SHERIFF APPEAL COURT

[2023] SAC (Crim) 6
SAC/2023/000128/AP

Sheriff Principal G A Wade KC
Sheriff Principal C Dowdalls KC
Appeal Sheriff F Tait

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL GILLIAN A WADE KC

in

Appeal by Stated Case against Conviction

by

BHUPINDER SINGH

Appellant

against

PROCURATOR FISCAL, KILMARNOCK

Respondent

Appellant: N. Shand; Faculty Services, Edinburgh for Maguire Solicitors
Respondent: Jessop KC (sol ad), AD; Crown Agent

6 October 2023

[1] On 17 March 2023 following a trial at Kilmarnock Sheriff Court, the appellant was found guilty of the following charge:

> "(001) on 15 February 2021 at …, you BHUPINDER SINGH did sexually assault [the complainer], then aged 17 years and in the course of her employment there, care of the Police Service of Scotland and did induce her to enter the rear of said premises, seize hold of her, push her against a counter there, seize her leg and place your hand on her thigh over her clothing and move it up to her private parts and you did intentionally direct sexual communications towards her and repeatedly make comments of a sexual nature to her;

CONTRARY to section 3 of the Sexual Offences (Scotland) Act 2009"

[2] It is a criminal offence, in terms of section 3(2)(b) of the 2009 Act, for a person to intentionally or recklessly touch another person sexually. Under section 3(2)(c) of the 2009 Act it is a criminal offence for a person to engage in any other form of sexual activity in which they, intentionally or recklessly, have physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with another individual.

[3] The sheriff imposed a community payback order with a supervision requirement of 12 months and a requirement to carry out 150 hours of unpaid work within 12 months.

[4] The appellant contends that the sheriff erred in repelling his no case to answer submission and, in turn, also erred in convicting him. Separately, the sheriff's decision lacked an adequate explanation as to why the sheriff had accepted the evidence of the complainer, drawn the evidential inferences he had and rejected exculpatory evidence.

[5] Given that the stated case raises a number of questions as to the whether the sheriff was entitled to make certain findings in fact, it is appropriate to give a summary of the evidence led.

Evidence led by the Crown

[6] The complainer, was employed as a shop assistant at a food takeaway. The appellant was the manager of the takeaway. As at 15 February 2021, the complainer was 17 years old. At around 5.30pm the appellant's then girlfriend entered the takeaway with a friend. She directed threats towards the complainer who remained behind the counter. The complainer contacted her mother who shortly collected her from the takeaway and took her home.

[7] The appellant called the complainer later that evening and asked that she return to work. The complainer returned to the takeaway between 9pm and 10pm. She and the appellant were alone in the shop, as the delivery driver was absent. While she was seated in the servery of the shop, the appellant approached her, leaned in so that his face was inches from hers and made remarks of a sexual nature, inviting her to join him in the rear of the shop and suggesting that he should "get a couch" for that purpose. She placed a pizza box between their faces and he desisted.

[8] Prior to the takeaway closing, the appellant and the complainer were again alone on the premises. He proceeded to place his hand on her right leg, beginning at her inner thigh and moving it upwards until his hand was over her private parts above her clothing. She stated she was uncomfortable and the appellant moved away. The complainer contacted her mother again asking to be taken home; however, after sending a second text she felt she could wait no longer and proceeded to head straight home. On arriving home, she made no mention to either her mother or her mother's partner of what had occurred in the takeaway.

[9] On 16 February 2021, the complainer was out socialising with a friend. She was under the influence of alcohol but not drunk. The complainer called the appellant asking if he could provide her and her friend with a lift. The appellant duly collected the complainer and her friend. He dropped off the friend. The appellant felt uncomfortable and asked the appellant to return her to the pick-up point, which he did.

[10] The complainer thereafter contacted the police for assistance to get home. The police officers found her upset and under the influence of alcohol, but not drunk. While in the company of the police officers, at 2am on 17 February 2021, the complainer disclosed for the first time that the appellant had sexually assaulted her on 15 February 2021. The complainer was visibly distressed in recounting what the appellant had done to her. She did not advise

the police officers, at this time, that she had been in the appellant's car during the previous evening, but did so in a statement to police officers later that same day.

[11] The police officers took the complainer home and seized the grey leggings which she told them she had been wearing during her shift at the takeaway on 15 February.

[12] A forensic analysis of the grey leggings was undertaken. Three tapings were taken, namely (i) from the front of the elastic waistband of the leggings; (ii) from an area on the right inside leg; and (iii) from the area of the leggings that would normally sit over the right buttock. The basis for the taping from the right buttock was to act as a "control sample" against which the first and second samples could be tested.

