SHERIFF APPEAL COURT

[2016] SAC (Crim) 30
SAC/2016/000445/AP

Sheriff Principal M M Stephen QC
Sheriff Principal I R Abercrombie QC
Sheriff J C Morris QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

APPEAL

by

JAMES THOMAS GIBSON LAUGHLAN

Appellant:

against

PROCURATOR FISCAL, PERTH

Respondent:

Appellant: Keenan (sol adv); Capital Defence, Edinburgh for Culley McAlpine, Perth
Respondent: Cottam, AD; Crown Agent

4 October 2016

[1] The appellant was convicted after trial at Perth Sheriff Court on 18 May 2015 of the following charges:

> "(001) on 22 February 2014 at Seven Acres Park, Perth, you JAMES THOMAS GREEN LAUGHLAN did assault Fiona Duncan, care of the Police Service of Scotland, and did strike her on the head causing her to fall to the ground and did thereafter repeatedly strike her on head and body with a block of wood and your fists, all to her injury

> (002) on 22 February 2014 at Seven Acres park, Perth, being a public place, you JAMES THOMAS GREEN LAUGHLAN did, without reasonable excuse or lawful authority, have with you an offensive weapon, namely a piece of wood; CONTRARY to the Criminal Law (Consolidation) (Scotland) Act 1995, Section 47(1) as amended"

The appellant appeals his conviction on both charges.

[2] The events of 22 February 2014 took place at 7 Acres Park, Perth. The precise locus is the gate leading from 7 Acres Park to the garden area behind a block of flats at Newhouse Road, Perth. The appellant at that time lived in one of these flats. The appellant was observed in an agitated state near the gate holding a block of wood. On the evidence led it was clear that the appellant had a grudge against the female complainer mainly due to her using the communal garden area behind his block of flats as an access to and from the park when she was exercising her two dogs. The sheriff concluded that the appellant had the block of wood in order to prevent the complainer coming through the gate entrance into the garden and that he had the wood in his possession with the intention of using it to cause injury. In due course the complainer and a friend, Ivy McIntosh, did indeed, come from the park with their dogs heading towards the gate. The complainer intended entering into the communal garden area by the gate where the appellant was lurking. The appellant challenged the complainer and assaulted her by striking her three times on the head and body with the block of wood. In the course of the assault the complainer fell to the ground and the appellant continued his assault using his fists whilst both were on the ground. He evinced by his words also a degree of animosity towards the complainer delivered in vulgar language. The complainer sustained injury. In reply to caution and charge in respect of charge 2 the appellant accepted he had a block of wood.

[3] This appeal has been granted leave to proceed solely in respect of question 2 of the stated case which is in the following terms:

> "2. *On the facts stated was I entitled to convict the appellant of charge 2 having convicted him on charge 1?"*

The sheriff was satisfied that there was sufficient evidence to convict the appellant of both charges and made discrete findings relating to both charges. The issue for this court is whether the appellant has been charged twice over on precisely the same facts and whether his conviction on both charges has resulted in what, has been described, as "double jeopardy".

[4] In his submissions the solicitor advocate for the appellant contended that the double jeopardy arose because the Crown relied on the same evidence for both charges namely, the evidence that the appellant was in possession of a block of wood which he subsequently used in an assault on the complainer. In his submissions reliance is placed upon the decision of the High Court of Justiciary Appeal Court in *McLean* v *Higson* 2000 SCCR 764.

[5] The advocate depute distinguished the facts of this case from *McLean* v *Higson*. In *Rodger* v *HMA* [2014] HCJAC 133, the approach to double jeopardy was set out clearly. In this appeal the *species facti* required to prove each charge were quite different and the sheriff was entitled to convict the appellant of both charges.

