SHERIFF APPEAL COURT

[2024] SAC (Crim) 11
SAC/2024349/AP

Sheriff Principal D C W Pyle
Appeal Sheriff R D M Fife
Appeal Sheriff C M Shead

OPINION OF THE COURT

delivered by APPEAL SHERIFF C M SHEAD

in

Appeal against conviction by stated case

by

WASEEM AKRAM

Appellant

against

PROCURATOR FISCAL, GLASGOW

Respondent

Appellant: Ogg, sol adv; Paterson Bell (for John Kilcoyne & Co, Glasgow)
Respondent: Keenan KC, sol adv, AD; Crown Agent

24 December 2024

[1] On 18 June 2024 at Glasgow Sheriff Court the appellant was found guilty of three contraventions of section 7(1) of the Sexual Offences (Scotland) Act 2009, which formed charges 1, 3 and 4 on the complaint. He was acquitted of the remaining charges. At trial there was no dispute that the offences had been committed. Apart from one instance when the appellant was identified as having attended the premises in charge 3 and asked for a

massage the crimes consisted of phone calls made to employees in the three workplaces. The central issue was whether the Crown had proved that the appellant was the perpetrator. The appellant elected to give evidence and denied that he had made the calls or was the person who asked for a massage. The sheriff rejected that evidence.

[2] The charges were in the following terms:

> "(001) on various occasions between 1 May 2016 and 31 August 2017, both dates inclusive at MDP, Glasgow you did intentionally and for the purposes of obtaining sexual gratification or of humiliating, distressing or alarming SD, EP and LD all care of Police Service of Scotland did direct a sexual verbal communication at said SD, EP and L D without their consent in that you telephoned said MDP and utter remarks which suggested you were monitoring said SD's movements, make enquiries in order to attempt to find out the names of the employees there, utter remarks about the appearance and clothing of employees there and utter sexual remarks;
>
> CONTRARY to Section 7(1) of the Sexual Offences (Scotland) Act 2009
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> [and] you did commit this offence while subject to a Sex Offender Order imposed on you on 25 August 2017 at Glasgow Sheriff Court
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> (003) on various occasions between 17 July 2016 and 31 August 2016, both dates inclusive, at HG, Glasgow you did intentionally and for the purposes of obtaining sexual gratification or of humiliating, distressing or alarming LD, AF and GL, all employees there care of the Police Service of Scotland did direct sexual verbal communications at, direct a verbal communication to them without their consent in that you did telephone said HG and utter remarks which suggested you were monitoring said LD and AF's movements, make enquiries in order to attempt to find out the names of the employees there, utter remarks about said LD, AF and EM clothing and appearance and utter sexual remarks and attend at HG and ask LD for a massage.
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> CONTRARY to Section 7(1) of the Sexual Offences.(Scotland) Act 2009
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> (004) on various occasions between 1 June 2017 and 30 September 2017 both dates inclusive at BH ,Glasgow you did intentionally and for the purposes of obtaining sexual gratification or of humiliating, distressing or alarming TL, RM, AW and MC, all employees there all care of the Police Service of Scotland did direct sexual verbal communications at, did direct a verbal communication to them without their consent in that you did telephone said BH and utter remarks which suggested you were monitoring said TL, RM, AW and MC's movements, make enquiries in attempt to find the names of the employees there, utter remarks about said TL, RM, AW and MC's clothing and appearance and utter sexual remarks;

CONTRARY to Section 7(1) of the Sexual Offences (Scotland) Act 2009

[and] you did commit this offence while subject to a Sex Offender Order imposed on you on 25 August 2017 at Glasgow Sheriff Court"

[3] The Crown led evidence from a number of employees who had worked at each of the three premises mentioned in the charges. In essence they spoke to receiving telephone calls in the course of which the caller had made sexual remarks. A common theme was the caller talking about the size of his penis. In some instances it was clear that the caller was looking into the premises in question and describing the clothing and appearance of some of the women who worked there.

[4] Some of those who gave evidence identified the appellant as the caller by reference to a short excerpt of his voice taken from the recording of a police interview. The defence objected timeously to this line of evidence. Unfortunately neither party drew the sheriff's attention to the Lord Advocate's guidelines[1] or the relevant authorities and surprisingly neither suggested that the evidence be heard under reservation. The latter course would have been the obvious one to take. At the very least it would have provided the parties with the opportunity to address the sheriff thoroughly at the conclusion of the Crown case. In the result the sheriff repelled the objection without hearing proper argument. The sheriff accepted the evidence of the disputed identification and that she relied upon that evidence in convicting the appellant.

