SHERIFF APPEAL COURT

[2023] SAC (Crim) 9
SAC/2023/000292/AP

Sheriff Principal D C W Pyle
Sheriff Principal G Wade KC
Sheriff Principal C Dowdalls KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D C W PYLE

in

Crown Appeal against Sentence

in

SB

Appellant

against

PROCURATOR FISCAL, ABERDEEN

Respondent

Appellant: Paterson, sol ad; Paterson Bell Solicitors
Respondent: Cameron, sol ad, advocate depute; Crown Agent

13 October 2023

Introduction

[1] This is a Crown appeal against the sheriff's decision to grant an absolute discharge.

[2] The respondent was charged on a summary complaint with assault to injury with an aggravation in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (the 2016 Act). Initially the complainer was a reluctant witness resulting in a

number of diets being adjourned. She had provided an oral account of the incident to police officers but was reluctant to commit to a formal statement. After she provided one, a plea was agreed under various deletions.

The charge

[3] The amended charge to which the respondent pled guilty was that on 16 October 2022 at a flat in Aberdeen he did assault the complainer and did seize her by the throat causing her breathing to be restricted, the aggravation being that the offence involved abuse of a partner or ex-partner, in terms of section 1 of the 2016 Act.

[4] The circumstances of the offence as narrated by the Crown were that the complainer and the respondent had been in an on-off relationship for eight years. The complainer sometimes stayed overnight at the respondent's flat. During the evening on the date of the offence, both were in the flat. An argument began, which escalated quickly. The respondent shouted and swore at the complainer, telling her to leave. She went into the bathroom where he continued shouting at her. She went past him into the living room. The respondent thought she was taking his cigarettes. He became angrier. He called her "a stupid bitch". The respondent telephoned someone. The complainer heard him say things like "crazy" and "delusional". He seemed calmer while he was on the telephone. He became angry as soon as the telephone conversation ended. Matters became physical. The complainer ended up on the floor but could not recall how. The respondent grabbed her throat with two hands. She could feel herself struggling to breathe but did not lose consciousness. The respondent said to her, "Why don't you just die already?" She pushed at his face and this made him angrier. The matter ended because the police were at the door. He made no reply to caution and charge.

The plea in mitigation

[5] In the plea in mitigation, the sheriff was told that the respondent was 30 years of age and lived alone. He has no children. He was a first offender. He had been employed as a general assistant at Sainsbury's for nine years but lost his job in November 2022 because the complainer was a co-worker. He was now on state benefits. In 2022 he had graduated with a degree in Law and Management at Robert Gordon University. He intended to take a year out to earn sufficient money for the last year of an LLB degree. A conviction would prevent him from pursuing a career as a solicitor. The respondent accepted full responsibility for the offence and recognised that there was no excuse for it. However, the nature of and the background to the relationship was relevant. The relationship had lasted for eight years. The complainer was alcohol dependent. He provided support for her. On the day of the offence she had been suspended from her job without pay because of her alcohol abuse. This had put pressure on the relationship. He had spent hours trying to console her about her job situation. They had ended up arguing. She threw various items, including vodka bottles, around the flat. He had asked her to leave. The complainer had been expressing suicidal ideation, which may have explained the remark he made. He was appalled and ashamed of his actions, but had reached breaking point. The relationship had ended. (We were, however advised that the relationship has since resumed and the parties are now living together.) Character references were provided.

The sheriff's report

[6] In her report, the sheriff acknowledges that the test for an absolute discharge was a high one. While she did not place undue weight on the character references which were from the respondent's family and friends, she accepted that he appeared to be a person of

previously good character and who had worked hard to achieve his degree. While the complainer's alcohol dependency did not mitigate his actions, it did provide an explanation for and background to his loss of control. Dealing with a partner who is alcohol dependent will have had, at the very least, an effect on the respondent's state of mind. She did not agree with the Crown's description, in the Note of Appeal, of the assault being "unprovoked and prolonged". Her impression was that the respondent had "snapped and lost control at the moment of the assault". There was no history or pattern of abuse in what had been a relatively long relationship. A conviction, particularly of this nature, would be likely to have continuing significant consequences on his future, which would be disproportionate. Having now seen the Law Society of Scotland Guidance, the sheriff noted that contrary to the information given to her in the plea of mitigation a conviction would not necessarily prevent the respondent from becoming a solicitor. But a conviction would be a considerable hurdle to overcome and admission to the Law Society cannot be guaranteed for someone in that position.

