

SCOTLAND / JUDGMENT

Stolarczyk v Procurator Fiscal, Stirling [2017] ScotHC HCJAC_23 (13 April 2017)

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[2017] HCJAC 23 [New search] [Help] APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 23 HCA/2017/000122/XC Lord Justice Clerk Lord Menzies Lord Turnbull OPINION OF THE COURT delivered by LADY DORRIAN, the LORD JUSTICE CLERK in APPEAL WITH LEAVE ON A POINT OF LAW FROM THE SHERIFF APPEAL COURT by GRZEGORZ STOLARCZYK Appellant against PROCURATOR FISCAL, STIRLING Respondent Appellant: Macintosh, Findlater; Faculty Services Limited, Edinburgh for Virgil M Crawford & Co, Stirling Respondent: Niven-Smith, AD; Crown Agent 30 March 2017

Background

- [1] On 9 August 2016, at Stirling Sheriff Court, the appellant went to trial on a complaint of assaulting his former partner by pushing her on the body and causing her to fall to the ground to her injury. Evidence
- [2] The Crown led evidence from the complainer and a police officer. A joint minute of admissions, which agreed the transcript of the interview which the appellant gave to the police, was lodged. The appellant pled self-defence. He neither gave nor led any evidence. The sheriff convicted the appellant as libelled.
- [3] The complainer gave unequivocal evidence of having been assaulted by the appellant just after 0600 hrs by being pushed from behind causing her to fall to the floor. She had a graze on her knee and banged her head on the wall. The police officer who interviewed the complainer with the assistance of an interpreter, noted that she had a graze to her right knee, about the size of a 50p piece. It was accepted that this was consistent with the complainer's account of events.

- [4] In the course of the police interview, the appellant initially denied that any assault took place, later admitted pushing the complainer, and finally added the qualification that he had been acting in self-defence. In the course of the interview the following statements were made: "It didn't happen." "I took her mobile.....she wanted to grab it back and I pushed her away." "She turned facing the radiator and she fell on it but it was her own intention I didn't push her enough to fall on it." When it was suggested to him that his admission of pushing her amounted to assault, he said: "I just pushed her back, it was her who attacked me, I was defending myself." When charged with assault he replied: "I was protecting myself and just pushed her back so she couldn't attack me"
- [5] In the statement, no further specification of the alleged attack by the complainer was given. It was suggested to the complainer in cross-examination that she punched, and tried to scratch, the complainer. The appellant did not give evidence. The Sheriff's decision
- [6] The sheriff rejected that aspect of the appellant's statement which contained the qualification of having acted in self-defence, and convicted the appellant. He did so because he considered that the necessary elements of self-defence could not be deduced from the terms of the statement. The elements were that the appellant had been attacked or was under reasonable apprehension of imminent danger of serious injury; and had no other means of avoiding the threat to his safety, other than to retaliate. The decision of the Sheriff Appeal Court
- [7] An appeal to the Sheriff Appeal Court by way of Stated Case was refused. The questions in the Stated Case were: "(i) was I entitled to reject the exculpatory parts of the appellant's statement to the police? (ii) did the Crown lead sufficient corroborated evidence to entitle the court to conclude beyond reasonable doubt that the appellant was not acting in self-defence? (iii) was there any direct or indirect evidence before the court which was no less strong than the appellant's evidence as contained within his mixed statements to enable the sheriff to conclude that the appellant's explanation was false? (iv) was the court entitled to find that the injury to the complainer's knee was caused by the appellant in the course of the incident referred to?
- (v) was I entitled to convict the appellant?"
- [8] At this stage three matters may be noted. First, that the statement appears to have been treated throughout as a "mixed statement". Second, that despite the terms of question 2, it does not appear from the stated case that any argument as to sufficiency had been presented and no submission of no case to answer was made: the defence argument was simply that the case had not been established to the requisite standard in that self-defence could not be said to have been excluded. Third, question 3, inserted by an accepted defence adjustment, relates to the statement in *Owens v HMA* 1946 JC 119 at p 124 per the Lord Justice General (Normand) that in circumstances of a statement such as the present: "The Crown cannot... take advantage of the admission without displacing the explanation or at all events presenting to the jury a not less strong case that shows directly or indirectly that the

explanation is false.”

