SHERIFF APPEAL COURT

[2022] SAC (Crim) 9
SAC/22-259/AP

Sheriff Principal D C W Pyle
Appeal Sheriff W A Sheehan
Appeal Sheriff D Hamilton

OPINION OF THE COURT

delivered by Appeal Sheriff W A Sheehan

in appeal by

SCOTLAND JAMES JOHN WALKER

Appellant

against

PROCURATOR FISCAL, DUNOON

Respondent

Appellant: Paterson Sol Advocate, Clyde Defence Lawyers, Clydebank
Respondent: S Borthwick KC Crown Agent

20 December 2022

[1] The appellant was convicted of a contravention of section 1 of the Domestic Abuse (Scotland) Act 2018; that between 20 August 2021 and 10 September 2021, both dates inclusive, at Hillfoot Street, Dunoon, he engaged in a course of behaviour which was abusive of his ex-partner [the complainer] in that he repeatedly loitered at Dunoon Primary School whilst she was attending there to collect his child Y.

[2] Section 1 of the Domestic Abuse (Scotland) Act 2018 makes it an offence to engage in a course of behaviour which is abusive of an ex-partner, in circumstances where a

reasonable person would consider that course of behaviour to be likely to cause physical or psychological harm and where the accused either intended the behaviour to cause such harm or was reckless as to whether it did so. References to psychological harm include fear, alarm and distress. Guidance as to what constitutes abusive behaviour for the purpose of the Act is given in section 2 which provides that abusive behaviour includes (in particular) behaviour which is violent, threatening or intimidating; is directed at the complainer and has a purpose (or amongst it purposes) or would be considered by a reasonable person to be likely to have certain effects on the complainer namely: making them dependent on or subordinate to the accused, isolating them from friends, relatives or other sources of support, controlling, regulating or monitoring their day-to-day activities, depriving them of or restricting their freedom of action and frightening, humiliating, degrading or punishing them. Section 10 provides that behaviour means "behaviour of any kind" and includes behaviour carried out directly and also through a third party. A "course of behaviour" involves behaviour on at least two occasions.

[3] The definition of behaviour contained in section 10 of the Act is deliberately widely drawn and must be considered in the factual matrix of each case. In this case, the appellant was convicted of repeatedly loitering at Dunoon Primary School when his ex-partner was there to collect their child. An analysis of the constituent parts of section 2 of the Act in the circumstances of this case means that in order to establish the *actus reus* of the offence, the court requires to find that the appellant's behaviour was directed at the complainer and either that by simply being present at the locus (in circumstances where the complainer objected to him being there) his behaviour could be regarded to be violent, threatening or intimidating or that a reasonable person would consider that his behaviour would be likely to have one or more of the relevant effects in subsection 3 (such as frightening the

complainer). These are straightforward questions of fact. The *mens rea* of the offence requires a finding that either the appellant intended to cause the complainer psychological harm or that he was reckless as to whether his behaviour had that result.

[4] The questions posed by the sheriff for the opinion of the court are:

1. Did I err in not sustaining the submission of no case to answer?
2. On the facts stated, was I entitled to convict?
3. On the evidence, was I entitled to hold that a reasonable person would consider the appellant's course of behaviour to be likely to cause the complainer to suffer physical or psychological harm?
4. Was the disposal of a non-harassment order excessive?
5. Were the terms of the non-harassment order excessive?

No submissions were made in relation to sentence and accordingly we need only concern ourselves with the first three questions.

[5] A no case to answer submission was made and repelled. The appellant proceeded to give evidence and was thereafter convicted. Our assessment of the first question posed is hampered by the layout of the stated case which does not follow the High Court guidance in *Wingate* v *McLennan* 1992 SLT 837 at page 839J:

> "If the stated case concerns the question as to whether the sheriff was justified in rejecting the submission of no case to answer, the stated case will require, first, to set out the evidence adduced by the prosecution and any inferences drawn therefrom, and, secondly, to set out the findings in fact which, of course, must be made on the whole evidence that has been led before the sheriff (*Bowman* v *Jessop*). As was observed in *Keane* v *Bathgate*, if the defence have led evidence, findings in fact can only be made considering the evidence led by the prosecution against any evidence which the defence have thereafter adduced. In a case where the accused has led evidence, the question whether the sheriff was justified in rejecting the submission of no case to answer raises a different issue from that raised by the question whether the sheriff on the facts stated was entitled to convict".

