

SCOTLAND / JUDGMENT

Sutherland v HM Advocate [2017]

ScotHC HCJAC_22 (12 April 2017)

[2017] ScotHC HCJAC_22

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[2017] ScotHC HCJAC_22, 2017 JC 268, 2017 SLT 721 [New search] [Help] APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 22 HCA/2017/000001/XJ Lord Justice Clerk Lord Turnbull Lord Clarke OPINION OF THE COURT delivered by LORD TURNBULL in APPEAL AGAINST SENTENCE FOLLOWING UPON A REFERENCE FROM THE SCOTTISH CRIMINAL CASES REVIEW COMMISSION by ADAM SUTHERLAND Appellant against HER MAJESTY'S ADVOCATE Respondent Appellant: A Ogg, Sol Adv; Paterson Bell for Beltrami & Co, Glasgow Respondent: A Prentice, QC, Sol Adv, AD; Crown Agent 12 April 2017

Introduction

- [1] This is an appeal against sentence following upon a reference to the High Court from the Scottish Criminal Cases Review Commission ("the SCCRC"). On 21 January 2016, at the Sheriff Court in Kilmarnock, the appellant pled guilty to the following charge on summary complaint: "On 31 May 2015 at School Road, Kilbirnie, you Adam Thomas Mark Sutherland did send, by means of a public electronic communications network a message or other matter onto Facebook a social media network, that was grossly offensive or of an indecent, obscene or menacing character, in that you did post a sexually explicit picture of [CW], c/o Police Service of Scotland on Facebook, a social media network; Contrary to the Communications Act 2003 section 127(1)(a)".

- [2] The point which arises is whether the sentencing sheriff was correct in holding that there was a significant sexual aspect to the appellant's conduct and in certifying that section 92(2) of the Sexual Offences Act 2003 ("the 2003 Act") applied to the offence to which the appellant pled guilty, with the consequence that he was subject to the notification requirements provided for by Part 2 of that Act. The statutory regime
- [3] Section 80 of the 2003 Act provides that a person is subject to the notification requirements of Part 2 of that act if he is convicted of an offence listed in Schedule 3. Offences under the Communications Act are not listed within that schedule but paragraph 60 of the Schedule extends its ambit to include an offence other than is listed; "...if 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."
- [4] In the present case the sheriff heard submissions from the appellant's agent and from the procurator fiscal depute on the question of whether paragraph 60 of the 2003 Act applied to the offence to which the appellant had pled guilty. Having done so, he held that there was a significant sexual aspect to the offender's behaviour. He therefore certified, in terms of section 92 (2) of the 2003 Act, that the appellant had been convicted of an offence which was listed in Schedule 3. He also imposed a community payback order with a supervision requirement to last for two years and required the appellant to perform 140 hours of unpaid work.
- [5] The appellant's agents lodged a Note of Appeal to the Sheriff Appeal Court seeking to challenge the Sheriff's decision to make the appellant subject to the notification requirements of the 2003 Act. Leave to appeal was refused on 30 March 2016 and a further application, supported by an opinion from Mr Paterson Solicitor Advocate, was in turn refused on 25 April 2016. The appellant then applied to the SCCRC in June 2016, maintaining that he had suffered a miscarriage of justice as a result of the sheriff's certification of the offence as having a significant sexual aspect. On 15 December 2016, the SCCRC decided to make a reference to the High Court, explaining that it did not believe that any sexual aspect of the offence was significant and that a miscarriage of justice may have occurred. The Circumstances of the Offence
- [6] At the time of the offence the appellant was 23 years old and the complainer was 20. They met each other around two months prior to the offence through a mutual friend. That was their only meeting but they remained in contact through social media platforms such as Facebook and Snapchat. On 16 May 2015, the appellant sent a fully naked image of himself to the complainer using Snapchat. In return the complainer sent a fully naked image of her vagina to him using the same medium. Although images sent using Snapchat only display for a few seconds before being deleted, the appellant took a screenshot of the image, meaning that it was saved and retained for him to view as and when he chose. The complainer received a notification on Snapchat that the appellant had saved a screenshot of the image. She took no action in response to this.

