APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 46
HCA/2022/380/XC

Lord Justice General
Lord Matthews
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the appeal from the Sheriff Appeal Court under section 194ZB of the Criminal Procedure (Scotland) Act 1995

by

PROCURATOR FISCAL, EDINBURGH

Appellant

against

FAISAL AZIZ

Respondent

Appellant: Edwards KC AD; the Crown Agent
Respondent: Mackintosh KC, Culross; John Pryde & Co

13 December 2022

Introduction

[1] This appeal concerns what constitutes the offence of "communicating indecently etc." under section 7 of the Sexual Offences (Scotland) Act 2009.

[2] Section 7 makes it criminal to direct a "sexual verbal communication" at a person, without any reasonable belief that the person consents to the communication, for the

purposes of: (a) obtaining sexual gratification; or (b) humiliating, distressing or alarming the person. Section 49 says that these purposes are established if "in all the circumstances it may reasonably be inferred [that the person directing the communication] was doing the thing for the purpose in question."

[3] The criminative circumstances are said to be those of a private hire taxi driver offering his services in exchange for sexual favours. The sheriff held that this amounted to a communication for the purpose of "obtaining sexual gratification". The Sheriff Appeal Court held that it did not.

The Stated Case

[4] The respondent was convicted of a charge which libelled that:

> "On 05 October 2019 at South College Street, Edinburgh within a motor vehicle … you … whilst acting in the course of your employment as a taxi driver did intentionally and for the purpose of obtaining sexual gratification or of humiliating, distressing or alarming [TM] … aged 18 … and [TE] … aged 21 … both persons unknown to you … did direct a sexual verbal communication to them without their consent in that you did make a sexual remark to them;
> CONTRARY to section 7(1) of the Sexual Offences (Scotland) Act 2009".

[5] It is important to note *in limine* that this is an appeal by stated case which poses only two questions:

> 1. Did I err in rejecting the no case to answer submission under section 160 of the [Criminal Procedure (Scotland) Act 1995]?
>
> 2. On the facts stated, was I entitled to convict the [respondent]?

It was accepted that there was sufficient evidence upon which to return an alternative verdict of guilty of a breach of the peace (1995 Act, sch 3 para 14(6)). That being so, the sheriff was bound to reject the submission of no case to answer. Only the second question remains. What then were the facts found?

[6] The respondent was a 33 year old private hire taxi driver. TE was a 21 year old care worker and her friend, TM, was an 18 year old beauty assistant. At about 3.00am on 5 October 2019, the complainers had left a nightclub in Tollcross and planned to return home to the Magdalene area (about 4 miles away). They had enough money for a bus or they could pay for a taxi on reaching their destination. At about 4.00am, they were in Nicholson Street. They tried to flag down a silver Volkswagen Passat private hire taxi which was being driven by the respondent towards the city centre. The respondent drove past the complainers, but then turned round, passed the complainers again, turned into South College Street and parked. The complainers thought that he had stopped to pick them up.

[7] The complainers each opened a rear passenger door and spoke to the appellant. Neither had met the respondent before. They asked him if he could take them home, but told him that they did not have any money. He said words to the effect of "what else can you offer". He was asked what he meant by that. He replied: "sex?". TE did not feel safe or comfortable. TM felt frightened. South College Street was dark and empty. Both complainers got out of the taxi. TE took a photograph of the registration plate. The appellant drove away.

[8] The findings in fact continues:

> "14. .. [T]he [respondent's] offer … to accept sex *in lieu* of payment of the taxi fare was a sexual verbal communication for the purposes of section 7(1) of the 2009 Act.
>
> 15. … [T]he [respondent] intentionally and for the purpose of obtaining both immediate and deferred sexual gratification, directed a sexual verbal communication at [TE] and [TM] without either of them consenting to it being so directed and without any reasonable belief that either of them consented to it being so directed.
>
> 16. … [T]he [respondent's] conduct towards [TE] and [TM] caused them alarm.
>
> 17. … [T]he [respondent's] conduct towards [TE] and [TM] would have been genuinely alarming and distributing, in its context, to any reasonable person.
>
> 18. The [respondent's] conduct towards [TE] and [TM] threatened serious disturbance to the community."