[13] The taping from the front waistband of the trousers showed a mixed DNA profile. It contained the DNA of the complainer, the appellant and another unknown individual.

[14] The taping from the inner right thigh area of the leggings produced a DNA profile which matched that of the complainer. Additional trace DNA recovered from this taping was insufficient to allow analysis.

[15] It was not possible to exclude the possibility that traces of the appellant's DNA may have been picked up by secondary transfer because they had been in close contact with one another; however, the forensic scientist's evidence was that the finding of the appellant's DNA on the waistband of the complainer's leggings was as a result of either primary or secondary transfer.

Submission of no case to answer

[16] Upon conclusion of the Crown's case, counsel for the appellant made a submission of no case to answer to the sheriff on the basis that the appellant's conduct, as spoken to by the

complainer, was not sufficiently corroborated. That submission was advanced on three grounds:-

i. there was no corroboration of the complainer's evidence that the grey leggings seized by the police in the early hours of 17 February 2021 were worn by the complainer while she was working on 15 February 2021;

ii. that the distress exhibited to the police officers in the early hours of 17 February 2021 could not corroborate the complainer's lack of consent due to the passage of time and the absence of any disclosure to other persons in the meantime; and

iii. the results of the DNA analysis did not support the complainer's account so as to amount to corroboration.

[17] The sheriff repelled the submission of no case to answer. He considered there was a clear sufficiency of evidence. The complainer had spoken to the relevant parts of the charge in her evidence. The sheriff considered the complainer's evidence of the appellant's conduct could be supported by the DNA sample taken from the front waistband of the complainer's grey leggings. With respect to counsel for the appellant's submissions, the sheriff did not accept there was a requirement for the Crown to corroborate the fact that the grey leggings seized on 17 February had been worn by the complainer on 15 February 2021. Moreover, although there was a delay in excess of 24 hours in the complainer exhibiting distress, the sheriff held, under reference to *Ferguson* v *HM Advocate* 2019 JC 53 and *CJN* v *HM Advocate* 2013 SCCR 124, that the complainer's distress could corroborate her lack of consent to the appellant's conduct on 15 February 2021.

Evidence led by the appellant

[18] Having repelled the no case to answer submission, the appellant elected to give evidence. He denied the conduct libelled in the charge. His evidence was that the complainer and his girlfriend had engaged in a fight in the shop on the evening of 15 February 2021. He pushed the complainer. In doing so, he fell to ground and touched the waistband on the complainer's leggings. He also did not accept that he was left alone with the complainer near to closing time as the complainer had stated in her evidence. The delivery driver would not have left until closing as he would have had further duties in the rear of the shop such as stocking the fridge. He also gave evidence that during the car journey on 16 February 2021 the complainer had placed his hand on top of her right thigh and would not let him remove it. Under cross-examination, he accepted that he had made no mention of the fight nor of having touched her waistband in the statements he gave to the police.

[19] The appellant's girlfriend at the time of the offence gave evidence. She confirmed the appellant's evidence that he had broken up a fight between her and the complainer by pushing them apart. She did not, however, recall him falling to the ground.

[20] Two further witnesses were led for the defence. These were two employees of the shop. The first employee gave evidence that he travelled with the appellant, the complainer and the complainer's friend on the night of 16 February 2021. His evidence was that he saw the complainer place the appellant's hand on her leg; however, he could not see properly where it was placed. The second employee was the delivery driver for the shop. He saw none of the occurrences described by either the complainer or the appellant. He never carried out other duties such as stocking the fridge. He saw the complainer leave the takeaway before it closed on 17 February 2021.

The sheriff's decision

[21] Having considered the evidence and submissions, the sheriff found the appellant guilty as charged. He found the complainer a credible and reliable witness. He considered her lack of consent to the appellant's conduct was supported by the evidence of her distress when notifying the police officers of the conduct that had occurred. He also considered the presence of his DNA on the front waistband of the grey leggings supported her account.

[22] By contrast, he found the appellant wholly unconvincing, both in relation as to how and when he placed his hand on the waistband of the complainer's grey leggings. He also found it significant that the appellant made no mention of a physical altercation between the complainer and his girlfriend until after becoming aware that DNA analysis had been undertaken. The evidence of the delivery driver failed to support that of the appellant. The sheriff found the appellant's other witnesses unconvincing and their evidence did not accord with the appellant's evidence as to where and when he placed his hand on the complainer.

