**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**[2020] HCJAC 47**
**HCA/2020/1/XC**

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION

by

GORDON CAMPBELL

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

**Appellant: A Ogg (sol adv); Paterson Bell (for McQuillan Glasser & Waughman, Hamilton)**
**Respondent: Edwards QC AD; the Crown Agent**

27 October 2020

**Introduction**

[1] On 21 November 2019, at the Sheriff Court in Hamilton, the appellant was found guilty of a charge of assaulting his partner on 26 December 2018 at an address in East Kilbride. The libel was that he had struck her on the head with a glass bottle to her severe injury and permanent disfigurement. The charge was aggravated in terms of section 1 of the

Abusive Behaviour and Sexual Harm (Scotland) Act 2016. On 20 December 2019, the sheriff imposed a sentence of 2 years and 6 months imprisonment and a non-harassment order of 5 years.

[2] The appeal concerns the sheriff's directions on the appellant's failure to respond to an accusation of assault made by the complainer *de recenti* and observed by a neighbour.

**The evidence**

[3] According to the complainer, in the early hours of 26 December 2018, she and the appellant had returned to the appellant's ground floor flat. They were arguing and drinking. A friend of the appellant had visited, but left. The complainer said that she would be leaving shortly and went to the bathroom. In the hall she felt a blow to the back of her head and glass smashing. She had been hit by a bottle. She saw the appellant's shadow at the kitchen door. She was hit a second time to the left of her forehead. She fell to the ground with blood pouring from her head. She saw a silhouette of the appellant, turned round and saw him standing at the kitchen door about a meter away. There was no one else in the flat at the time.

[4] The complainer managed to leave the flat. She crawled to various doors on the same floor and asked for help, without success. She went upstairs with blood continuing to drip from her head. Some people opened their doors, but then closed them. The appellant arrived and said: "Hello, what have you done? Come back into the flat honey". She told him to keep away and that she was not forgiving him this time.

[5] A neighbour on the upper floor testified to hearing someone saying "help me" at about 3.00am. She looked through her door's spy hole and saw a woman slumped and covered in blood. She asked her husband to telephone the police and an ambulance. The

woman was asking for help. The appellant was there as well. He lived on the ground floor. She realised that it was his girlfriend. The complainer said to the appellant: "You've really hurt me this time". The appellant did not say anything in reply. The following morning the neighbour saw a trail of blood leading from the appellant's flat up to her landing.

[6] The police arrived at about 3.30am and found the complainer covered in blood. She had a wound on her forehead. They forced entry to the appellant's flat and arrested him. En route to the police station the appellant asked how the complainer was.

[7] The appellant testified that he had woken up at about 3.30am and found that the complainer was not in bed. He went out onto the stairwell and saw her sitting on the landing. He had asked her what had happened. She had said: "You did this, I'm going to get the police". He had replied: "I never touched you. If that's what you are saying there is nothing I can do. I'll need to leave". He then returned to his flat. He did not hear the police at his door. He had no explanation for the broken glass in the apartment. In cross-examination he speculated that the complainer must have tripped, as he noticed blood in the house. It looked as if the appellant had hit her head.

**The Charge**

[8] The sheriff gave the jury the standard directions on the need for corroboration, both of the assault occurring and of the identification of the appellant as the assailant. In relation to the evidence of the neighbour, he said the following:

> "… you'll remember evidence from [the neighbour] that [the complainer] was on the landing outside her door and that she made a statement in the presence and the hearing of the accused, and there was evidence that [the neighbour] had said that [the complainer] had said something to the effect that 'you're really hurting' or 'you really hurt me this time', and that she was saying that to [the accused]. Well, what [the complainer] said incriminated the accused. [The neighbour's] statement of what [the complainer] said, however, isn't itself evidence against the accused because it's

> hearsay evidence and, in any event, [the complainer] is already the principal source of evidence and so, this came from the same person and the additional source to that of her own evidence in court, but you can take into account that it's been said, but not necessarily that it's a second source of evidence.
>
> So, what you can do is you can take account of it in this context: you'll have to consider whether the accused did or did not deny or disassociate himself from what was said. That's because you can look at the accused's reaction or lack of reaction on hearing what was said. So that is admissible evidence against him. It's for you to decide, but if [the accused] made no response to what he heard, it would be open to you to infer from his silence that he was impliedly admitting what was said about him."

