behaviour in committing the offence." The key words are *significant sexual*

aspect. Registration can only follow if the sentencer concludes that there was a significant sexual aspect to the offender's behaviour in committing the offence.

The Offence

[7] The appellant and the complainer had been in a relationship for approximately two years. This was an intimate relationship. They had separated in the summer of 2019 not on the best of terms. Whilst in the relationship the appellant had taken photographs of the complainer with her consent including photographs of an intimate nature of the complainer in various positions and in a state of undress.

[8] In submissions the precise circumstances relating to the offence appeared to us to be somewhat unclear and we therefore proceed on the narration provided by the sheriff who reports as follows:-

“On 2 October 2019 the complainer was contacted on Facebook by a friend. She was alerted to a photo which had appeared in the comments section of a Facebook video and the video was sexually explicit and showed the complainer. As a consequence the complainer was very distressed. She sent a message to the appellant to remove the photograph. The accused responded by laughing at her. The photo remained on the Facebook page for a period of 25 minutes. The complainer was distressed and contacted a friend and thereafter reported the matter to the police.”

Despite reference to a video it appears, and the libel confirms, that the offence was committed by publicly posting one intimate photograph on Facebook.

[9] The only mitigation advanced, if it can indeed be considered exculpatory, was that the appellant had been drunk when he posted the photograph. He now accepted that the relationship was over. The photograph had been on Facebook for a short period of time. It was accepted that he had a previous conviction for assaulting another partner to severe injury.

Submission for the Appellant

[10] The solicitor advocate for the appellant advanced six factors material to the question whether there was a significant sexual aspect to the appellant's behaviour. These are:-

- (1) The photograph was taken with the complainer's consent whilst they were in a relationship.
- (2) The appellant posted the photograph on Facebook whilst he was drunk and trying to get a reaction from the complainer in the aftermath of their separation.
- (3) When the complainer sent a message to the appellant to remove the photograph he laughed at her.
- (4) There was no deviance or voyeurism on the part of the appellant.
- (5) The offence itself was one of abuse and not specifically sexual or sexually deviant behaviour.
- (6) The sheriff who imposed the registration requirement did not hear the circumstances of the offence in detail, but stated that this was a domestic abuse offence which she viewed as "a particularly nasty and distressing form of abuse". There was no suggestion in terms of her report that she thought there was sexual motivation or sexual deviance.

Hay v Her Majesty's Advocate [2012] SLT 569; *Sutherland v Her Majesty's Advocate* [2017]

HCJAC 22 and *McHugh v PF Airdrie* [2015 HCJAC 86] were cited to us. *Hay* gives

guidance to sentencers in their approach to the question whether there was a significant sexual aspect. Both *Sutherland* and *McHugh* are cases involving similar issues.

Decision

[11] Whether an accused's behaviour in committing an offence has a significant sexual aspect is a question of fact which the sentencer requires to decide on the facts and circumstances of each case. The Lord Justice Clerk in *Hay v HMA* [*supra*] sets out the sentencing sheriff's duties in paragraph 60 cases at paragraphs [49] to [52] namely:- that the sentencer has to decide the matter for himself which in cases where there is a plea of guilty

will involve careful consideration of the Crown narrative. The submissions advanced by parties will be accorded appropriate weight but it is the duty of the sentencer alone to analyse the facts and circumstances and make the determination. This is particularly important given that registration does not *per se* constitute a sentence. Nevertheless it was stressed in *Hay* that the onerous consequences on the offender of registration require to be borne in mind. The LJC at para [35] states:-

“However, although registration does not constitute a sentence, it is nonetheless a grave stigma and one which, designedly, places onerous restrictions and requirements on the registered offender’s life. In particular, the offender has the public status of sex offender. He is under a continuous obligation throughout the registration period to inform the police of his whereabouts and to notify them whenever he changes his address.”