The stated case

[23] The stated case posed the following questions for the opinion of this court:

i. [No longer insisted upon]

ii. Was I entitled on the evidence to make finding in fact 4?

iii. [No longer insisted upon]

iv. Was I entitled on the evidence to make finding in fact 6?

v. [No longer insisted upon]

vi. Was I entitled on the evidence to make finding in fact 10?

vii. Was I entitled on the evidence to make finding in fact 11?

viii. Was I entitled to repel the appellant's submission that there was no case to answer?

ix. On the evidence available to the court was I entitled to convict the appellant?

x. Did I provide sufficient reasons for my decision?

Submissions for the appellant

[24] Counsel for the appellant invited the court to answer all the remaining questions which were insisted upon in the stated case in the negative. In broad terms, counsel submitted the sheriff erred in repelling the no case to answer submission, convicting the appellant and that there was a failure by the sheriff to explain his reasoning.

[25] Counsel restated the three objections that had been raised before the sheriff during his no case to answer submission (as noted at paragraph [16] above). Firstly, in line with his position at trial, he submitted that the Crown required to corroborate the fact that the complainer had worn the grey leggings on 15 February 2021. The only evidence that the complainer wore the leggings on 15 February 2021 was from the complainer. The complainer could not corroborate her own evidence. In this instance, the DNA of the appellant on the waistband could not corroborate whether the grey leggings were worn by the complainer on 15 February 2021, under reference to *Palmer* v *HM Advocate* 2016 SCCR 71 at paragraph [10].

[26] Secondly, he submitted the sheriff erred in finding that the complainer's distress on 17 February 2021 could corroborate lack of consent by the complainer. The complainer had opportunities to make a disclosure to her parents and to her friend. She did not do so. Counsel accepted that while absence of disclosure would not always be fatal to the Crown's case, there was a requirement for the Crown to lead evidence to explain why there had been

a delay in disclosure. Counsel submitted that requirement was placed upon the Crown by virtue of *Ferguson* v *HM Advocate supra* and *Wilson* v *HM Advocate* 2017 JC 135. The Crown had failed to discharge it.

[27] Counsel's main objection was the sheriff holding that the DNA from the front waistband could corroborate the complainer's testimony. He submitted two justifications for doing so. Firstly, the charge made against the appellant was that he placed his hand on the complainer's thigh over her clothing and moved it up to her private parts. That was what the Crown required to corroborate. By contrast, in the stated case, the sheriff had referred to the complainer having given evidence on being touched sexually in her "lower area". Counsel submitted that, on his reading of the sheriff's decision, "lower area" was an undefined location. In any event, it was not the charge as libelled that the appellant faced. The appellant's DNA was not found on the sample taken on the thigh from the complainer's leggings. The appellant's DNA taken from the sample at the waistband of the complainer's leggings, in counsel's submission, could not corroborate the charge. Secondly, the sheriff's inference that the appellant's DNA on the waistband had been made by primary or secondary transfer was not explained. That was particularly so since there was evidence of other individuals' DNA recovered from the samples on the complainer's leggings that had arrived by non-criminal means.

Submissions for the respondent

[28] The advocate depute dealt first with the sheriff's decision on the no case to answer submission. The appellant's DNA was found in an area proximate to the complainer's private parts. Although there were a number of explanations as to how the appellant's DNA could have been transferred onto the waistband of the complainer's grey leggings, one

explanation was that the appellant placed his hand on it on 15 February 2021. The sheriff was entitled to find that there was a case to answer: *Smith* v *HM Advocate* 2008 SCCR 255.

[29] There was no requirement to corroborate that the complainer wore the grey leggings on 15 February 2021. The Crown required to corroborate the identity of the appellant and the charge as libelled. Evidence had been led of actions of the appellant and also of the lack of consent from the complainer.

[30] As for the delay by the complainer in reporting the sexual assault, the appellant's interpretation of *Ferguson* and *Wilson* was wrong. *Wilson* is authority for the proposition that there is no fixed interval as to when distress can corroborate lack of consent by a complainer.

[31] For those reasons, the sheriff was correct to repel the submission of no case to answer. As regards his decision to convict, the sheriff had explained why he did not accept the evidence led on the appellant's behalf. There was sufficient reasoning given by the sheriff as to why he preferred the complainer's evidence. That, along with the DNA evidence and the evidence of distress, entitled to the sheriff to reach the conclusion that he did.

[32] The advocate depute moved the court to answer all remaining questions in the stated case in the affirmative.