[1] Lord Advocate's guidelines: visual identification procedures, Appendix G-voice identification first published 1 February 2007

The appellant's submissions

[5] Ms Ogg invited us to conclude that the evidence of voice identification given by reference to the short excerpt of the tape recording was inadmissible and that the sheriff had erred in repelling that submission.

[6] Excerpts from the interview itself were not played to the witnesses. Rather, they were utterances made by the appellant in response to him being cautioned and asked to explain his understanding of the caution. Ms Ogg characterised the questions asked by the police as administrative steps and accepted such steps are commonly taken by the police at interview. However it was clear that the appellant had not been alerted to the possibility of the use to which his answers might be put in the event of a trial.

[7] The circumstances of the case were to be distinguished from *McIntyre* v *HMA* 2009 SCCR 380 and the court was not bound to reach the same conclusion on the question of admissibility. Borrowing the language from para [15] of the opinion of the court, the question was whether the evidence had been legitimately obtained. It was submitted that it had not been because, while the caution would alert a suspect to the possibility that his answers to questions in the interview may be used as evidence against him, the same could not sensibly be said of a circumstance where a suspect was responding only to questions about his understanding of the caution and in circumstances where he could be expected to respond without fear that his responses would be used against him.

[8] In any event it was submitted that the court should look at all the circumstances including the absence of a proper identification procedure, the passage of time between the alleged offences and the trial at which the witnesses were invited to make an identification by voice and the shortness of the sample played to the witnesses. The sample did not include any of the utterances said to have been made by the caller in the course of the phone

calls spoken to by the witnesses. This could be usefully contrasted with the procedure followed in *McFadden* v *HMA* 2009 SCCR 902. The Crown should have instructed that the necessary identification procedure be carried out in accordance with the Lord Advocate's guidelines. These factors combined to produce the conclusion that the sheriff should have sustained the objection. The question for the court was one of fairness. If it was unfair to allow the evidence to be led then it should have been ruled inadmissible.

[9] If that argument was rejected it was submitted that the sheriff had, on a fair reading of the stated case, accepted the evidence as reliable and as part of the evidence on which she relied for conviction. That too pointed to a miscarriage of justice having occurred again taking into account the same accumulation of circumstances. This submission was not further developed.

[10] If the court accepted the first argument and the relevant evidence fell to be left out of account it was submitted that there was insufficient evidence to entitle the sheriff to convict of the charges of which the appellant was ultimately found guilty.

The Crown submissions

[11] The advocate depute adopted the Crown's written submissions.

[12] In respect of the use of the particular part of the recording the advocate depute drew our attention to the decision in *McIntyre* at paras [14] - [16]. He submitted that the decision governed the resolution of the first argument made on the appellant's behalf. The present case was indistinguishable from the situation in *McIntyre*.

[13] It was accepted that there had been a failure to follow the Lord Advocate's guidelines. It seemed that there had been a lack of understanding on the part of those conducting the case that an identification procedure should have been instructed. We were

informed that local practice was being reviewed in light of this case. The advocate depute took no issue with the underlying rationale for holding such a procedure. The concerns about the reliability of this kind of evidence were well understood and accepted. It was to be noted that the sheriff had been conscious of the possible limitations of the evidence.

[14] The failure on the part of the Crown to follow this fundamental step had not produced unfairness at least to the extent which rendered the evidence inadmissible.

[15] The advocate depute accepted that fairness was the test and whether what had transpired was unfair had to be decided according to the circumstances of the particular case under consideration.

[16] If the court resolved the issue of admissibility in favour of the appellant we were invited to conclude that there had been no miscarriage of justice having regard to the other evidence which implicated the appellant in the commission of the offences.

Decision

The admissibility of the impugned evidence

[17] In our opinion, the sheriff erred in repelling the defence objection. The circumstances of this case are highly unusual and unlikely, it is to be hoped, to be repeated. There was a very marked gap in time between the offences of which the appellant was convicted and the trial itself. Despite the existence of the Lord Advocate's guidelines prescribing the appropriate identification procedure no such procedure was instructed by the Crown. The advocate depute accepted that there was no basis on which that failure could be justified and he did not take issue with the positive advantages that the use of such a procedure would have brought to the sheriff's assessment of the evidence relating to identification.