[6] The only issue which this court requires to determine in this appeal is whether the sheriff was entitled to convict the appellant of both charges. The sheriff has set out clearly in her stated case the evidence upon which her findings are based. The findings which support the statutory charge of possession of an offensive weapon are findings 2 to 6. These findings are supported by the evidence of the complainer and Mrs McIntosh together with the appellant's reply to caution and charge. The appellant in his evidence admitted grabbing the pallet or piece of wood. The findings in fact in support of charge 1 may be found in

findings in fact 7 onwards and amount to an assault by the appellant on the complainer using the wood and also by punching or striking her with his fists.

[7] Against that background we observe that the charges are quite separate and distinct. Charge 1 is a common law charge of assault and charge 2 is the statutory charge prohibiting the carrying of offensive weapons in terms of section 47 of the Criminal Law (Consolidation) (Scotland) Act 1995. It is an offence for any person to have with him in a public place an offensive weapon. An offensive weapon is an article made or adapted for use for causing injury to a person or intended by the person having the article for use for causing injury to a person either by the person having it or some other person. The locus was undoubtedly a public place. Charge 1, on the other hand, requires proof of a deliberate attack on another with evil intent with or without a weapon. Accordingly, the facts necessary to constitute the two offences are different. In this case the evidence demonstrates clearly that the appellant had the piece of wood or offensive weapon with him in a public place prior to him using it. The appellant was, therefore, in possession of the offensive weapon prior to it being used. The appellant was seen waiting near the gate with the block of wood. The sheriff found that he was in an agitated state. The sheriff is entitled to infer that the appellant had the block of wood for the purpose of causing injury. Subsequently, when the complainer appears from the park the appellant, indeed, uses the wood for that purpose, namely, an assault on the complainer. That in itself lends weight to the inference drawn by the sheriff in finding in fact (5).

[8] The Crown led evidence in support of each charge. The charge of having the offensive weapon with him preceded the assault and can be distinguished from the situation where an individual may, in the course of or immediately prior to an assault on another, pick up a piece of wood or brick or other offensive weapon and use it. Plainly the charges

are distinct and the evidence points to there being a gap in time between the appellant's possession of the wood and his use of it.

[9] In *McLean* v *Higson* [*supra*] the Crown consented to the setting aside of the conviction in terms of section 47(1) on the basis that the appellant was convicted on the same *species facti* relied on by the Crown for that conviction and the assault charge. Thus, it was accepted that exactly the same conduct led to the sheriff convicting of both charges. In *Rodger* v *HMA* [*supra*] the appellant was charged with a contravention of section 38(1) of the Criminal Justice and Licensing (Sc) Act 2010 and also a contravention of the Firearms Act 1968 by having in his possession a firearm or imitation firearm with intent to cause a person to believe that unlawful violence would be used against them. The appeal court was of the opinion that the *species facti* necessary to constitute the two statutory offences with which the appellants were jointly charged were not the same. The court acknowledged that it will not convict a person of more than one offence arising out of the same *species facti*. At paragraph 14 of the opinion it is stated:

> "In this context, the latin term *species facti* means simply the facts which must necessarily be established to constitute the offence in question. A body of evidence covering a course of conduct or sequence of activities may well involve the commission of offences with different *species facti*. Where two offences are charged there may be a partial overlap in the set of facts which has to be established for each offence. But in our view a partial overlap does not equiperate with identity in the *species facti*"

[10] Under reference to *Rodger* v *HM Advocate* [*supra*], we are of the opinion that the sheriff was entitled to convict of both charges. The *species facti* required to constitute both offences are quite separate. The charges may be proved from the facts and inferences which can be drawn from the general body of evidence led by the Crown. The evidence in this case covers a course of behaviour on the part of the appellant firstly, being in possession of the

piece of wood whilst in an agitated state and secondly, using the wood in the course of his assault on the complainer. The crime of using a weapon is quite different in character and facts to the offence of having or possessing it. The appellant's possession of the block of wood preceded and was separate in time to his use of it as a weapon in the assault. Any overlap or partial overlap in the facts required to establish or prove the separate offences does not in itself involve double jeopardy and clearly not in the circumstances of this case. We are, therefore, of the opinion that the appeal must be refused and we do so by answering the second question in the stated case in the affirmative.