- [7] On 31 May 2015, the complainer received a notification on Facebook that she had been tagged in a post on the appellant's own Facebook account. On checking she observed that the image which she had sent to the appellant had been posted, with the result that it was visible to anyone on her own friends list as well as anyone on the appellant's friends list. She was shocked and alarmed and immediately notified it to Facebook who removed it after around three hours. She also contacted the police to report the matter. When interviewed a few days later the appellant admitted responsibility and was remorseful. The sheriff was informed that the appellant did not remember posting the image but accepted that he must have done so. He was drunk at the time. The sheriff was also told that the appellant had been with a friend at the time the image was posted but that there had been no discussion between the two of them about the complainer. The Sheriff's Decision
- [8] In the submissions presented to him the sheriff was referred to the cases of *Clark v HM Advocate* 2008 SLT 787, *Wylie v M* 2009 SLT (Sheriff Court) 18, *Hay v HM Advocate* 2012 SLT 569, *Young v Brown* 2014 JC 4, *Heatherall v McGowan* 2014 JC 8, and *McHugh v Harvie* 2015 HCJAC 86. The sheriff concluded that the guidance to be drawn from the case law was that he should consider whether there was an element of sexual disorder or deviance in the appellant's conduct, that he should be alive to the need for public protection and to the need to keep a sense of proportion and common sense. With this guidance in mind, he concluded that there was a significant sexual element to the appellant's behaviour. In explaining his reasons for coming to this conclusion he said he was influenced by the nature of the image and distinguished between a drunken situation in which someone exposed himself, in circumstances when they would normally be too embarrassed to do so, and displaying a private picture which had been sent with no intention that it would be displayed to others. The sheriff said that posting a picture in such a manner appeared to him to be deviant. It was a breach of trust causing embarrassment, consternation and upset and that there was a public protection issue, as it was unknown who would see the image. He therefore saw a risk that schoolchildren or relatives of the complainer might be exposed to the image. The Decisions on Leave to Appeal First Decision
- [9] When leave to appeal was first refused the Appeal Sheriff who considered the papers said that, in his view, it was inevitable that the sentencing sheriff would reach the view that he did on a reasonable view of the facts and the law, particularly the case of *McHugh*. He observed that the posting was not accidental, that being under the influence of alcohol was not exculpatory and that no other motive had emerged. Second Decision
- [10] When the appellant applied again for leave to appeal the two Appeal Sheriffs who refused leave adopted the reasons given by the first Appeal Sheriff and stated that: "Looking to both the facts of the instant case and the case law to (be) applied, it is clear that the purpose of the appellant was sexual humiliation and that the offence had a voyeuristic element to it. Accordingly, it is caught by the terms of the legislation." The SCCRC Statement of Reasons

- [11] In its analysis of the appellant's case the SCCRC began by observing that the sentencing process proceeded on the assumption that the appellant had been drunk when posting the image. It commented that, in its view, this was a matter of some significance and perhaps more so than the sentencing sheriff or the Appeal Sheriffs had realised. It acknowledged that voluntary intoxication was not exculpatory and could not serve as mitigation but observed that these were not the issues which arose. The question was whether or not as a matter of fact the appellant's behaviour contained a significant sexual aspect and, on that point, the SCCRC stated: "...the authorities are unambiguous that the motivation for the behaviour is an important factor and that the use of alcohol is, in turn, a significant consideration when assessing motivation."
- [12] The SCCRC considered what the appellant's motivation might be but expressed doubts as to how his behaviour might be described as having a voyeuristic element to it. It found the suggestion that he was attempting to embarrass the complainer unpersuasive. The SCCRC concluded that the only thing that seemed relatively clear to it was that the appellant's behaviour was the result of a serious lapse in judgement and that it almost certainly would not have occurred but for the influence of alcohol. Having viewed matters in this fashion, the SCCRC explained that it found it difficult to understand how one might conclude that the appellant's behaviour was sexually motivated and expressed the conclusion that the appellant's behaviour could not be said unambiguously to demonstrate the sort of underlying deviance or sexual disorder required to attract notification requirements. In the view of the SCCRC, any public protection issue which arose was adequately managed by the community payback order which was imposed. In conclusion, the SCCRC stated that the question was whether or not the public required protection from the appellant as a sex offender. The submissions for the appellant
- [13] Ms Ogg submitted that the appellant's conduct in posting the image had been motivated by drunkenness. There was no sexual component to the appellant's behaviour at all. If that submission could not be accepted her secondary position was that there could not be said to have been a significant sexual aspect to the appellant's behaviour in committing the offence. On either basis the sheriff had been wrong to order that the appellant should be subject to the notification provisions of Part 2 of the 2003 Act.
- [14] In support of her submission Ms Ogg drew our attention to the opinion of the Lord Justice Clerk (Gill) in *Hay v HM Advocate*, which was one of seven conjoined appeals raising general questions as to the circumstances in which the procedure of notification of a convicted offender was necessary or appropriate. To identify what the purpose of the notification requirement was Ms Ogg referred us to what had been said at paragraph [34] by the Lord Justice Clerk in *Hay*. She submitted that in paragraph [35] he had made plain how important the impact of registration was for the individual concerned and she drew our attention to the guidance for sentencers in arriving at a decision on the application of paragraph 60 of Schedule 3 which the Lord Justice Clerk had given at paragraphs [49] – [52].

