APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 51
HCA/2021/000197/XC

Lord Woolman
Lord Doherty
Lord Matthews

OPINION OF THE COURT

delivered by LORD DOHERTY

in

APPEAL AGAINST CONVICTION

by

JACK FERGUSON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: McConnachie QC; John Pryde & Co SSC Edinburgh for Livingston Browne, Glasgow
Respondent: Prentice QC, sol adv, AD; the Crown Agent

2 December 2021

Introduction

[1] On 26 April 2021 at Glasgow Sheriff Court the appellant was convicted after a three day trial of the following offences:

> "(002) on 1 January 2020 at The Shed Nightclub, 129 Langside Avenue, Glasgow, you JACK FERGUSON did sexually assault [CF] … in that you did dance in front of her and touch her buttocks;
> CONTRARY to Section 3 of the Sexual Offences (Scotland) Act 2009;

and

(003) on 1 January 2020 at The Shed Nightclub, 129 Langside Avenue, Glasgow, you JACK FERGUSON did sexually penetrate the vagina and anus of [KR] … and did approach her from behind, place your hand beneath her underwear and digitally penetrate her anus and vagina;

CONTRARY to Section 2 of the Sexual Offences (Scotland) Act 2009."

[2] On 24 May 2021 the sheriff sentenced the appellant to a community payback order with 3 years' supervision and 250 hours of unpaid work, and a requirement that, as and when directed by his supervising officer, he co-operate in an assessment of his suitability for the community sex offender programme and if deemed suitable undertake the programme. The sheriff also imposed a 6 month restriction of liberty order. The appellant was made subject to the notification requirements of the Sexual Offences Act 2003 for a period of 5 years. The appellant appeals his conviction. He does not appeal against sentence.

The evidence

[3] Senior counsel for the appellant accepted that there had been sufficient evidence to entitle the jury to convict the appellant of both charges. For present purposes it suffices for us to provide the following summary of the evidence.

[4] At the time of the offences the appellant was aged 19. CF and KR were young women who were also aged 19. They were friends. Neither knew the appellant. All three attended an event at the Shed nightclub which began on Hogmanay and went on until the early hours of New Year's Day.

[5] CF's evidence was that when she was dancing on the dance floor with A, a female friend, the appellant approached them and started dancing with them. When he walked away he went behind CF and touched her buttocks with one hand. It had been deliberate

rather than accidental, and it had been very noticeable to CF. The appellant did not say anything to her. She described him as having "a merry happy level of intoxication".

[6] KR's evidence was that she and M, a female friend, were dancing alone on the dance floor at about 2 am. Suddenly she felt a finger in her anus and a finger in her vagina. It felt aggressive, forceful and painful. She turned around and saw the appellant standing close behind her, less than a metre away. He was alone. No other male was as close to her. She shouted at him, asking him what he was doing. She told him not to touch her. The appellant did not react. He said nothing. In cross-examination KR did not accept that her identification was mistaken or that the appellant had simply been in the wrong place at the wrong time.

[7] Shortly after the assault on KR a steward was given a description of the man who had been close behind her, and he located the appellant within the nightclub. He recognised him as a person whom he had ejected earlier in the evening for being "quite drunk".

[8] The appellant did not give evidence and the defence did not lead any other evidence.

The relevant statutory provisions

[9] Sections 2, 3 and 60(2) of the Sexual Offences (Scotland) Act 2009 provide:

> "**2 Sexual assault by penetration**
> (1) If a person ("A"), with any part of A's body or anything else—
> (a) without another person ("B") consenting, and
> (b) without any reasonable belief that B consents,
>
> penetrates sexually to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of B then A commits an offence, to be known as the offence of sexual assault by penetration.
> …
>
> **3 Sexual assault**
> (1) If a person ("A")—
> (a) without another person ("B") consenting, and

(b) without any reasonable belief that B consents,

does any of the things mentioned in subsection (2), then A commits an offence, to be known as the offence of sexual assault.

(2) Those things are, that A—

…

(b) intentionally or recklessly touches B sexually,

…

60 Interpretation

…

(2) For the purposes of this Act—

(a) penetration, touching, or any other activity,

…

is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual."

The appeal

[10] It is common ground that in order to convict the jury had to be satisfied that there was mutual corroboration. It is not suggested that the sheriff did not give appropriate directions in that regard. It is also common ground that CF and KR did not consent to what happened to them, and that there was no basis for maintaining that the appellant reasonably believed that either of them had consented. Senior counsel for the appellant also accepted that, given the nature of the penetration in charge 3, a reasonable person would consider it to be sexual. The narrow issue in the appeal is whether the sheriff adequately directed the jury as to what constitutes a sexual assault.