- [9] The Sheriff Appeal Court refused the appeal for reasons given *ex tempore* and later issued to the parties in writing. Those reasons mistakenly refer to the appeal as being one against the refusal of a no case to answer submission. The court considered that Owens, decided prior to the enactment of section 160, was essentially concerned with the question of onus, and did not assist the appellant.
- [10] On the basis of Morrison the court considered that the sheriff was bound to consider both the incriminatory and exculpatory parts of the statement and to decide whether he accepted the whole or any part of it. Taking the Crown case at its highest, the court was satisfied that there was a sufficiency of evidence and that the appeal must fail. The Sheriff Appeal Court stated that “the sheriff was correct to reject the section 160 submission, and in that connection the first four answers in the stated case required to be answered in the affirmative.” On the basis that the sheriff was entitled to accept the sufficiency of the evidence before him, they also answered the final question in the affirmative.
- [11] Subsequently, this court received what purports to be a “report” from the Sheriff Appeal Court, consisting of a note from the Appeal Sheriff who delivered the court’s decision. The Appeal to the High Court of Justiciary
- [12] Leave to appeal to the High Court of Justiciary was granted. The appellant presented two grounds of appeal to this court. First, that a decision that the sheriff was entitled to repel a submission under section 160 when no such submission was made was inevitably productive of a lack of confidence in the rationality of the court’s decision, and constituted an error in law. Second, on the authority of Owens, the evidence of the complainer could not be used to displace the special defence of the appellant where her evidence was the only evidence of the assault having taken place.

Submissions

Appellant

- [13] It was submitted that, as the headnote of the report suggests, the case of Owens concerned sufficiency, not onus, and supported the appellant’s argument: essentially all the court had were two competing accounts, the injury being neutral, and the Crown had not displaced the qualification or presented a “not less strong” case demonstrating its falsity.
- [14] Reference was made to the case of Croly v HMA 2005 SCCR 389, which concerned a charge of assault to severe injury and permanent disfigurement. The Crown case consisted of the evidence of the complainer, and a detailed statement made by the appellant claiming that the complainer had attacked her to the point of near suffocation, and in fear of her life she used the knife. She also gave evidence to that effect. During the appeal an amended ground was added, to the effect that there had not been a sufficiency of evidence since the appellant’s account could not corroborate that of the complainer. In rejecting that

submission the court noted that the appellant's account involved her taking possession of and deliberately using a Stanley knife. Counsel submitted that the case could be distinguished from the present on the basis of the serious nature of the charge and the severe nature of the injury. *McInally v HMA 2006 SCCR 224* could be distinguished on the same basis. Advocate Depute

- [15] The Advocate Depute submitted (i) this was not a mixed statement; (ii) that no question of sufficiency arose; (iii) if it were a mixed statement, the sheriff had been entitled to reject the explanation; (iv) *McInally* could not be distinguished; and (v) the appeal should be refused. Decision
- [16] Before addressing the merits of the case, there are several procedural aspects of this case which require to be commented upon. As noted already, no question of sufficiency arose during the trial, where the argument was simply directed to the question whether the appellant should be convicted, the submission being that self-defence had not been excluded on the evidence and that "the Crown has not met the required standard for conviction". It may be that the sheriff should not have phrased question two in the way he did, since the wording appears to suggest a question of sufficiency, rather than the question which did arise. In any event, once the matter came to the Sheriff Appeal Court, the argument which was advanced was clearly one on sufficiency, which the format of the question allowed. In the circumstances the mistake of the Sheriff Appeal Court in incorrectly categorising the case as one in which a submission of no case to answer had been made is perhaps more understandable than it might otherwise have been.
- [17] The other procedural issue which we require to address is the submission of the "report" from one of the Appeal Sheriffs. As a report from one of the members of the Court, that document could not in any event be described as a report from the Sheriff Appeal Court. More importantly, even if it was such a report, there is no provision or authority for the provision of such a report. The normal approach on appeal, particularly an appeal from one appeal court to another, is that the appeal proceeds on the basis of the judgment issued by the Court. Statutory provisions allow for the submission of a report in certain circumstances – for example, in solemn proceedings where the decision under attack is not one of the Trial Judge but the jury, and where some explanation of the background, evidence and issues may be required; or in cases such as a sentence appeal, where no judgment will usually have been issued by the Court. Otherwise, the appeal must proceed on the basis of the judgment of the court appealed against. That this is the procedure to be adopted in appeals from the Sheriff Appeal Court to the High Court of Justiciary is clear from the terms both of the primary legislation and the Criminal Procedure Rules which govern such appeals.
- [18] We consider that we do not require to make any further comment on what is presented as the appellant's first ground of appeal: given that leave was granted on the second ground the merits of the appeal are available for decision by us in any event.