- [15] The result, she submitted, was that in determining whether there had been a significant sexual aspect to an offender's behaviour, the court required to be alert to the fact that it was not enough to ask if a sexual act had occurred. The court required to take account of the whole background to the incident and in particular to consider whether the offender's conduct had been motivated by alcohol intoxication. Ms Ogg went on to draw attention to the decisions in the other cases conjoined with Hay in order to show the application of the approach which she had described. In each of *Heatherall v McGowan*, *Young v Brown* and *Thomson v Dunn* 2012 SCCR 298, the court held that the sentencing sheriffs had been wrong to conclude that there was a significant sexual aspect to the offender's conduct. In each case the offender had been under the influence of alcohol. By contrast, in the cases of *Halcrow v Shanks* 2014 JC 1 and *Akdeniz v Cameron* 2014 JC 13, there was clear evidence of conduct which was sexual in nature.
- [16] Lastly, Ms Ogg drew our attention to the subsequently decided case of *McHugh v Harvie*, in which the court upheld the sheriff's decision to make the offender subject to the notification requirements. She submitted that the present case could be distinguished in a number of ways. There was no suggestion that the appellant obtained the complainer's photograph clandestinely, there had been no request that he should delete it, there was no suggestion that the appellant in *McHugh* had been under the influence of alcohol and, unlike *McHugh*, the present appellant had a supportive criminal justice social work report which identified no significant risks or needs in terms of public protection. The submissions for the Crown
- [17] The advocate depute submitted that the sheriff had been faced with a difficult and finely balanced decision but in the whole circumstances it could be seen that he had arrived at the correct conclusion. The appellant had distributed a pornographic image which he had retained some weeks earlier. He took the trouble to tag the image so that the complainer would be aware of its presence and the extent of distribution in the present case was much wider than in the case of *McHugh*.
- [18] In the whole circumstances the advocate depute submitted that we should not interfere with the sheriff's decision. Discussion
- [19] The various cases to which our attention was drawn make it plain that drunken criminal conduct which appears to have certain sexual connotations to it need not always trigger the requirement for registration. That is inherent in the language used in paragraph 60, which talks of there being a "significant" sexual aspect to the offender's behaviour. So in the case of *Heatherall* the offender who exposed his naked penis to a young lady outside a public house was held to have engaged in an incident which was caused by drink rather than sexual urges and any sexual element which might have been present was not "significant". In *Young* the adult offender who kissed a teenage girl on a train late at night was held to have engaged in conduct which, though criminal, was caused by drink and not sexual urges. Again, the limited sexual aspect to his behaviour did not meet the test of "significant". In *Thomson* the offender who grabbed a young lady's buttocks in the early hours of the morning whilst waiting for a taxi behaved inappropriately whilst under the influence of alcohol. The court

held that the application of paragraph 60 did not arise, but described the incident as momentary and observed that if the question had arisen the drastic consequences of registration would not have been brought into play by a minor incident of that nature.