Decision

[33] The stated case originally posed ten questions for the court but before us the appellant did not seek to insist upon questions 1, 3 or 5 leaving only questions 2, 4, 6, 7, 8, 9 and 10 to be answered. Despite the order in which the questions are asked, the first question which must be answered is in fact question 8:

Was I entitled to repel the appellant's submission that there was no case to answer?

[34] Lest there be any doubt, the test at this juncture is to be found in *Williamson* v *Wither* 1981 SCCR 214 namely whether there is evidence, which if accepted, would be sufficient for conviction. The test is not qualitative. The appellant both at first instance and before us asserted that the lack of sufficiency was due to (i) a failure to corroborate that the complainer had been wearing the leggings (which were subject to forensic analysis and upon the waistband of which the appellant's DNA was detected) on 15 February 2021; (ii) the distress exhibited to the police officer on 17 February 2021 could not corroborate the complainer's lack of consent due the temporal gap of more than 24 hours since the alleged incident, which the Crown had failed to explain, and the absence of disclosure to other persons in the meantime; and (iii) the failure of the DNA results to corroborate the complainer's account and the offence as libelled, given that the location of the DNA finding was on the waistband of the leggings as opposed to the thigh area or private parts.

[35] Dealing with each of these criticisms in turn, we do not consider that there is any requirement to corroborate the fact that the complainer was wearing the particular leggings which were examined on the night of the 15 February 2021. Corroboration is required in relation to the essential elements of the crime, namely that the crime was committed and that it was the accused who committed it. The crime with which we are dealing here is a sexual assault by touching. What requires to be corroborated is that the complainer was assaulted in the manner alleged and that the perpetrator of that assault was the person responsible. Identity was not in dispute in this case. Accordingly the only matters which require corroboration are the sexual activity described in the charge and the complainer's lack of consent. The only authority upon which the appellant sought to rely in support of his proposition was *Palmer* v *HM Advocate supra.* The question in that case was whether

there was sufficient evidence to entitle the jury to infer that a duvet cover, on which the appellant's semen was found mixed with the complainer's DNA, had been on a bed at the time of an alleged rape. There, unlike in the instant case, the complainer had been a little unsure about this. Furthermore, the question was whether this evidence could provide evidence of penetration.

[36] In this case the complainer was absolutely clear that the leggings seized were the ones which she had worn on the day in question. She then proceeded to give an account of the sexual activity which took place when she was wearing those leggings. That is one source of evidence to the effect that the crime has been committed. All that is then required is evidence that fits with or supports or confirms that testimony: *Munro* v *HM Advocate* 2015 JC 1 per Lord Carloway at paragraph [7], following *Fox* v *HM Advocate* 1998 JC 94 per Lord Justice-General (Rodger) at p 100 and per Lord Gill at p 124. The corroborating piece of evidence does not, of itself, have to point exclusively to the fact in issue. It is in the very nature of circumstantial evidence that it may be capable of more than one meaning. Day in and day out juries are directed that a piece of circumstantial evidence may be spoken to by a single witness.

[37] In our view the submission that the wearing of the leggings on the day in question is a fact requiring to be specifically corroborated is wrong and we reject this criticism of the sheriff's approach.

[38] The second limb of attack related to the temporal gap between the complainer exhibiting distress and the alleged incident which, so it was submitted, required to be explained by the Crown. Before us there seemed to be a degree of confusion between issues of delayed disclosure and the question of the use to which distress evidence could be put. In

this case the distress evidence was relied upon to corroborate the complainer's account that she did not consent to the sexual activity which took place.

[39] We do not accept the interpretation which counsel for the appellant sought to place upon the cases of *Ferguson* and *Wilson* and indeed the latter is authority for the proposition that there is no fixed interval after which distress cannot constitute corroboration; *RWP* v *HM Advocate* 2005 SCCR 764 per Lord Hamilton at p 771. Intervals of more than 24 hours have been considered relevant. The test is not to be measured in terms of time but rather is a causative one. The fact finder must be satisfied that the exhibited distress was caused by the offence and not by some other factor. At the stage of a submission of no case to answer the sheriff is simply being asked whether the complainer's observed distress at the point of first disclosure to a police officer is capable of supporting her lack of consent. In this regard the observations to be found at paragraph [16] of the decision in *Ferguson supra* (per Lord Justice-General (Carloway)) are supportive of the sheriff's approach. Standing the requirement to take "great care…….before excluding the occurrence of distress after an interval of time as constituting corroboration" the occasions upon which distress could be deemed incapable of providing a sufficiency for the purposes of a no case to answer submission must be limited.

