**SHERIFF APPEAL COURT**

**[2023] SAC (Crim) 1**
**SAC/2022-000372/AP**

Sheriff Principal A Y Anwar
Appeal Sheriff T McCartney
Appeal Sheriff F Tait

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL A Y ANWAR

in

the appeal by

by

DF

Appellant

against

PROCURATOR FISCAL, DUNDEE

Respondent

**Appellant: Templeton; Richard Freeman & Co solicitors**
**Respondent: Meehan KC, AD; Crown Agent**

22 February 2023

## Introduction

[1] On 5 August 2022 following a trial at Dundee Sheriff Court, the appellant was found guilty of the following charge:

> "On 19 December 2021 at [locus] you DF did disclose a quantity of photographs which showed or appeared to show [the complainer] 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 upload intimate images of [the complainer] to a website, and in doing so you intended to cause her, or were reckless as to whether she would be caused, 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 was aggravated by involving abuse of your partner or ex-partner."

[2] The appellant was sentenced to a community payback order with a supervision requirement of 12 months, a compensation requirement of £500 and a requirement to carry out 180 hours of unpaid work within 12 months.

[3] The appellant appeals the conviction and the sentence. The following questions have been posed by the sheriff for the opinion of this court:

1. Was I entitled to hold that there was sufficient evidence to convict the appellant in terms of Section 2(1) of the 2016 Act?

2. Further was there sufficient evidence beyond reasonable doubt that the appellant was reckless as to whether the complainer would be caused fear, alarm or distress?

3. Was the sentence I imposed on the appellant excessive?

**The 2016 Act**

[4] Section 2(1) of the 2016 Act provides as follows:

> **"2 Disclosing, or threatening to disclose, an intimate photograph or film**
> (1) A person ("A") commits an offence if—

> (a) A discloses, or threatens to disclose, a photograph or film which shows, or appears to show, another person ("B") in an intimate situation,
>
> (b) by doing so, A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress, and
>
> (c) the photograph or film has not previously been disclosed to the public at large, or any section of the public, by B or with B's consent."

[5] Section 3(1) provides that a person is in an "intimate situation" if

> "(a) the person is engaging or participating in, or present during, an act which—
>
> (i) a reasonable person would consider to be a sexual act, and
> (ii) is not of a kind ordinarily done in public, or
>
> (b) the person's genitals, buttocks or breasts are exposed or covered only with underwear."

**The circumstances of the offence**

[6] The appellant and the complainer had been in a relationship for around four years and resided together. Their relationship ended in October 2020 on amicable terms. During their relationship, they took explicit and intimate photographs of each other naked and participating in sexual acts. These images and videos were for their own private use.

[7] The appellant had a user profile on *fabswingers.com* ("the website"), an adult content website designed to facilitate sexual encounters between users. Users can upload explicit images and videos to their account profile. Users have some access to materials uploaded by other users and can gain increased access to images by being added as "friends".

[8] Between March 2018 and June 2020, during his relationship with the complainer, the appellant uploaded explicit images of himself and of the complainer in intimate situations ("the images"). He did so without the complainer's knowledge or consent.

[9] The complainer's friend ("AB") had a user profile on the website. AB received a "friend request" from the appellant's account. She accepted. Having gained access to the appellant's content, she was able to view the images. She recognised the appellant from his profile photograph. She recognised the complainer in the images. AB contacted the complainer and provided screenshots of the images to her. Four of the images were of the complainer's body. The complainer's face appeared in one image. The appellant had sought to conceal the complainer's identity in that image by covering her eyes with a black horizontal band.

[10] The complainer was distressed and upset. She contacted the appellant. The appellant apologised and removed the images. The complainer reported matters to the police.

**The trial**

[11] A joint minute of agreement had been lodged by the Crown in terms of which the images, their disclosure without consent and the distressed suffered by the complainer were agreed. The only evidence led was that of the appellant.

[12] The appellant explained that he had added the images to his profile to make it more attractive. He explained that the website was anonymous. When he had sent a "friend request" to AB, he had not known that she was the complainer's friend. He has sought to obscure the complainer's identity in the only image bearing her face by photo editing her eyes. He had not wished her to be identified. He did not believe her to be using the website. He had been shocked when contacted by the complainer as he had not expected her to have viewed the images. He deleted the images immediately and had not intended to cause the complainer harm. He accepted that he had shared the images with anyone who had been granted access to his account as a "friend", both during and after his relationship with the complainer.

