SHERIFF APPEAL COURT

[2016] SAC (Crim) 32
SAC/2016-000437/AP

Sheriff Principal M M Stephen QC
Sheriff Principal C D Turnbull
Sheriff M G O'Grady QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

STATED CASE AGAINST CONVICTION

by

ROY BROWN

Appellant;

against

PROCURATOR FISCAL, AYR

Respondent:

Appellant: A Ogg (sol adv); Paterson Bell
Respondent: R Goddard, AD; Crown Agent

1 November 2016

[1] The appellant appeals his conviction at Ayr Sheriff Court on 3 May 2016 of the following offence:

> "(001) on 23 November 2015 at 23 George McTurk Court, Cumnock and elsewhere you ROY BROWN did send, by means of a public electronic communications network messages to E. C., your former partner Police Service of Scotland, Glasgow, that were of a menacing character, in that

> through a social media network you did send messages that were of a threatening nature;
> CONTRARY to the Communications Act 2003, Section 127(1)(a)"

[2] The sheriff's stated case contains a single question for this court in the following terms:- "*Did the court err in repelling the submission of no case to answer*?"

[3] The background to this case as set out by the sheriff in her stated case has a domestic character. The appellant and the complainer had been in a relationship until April 2012. There is a child of that relationship 'W' (date of birth 4 October 2011). After the separation the appellant apparently had some limited supervised contact with the child. It appears that relations between the appellant and the complainer had not been cordial and the complainer had not encouraged any communication from the appellant and was not disposed to allow contact between the appellant and their son.

[4] The charge relates to two Facebook messages from the appellant to the complainer's Facebook account posted at 2.15pm and 2.26pm on 23 November 2015. They are in the following terms:

> *"2.15 pm – why are you doing this to spite 'W' against me or something got ur shitty lawyers letter lol must admit quite funny really 'W' doesn't remember me get a grip we both know that aint true please 'E' am begging you a will not screw up with 'W' a love our wee guy and u know a do*"; and
>
> *"2.26 pm – and also a get tht u hate me and probably wish a was dead but believe me when a tell you a will see 'W' if it kills me a will remember there is no bail or anything now*".

[5] The complainer became distressed and upset on seeing that the appellant had sent the messages and before she read either. She took the second message to be a threat and believed the appellant knew her address and might attend uninvited. The complainer had, indeed, instructed her solicitor to reply to the letter from the appellant's solicitor seeking to contact with the child. The complainer had refused that request for contact.

[6] The complainer attended Ayr Police Station and reported the matter providing a copy of the Facebook messages. There is no dispute as to the content of the messages and that they had been sent by the appellant from his Facebook account to the complainer's. The complainer had not blocked the appellant's access to her Facebook page.

[7] It was argued on behalf of the appellant that the sheriff had erred in repelling the no case to answer submission. In respect of the first message, there was nothing menacing or threatening at all in that communication. The second message did not contain any threat. Although the complainer felt distressed and threatened she conceded under cross-examination that the message may have had a perfectly innocent purpose. It was insufficient that the complainer felt distressed and threatened. Indeed she said she was upset and distressed to see that the Appellant had sent her any message and that was before she had read the contents. It was necessary for the Crown to show objectively that the message was threatening or menacing and they had not done so. In order to prove the charge it was necessary that the Crown prove that the message sent by the appellant was either grossly offensive or of an indecent obscene or menacing character. The sheriff had failed to apply an objective test to the messages.

[8] The Crown rely on the nature of the message being menacing and that the context is important. The appellant had been subject to special conditions of bail preventing him from communicating with or contacting the complainer. It was, indeed, correct that these bail conditions no longer applied. On his release from prison the appellant engaged lawyers to seek contact with his son. The complainer was not minded to allow contact and she, herself, had engaged lawyers. The first message could be characterised as unpleasant but otherwise unobjectionable. The second message should properly be construed as threatening. There was an implied threat. The appellant would go to any lengths to have contact with his son.

The complainer felt threatened and distressed and took the second message to be a threat and reported it to the police. Against that background and given these facts and circumstances the Crown had led sufficient evidence to prove the charge.