[11] The sheriff directed the jury that touching is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual. He explained to them that that is an objective test. Senior counsel for the appellant accepted that those were accurate directions, but he submitted that in circumstances such as the present case, where an accused was under the influence of alcohol, they were insufficient. He maintained that the

sheriff ought also to have directed the jury that they should consider "whether the conduct in question had a sufficiently large sexual component or whether the incident was drink-fuelled rather than overtly sexual." He submitted that the decision of the court in *SD* v *Dunn (Procurator Fiscal, Edinburgh)* 2015 SCCR 449 supported that proposition. That case involved a summary complaint rather than solemn proceedings, but the circumstances had been broadly similar to those in charge 2. In *SD* the court held that the sheriff had been wrong to convict the accused of sexual assault. It quashed that conviction and substituted a conviction of assault. Senior counsel for the appellant acknowledged that *SD* was an appeal in respect of a single charge of sexual touching, whereas in the present case it had been open to the jury to have regard to the evidence concerning charge 3 when forming a view as to whether the touching in charge 2 had been sexual. Nevertheless, the jury ought to have been given the suggested supplementary directions.

[12] The advocate depute submitted that the sheriff's directions about sexual assault had been appropriate. They reflected and explained the statutory test in section 60(2). The sheriff did not require to give the suggested further directions. The circumstances in the present case were very different from those in *SD* because here a course of conduct was alleged and it was open to the jury to have regard to the evidence relating to charge 3 when determining whether the touching in charge 2 was sexual. In any case, in *SD* the court was not seeking to prescribe directions which must be given in every case where a contravention of section 3 is alleged and where the accused had been drinking. The proposed additional directions would only have served to confuse the jury. They would have tended to suggest a test which was different from the statutory test.

Decision and reasons

[14] In our opinion the sheriff's directions in relation to sexual touching were both appropriate and sufficient. Equipped with those directions, the jury could be relied upon to apply their common sense and experience of life to decide whether the touching was sexual. It was not necessary for them to be given the further directions which senior counsel for the appellant suggests.

[15] *SD* v *Dunn (Procurator Fiscal, Edinburgh)* was an appeal by stated case from a summary trial. The conviction which was appealed was a charge of sexual assault by touching. The court was not addressing the question of the jury directions which would be necessary or appropriate in trials of such charges in solemn proceedings. We do not find *SD* to be of any assistance in the present context. In our opinion it ought to be treated as a case decided on its own particular facts.

[16] We do not understand the court in *SD* to have intended to provide any authoritative interpretation or gloss of section 60(2), or to have laid down any legal principles which it envisaged ought to have general application. Had the court meant to do any of those things we are sure that it would have issued a much more substantial and fully reasoned opinion than it did. In that regard it is not without significance that the opinion was not published on the High Court Judgments website. Rather, it seems likely that it was reported as a note in the Scottish Criminal Case Reports only because someone who knew of it requested that it be reported.

[17] That is sufficient to dispose of the appeal. However, we think it right to add that, having had the advantage of reading both the stated case and the opinion in *SD*, we doubt whether it was correctly decided.

[18] SD was charged with sexual assault by placing his hands on the complainer's buttocks. The salient facts were as follows. The incident took place on the dance floor in a nightclub. SD and the complainer did not know each other. SD had had a substantial amount to drink. During the evening he approached the complainer, but she indicated to him that she was not interested in his attentions. Later, when the complainer and a female friend were dancing together on the dance floor, SD came up behind the complainer and grabbed her buttocks with both hands, causing her dress to ride up slightly. SD's defence was that he had not touched the complainer's buttocks. He gave evidence to that effect. He maintained that the complainer and other Crown witnesses who spoke to him having done so were making it up.

[19] The sheriff found the Crown witnesses to be credible and substantially reliable and that it was SD who was being dishonest. He was satisfied that the grabbing of the complainer's buttocks had been intentional or reckless, and that it was without her consent or any reasonable belief on SD's part that she was consenting. He was also satisfied that a reasonable person in all the circumstances would consider that the touching was sexual.