**The sheriff's decision**

[13] The sheriff found the appellant's evidence that he had not meant to cause harm, on the basis that the appellant has sought to conceal the complainer's identity, as unconvincing. The sheriff concluded that the appellant had been reckless as to whether the complainer would be caused fear, alarm or distress. She noted that the appellant's behaviour had been protracted over a period of time and the images were capable of being accessed by the public, once the appellant had permitted access to them. She noted at paragraph 22 of the stated case that "the fact that the appellant attempted to conceal the complainer's identity shows he considered the potential of distress, fear or alarm was real but instead recklessly proceeded in

contemplation of his own ends anyway without due regard of the impact on the complainer".

[14] The appellant had sought an absolute discharge in terms of section 246 of the Criminal Procedure (Scotland) Act 1995. The sheriff concluded that in light of the serious nature of the offence, an absolute discharge was not appropriate.

**Submissions**

[15] On behalf of the appellant, it was submitted that the 2016 Act had been enacted to criminalise the behaviour of those who use intimate images to shame, humiliate or control their ex-partners, commonly referred to as "revenge porn". The Scottish Parliament had indicated that the legislation was designed to bring Scotland into line with other parts of the UK. Members of the Scottish Parliament had referred to section 2 as criminalising "revenge porn" during the passage of the Bill. That was the mischief which section 2 had been designed to address. Reference was made to section 33 of the Criminal Justice and Courts Act 2015, applicable in England. It was submitted that section 33 required an intent to cause distress. While the 2016 Act extended to reckless acts, the mischief which had been sought to be addressed by each statute in England and Scotland was the same. The Scottish legislature had not intended to introduce a strict liability offence.

[16] The appellant had not intended to cause harm. There was no suggestion that this was an incident of "revenge porn". He had sought to advertise himself to other persons with similar sexual interests. Only one image contained the complainer's

face. It had been redacted to obscure her eyes. The appellant had not been reckless as to the effect upon the complainer as he had taken steps to obscure her identity. He had taken action to remove the images immediately and had expressed remorse. He had not expected the complainer to view the images. The images were not readily available to the general public at large as users of the website required registration and permission to view them. The complainer was identified through association only.

[17] In relation to sentencing, it was submitted that the sentence imposed was excessive and that the sheriff ought to have granted an absolute discharge (*Kheda* v *Lees* 1993 SCCR 63). A conviction was likely to have a disproportionate effect upon the appellant's career in dentistry. He had been suspended by his governing body pending the outcome of these proceedings. The appellant had been 25 years of age at the time of sentencing. He had no prior convictions. The appellant had made an error in his personal life and had expressed his immediate remorse to the complainer. There was no malice and no intent to cause harm. He is unlikely to re-offend.

[18] On behalf of the crown, the advocate depute submitted that the sheriff had applied the correct legal test. She had been satisfied that the appellant had acted recklessly in contemplation of his own ends. The legislature had intended to enact more robust legislation in Scotland and it was unhelpful to compare the 2016 Act with the English equivalent. Campaigners had been uncomfortable with the

repeated references in the media to "revenge porn" as a means of describing the offence created by the 2016 Act.

[19] It was irrelevant that the appellant had sought to obscure the complainer's face in one of the images. The complainer would have suffered the same distress upon identifying herself in the other images. The length of the parties' relationship and the dates upon which the images had been uploaded could have led to others identifying the complainer.

[20] On the issue of sentencing, the advocate depute referred to the contents of the Criminal Justice Social Work Report. The appellant had advised the author that it was his understanding that if he had been made subject to the notification requirements of the sex offenders' register, he would likely be unable to follow his chosen career. The sheriff had not imposed any such requirement. Upon appeal, the appellant had advised that only an absolute discharge would allow him to continue in his field. There was a lack of clarity as to the effects of any sentence upon the appellant. In light of the nature of the offence, an absolute discharge was not appropriate.

**Decision and analysis**

[21] During the trial and upon appeal, the focus of the appellant's submissions related to section 2(1)(b) of the 2016 Act, namely the question of whether the appellant had been reckless as to whether the complainer would be caused fear, alarm or distress by the disclosure of the images. The sheriff accepted that the

appellant had not intended such an effect, but that he had been reckless as to whether his conduct would have such an effect.