[9] Section 127 of the Communications Act 2003 makes it an offence to send a message that is grossly offensive, indecent or menacing by means of a public electronic communications network. This section is designed to protect the public from threatening or menacing messages *inter alia.* The *actus reus* of the offence is the sending of the message of the proscribed character by the means mentioned in the section. The Communications Act 2003 is a UK Statute. Regard may be had to case law from England and Wales. In *D P P* v *Collins* [2006] UKHL 40 the House of Lords considered this offence. The offence of which the appellant was convicted cannot be proved unless the content of the message was of a "*menacing character*". When analysing a message to determine whether it is menacing or threatening that message needs to be examined in the context in which it was sent. A menacing message is one which conveys a threat. In the Divisional Court in *DPP* v *Collins* Sedley LJ made the following observation on what may be 'menacing':- "*…fairly plainly,(it) is a message which conveys a threat – in other words, which seeks to create a fear in or through the recipient that something unpleasant is going to happen.*" Conviction of this offence does not depend upon the message being received or the recipient's reaction or state of mind following receipt of the message. In *DPP* v *Collins* it was emphasised that the message or messages must be assessed objectively. Lord Bingham of Cornhill at para 8 observed:

> *"The offence is complete when the message is sent. Thus it can make no difference that the message is never received, for example because a recorded message is erased before anyone listens to it. Nor, with respect, can the criminality of a defendant's conduct depend on whether a message is received by A, who for any reason is deeply offended, or B who is not. On such an approach criminal liability would turn on an unforeseeable contingency."*

Therefore the messages require to be considered objectively in the context in which they are sent. The reaction of the recipient or complainer is not the determining factor.

[10] On an objective analysis the first message is in the nature of a plea to the complainer not to turn his son against him. It was conceded that it is unobjectionable. The second message is a continuation of the first and returns to the issue of the child and contact with the child. That, in our view, is the context in which the messages should be assessed. The exchange relates to the issue of contact with the child of the relationship. Clearly, the complainer did not wish the appellant to have contact either with her or with her son. That, in itself, may explain the complainer's distress and upset. Contact can, of course, be a Trojan Horse to effect continued communication with an estranged and unwilling former partner. However, any court will be aware of the difficulties and upset that can arise in such family disputes but in assessing the nature of messages which pass between parties for the purpose of criminal liability the court should not only have regard to that background but must undertake an objective assessment of the words deployed. That analysis should allow the court to recognise whether the boundary has been crossed between words which may be unwelcome, intemperate or even upsetting and words which are menacing and threatening. In our opinion, had the sheriff made that objective assessment she would have recognised that the messages did not contravene section 127 of the 2003 Act for the very simple reason that the messages lack menace. We agree that the first message is not objectionable at all. We are not persuaded that the second message contains anything more than an expression by the appellant of his determination to pursue his quest for contact with his son. There is no explicit threat or menace. The second message plainly reiterates the appellant's determination to see his son and contains words to the effect that he is no longer subject to bail conditions. At its highest this message contains both factual information and a vague

warning. It is, however, an entirely equivocal statement. Of course, the findings of any sheriff who has heard evidence deserve respect. Nevertheless, it appears to us, that the sheriff has erred in focusing on the complainer's reaction. Clearly, the messages are directed solely to the complainer, however, on a plain reading and analysis of the messages we decern no threatening or menacing words. Accordingly, it was not open to the sheriff to repel the no case to answer submission. We therefore propose to allow the appeal and answer the question posed in the stated case in the affirmative.

[11] Finally, the manner in which the sheriff has stated her case for the Appeal Court has caused certain difficulties in this appeal. Where the sufficiency of evidence is the matter which the appellant wishes to bring under review the practice on how to state a case should be clear. Even in a case such as this where there is no point other than the question whether a no case to answer submission ought to have been sustained or repelled findings in fact must be stated. In this appeal findings in fact have been requested and provided in the form of a supplementary note which, in itself, is irregular, as it denies the parties the opportunity of subjecting the draft findings in fact to scrutiny and adjustment. Guidance on the form of a stated case especially where there has been a submission of no case to answer is given in *Wingate v McGlennan* 1991 SCCR 133 by the Lord Justice Clerk (Ross). It is summarised conveniently in Renton and Brown's *Criminal Procedure* at 31.20 -21.