[18] It is important to spell out what that failure led to. The Crown asked the relevant witnesses to listen to a very short excerpt of a police interview with a view to comparing it to their recollection of phone calls which were made to their place of employment many years before. The appellant was not known to any of the witnesses and the excerpt played did not contain any of the offensive language used by the caller. It appears that there had been a recording of one of the telephone calls but that it had been lost. As a consequence, the sheriff was left to try to make a meaningful assessment of that evidence without the benefit of the controlled conditions of an identification procedure which had been expressly provided for in the guidelines. In our view this omission was not some minor technical breach but a significant failure which led to the use of the evidence in circumstances where the well understood risks of a wrongful identification were obviously present and not counterbalanced by the use of the prescribed identification procedure. There was no explanation for why the guidelines were not followed. The opportunity was lost to test the reliability of the evidence led at trial. This was to be contrasted with the use of the VIPER parade in respect of two of the complainers one of whom identified the appellant and the other a stand in. The use of the identification made at the parade provided support for the reliability of the positive identification made in court.

[19] While the sheriff's attention was not drawn to the existence of the guidelines before she made her ruling, all she says on the point is that it may well have been preferable for a voice identification parade to have been held without considering the full implications of the failure to do so. We note that the sheriff had reservations about the quality of that evidence. Although there was other evidence which pointed to the appellant, to which we shall turn, it appears to us clear that the sheriff accepted the voice identification as reliable notwithstanding those reservations.

[20] Given our conclusion on the admissibility of the evidence we do not consider it necessary to express a view on Ms Ogg's first submission that the circumstances of the present case are capable of being distinguished from those under consideration in *McIntyre*.

The sufficiency of the remaining evidence

[21] In the event that we were prepared to hold that the evidence was inadmissible it was submitted on the appellant's behalf that there was insufficient remaining evidence to justify conviction on the three charges.

[22] The sheriff makes reference to other adminicles of evidence which might be said to implicate the appellant. In summary these are as follows:

> Charge 1: the call logs which show a mobile phone given to the appellant by his former partner was used to call MDP on 15, 17 and 18 May 2017. The dates match the complainers' recollection of when they received calls.
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> Charge 3: the evidence of the witness LD who identified the appellant as the person who had come into HG 17 July 2016 and asked for a massage. This request was capable of being interpreted as a request for a sexual service. The calls which form the subject matter of the charge began shortly afterwards. The witness was able to say in relation to a call which she answered that the caller's voice sounded very similar to the person who had asked for a massage and that she believed it was the same man.
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> Charge 4: the evidence that BH had been called four times on 20 September and twice on 26 September both 2017 and each time from a landline number which was registered to the family home at which the appellant had been living at the relevant time. The only other male living there at the time was the appellant's father who did

not speak good English. The timing of the calls corresponded, broadly speaking, to the recollection of the two complainers who gave evidence.

[23] The sheriff considers the approach which she would have taken in the event that there had been no evidence of voice identification by reference to the application of the principle set out in *Howden* v *HMA* 1994 SCCR 19. The sheriff draws attention to the following considerations:

> The targeting of locations staffed predominantly by females; the nature of the comments made in the calls and their similarity; the majority of the witnesses describing some Scottish Asian, Glaswegian male voice as the caller; and the fact that the calls took place over a relatively short period of time.

[24] The sheriff says she would have concluded the person who made the calls in charge 3 was the same as the person who made the calls in charges 1 and 4.

[25] In our opinion there is merit in first considering whether the principle in *Moorov* v *HMA* 1938 JC 68 might be capable of being applied to the evidence in the present case. In *Lindsay* v *HMA* 1993 SCCR 868 the issue was whether it was necessary for the application of the principle in *Moorov* that there be eyewitness identification in respect of each charge. Having referred to the opinion of the Lord Justice General (Clyde) in *Moorov*, the Lord Justice General (Hope) made the following observations:

> "The point which emerges from that statement of principle is that what matters as far as the *Moorov* doctrine is concerned is the underlying unity as regards the separate acts established by the evidence of the various witnesses. We cannot find anything in any of the statements of principle which makes it necessary that the evidence of identification of the accused in each case must be that of a single eyewitness to the crime. There must of course be evidence in the case of each charge that the accused was the perpetrator of it and, since the *Moorov* doctrine is concerned with the problem of corroboration where only one witness can speak to this, it is a feature common to all these cases that this depends on the evidence of a single witness as to each act. But we cannot see any sound reason in principle why the evidence which identifies the accused as the perpetrator has to be the evidence of an eyewitness. In

> our opinion it is not an extension of the *Moorov* doctrine to say that the evidence of identification may come from a single witness from whose evidence, together with other evidence, it can be inferred that the accused was the perpetrator."