[6] A joint minute of agreement was lodged and in which it was agreed *inter alia* that Crown production 1 contained a photograph of the accused sitting on a bench at the locus on 20 August 2021, (taken by the complainer), that Crown production 2 contained a photograph of the accused in a van at the locus on 27 August 2021 (taken by the complainer's daughter, the complainer not being present on that occasion) and that Crown production 3 contained a photograph of the accused in a van at the locus on 10 September 2021 (taken by the complainer). The terms of the appellant's police interview on 8 October 2021 were admitted. In the interview, he admitted to being present at the locus on each of the afternoons of the dates libelled.

[7] The locus, Hillfoot Street, Dunoon, lies in close proximity to Dunoon Primary School. The school gates are visible to a person sitting on a public bench or in a parked vehicle at the locus. The appellant was observing or attempting to observe his five-year-old daughter leave school. The appellant exercised contact with her every Friday in terms of an interlocutor pronounced in Dunoon Sheriff Court on 18 August 2021. The terms of the interlocutor specifies that the appellant should collect her from Dunoon Contact Centre at 3:45pm. Dunoon Contact Centre is a few minutes' walk from the primary school.

[8] On 20 August 2021, the appellant sat on a public bench at the locus and waved to his daughter who waved back. The complainer objected to the appellant's presence at Dunoon Primary School after this incident. The findings in fact make no reference to the complainer being distressed at the locus - only that she "objected" to the appellant's presence. She made her objection known by means of a solicitor's letter. There was no evidence of this letter stating that she was threatened, intimidated, fearful, alarmed or distressed. The appellant sought advice from his solicitor and was advised that there was no legal restriction on him attending Dunoon Primary School to observe his daughter leaving school. On 27 August

2021 the appellant stayed in his vehicle at the locus and was observed by the complainer's daughter. The complainer herself was not present. On 10 September 2021, he attended the locus and remained in his vehicle.

Appellant's Submissions

[9] It was submitted that the sheriff erred in repelling the no case to answer submission in that the sheriff had failed properly to consider the constituent elements of the offence. Whilst the definition of behaviour is widely drawn in the 2018 Act, it was a step too far to characterise the appellant's behaviour as abusive in the circumstances of this case. There was no finding of a history of domestically abusive behaviour on the part of the appellant. His behaviour was not found to be violent, threatening or intimidating. The libel had originally contained the phrase "in an attempt to see [the complainer]". The appellant was convicted of an amended charge with these words being deleted. The appellant's behaviour was not directed at the complainer. The sheriff found that the accused was at the locus to see his daughter coming out of school. It is difficult to see how in such circumstances the sheriff could have concluded that his behaviour was directed at the complainer. Whilst in some circumstances behaviour directed at a child of the complainer may fall within section 2(2)(b), that provision was not applicable in circumstances where the appellant's daughter waved at him on the first occasion and where there was no evidence that she was even aware of his presence on the other dates libelled.

[10] The sheriff erred in reaching the conclusion that a reasonable person would consider that the appellant's mere presence at his daughter's school in circumstances where the complainer had a strong aversion to him and had objected to him being there would be likely to have one or more of the relevant effects in section 2(3), namely that she would be

fearful or that a reasonable person would consider that the appellant's presence at the locus would be likely to cause the complainer psychological harm in terms of section 1(2). It was a step too far to convict someone of an offence under section 1 in such circumstances.