[22] We were referred, on behalf of the appellant, to section 33 of the Criminal Justice and Courts Act 2015 which extends to England and Wales and to the absence of any reference to "recklessness" in section 33(1)(b). It was submitted that the Scottish Parliament had intended to introduce a similar provision in Scotland, to criminalise conduct commonly referred to as "revenge porn" involving a vengeful ex-partner distributing photographs taken consensually without his or her former partner's permission. References were made to various parliamentary sessions in which the term "revenge porn" was used.

[23] We regard it as neither helpful nor appropriate to have regard to section 33 of the Criminal Justice and Courts Act 2015 when considering the scope or purpose of section 2(1)(b) of the 2016 Act. The latter is clear in its terms and was intended to be broader in scope than the former. Recklessness and intention are separate and distinct forms of *mens rea.* The legislature has chosen to define the *mens rea* requirement for an offence under section 2(1)(b) by reference to both recklessness and intention.

[24] The language of section 2(1)(b) is clear and unambiguous. The mischief which the 2016 Act was designed to address is plain from its terms; it is not restricted to what might commonly be referred to as incidents of "revenge porn". As such, there is no need for recourse to parliamentary materials to aid an understanding of legislative intent. Had such recourse been necessary, it would not have supported

the appellant's position. We note that an amendment to remove the reference to "recklessness" was debated and withdrawn during stage 2 of the Bill.

[25] An offence is committed in terms of section 2(1) of the 2016 Act if the individual who has disclosed or threatened to disclose intimate images has acted recklessly, that is, if he failed to give thought to or was indifferent as to the foreseeable effect upon the complainer of such a disclosure. Recklessness is to be inferred or deduced from the conduct of the individual at the time of the circumstances giving rise to the offence.

[26] In the present case, on behalf of the appellant it was submitted that his conduct did not meet the test for recklessness; he had acted carelessly. We do not agree. The appellant was not motivated by a desire to embarrass or humiliate the complainer. He is genuinely remorseful. He was however motivated by a desire to further his own ends; to gain popularity on the website by uploading what he considered to be images which would make him more attractive and appealing to other users. In so doing, he failed to give thought to, or was indifferent as to the foreseeable effect upon the complainer of such a disclosure.

[27] The appellant did seek to obscure the complainer's eyes in the only image which showed her face. He failed, however, to give any thought to, or was indifferent to, the very real possibility of "jigsaw identification". The images were uploaded during the parties' relationship. Any user who knew the appellant and the complainer had been in a relationship would have been in a position to deduce that the complainer was the female in the images. Indeed, AB had identified the

complainer from the image in which the complainer's eyes had been obscured (paragraph 9 of the joint minute of agreement). That the appellant explained in his evidence that he had not expected the complainer or her friends to view the images (paragraph 15 of the stated case) underscores that he readily understood that those who knew the complainer might have identified her. In any event, the complainer was able to identify herself and would likely have been able to do so, regardless of whether her face appeared in the images.

[28] That the images were accessible only by those whom the appellant invited to view them as "friends", rather that the public "at large" is irrelevant. The complainer entrusted the appellant with intimate images with the expectation of privacy. Once the appellant chose to disclose the images on the website, the appellant was able to provide users with access to them. He had no control over what other users might have done with them. He ought to have been aware of the possibility that the images might also be shared more widely or that they might find a way back on other internet platforms or social media to the complainer or those she knew.

[29] The sheriff was correct to conclude that the appellant had acted recklessly and that there had been sufficient evidence to convict the appellant in terms of section 2(1) of the 2016 Act. Questions 1 and 2 fall to be answered in the affirmative.

[30] On the issue of sentencing, the sheriff had considered the effect upon the appellant of a conviction and had attached due weight to his age and previous good character. In our judgment, she was correct to conclude that the nature of the

offence was serious and significant and that an absolute discharge was not appropriate in the circumstances. The offence involved a breach of trust over a period of time, for personal gain. It was not a momentary lapse of judgement nor an ill-judged reaction to a situation or provocation (such as that in *Kheda* v *Lees* 1995 SCCR 63 or *Galloway* v *Mackenzie* 1991 SCCR 548). We are mindful of the potential effects upon the appellant's career. Whether he is able to practise will be a decision for the General Dental Council. The circumstances of the offence and in particular, the lack of intent to cause harm to the complainer, the sheriff's decision that a non-harassment order was not appropriate and her decision that there was no requirement to make the appellant subject to the notification requirements of the sex offenders' register are all matters of which the governing body will no doubt be made aware.

[31] We shall, accordingly, answer questions one and two in the affirmative, question three in the negative and refuse the appeal.