- [20] We therefore cannot agree that it was inevitable on a reasonable view of the facts and the law that the sentencing sheriff would reach the view that he did. As the advocate depute said, the decision which had to be made was difficult and finely balanced. Nor are we comfortable with the observations made at the stage of the second decision on leave to appeal when it was said that the offence had a voyeuristic element to it. There was nothing surreptitious, which ordinarily would be of the essence of voyeurism, about the appellant's conduct in posting the image. Nor is it obvious how he could be thought to have posted it in order to gain sexual gratification by looking at it. He had unlimited access to the image before posting for whatever purpose he wished.
- [21] On the other hand it is not the case that registration can be avoided just because the offender would not have behaved in the same way if sober or less intoxicated. Alcohol consumption may no doubt cause many forms of disinhibited conduct, but disinhibited sexual behaviour is certainly one such type. It follows that there will be many circumstances in which it is obvious that the offender's conduct has a significant sexual aspect to it regardless of the issue of intoxication. In the case of Hay, for example, the adult offender engaged in various forms of conduct directed at teenage girls, none of whom knew him. The Lord Justice Clerk, with whom the other judges agreed, observed that the sheriff was amply justified in concluding that the offender's behaviour exemplified a significant sexual aspect. The sheriff's conclusion would have remained valid and correct whether the offender had been intoxicated at the time or not.
- [22] The question of whether an offender's behaviour exemplified a significant sexual aspect may be less straightforward in other cases. In such cases a helpful context within which to begin to consider the question can be found in what was said by the Lord Justice Clerk about the meaning and effect of registration at paragraphs [34] and [35] of Hay : "The purpose of registration is not punitive. It is protective. It enables the police to keep tabs on a sex offender who is, or who may be, a continuing danger to others, and particularly to women and young people. However, although registration does not constitute a sentence, it is nonetheless a grave stigma and one which, designedly, places onerous restrictions and requirements on the registered offender's life. In particular, the offender has the public status of sex offender." With this context in mind it is helpful to then look at what he went on to say at paragraph [52]: "In my opinion it would be futile to attempt to define the word 'significant' as it is used in para. 60. That is a question best left to the judgement of the sentencer. 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. One way to approach that is to consider whether the sexual aspect is important enough to merit attention as indicating an underlying sexual disorder or deviance from which society is entitled to be protected (Wylie v M , Sheriff Pyle at 2009 SLT

(Sh Ct), p.20, para.13). In this difficult exercise, in my view, sentencers should consider the accused's behaviour in the context of the purpose and the effects of registration, keep a sense of proportion and use their common sense."

- [23] In our opinion, these observations are particularly important in the circumstances of the present case, given the background of consensual exchange to the appellant's possession of the image. It is our impression that, whether a wise practice or not, this is now a relatively common feature of relationships between young people. When giving the opinion of the court in the case of *McHugh*, the Lord Justice Clerk (Carloway), made an observation concerning such conduct and drew a distinction which, in our view, is particularly relevant. At paragraph [5] he said this: "The appellant's actions involved the clandestine viewing of another person's intimate photograph and then sharing it electronically. This was a deliberate act, distinguishable from the common practice prevalent among young persons of 'sexting'."
- [24] If "sexting" is prevalent among young persons, and if that term includes the sending of naked or semi-naked images, then it is worth remembering that the present appellant was prosecuted under the Communications Act 2003, and that the offence which he committed was constituted by sending an image, which the advocate depute characterised as pornographic, over a public electronic communications network. That image would, presumably, have held the same characterisation when earlier sent by the complainer over a public electronic communications network to the appellant. One might assume easily enough that there was at least a flirtatious motivation to such conduct. In many cases such an exchange will no doubt constitute conduct with an overtly sexual aspect to it.
- [25] We have no doubt that the same need to keep a sense of proportion and apply common sense which the Lord Justice Clerk referred to in *Hay* restrains the Crown from bringing proceedings under section 127(1) of the Communications Act 2003 in relation to any such consensual exchange of images, even if of an indecent or pornographic nature. However, it is also important to ensure that individuals who receive such images consensually do not find themselves subject to the grave stigma and onerous restrictions of registration on account of ill-judged, foolish or hurtful subsequent conduct, unless they properly fall to be classed as a sex offender who poses the sort of continuing danger from which the public require protection.
- [26] That having been said, it is clear that individuals who disclose intimate images on a private basis have little or no control of the image once it has been sent and are vulnerable to considerable embarrassment and upset if that anticipated privacy is not maintained. Media coverage has highlighted many examples of circumstances in which such unauthorised public disclosure has taken place by uploading or posting images onto one internet platform or another. The motivation for such conduct may include disappointment at the termination of a relationship, or many other circumstances which lead to rancour and causes one party to deliberately embarrass and upset the other. There may be no sexual motivation involved but rather a cruel determination to cause distress. An individual who has previously

entrusted a partner or friend with an intimate image is entitled to be protected from the risk of such deliberately caused distress. In our opinion, that form of public protection is different from the protection encompassed within registration, which is designed to enable monitoring of an individual who poses a continuing danger to others, or who displays an underlying sexual disorder or deviance from which society is entitled to be protected.

