



SHERIFF APPEAL COURT

**[2021] SAC (Crim) 8
SAC/2021/000279/AP**

Sheriff Principal M M Stephen QC
Sheriff N McFadyen

JUDGMENT OF THE COURT

DELIVERED EX TEMPORE

by

SHERIFF PRINCIPAL M M STEPHEN QC

in

APPEAL

by

BUPINDER DHALIWAL

Appellant;

against

PROCURATOR FISCAL, DUMBARTON

Respondent:

**Appellant: Ogg, Solicitor Advocate; Paterson Bell, solicitors
Respondent: Farrell Advocate Depute; Crown Agent**

6 October 2021

[1] The appellant was convicted after trial at Dumbarton Sheriff Court on 6 May 2021 of the following offence:

"(001) On 12 April 2019 at ASDA, Milngavie Road, Bearsden you BUPINDER DHALIWAL did behave in a threatening or abusive manner which was likely

to cause a reasonable person to suffer fear and alarm in that you did repeatedly follow LS c/o Police Services Scotland and approach her and make sexually inappropriate remarks towards her;

CONTRARY to section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010"

[2] On 4 June 2021 the sheriff imposed a fine of £1,000 and, having decided there was a significant sexual element to the offending, the appellant became subject to the sex offender registration requirements for a period of five years.

[3] The appellant lodged an application for a stated case appealing against both conviction and sentence. Leave to appeal was refused against conviction at first sift but granted solely in respect that the sheriff had made an interim notification order.

Subsequently, the appellant lodged an application in terms of section 187(7) of the Criminal Procedure (Scotland) Act 1995 seeking to reinstate the appeal against conviction and sentence. Again, leave was refused in respect of conviction but allowed on the question of whether there was a significant sexual aspect to the offending.

[4] The solicitor advocate for the appellant adopted her written case and argument and supplemented that with oral submissions. The sheriff had insufficient regard to the purpose and nature of the reporting requirements of the Sexual Offences Act 2003. Under reference to *Hay v HMA* 2014 JC 19 it is clear that the purpose the legislation "is to protect the public against a perceived danger" and the question of whether any sexual aspect of the accused's behaviour was 'significant' should be assessed in light of that purpose. Registration is a grave stigma for an offender and places onerous restrictions and requirements on the registered offender's life (*Hay* – paras 34 and 35). In any event, the sheriff had no power to make an interim notification order. Before an order could be made in a case involving a contravention of section 38(1) of the 2010 Act there required to be not only a sexual aspect

but a significant sexual aspect to the offending. In this case the sheriff erred in finding that there was a significant sexual aspect. The offence occurred in a public place - a supermarket – covered by C.C.T.V. and was of short duration.

[5] The advocate depute had no submissions to make on the issue before the court.

Decision on the issue

[6] The offending in this case involved the appellant following the complainer through the Asda Store in Bearsden and making remarks of a sexual nature about her removing her feet from her high heel shoes. He then, in effect, solicited her by offering to pay her £70 to repeat the act for him in the carpark for his sexual gratification – all as set out in findings in fact (8) – (16) on pages 4 and 5 of the stated case. The complainer rebuffed the offer however the appellant persisted. The exchange ended with the complainer saying "*I am going*" to which the appellant's final riposte is "*if you go to the checkout will you do it again?*". The situation may be regarded as unusual and also concerning. The appellant had followed or 'trailed' the complainer round the supermarket. The circumstances are suggestive of sexual deviance - soliciting a stranger, a lone female, in a supermarket for fetish prostitution. The sheriff was fully addressed on the issue of whether there was a significant sexual aspect. The purported *interim* notification order made by the sheriff when convicting the appellant is incompetent (*Moneagle v PF Elgin* 2018 SLT (Sh Ct) 13). However, any error made in making an *interim* notification requirement was rectified by the procedure adopted by the sheriff subsequently and does not taint the sheriff's approach to the issue of whether there was a significant sexual aspect; nor indeed was it argued that the incompetent *interim* order had any such effect. The sheriff specifically required parties to address him on the issue of whether there was a significant sexual aspect when the case called for sentence. The sheriff sets out his reasoning on page 19 of the stated case:

"I considered that the conduct of the appellant did have a significant sexual element. As submitted by the Crown he had approached the lone female and offered her money to perform an action that he found 'sexy'. He had repeated his offer and suggested it could be done in the carpark. It was easy to infer that he was doing so for his own sexual gratification, in fact it is difficult to see why else he was doing so."

[7] It is not and has never been suggested that the appellant acted in the manner he did as something of a joke or prank. The appellant's conduct caused alarm to the complainer. She was shocked and then disgusted by the appellant's behaviour. Assessment of whether there is a significant sexual aspect depends on the facts and circumstances of each case and it is quintessentially for the sheriff to assess that matter having regard to the specific circumstances of each case. Here the sheriff heard evidence at trial and is therefore best placed to make that assessment. There is no basis to consider that there was anything other than a sexual motivation to this offending as the sheriff rightly observes. Furthermore, as we have said, the circumstances are clearly suggestive of sexual deviance. We therefore consider that the sheriff was entitled to find that there was a significant sexual aspect to this offending and the appeal is, accordingly, refused. Only questions of law 4, 5 and 6 fall to be considered and we answer these as follows: Question 4 will be answered in the affirmative, Question 5 in the negative and Question 6 in the affirmative.