[9] The sheriff thus found in fact (ff 14 and 15) that the respondent, intentionally and for the purpose of obtaining both immediate and deferred sexual gratification, directed a sexual communication to the complainers without any reasonable belief that either of them consented to his approach. There is no challenge to that finding in the stated case. A request at the adjustment stage that the finding be deleted does not constitute such a challenge. It ought to have been posed in the question: "On the evidence, was I entitled to make finding in fact 15?" (*Prentice* v *Skeen* 1977 SLT (notes) 21). The absence of such a question ought to have been fatal to the appeal to the Sheriff Appeal Court. The SAC were not entitled, in the absence of a properly directed question, to go behind the findings in fact and look directly at the evidence. The appeal from the sheriff ought to have been refused on that basis. That said, the sheriff, having considered the application for a stated case, might have framed an appropriate question relating to the findings in fact given the nature of the respondent's complaint. The court will therefore consider the merits of that complaint.

Finding in Fact 15

The sheriff

[10] The sheriff accepted the testimony of the complainers about what had happened (as set out in his findings in fact). He rejected the appellant's account that, when he had parked, he had been approached by the complainers, told them that he could not take them without a prior booking and had driven off.

[11] The sheriff considered that it was a reasonable inference that the respondent had acted deliberately and had therefore intentionally directed the sexual communication at the complainers. He inferred from this that the respondent's primary purpose had been to obtain "deferred sexual gratification" by later engaging in sexual activity with one or both of

the complainers. A secondary purpose was to obtain some immediate sexual gratification by watching the complainers' reaction to what he had said. The sheriff did not consider that the respondent's intention had been to humiliate, distress or alarm the complainers; even if they were in fact alarmed and the conduct would have constituted a breach of the peace.

The Sheriff Appeal Court

[12] The SAC considered that the issue was whether it could reasonably be inferred that the respondent made the communication for the purpose of sexual gratification or for the purpose of humiliating, distressing or alarming the complainers. In contrasting the circumstances with those involving comments to a young girl in *Raza* v *Procurator Fiscal, Glasgow* [2017] SAC (Crim) 6, the SAC referred to the exchange between the respondent and the complainers as "short and inspecific". There was:

> "[31] … no evidence justifying the drawing of a reasonable inference that the [respondent] obtained sexual gratification from the making of the communication. There was no evidence justifying such an inference that he had the purpose of humiliating, distressing or alarming the complainers. While any gratification may be deferred to a later time (*Robinson* v *Cassidy* [2013 SCCR 359]), it is still necessary … to establish that such gratification, or such intent, was directly connected to the making of the remarks.
>
> [32] Hoping to be offered sexual favours, or the expression of such hope, is different from obtaining sexual gratification. Obtaining sexual gratification is … the satisfaction of a sexual urge by the making of the communication, and is apt to include satisfaction from observing the reaction of the person to whom the communication was made. … [T]he sexual gratification must be intrinsically connected to the making of the communication. This case turns on the extremely limited nature of what passed from the [respondent] to the complainers. The making of the remark did not invade the sexual autonomy of either of the complainers."

[13] On this basis the sheriff had erred. He could only have convicted the respondent of a breach of the peace. Even then, standing *HM Advocate* v *Hay* 2014 JC 1952 (at para [52]), the

conduct could not be said to have had a "significant sexual element" as it did not indicate an underlying sexual disorder or deviance from which society should be protected.

Submissions

The Crown

[14] The Advocate depute argued that, although the exchange between the respondent and the complainers may have been short, its meaning was clear, direct and specific. Context was important (*Ingram* v *PF Forfar*, unreported, SAC, statement of reasons, 16 June 2021). There was a considerable power imbalance between the complainers and the respondent. It was reasonable to infer that the respondent's intention had been to obtain sexual gratification. The latter was not limited to immediate gratification but could extend to a longer term plan (*Robinson* v *Cassidy* 2013 SCCR 359 at para [2], citing *R* v *Abdullahi* [2007] 1 WLR 225). It was a jury question and thus, in a summary case, a matter pre-eminently for the sheriff.