**Submissions**

[9] The appellant maintained that the sheriff misdirected the jury in relation to the evidence of the neighbour. He should have directed the jury that they had to determine: (i) if what was heard by the appellant reasonably required comment; (ii) if what was said was incriminating; and (iii) if there was a reaction or lack of reaction by the appellant. He ought to have said that an implied admission could only arise if the circumstances were such that the appellant was reasonably called on to repudiate it (*Wilson* v *HM Advocate* [2017] HCJAC 52 at para [4]) and that, if they accepted the appellant's explanation, the evidence could not be used against him. The sheriff ought to have directed the jury that the lack of reaction was not evidence against the appellant if they determined that the circumstances were such that there was no requirement for the appellant to contradict the complainer's statement or there was no need for the appellant to make any comment. It would only be in circumstances where the jury considered that the appellant required to repudiate the comments which had been made that the jury could use his lack of reaction as an admission. There would be no need to deny or react if only the complainer was present (see also *Rehman* v *HM Advocate* 2014 SCCR 166 at paras 60-61; *Douglas* v *Pirie* 1999 SCCR 884 at 888).

[10] The Crown cited the passage from Renton & Brown: *Criminal Procedure* (6th ed at para 23-56) whereby an accused's reaction to a statement made by another person, or indeed his failure to react when it was incriminating, was evidence against him in the same way as a statement made by him. That had been approved in *Buchan* v *HM Advocate* 1993 SCCR 1076. The principle applied to any statement which, if true, was criminative of the accused (*McDonell* v *HM Advocate* 1997 SCCR 760). If one person made a statement within the hearing of a party who was accused, and that person did not say anything, the evidence of the statement was competent against the accused (*Lewis* v *Blair* (1858) 3 Irv 16 at 28; *Glover* v *Tudhope* 1986 SCCR 49; *Wilson* v *HM Advocate* (*supra*) at para 4; and Walker & Walker: *The Law of Evidence* (4th ed) at paras 9.6.1-2). All that was required was that the statement was made in the hearing of the accused, was incriminatory and the accused was in a position to contradict it before silence or lack of reaction could be inferred as an admission. It was a matter of fact for the jury to decide whether they were satisfied that such an inference could be drawn. There was no authority to support the proposition that an accused person had to know that the statement was likely to be overheard by others before responding to it.

[11] The adequacy of the directions had to be seen in the context of the overall evidence and the live issues in the case (*Rehman* v *HM Advocate* (*supra*) at paras 60-61). The only live issue in relation to the statement was whether the jury accepted the evidence that the appellant had not responded to the complainer's statement and had rejected his account, which was that he had denied the accusation. Even without the implied admission, there was a sufficiency of evidence. The complainer's injuries and distress corroborated the occurrence of an assault. There was circumstantial evidence available to corroborate the complainer's account that the appellant had been her attacker from the testimony of the neighbour of what she had seen on the landing, including the presence of the appellant, and

the distribution of blood together with the appellant's post incident actings. No miscarriage of justice had occurred.

**Decision**

[12] In *Buchan* v *HM Advocate* 1993 SCCR 1076 it was accepted (LJC (Ross) delivering the Opinion of the Court, at 1081) that the law was to be found in *Lewis* v *Blair* (1858) 3 Irv 16 and had been correctly stated in Renton & Brown: *Criminal Procedure* (5th ed) para 18-41A [(6th ed) para 24-56]) as follows:

> "A statement by another person, whether or not that person is a co-accused, made in the present of an accused, is not in itself evidence against that accused. The accused's reaction to that statement, or indeed his failure to react to it where it is incriminative, is, however, evidence against him in the same way as a statement made by him, silence in the face of accusation being capable of being construed as an admission of guilt. The evidence of the other person's statement is therefore admissible for the limited purpose of explaining the accused's reaction."

There is no requirement that the accused had to be aware that his lack of reaction might be observed by others. It is no doubt correct to state as a generality that the implied admission can only arise in circumstances in which an innocent accused could reasonably be expected to repudiate the allegation (*Wilson* v *HM Advocate* [2017] HCJAC 52, Lord Malcolm, delivering the Opinion of the Court, at para [4]). The circumstances here fit into that picture.

[13] The live issue in this trial was not whether the circumstances were such as to give rise to an implied admission. That was not the appellant's position. He maintained that he had replied and repudiated the allegation. The complainer had made a clear accusation that the appellant had assaulted her. The appellant, on the evidence of the neighbour, did not deny this. In these circumstances the jury were entitled to hold that this was an implied admission. That is essentially what the sheriff directed the jury. He did not require to give any further directions given the extent of the live issue at trial. On this basis the appeal must

fail. As the sheriff said, it was for the jury to decide whether to infer from the appellant's silence that he was impliedly admitting what had been said about him.

[14] In any event, no miscarriage of justice can be said to have occurred. There was clear evidence from the complainer that she had been assaulted and that it had been the appellant who had assaulted her. The assault was adequately corroborated by the injuries which the pursuer was suffering when observed by the neighbour on the landing. The complainer's identification of the appellant as her assailant was adequately corroborated by the circumstances spoken to by the neighbour, whereby, at or about 3.00am, the appellant was standing over the complainer on the landing with blood trailing from there down to the appellant's flat, where he was found soon after and alone by the police.