[40] Finally, in this regard the submission of the appellant to the effect that there is an onus on the Crown, presumably through the vehicle of a complainer, to plug the gap between the alleged incident and the exhibited distress would seem to fly in the face of the mandatory directions and the new jury directions which tell juries that there is no typical response to sexual offending and there may well be delays in disclosure or indeed displays of emotion. If the appellant's approach were correct it would endorse rather than dispel

what have come to be known as "rape myths". That would be a retrograde step. Accordingly for these reasons we reject the second limb of the appellant's argument.

[41] Finally the appellant contended that the finding of DNA on the waistband of the leggings could not corroborate the complainer' account of where she was touched or the charge libelled. Where, as here, there is a main source of evidence, such as a witness describing the event in which a crime was committed, corroborative evidence does not need to be more consistent with guilt than with innocence. As has already been observed the corroborative evidence need only fit with, support or confirm the principal source, namely the complainer.

[42] The complainer's evidence was that she was touched in the "lower area". Evidence of the appellant's DNA in an area which the advocate depute described as "very close to the complainer's private parts" is undoubtedly capable of being construed as fitting with the complainer's evidence that the appellant came into contact with her "lower parts". The fact that there may be other explanations for this is of no moment. It is for the fact finder to determine whether the explanation advanced by the Crown does indeed corroborate the principal source of evidence. It is not for the Crown to exclude any alternative explanations, particularly at this stage in the proceedings. For these reasons we also reject the third limb of the appellant's argument and answer question 8 in the affirmative.

On the evidence available to the court was I entitled to convict the appellant?

[43] We are then required to consider whether , on the evidence the sheriff was entitled to make the findings in fact which the appellant seeks to attack, namely findings in fact 4,

6, 10 and 11 and whether on that basis he was entitled to convict. These issues are focussed in questions 2, 4, 6, 7 and 9.

[44] Although the appellant gave evidence the sheriff did not find him to be credible and reliable. He explains that he found his evidence to be contradicted by the evidence of other defence witnesses and formed the view that his explanation for the presence of his DNA on the complainer's leggings had been provided only after he knew about the forensic findings as this had not been mentioned in his earlier statements to the police.

[45] On the contrary the sheriff explains that he found the complainer to be a compelling witness and when her account was considered alongside the evidence of PC Cuthbert and the DNA evidence spoken to by Dr Stuart Bailey there was clear support for her version of events. In particular he took account of the evidence that the DNA on the waistband of the leggings must have been as a result of primary or secondary transfer. Transfer as a result of two people working together would have been considered tertiary transfer and was therefore not an explanation. As has already been noted alternative explanations may exist. That does not matter. It is a matter for the fact finder to determine whether the evidence and the explanation indicated by the circumstantial evidence support or confirm the primary source of evidence in all the circumstances.

[46] Finding in fact 4 is therefore corroborated by virtue of the complainer's account which is supported by the DNA on the waistband in an area in close proximity to the complainer's private parts. In so far as finding in fact 6 is concerned, for the reasons provided, there was no need to corroborate the fact that the complainer was wearing the leggings on 15 February. Her own account provides sufficient evidence of that fact. Finding in fact 10 derives directly from the evidence of Dr Stuart Bailey and, for the reasons given,

the distress evidence exhibited to PC Cuthbert corroborates the lack of consent and therefore finding in fact 11 is justified.

[47] For these reasons we answer questions 2, 4, 6, 7 and 9 in the affirmative.

Did I provide sufficient reasons for my decision?

[48] The final question relates to the failure of the sheriff to provide reasons for his decision. Before us the submissions of the appellant focussed upon paragraph [56] of the stated case in which the sheriff explains that in his view the results of the DNA analysis did not support the appellant's version of events which involved him placing his hand on her thigh only hours before the garment was seized. It was argued that this was the only reason which was given for the rejection of the appellant's evidence.

[49] In our opinion this is not an accurate statement when one considers the stated case as a whole. Paragraphs [53] to [55] articulate in detail the additional reasons for the sheriff's conclusion that the complainer was "wholly unconvincing". He was unimpressed by the appellant's attempt to provide a narrative which explained the DNA findings, particularly as he had failed to mention these matters in his earlier statements. He was critical of the lack of conjunction of testimony between the appellant and the other defence witnesses; the delivery driver's evidence refuted the appellant's position in respect of the driver's whereabouts and duties on the evening in question. These are detailed and cogent reasons for the conclusion reached by the sheriff and the appellant accordingly fails in this regard. We therefore answer question 10 in the affirmative.

[50] Accordingly, for the reasons given we answer all of the questions in the affirmative and the appeal falls to be refused.