- [19] Turning to the merits of this appeal, we consider, in the first place, that the argument for the appellant proceeds on a false premise of fact, namely that the sheriff's reason for concluding that self-defence had been excluded lay in his acceptance of the evidence of the complainer. The sheriff made it quite clear that his reason for rejecting the issue lay in his assessment of the statement made by the appellant, looking at that statement in all its parts. There was no evidence before the Court to suggest that the complainer had either punched or tried to scratch the appellant; questions to that effect do not constitute evidence. The only specification of the alleged "attack" by the complainer was that she wanted to grab back her phone, which the appellant had taken. We consider that the sheriff was correct in reaching this conclusion.
- [20] Furthermore, although we accept that the sheriff might have erred in seeming to suggest that for self-defence in assault there was a requirement for an apprehension of serious injury, the matters which he actually took into account in this regard were perfectly valid in relation to the question of equivalence, which remains relevant in a case of assault as in a more serious case. Finally, there was absolutely no basis upon which the sheriff might even have been caused to have a doubt on the question of whether the appellant might have had a means of escape.
- [21] The sheriff was entitled to conclude that no doubt was cast upon the admission by examination of the terms of the statement itself. On the basis of the statement made by the accused the question of self-defence does not arise at all. In our view, the statement is not in fact a mixed statement at all.
- [22] Even if the statement were to be treated as such, it is quite clear that in a case of a mixed statement the sheriff may accept the admission and reject the qualification. In *Morrison*, at p311 the court noted the observations in *R v Sharp*
- [1988] 1 WLR 7, at p15 that: "It is only if the jury think that the facts set out by way of excuse or explanation might be true that any doubt is cast upon the admission..."
- [23] The issue raised under reference to the passage in *Owens* was considered in *McInally*, where the passage quoted above was cited. Under reference to that case, and *Morrison*, the court observed (Lord Nimmo Smith, delivering the opinion of the court, para 8): "The effect of the above authorities is not that, if an admission is to be accepted as true, then the qualification attached to it must also be accepted as true. They mean no more than that the jury must consider both the admission and the qualification, and decide, as they would have to do with any other incriminatory or exculpatory evidence, which to accept and which to reject, bearing in mind always that the burden of proof rests on the Crown. It is open to a jury, properly directed, to accept an incriminating admission, and to reject an exculpatory qualification, for a number of possible reasons. They may, for example, find the qualification inconsistent with other evidence which they accept; or they may find it inherently unconvincing; or, if the accused gives evidence, his demeanour may belie his account of the events. In the present case, it was not in issue that the appellant struck the

complainer, in a manner which could readily be described as an assault. The issue of self-defence having been raised by the appellant, it was for the Crown to satisfy the jury that he was not acting in self-defence. In considering this, the jury were entitled to take into account the appellant's statement to the police that he 'had to stand his ground so that he would not get attacked', and his evidence that 'he could have walked away, but he could not back down'. There was also his evidence about the width of the path. It was therefore open to the jury to conclude that, on the appellant's own account, the second and third of the three tests mentioned in the sheriff's charge had not been met. There may, of course, have been other reasons why the jury rejected the appellant's account."

- [24] In the present case what the sheriff did accords entirely with what is suggested in that case as a legitimate approach. Once the qualification had been rejected on this basis, the sheriff was left with an admission which constituted evidence of an unjustified physical attack on the complainer.
- [25] In dealing with the sufficiency submission in Croly, the court stated, p391, that at the end of the Crown case, "there was then before the jury evidence from which, if the jury believed the complainer's account and rejected (as they were entitled to do) the appellant's explanation which she gave in the course of the police interview, the jury would be entitled to find from two independent sources sufficient evidence in law to convict the appellant".
- [26] There was no question in Croly that the statement could not amount to self-defence, and the case is destructive of the broader submissions for the appellant in the present case. There is no basis for thinking that the case can be distinguished on the basis of the nature of the attack: the present case involves assault to injury. Assault can occur even without injury and the methodology of how one approaches a mixed statement, as described in Croly, does not vary according to the nature of the injury, which is relevant only in the question of balance.
- [27] As to the case of Owens , the head-note in the Justiciary case report referring to sufficiency is in our view mistaken, if by that is to be understood sufficiency of the Crown case: in so far as that case may be described as relating to any kind of "sufficiency" it relates to the sufficiency of evidence which may enable a defence of self-defence to be put in issue. Otherwise, as the Sheriff Appeal Court recognised, it concerns the question of onus, particularly in the passages relied upon by counsel for the appellant.
- [28] Accordingly, we consider that there is no merit in this appeal which must be refused. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: [https://www.bailii.org/scot/cases/ScotHC/2017/\[2017\]HCJAC23.html](https://www.bailii.org/scot/cases/ScotHC/2017/[2017]HCJAC23.html)

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