- [27] Protection from the sort of deliberately caused distress which we have mentioned is provided by the criminalisation of such conduct, regardless of whether it contains any sexual motivation, such as is provided for by the Communication Act 2003. In the present case the appellant was punished by the imposition of a robust community payback order which included the requirement to undertake unpaid work in the community.
- [28] The distinction between the two different forms of public protection mentioned is also highlighted by the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, which comes into force on 1 April 2017. Section 2 of that Act creates a new offence of disclosing, or threatening to disclose, an intimate photograph or film. The offence is committed in the following circumstances: “(1) A person (‘A’) commits an offence if –
- (a) A discloses, or threatens to disclose, a photograph or film which shows, or appears to show, another person (‘B’) in an intimate situation,
 - (b) by doing so, A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress, and
 - (c) the photograph or film has not previously been disclosed to the public at large, or any section of the public, by B or with B’s consent.” A person convicted of such an offence is liable on summary prosecution to a maximum of 12 months’ imprisonment or up to 5 years’ imprisonment if prosecuted on indictment. These penalties are significantly greater than any penalty available to the court on a prosecution under the Communications Act 2003.
- [29] The 2016 Act does not however amend Schedule 3 of the 2003 Act so as to bring this new offence within the list of offences for which registration is automatic. As with a prosecution under the Communications Act, it will be for the presiding sheriff or judge to determine on conviction whether a further element of public protection from the individual as a sex offender is necessary by considering whether the offence discloses a significant sexual aspect. It is implicit that it need not do so.
- [30] Returning to the circumstances of the present case, we acknowledge that the appellant is a young man with no previous convictions who had a good record of full-time employment and a very supportive criminal justice social work report. No significant risks or needs, either in terms of sexual or general recidivism were identified. He also displayed appropriate remorse and responsibility.

- [31] In our opinion, Ms Ogg was correct in submitting that the circumstances of the appellant's case can be distinguished from those in the case of McHugh for the reasons which she gave. Whilst we recognise that the image was distributed in a wider and more hurtful fashion that occurred in McHugh that is not the deciding issue. As the court said in McHugh at paragraph [8]: "The issue of whether any sexual element is significant requires to be decided against a background of the purpose of the notification requirements as a mode of public protection."
- [32] There was a deceitful, voyeuristic and clearly sexual aspect to the appellant's conduct in McHugh which, in our opinion, is not replicated in the appellant's case.
- [33] In the present case the sheriff said that posting a picture as the appellant did, appeared to him to be deviant, and we took him to use that word in the context of sexual deviance as discussed in Hay . It seems to us that such conduct may or may not merit that description but it need not necessarily do so. The sheriff explained why it seemed to him to be deviant. He said it was a breach of trust and caused embarrassment and upset to the complainer and her friends. It no doubt did but that description and those consequences do not seem to us to equate to sexual deviance.
- [34] In our opinion there was nothing in the appellant's conduct in committing the present offence which indicated any ongoing perceived danger from which the public required protection. Whilst it is difficult to accept that there was no sexual content at all to his behaviour, given the nature of the image concerned, we can see no basis for the view that any sexual aspect which might have been present indicated an underlying sexual disorder or deviance and we conclude that the sheriff was wrong in arriving at the view which he did. We also consider that the sheriff failed to separate out the protection of the complainer's privacy and dignity, to which she was entitled, from the wider issues of whether any public protection from the appellant as a sex offender was necessary.
- [35] In the whole circumstances we are satisfied that the appellant's conduct was properly described as criminal and that the upset and embarrassment which he caused merited punishment. If his conduct is considered in the context of the purposes and effects of registration, we are satisfied that any sexual element which there may have been cannot properly be described as "significant". Disposal
- [36] We shall therefore sustain the appeal and quash the finding made by the Sheriff under paragraph 60 of Schedule 3 to the 2003 Act and the sheriff's notification of the appellant.
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