[15] The SAC had erred in its approach to sexual autonomy. They ought to have considered whether the sexual communication was intentionally made without consent. If so, it was an invasion of the complainer's sexual autonomy (Scottish Law Commission: *Report on Rape and Other Sexual Offences* (No 209; 2007) paras 2.1-5, 3.62). In their written Case and Argument, the Crown had argued that whether an offence had been committed depended on whether the respondent had acted for a purpose defined in the 2009 Act. However, at the hearing on the appeal, it was said, under some prompting from the court, that the test in section 7 was objective. Even if there had been no error in that respect, the SAC erred in their application of *HM Advocate* v *Hay*. The respondent's conduct met the test

for sexual deviancy from which the public was entitled to be protected. He ought to have been subject to the notification requirements.

[16] The court should decline to consider the respondent's late compatibility minute (Act of Adjournal: Criminal Procedure Rules 1996, rule 40.3). The issue had been live from the start of the proceedings. It should at least have been raised in the appeal to the SAC (*Nyiam* v *HM Advocate* 2022 JC 57 at para [22]).

The respondent

[17] The respondent accepted that he ought to have been convicted of a breach of the peace. His primary concern was about being made subject to the notification requirements.

[18] The SAC had correctly identified the issue as being what reasonable inferences might be drawn as to the purpose of, what was accepted to be, a sexual communication which was made without consent. The test of what could be inferred was objective. There was a distinction between a short communication which lacked detail and one involving repeated contact with schoolgirls. A reasonable inference of sexual gratification could not be drawn. As the SAC held, it was necessary to establish that the gratification, or intent, was directly connected to the making of the communication. Asking for sexual favours differed from obtaining gratification. It did not invade the complainers' sexual autonomy. Care should be taken before relying on *Robinson* v *Cassidy* or *R* v *Abdullahi* given the different nature of the facts and crimes involved.

[19] The respondent's compatibility issue minute should be considered. This argued that section 16 of the 2009 Act envisaged that persons who wish to engage in sexual activity should take steps to ascertain whether the other party is consenting. As distinct from *Nyiam* v *HM Advocate*, the Crown's decision to appeal the SAC's determination raised important

points of principle and practice. When the prosecutor sought a wide application of section 7, the engagement of Article 8, as encompassing the right to establish relationships should be considered (*Niemietz* v *Germany* (1993) 16 EHRR 97 at para 29). Section 7 potentially criminalised a communication which amounted to an inquiry as to whether a person would consent to sexual activity. It was thus an interference with Article 8.

Decision

[20] The common law has always criminalised certain conduct which interferes with the sexual autonomy of others, notably, but not exclusively, females. It did this in two ways. First, it rendered criminal acts which involved the physical invasion of the body of another in the form of, for example, rape and indecent assault. Secondly, it declared illegal certain forms of conduct which were thought to corrupt certain protected groups, notably of children, in the form of lewd, indecent and libidinous practices. Other forms of sexual conduct, if occurring in public, might also be criminal as offending against morality (eg indecent exposure).

[21] The existence of a more all encompassing crime in the form of shameless indecency, which was based on Macdonald's well-known statement that "All shamelessly indecent conduct is criminal" (*Criminal Law* (5th ed) 150), was declared not to exist in *Webster* v *Dominick* 2005 JC 65. In *Webster*, the Lord Justice Clerk (Gill) said (at para [49]) that a lewd conversation could be criminal, as a lewd, indecent and libidinous practice, but it would have to involve a person, such as a child, in a specially protected class. Otherwise the accused's actions would require to outrage the public's sense of decency (*ibid* para [50]).

[22] It was against that background, and the redefinition of rape in *Lord Advocate's Reference (No. 1 of 2001)* 2002 SLT 466, that the Scottish Law Commission produced its *Report*

on Rape and Other Sexual Offences (no 209) in 2007. This examined how, what it described as, "the most fundamental principle" of "Respect for sexual autonomy" might find its way into the criminal law. This respect was described as operating (para 1.25):

> "Where a person participates in a sexual act in respect of which she has not freely chosen to be involved, that person's autonomy has been infringed, and a wrong has been done to her. This generates a fundamental principle for the law on sexual offences, namely that any activity which breaches someone's sexual autonomy is a wrong which the law should treat as a crime."

