APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 65
HCA/2019/303/XC

Lord Justice Clerk
Lord Menzies
Lord Glennie

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL FROM THE SHERIFF APPEAL COURT
ON A POINT OF LAW

by

PAUL McFADYEN

Appellant

against

PROCURATOR FISCAL, PAISLEY

Respondent

Appellant: Ogg (sol adv); McCusker McElroy
Respondent: Prentice QC (sol adv) AD; the Crown Agent

11 October 2019

[1] The appellant was convicted of two charges under section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. These charges had appeared on a complaint which also libelled as charge 1 an alleged sexual assault by touching of A, aged 14, of which the appellant was acquitted. The charges of which he was convicted were (2) that he

behaved in a threatening, or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that he did attempt to entice B, who was aged 18, into his car; and (3) that he behaved in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that he did follow A, aged 14, entice her into his car, ask for her name and telephone number and repeatedly ask her to come to his home address. The complainer A gave evidence that the appellant had placed his hand on her thigh.

[2] At the conclusion of the case the presiding sheriff invited submissions from the crown and defence on the question whether there was a significant sexual element to the offences, such that the notification requirements of the Sexual Offences Act 2003, Schedule 3, paragraph 60 might apply. The notification requirements apply to a list of specific, scheduled sexual offences. Under paragraph 60 of schedule 3 they also apply on conviction of an otherwise non-scheduled offence in circumstances where:

> "the court, in imposing sentence or otherwise disposing of the case, determines for the purposes of this paragraph that there was a significant sexual aspect to the offender's behaviour in committing the offence."

[3] In response to the sheriff's invitation, the PFD submitted that there was a significant sexual aspect to the offences of which the appellant had been convicted. The defence solicitor submitted that any sexual element was restricted to charges 1 (of which the appellant was acquitted) and 3. The sheriff concluded that there was a significant sexual aspect to the conduct of which the appellant was convicted and that the notification requirements were triggered.

[4] In a subsequent appeal against conviction and sentence the Sheriff Appeal Court concluded that the sheriff had been entitled to reach this conclusion and refused the appeal.

The appellant has been given leave to appeal against that decision on the ground only that there had not been adequate notice that the conduct was such as might trigger the notification requirements.

Submissions for the appellant

[5] The argument was advanced primarily under reference to *Hay* v *HMA* 2014JC 19, and the cases decided contemporaneously with that case. In *Hay* the Lord Justice Clerk (Gill) noted that, in a case in which reliance was being placed on paragraph 60, it may not always be apparent to the accused that the question of there being a significant sexual aspect could arise. He added (para 40):

> "In my opinion, if the Crown chooses to libel an offence that is not on the specific list, for example by libelling breach of the peace ….., and libels it without further narrative, the accused is entitled to infer that the Crown makes no suggestion that there is a significant sexual aspect in the accused's behaviour. If however in libelling an offence that is not on the specific list the Crown proposes, in the event of conviction, to contend that there is a significant sexual aspect, fair notice requires, in my opinion, that that should be narrated in the libel itself together with the alleged facts and circumstances from which that aspect is to be inferred."

On the basis of this paragraph, it was submitted in the Case and argument that if the crown contended that there was significant sexual element in an offence then that assertion required to be narrated in the libel, as did the facts and circumstances from which that aspect was to be inferred. The oral submission came to be that the latter would be sufficient. What was required was a narration of facts and circumstances which could reasonably be said to allow the inference that there was a significant sexual element to the conduct. It was submitted that there had been no adequate notice in this case and that the court had not been entitled to proceed to consider that question.

[6] The conduct narrated in the charges did not have the clear sexual specification such as was found in, for example, *Halcrow* v *Shanks* 2014 JC 1 - handling private parts over clothing – and *Akdeniz* v *Cameron* 2014 JC 133 – repeatedly cuddling the complainers and touching them. It was recognised that the conduct in question was very similar to the conduct in *Hay* but in that case the persistency of the conduct was an important element of the decision. In *Thompson* v *Dunn* 2014 JC 16 the Appeal Court held that a libel of seizing hold of complainer's buttocks did not meet the requirements of fair notice.

Submissions for the respondent

[7] The libel in charges 2 and 3 required to be considered in the context of the whole complaint, which had also contained charge 1, libelled as a sexual assault contrary to section 3 of the Sexual offences (Scotland) Act 2000. Charges 1 and 3 were both part of the same event and it was obvious on the plain fact of the narrative of charge 3 that it was capable of giving rise to the inference that there was a significant sexual element to the conduct. In its context, the same could be said for charge 2. It was a reasonable inference from that narrative that the question of a significant sexual element was put in issue, and would be tested by the evidence.