[11] The sheriff erred in finding that the *mens rea* of the offence had been established. The findings in paragraph (25) of the stated case that the appellant went to the locus to see his daughter in her school uniform and to wave to her an hour before his contact visit was due to start were inconsistent with an inference that his intention was to cause the complainer psychological harm. The sheriff also erred in finding that the appellant was reckless as to whether his behaviour caused the complainer to suffer psychological harm. On 20 August 2021, the complainer's objection to him going to the school had not been intimated. Her objection (made via her solicitor) was just that. No mention of fear, alarm or distress was made. The appellant took legal advice before returning to the school. That advice was that there was no legal restriction on him going there. In such circumstances, it could not be said that he was reckless. On the second and third occasions, he stayed in his vehicle to minimise contact. On the second occasion, the complainer herself was not at the locus.

Crown Submissions

[12] The definition of abusive behaviour in section 10 of the 2018 Act is deliberately widely drawn. The appellant's behaviour should not be looked at in isolation but in the context of the whole facts and circumstances of the case. The appellant was well aware that the complainer wished to have no contact with him. His contact with his daughter had been regulated by the court two days prior to the first incident. The interlocutor required him to collect her from a contact centre at 3:45pm. He had deliberately gone to the locus to see her earlier regardless. The relationship between the appellant and the complainer was an

acrimonious one. He was aware that by attending the locus he would be likely to cause the complainer fear, alarm or distress in terms of section 1(3) of the Act. If he was not aware of that then he was reckless as to whether his behaviour was likely to have that result. When made aware of the complainer's objection to him attending the locus, he persisted in doing so. There was a sufficiency of evidence to satisfy the statutory test. The sheriff had not erred in repelling the no case to answer submission and, on the facts stated, he was entitled to convict the appellant. A reasonable person would consider that the appellant's behaviour would be likely to cause the complainer psychological distress.

Decision

[13] Section 10 of the Act is in broad terms and encompasses behaviour of any kind. Mere presence at a locus may be covered by this definition. Each case must be looked at on its own facts and circumstances. The sheriff found that the appellant attended the locus to see his daughter come out of school. He did so on three occasions. Whilst this was a course of behaviour in terms of section 1(1)(a), it was not abusive. To be so defined, the behaviour concerned required to be either violent, threatening or intimidating in terms of section 2(2)(a) or to have as one of its purposes, frightening the complainer in terms of section 2(2)(b)(ii) and (3). There is no finding-in-fact to support such an inference. There is no finding that the appellant was aware that the complainer was fearful, alarmed or distressed by his presence at the school. After the first incident, he was made aware (by correspondence sent by his solicitor) that the complainer objected to him going to the school. That objection falls some way short of her being frightened or indeed of her being psychologically harmed in terms of section 1(2)(b) simply by his presence at the locus.

[14] It is difficult to see how the sheriff could have concluded that the appellant was reckless as to whether his behaviour was likely to cause the complainer psychological harm in terms of section 1(2)(b)(ii). It was submitted that by persisting in his course of conduct, having been made aware of the complainer's objection to his presence at the locus, he was reckless. The appellant took legal advice before so doing. The advice given was that there was no legal restriction to him going to the locus. He stayed in his vehicle on the second and third occasions.

[15] The sheriff's determination of the no case to answer submission is dealt with at paragraph 14 of the stated case. He failed to address section 2(2) of the Act, which required him to find that in terms of section 2(2)(b) the appellant's behaviour was directed at the complainer. The sheriff's findings-in-fact do not support an inference that the appellant's behaviour was directed towards the complainer. His consideration of the no case to answer submission focussed purely on the second part of section 2(2)(b)(ii), namely whether the behaviour concerned would be considered by a reasonable person to be likely to have one or more of the relevant effects set out in section 2(3, such as frightening the complainer in terms of subsection 3(e). He failed to address the issue of the need for the appellant's behaviour to be directed at the complainer.

[16] In the facts and circumstances of this case, the sheriff erred in repelling the submission of no case to answer. We answer the first question in the affirmative. In consequence, we do not require to answer the other four questions. The appellant's conviction and sentence are quashed.