[23] The most obvious breaches of sexual autonomy, in the context of participating in a sexual act, involve some form of physical interference with the person of another. It may not be immediately clear how a communication could involve a sexual act. However, the Commission went on to consider conduct which did take the form of communicating with someone without her consent. Thus (para 3.62):

> "We therefore recommend that it should be an offence to make a communication which is sexual in nature to a person without that person's consent … [T]his offence would require that the accused acted for the purpose of obtaining sexual gratification or of humiliating, distressing or alarming the victim" (see also 3.63).

This thinking resulted in the terms of the operative section which made it an offence to make a sexual communication for these purposes (draft Bill, s 6). Presumably, such a communication was being classified as an invasion of sexual autonomy.

[24] Section 7 of the 2009 Act followed the Commission's draft. However, what was not in the draft Bill was what became section 49 of the Act. The critical difference, which section 49 created, is that the relevant purpose is established (i.e. held proved) if it can reasonably be inferred that the accused was "doing the thing" (acting?) for that purpose. That is an objective test. The court is not directed towards determining what the accused's subjective purpose (intention) actually was, since that purpose is proved if an inference of one of the stated purposes is capable of being drawn from the accused's actings.

[25] There is little difficulty in inferring from the respondent's conversation with the complainers that one purpose may have been to obtain sexual gratification. That is exactly what his request was. Whether the expectation was for immediate, or deferred, gratification does not matter. The only defence open, once this type of communication had been proved along with the complainers' lack of consent, would have been to raise the issue of reasonable belief that the complainers consented. That might have been open had the communication been made in a social setting and between persons known to each other. It could hardly have been available in a situation involving strangers in the relationship of potential taxi driver and passenger in the public street where the passenger's obvious desire is to go home and not to indulge in sexual activity. The sheriff arrived at the correct decision and this appeal ought to be allowed also on this basis; restoring the sheriff's conviction.

Significant sexual aspect

[26] Had the appeal against the conviction on section 7 failed, the court would have held that the respondent ought to have been made the subject of the notification requirements of the Sexual Offences Act 2003 because the offence, had it been classified as a breach of the peace, involved a "significant sexual aspect" (2003 Act, Sch 3 para 60). No doubt it is necessary for the sentencer to keep a sense of proportion and to use common sense when determining whether a significant sexual aspect is evident (*HM Advocate* v *Hay* 2014 JC 19, LJC (Gill) at para 52). If the conduct indicates an underlying sexual disorder or deviance, that will be a strong indicator. Here, the respondent was carrying out his employment as a licensed taxi driver with responsibilities towards the persons whom he might encounter in his trade. Those persons, especially if they are vulnerable as a result of youth and alcohol,

are entitled to be protected from predatory males seeking sexual favours in exchange for fares. The significant sexual aspect is made out.

Compatibility Minute

[27] The first calling of the complaint was on 16 December 2020, when an intermediate diet was fixed for 7 May and a trial diet for 28 May 2021. In terms of rule 40.3(a) of the Act of Adjournal (Criminal Procedure Rules) 1996, the respondent required to lodge a minute giving notice of any compatibility issue prior to the intermediate diet. He did not do so, even although he could have done. Where such an issue is sought to be raised in an appeal in a summary case, the party requires to raise it in the application in the stated case (rule 40.4). The respondent did not do so in his application of 18 January 2022. The issue is not covered by the terms of the stated case. In particular, there is no question directed towards it. It was not raised at the hearing before the SAC. It featured for the first time only a few weeks before the hearing before this court. The court, which forms a second tier of appellate jurisdiction, is being asked to look at the matter at first instance. In the absence of cause shown (rule 40.6(1)), it declines to do so. In so deciding, it takes into account the fact that it was not the respondent's position that he was innocently seeking to ascertain whether these young and, to a degree, vulnerable, complainers were willing to engage in sexual activity with him. Rather, he said the incident simply did not happen. In these circumstances, a complaint that his Article 8 rights were impinged, is not arguable.