Grounds of appeal

[7] The advocate depute submitted that an absolute discharge was unduly lenient. There require to be exceptional circumstances before the court may order an absolute discharge (*AS* v *PF Kilmarnock* 2017 SLT (Sh Ct) 89 at paragraph [5]). Offending of the sort of which the respondent was convicted should in almost all circumstances attract a criminal conviction. Offending in the domestic context is serious and far from unusual in the Sheriff Court (*ibid*, paragraph [11]). The sheriff placed too much weight upon the purported consequences for the respondent's future career. Acceptance to study for a degree in a certain discipline does not guarantee that a degree will be awarded, far less that

employment in that field will follow. In any event, a criminal conviction would not necessarily prohibit the respondent from pursuing a career in law should he wish to do so. As was observed in *AS* v *PF Kilmarnock* (at paragraph [12]), a case in which the appellant was a qualified solicitor, the consequences of a conviction for an offender's career may be severe, but that is a matter for the disciplinary procedure of their regulating body. The sheriff had also placed too much weight upon the respondent's account of the complainer's alcohol difficulties. The relevance of a history of alcohol misuse by the complainer is minimal. The parties did not reside together and there was no information as to what the financial strain upon the parties would be in the event that she lost her employment. That the complainer had allegedly made a threat to kill herself in the past only highlighted her vulnerability and did not excuse or explain the respondent's actions. The sheriff had failed to place sufficient weight on the seriousness of the offence. Notwithstanding that no injuries occurred, holding down the complainer by her throat to the extent that she was struggling to breathe, whilst telling her to "die already", is a serious matter. This is against a background of aggressive behaviour just prior to the assault, whilst the complainer was attempting to gather her belongings and leave. The Crown did not accept that there was any provocation by the complainer mitigating the assault upon her by the respondent. The description of the assault as "unprovoked and prolonged" is accurate and the sheriff was wrong to reject it. The behaviour of which the appellant in *AS* v *PF Kilmarnock* was convicted was described by the court (at paragraph [12]) as "not trivial…concerning and serious". The conviction was for contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 involving acting in an aggressive manner towards, and shouting abuse and swearing at, the appellant's wife on a single day. It did not involve assault. The disposal failed to reflect the

gravity of the respondent's conduct and failed to satisfy the sentencing purposes of punishment and the expression of disapproval of offending behaviour.

Decision

[8] The test of undue leniency is described in *HMA* v *Bell* 1995 SCCR 244 (at p 250):

> "It is clear that a person is not to be subjected to the risk of an increase in sentence just because the appeal court considers that it would have passed a more severe sentence than that which was passed at first instance. The sentence must be seen to be unduly lenient. This means that it must fall outside the range of sentences which the judge at first instance, applying his mind to all the relevant factors, could reasonably have considered appropriate. Weight must always be given to the views of the trial judge, especially in a case which has gone to trial and the trial judge has had the advantage of seeing and hearing all the evidence."

In our opinion, an absolute discharge was not an unduly lenient disposal. When dealing with any narration of the facts of an offence, it is always difficult for a sheriff to identify the true flavour of the circumstances, whether of the offence itself or the events which led to it. We do not accept the Crown submission that the assault was an unprovoked and prolonged one. It was, it is true, unprovoked in the sense of the rules governing a plea of provocation. But that is not what was being offered by the defence. Based on the Crown narrative, it cannot be said that it was a prolonged one, in that no information was provided about the period of time over which the respondent had his hands around the complainer's neck. To say that "the matter ended because the police were at the door" raises more questions than it answers. We accept that the sheriff was entitled to describe the offence in the manner she did and that she was entitled to take into account the events which led up to it on the un-contradicted information provided by the defence agent. Given the exceptional nature of cases where absolute discharge is appropriate, previous authorities, which are few in number anyway, are of limited assistance. In *Kheda* v *Lees* 1995 SCCR 63, the Appeal Court

ordered an absolute discharge where the appellant had brandished a knife. The charge was one of breach of the peace. In *S* v *Procurator Fiscal, Kilmarnock*, the appellant showed no remorse and contrition and while the charge was also, in effect, a breach of the peace it was described as "angry, abusive and aggressive behaviour of a controlling and jealous nature". The conduct in each of these cases is not minor in its seriousness.

[9] While the information provided to the sheriff about the rules relating to admission as a solicitor proved to be incorrect, she considered that at the very least a conviction would call into question whether the appellant would be deemed a suitable person to be admitted as a member of the Law Society. Such an effect on the appellant's future was a factor which the sheriff was entitled to take into account. That any effect was uncertain did not mean that it was not a relevant factor (*Kheda*, at p66; *Galloway* v *Mackenzie* 1991 SCCR 548 (at p 550). The sentence was not one which fell outside the range of sentences which the judge at first instance, applying her mind to all the relevant factors, could reasonably have considered appropriate.

[10] The appeal is refused.