Decision and analysis

[8] Paragraph 41 of *Hay* must be read in its proper context. It was dealing with the situation where the crown contention was that a non-scheduled offence justified the inference which would trigger the notification requirements. In such cases the clearest and safest way for the Crown to give notice of its intention would be to make a specific averment that there was such a significant element. However, in *Hay* itself, where none of the charges

libelled contained such an averment, the court nevertheless concluded that the court had been entitled to find that paragraph 60 applied. The case did not fail for want of notice. Moreover, the court recognised that a court may conclude that there is a significant sexual aspect to behaviour either *ex proprio motu* or where the matter only truly appeared in that light after trial or at sentencing. The observations in para 41 of *Hay* refer also to circumstances where the crown libel a non-scheduled offence "without further narrative" from which the sexual nature of the offence may be divined. We cannot therefore read from para 41 of *Hay* the assertion that a significant sexual element may be established only where direct assertion of that has been made in the libel. This may indeed be the clearest and safest way for the Crown to give notice of its intention when libelling non-scheduled offences. However, in our view *Hay* is also authority for the proposition that it would constitute sufficient notice for the terms of the libel as narrated to contain elements from which the applicability of paragraph 60 may clearly and reasonably be inferred. In our view the two critical issues which arise from *Hay* are that the circumstances of the libel must set out facts and circumstances from which a significant sexual aspect of the case may be inferred; and that in all cases where the issue arises at a hearing the sentencing judge must give the defence a full opportunity to make submissions on the matter. In paragraph 52 the Lord Justice Clerk noted that

> "Since the purpose of registration is to protect the public against a perceived danger, the question whether a sexual aspect of the accused's behaviour was significant should be assessed in that light."

This was a matter explored further in *JGW* v *HMA* 2013 SCCR 152, para 12, where the court observed that the comments in para 41 of *Hay*:

> "...were confined to the situation where the Crown are seeking to persuade the court that although an offence does not appear on the list of offences for which notification is mandatory, nevertheless notification should be required…".

The court added, however, that:

> "...the court is not precluded from considering the question of notification in circumstances where the Crown are not adopting such a position. The court has a duty to protect the public by imposing notification requirements in appropriate cases. Provided the court affords an accused an appropriate opportunity to make representations about the application or otherwise of the notification requirements, it is entitled to make such an order if it is satisfied that there is a significant sexual element to the offence of which the accused has been convicted."

Application to the present case

[9] The questions whether the court was entitled to conclude, as a matter of fact, that there was a sexual element to the offences, or the relevance of taking into account evidence led, initially at least, in respect of a charge not proved, are not ones which arise in this appeal. Leave on these points was refused at the first sift, and the reasons for that refusal endorsed at second sift. The only issue which arises is whether there has been a failure to give the notice required by *Hay* and whether there had as a consequence been a miscarriage of justice.

[10] The first point of significance is that this is not a case where the libel contained only non-scheduled offences. The first charge on the complaint related to a scheduled offence and in our view it cannot be said that the complaint did not give adequate notice that notification may be an issue in respect of any of the charges. The behaviour involved in charges 2 and 3 involved an attempt by a middle aged man to entice an 18 year old young woman into his car whilst she was on her way to work and following, and enticing into his vehicle, a 14 year old child, asking her name and telephone number and repeatedly asking her to come to his home address. The nature of this conduct together with the terms of charge 1, provided sufficient notice.

[11] In any event, it is clear from the Stated Case that it was the sheriff who raised the issue of whether the conduct contained a significant sexual element, in which case the obligation of the court was to invite submissions on the point, and to allow an adjournment for further consideration if appropriate. In this case the defence was given a full opportunity to address the court and did not dispute that charge 3 at least contained a significant sexual element. The requirements identified in *Hay* for proceeding in this way were thus fulfilled.

[12] In any event, even if we had been satisfied that there had been an insufficiency of notice, we would not have been able to conclude that there had been a miscarriage of justice. The appellant's solicitor was given the opportunity to make representations about the issue, and did not complain of any lack of notice or suggest that the possibility that the notification requirements might apply came as a surprise. No request was made for an adjournment to consider the matter further, and indeed the suggestion that there was a significant sexual element was only partially challenged.

[13] In these circumstances the appeal must fail.