[26] With those observations in mind we refer to the summary of the evidence given by the sheriff in respect of each of the charges. In relation to charge 3 there is a source of evidence from LD who identified the appellant as the person who came into the premises and asked for a massage. In addition she gave evidence that the voice on the telephone call which she took sounded very similar to the man who had asked for a massage and that she believed that the man on the phone was the same man who had asked for the massage. That identification was made independently of the comparison with the recording of the police interview.

[27] In relation to charge 4 there was evidence that the landline number registered to the house at which the appellant was then living was used to call the premises four times on 20 September and twice on 26 September and that the times and dates corresponded with the evidence of when the witnesses say that some of the calls were made. We agree with the sheriff that this was a strong piece of evidence pointing to the appellant as the maker of those calls.

[28] In respect of the remaining charge the evidence showed that a mobile number registered to Ms A was used to phone the premises on 15, 17 and 18 May 2017 and she gave evidence that she had given that mobile phone to the appellant at the end of 2016 or the beginning of 2017. Other evidence showed that some of the calls in which the caller made sexual remarks were made on those days. In our view these pieces of evidence would allow a reasonable inference to be drawn that the appellant was the maker of those calls.

[29] There was no dispute that the crimes themselves were committed and the same person made all the calls and asked for a massage. In our view there are a number of

important similarities in the conduct complained of such that it would have been open to the sheriff to have applied the *Moorov* principle to the three charges under consideration provided she was also prepared to accept the adminicles of evidence to which we have referred as providing one source of identification of the appellant in respect of each charge as having made the calls in question.

[30] On that basis we have reached the view that the appellant's submission in respect of the sufficiency of the evidence should be rejected.

[31] In *Wilson* v *HMA* 2019 SCCR 273 the Lord Justice General (Carloway) observed at para [37] in relation to the *Howden* principle:

> "However, if one incident involving one complainer is proved by corroborated evidence to have been committed by the accused, then other incidents, which are themselves proved to have happened by corroborated evidence, will also be proved to have been perpetrated by the accused if the evidence yields an inference that they must have been committed by the same person…."

[32] Had it been necessary to determine this point and having regard to the sources of evidence referred to by the sheriff we would not have been persuaded that it would have been open to convict the appellant by the application of this principle. The short point is that in none of the three charges, according to her note and leaving out of account the impugned evidence, was there corroborated evidence to establish that the accused was the perpetrator of one of the offences. That is the essential starting point for the application of the principle and it is not present in the evidence which remained to be considered.

[33] Having resolved the issue of admissibility in the appellant's favour the second ground of appeal becomes academic. The effect of our decision means that the impugned evidence should not have been before the sheriff for her consideration. The question of whether she erred in relying on it is no longer of any practical significance.

[34] However it needs to be recognised that this was not the basis on which the sheriff proceeded to convict the appellant. In the circumstances it remains to be decided whether it can be affirmed that the sheriff would have convicted on the basis of the evidence which we have identified had she left the impugned evidence out of account.

[35] The findings in fact made by the sheriff have, for the most part, not been challenged. Those which have relate to the sheriff's conclusion that the appellant was the perpetrator (findings in fact 9, 18, 29, 32-34). On the unchallenged findings in fact and having regard to the sheriff's assessment of the evidence would she have reached the same conclusion that the appellant had been proved to be the perpetrator?

[36] We have come to the conclusion that the sheriff would still have convicted on the basis of the evidence which she did accept and the inferences open to her from those adminicles of evidence. In particular, the sheriff commented on the strength of the evidence that the appellant had made the calls from the landline in his parent's house on two separate days in September 2017 and that he had used the mobile number to call MDP on 15, 17 and 18 May 2017. Once that evidence is accepted it is a short step to conclude that the appellant made all the calls and the same applies in respect of the remaining charge and the evidence given by LD. The implausibility of someone else having made the other calls is obvious given the content of those calls. The remaining question is whether the sheriff would have applied the *Moorov* principle to the three charges. Standing the sheriff's view of the similarities between the offences and the link in time in our view it is clear that had the sheriff approached the matter from this perspective she would have applied the principle and convicted the appellant.

[37] Accordingly we are not satisfied that the appellant has demonstrated that there has been a miscarriage of justice.

[38] In the circumstances we need not answer question 2 for the reasons given and we would answer the remaining questions posed in the stated case as follows: 1 and 3 in the affirmative; 4 and 5 in the negative. In the result the appeal is refused.