Another important consideration is the purpose of registration which is protective rather than punitive. “It enables the police to keep tabs on a sex offender who is, or who may be, a continuing danger to others, and particularly to women and young people”: *Hay* (supra). It is therefore necessary that the purpose and consequences of registration are given careful consideration. Sentencing sheriffs must “keep a sense of proportion and use their common sense” (*ibid*).

[12] It follows from what we say that in this case the certification process went off the rails at the first calling of the case when certification was made without the sheriff giving consideration to the facts. On the hypothesis that the parties agreed to the proposition that certification was appropriate that is not sufficient and the court must discharge that duty having analysed the facts and given careful consideration to the effect and purpose of registration. The statute does not provide for provisional or interim certification (see *Moneagle v PF Elgin* [2017] SAC (Crim) 17). Once the sheriff had pronounced on certification without hearing the facts the question of whether there was a significant sexual aspect

justifying certification could not be reviewed and the notice recalled by the sheriff who ultimately heard the facts. An appeal is required to deal with the matter. The sheriff having erred in certifying at the stage she did it is now for us to consider the question whether there was a significant sexual aspect to the appellant's behaviour in committing the offence.

[13] The appellant's motivation in committing this offence requires to be examined.

"Motivation is a factor of importance" (*McHugh v PF Airdrie* [2015] HCJAC 86 para [8]). The facts of this case appear to us to point to the appellant's motivation being a determination to embarrass, humiliate and demean the complainer. This case has material similarities to that of *Sutherland* (*supra*) another case where the offence was committed following the termination of a relationship. In *Sutherland* the court stated that:

"The motivation for such conduct may include disappointment at the termination of a relationship, or many other circumstances which lead to rancour and causes one party to deliberately embarrass and upset the other. There may be no sexual motivation involved but rather a cruel determination to cause distress. An individual who had previously entrusted a partner or friend with an intimate image is entitled to be protected from the risk of such deliberately caused distress."

Clearly, the enactment of the 2016 Act was intended to provide such protection.

[14] Nevertheless, accepting the similarities with the *Sutherland* case, the question is this:-

"Does the offending involve a significant sexual aspect which discloses an underlying sexual disorder or deviance from which society requires to be protected?" Simply because the offence involves a contravention of legislation entitled the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 does not necessarily mean that the true nature of the offending is sexual. A contravention of section 2 of the 2016 Act does not necessarily equate with a sexual purpose. Rather, the circumstances of this case indicate that the appellant's conduct was a determination to cause significant upset, embarrassment and humiliation. As was said in *Sutherland* the fact that the appellant was intoxicated when he committed the offence

does not mean that his conduct did not have a significant sexual aspect. The intoxication is likely merely to have had a disinhibiting effect, and the conduct must nonetheless be considered in light of the purpose of registration as discussed in *Hay*. In this case the appellant's conduct towards the complainer is criminal behaviour and he has been punished for that. However, we do not consider the offence nor the motivation for the offending involves a significant sexual element even though there was a sexual element to the method chosen by the appellant to inflict harm and distress on his ex-partner. It appears to us that this was a particularly nasty and immature attempt to hurt his partner, which, of course, he succeeded in doing. Although the assessment is one for the sheriff to make, nevertheless, we notice that the author of the Criminal Justice Social Work Report also reaches the conclusion that the appellant's behaviour was driven by malice. There does not appear to us to be any evidence that the appellant's behaviour was driven by sexual purpose or deviance in respect of which not only the complainer but the general public require to be protected. Accordingly, we conclude that although this offence is undoubtedly nasty and must have been extremely distressing for the complainer the question whether there is a significant sexual aspect ought to be answered in the negative. That being so no certification can follow in a case such as this which falls into the residual category provided for in paragraph 60 of Schedule 3 to the 2003 Act. The appellant's behaviour was motivated by a number of factors but none of these disclose sexual deviance or a focus for public protection. Accordingly, we allow the appeal against registration and recall the certificate and notices issued on 25 October and 27 November 2019.