[20] In his note within the stated case the sheriff explained that the matters raised in the grounds of appeal had not been ventilated before him during submissions at the trial. He commented on three of those matters. The first (reading short) was that "any contact" with the complainer's "clothed buttocks … took place in a public place … when [SD] was under the influence of alcohol." The sheriff observed that that was indeed correct, but that SD had earlier shown interest in the complainer and been rebuffed, and had later come up behind her and grabbed her buttocks with both hands. The contact had not been fleeting. The grabbing had been deliberate and sexual. The second matter was a contention that in applying the test in section 60(2) the sheriff ought to have had regard to the fact that a

conviction would result in SD becoming subject to the notification requirements of the Sexual Offences Act 2003. The sheriff, observed (rightly) that consideration of those consequences was not relevant to his application of the section 60(2) test to the facts. The third matter was that, if the sheriff was satisfied that SD grabbed the complainer's buttocks but that it was not sexual, he could have convicted him of common law assault. The sheriff responded that it was very clear to him from the nature of the contact and the other facts found that the section 60(2) test was satisfied.

[21] The opinion of the court was very short. It contained only four paragraphs. The first paragraph was an introduction and the fourth paragraph dealt with the formal disposal of the appeal. The material parts of the opinion are as follows:

> "1 … A conviction under s.3 has the consequence of triggering the notification requirements of the Sexual Offences Act 2003, which are relatively onerous.
>
> 2. … We take the view that in order for an offence to be sexual in terms of s.3, any sexual element must be sufficiently significant to trigger that section. In this connection an objective test is applied; s.80 [*sic*] of the 2009 Act makes that clear. We are of opinion that the sexual element is insufficiently demonstrated in the present case to bring it within the requirements of s.3 of the 2009 Act, as against the requirements of common law assault. As I have mentioned the test for what is sexual is an objective one, that is, what a reasonable person would consider to be sexual. The sheriff has referred to a number of factors that he relies upon in supporting his conclusion here that the assault was sexual. It seems to us, however, that he has not given sufficient attention to the fact that the appellant had consumed a considerable amount of drink beforehand, with the result that the assault can be regarded as drink-fuelled rather than overtly sexual.
>
> 3. Against that background, what was involved, seizing the complainer's buttocks with both hands, while clearly to be condemned and clearly amounting to a common law assault, does not seem to us to have a sufficiently large sexual component to bring s.3 into operation. For these reasons we will allow the appeal."

[22] We find it remarkable that the court held that on the facts found by the sheriff he was not entitled to hold that a reasonable person would consider that SD's grabbing of the complainer's buttocks was sexual. SD had been attracted to the complainer earlier in the

evening, but he had been rebuffed. Later, he grabbed her buttocks with both hands. It caused her dress to ride up slightly. A reasonable person would be likely to have in mind that a woman's buttocks are among the more private parts of her anatomy and that another person might well have a sexual interest in observing or touching them. Each case will turn on its own particular facts and circumstances. In our view, on the facts in *SD* it was open to the sheriff to conclude that the grabbing of the complainer's buttocks was sexual. We find it unsurprising that he reached that conclusion.

[23] The court in *SD* interfered with the sheriff's assessment, observing that he had:

> "not given sufficient attention to the fact that the appellant had consumed a considerable amount of drink beforehand, with the result that the assault can be regarded as drink-fuelled rather than overtly sexual."

We doubt whether that was a good basis for the court to interfere. The assessment of the evidence was a matter for the sheriff. The fact that an accused was intoxicated at the time of an alleged offence is, of course, one of the facts and circumstances to which a decision-maker may have regard along with all the other facts and circumstances when deciding whether a reasonable person would consider the behaviour in question to be sexual. However, usually it is unlikely to be of any great significance. We see no error in the approach the sheriff took. We do not find the distinction which the court drew between "drink-fuelled" and "overtly sexual" assaults helpful or illuminating in this context, not least because the proposed dichotomy is a false one. The two categories are not mutually exclusive. Many sexual assaults are committed by assailants who are intoxicated to varying degrees with alcohol or drugs or both; and, in general, self-induced intoxication is no defence to a criminal charge (*Brennan* v *HM Advocate* 1977 JC 38, opinion of the court delivered by Lord President Emslie at p 47; see also pp 50 and 51). In every case, if all of the other requirements of section 3 are satisfied, the question is whether in all the circumstances a reasonable person would

consider the relevant activity to be sexual. That is the position whether or not the perpetrator was intoxicated.

[24] The court in *SD* may have been influenced by the consequences for SD of a conviction for sexual assault - and in particular that he would be subject to the notification requirements of the Sexual Offences Act 2003 for 5 years. It may have felt that those requirements would be disproportionate to what it might have considered to be the relatively minor nature of SD's offence, and it may have been astute to try to avoid such an outcome. If so, that would have been an erroneous approach. Parliament has legislated to provide the circumstances in which the notification requirements are to apply.

Conclusion and disposal

[25] The challenge to the sheriff's directions is ill-founded. There has not been a miscarriage of justice. The appeal is refused.