

APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Justice General
Lord Justice Clerk
Lord Brodie
Lord Drummond Young
Lady Clark of Calton

[2014] HCJAC 87
Appeal No: XJ1025/13
XJ8/14
XJ1039/13

OPINION OF THE
LORD JUSTICE GENERAL

In the
APPEALS AGAINST CONVICTION

by
(1) EWAN PATERSON
Appellant;
against

PF AIRDRIE
Respondent;

(2) DAVID BOW
Appellant

against

PF AIRDRIE
Respondent;

(3) JAMIE LOVE
Appellant
against

PF STIRLING
Respondent;

For first appellant: C M Mitchell, Hay; John Pryde & Co, Edinburgh
For second appellant: Mackintosh, Ross; John Pryde & Co, Edinburgh
For third appellant: C M Mitchell, Green; Capital Defence Lawyers, Edinburgh
For the Crown: Fairley QC AD; Crown Agent

14 August 2014

Introduction

[1] Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (the 2010 Act) provides as follows:

“38 Threatening or abusive behaviour

1. A person (“A”) commits an offence if-

- (a) A behaves in a threatening or abusive manner,
- (b) the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and
- (c) A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.”

Each of the appellants was convicted under section 38(1). The question in each case is how section 38(1)(b) is to be interpreted. On that question there are two seemingly conflicting decisions of this court.

Rooney v Brown 2013 SCCR 334

[2] In this case the appellant, having been arrested, was taken from the scene in a police van. During the journey he was repeatedly abusive to the police officers. He shouted remarks such as “shoot Gerry Adams”, “Fuck Billy Sands”, “kill all Paki bastards” and “Kill all Fenians”. He also whistled and sang sectarian songs and in a raised voice ranted sectarian and racial threats of violence. For this, he was charged under section 38(1).

[3] The sheriff found that while the officers took the threats to them seriously because of their knowledge of the appellant, and while they found the sectarian and racist comments offensive, there was no evidence that they were fearful or alarmed. The sheriff convicted the appellant on the view that it did not matter that the officers were not themselves in a state of fear or alarm. The appellant’s remarks were likely to cause a reasonable person to suffer fear or alarm.

[4] This court refused the appeal. The following is the relevant part of the Opinion of the Court delivered by Lady Dorrian:

“[6] In our view the sheriff had a proper evidential basis for concluding as he did. The matter is not to be decided by the reaction of individual police officers but on an objective basis. The court has to consider matters from the standpoint of the reasonable man placed in the shoes of these police officers. We have to assume that the behaviour occurs in the presence of such a person, we do not require to consider the likelihood of the remarks actually reaching a person. We agree that context is relevant to that consideration. However, in the present case, the context in which this behaviour took place was one in which the appellant had immediately previously been abusive and threatening to the police officers and causing a disturbance. They had difficulty handcuffing him. They had not succeeded in calming him down completely and he was continuing to be offensive, although his remarks now were largely not directed to them personally. A reasonable person in the shoes of the police officers during the appellant’s abusive behaviour in the van would have been aware of this, and also aware of the fact that when they arrived at their destination they would be faced with the task of removing him from the van into the police office. In

that context we consider that the sheriff was fully entitled to conclude that this was behaviour which was likely to cause a reasonable person to suffer fear and alarm.”

***Jolly v HMA* 2013 SCCR 511**

[6] The appellant in this case was detained in a young offenders institution. In preparation for a supervised release order he was interviewed by social workers. During the course of three separate interviews, and in response to questioning by the social workers as to his feelings, the appellant spoke of his intention to seek revenge on his ex-girlfriend, to harm her and her family and to seek revenge on anyone who hurt him. His comments were reported to the police. He was then charged with a contravention of section 38(1). The sheriff held that the evidence of the interviews was inadmissible.

[7] This court upheld that decision on the view that it was contrary to all principles of fairness to allow evidence of what the appellant said at such interviews to found a prosecution under section 38(1) (at para [3]). The court also considered a submission by the Crown that for a contravention of section 38(1) it was not necessary that the threats libelled were uttered to the persons who were the subject of the threats. It was enough that the behaviour was such as would have caused a reasonable person to suffer fear and alarm (*Rooney v HM Adv, supra*). On that point, Lady Smith, giving the Opinion of the Court, quoted section 38(1) (*supra*) and continued as follows:

[28] Accordingly, where (i) a person behaves in a threatening or abusive manner which (ii) in fact causes another person to suffer fear or alarm, (iii) in those circumstances, a reasonable person would have suffered fear or alarm and (iv) causing that fear or alarm is either what the person intended or was a consequence in relation to which they were reckless, then but only then has an offence been committed. Subsection (c), which deals with *mens rea*, of itself plainly points to it being a requirement that fear or alarm has in fact been suffered by those to whom the threatening or abusive behaviour was directed.

[29] To put matters another way, it is not enough that someone present suffers fear or alarm; some people may, no doubt, suffer fear or alarm when a reasonable person in the same position would not do so. It must also be established that a reasonable person in that position would have suffered fear or alarm. That, essentially limiting, provision that a reasonable person would suffer fear or alarm does not, however, mean that if all that can be said is that the hypothetical – and thus absent – reasonable person would, had that person been present, have suffered fear or alarm, an offence has occurred. It would, we consider, be extraordinary for that to have been the parliamentary intention and we cannot find any basis on which it can properly be contended that it was. Rather, it is clear to us that what has been legislated for in terms of section 38(1) of the 2010 Act are circumstances where real fear or alarm has been suffered by a real complainer.

[30] Regarding the case of *Rooney v HM Advocate*, which was relied on by the Crown in support of the submission that there was no need for actual fear or alarm, we note two matters. First, the issue was not whether or not the statutory offence required there to be actual fear or alarm but whether or not the conduct which occurred was behaviour which would, in terms of section 38(1)(b), have caused a reasonable person to suffer fear and

alarm. Secondly, although it seems to have been submitted on behalf of the appellant that police officers who had been threatened by the appellant were not themselves placed in a state of fear or alarm, the sheriff had made findings which were relied on by the court, to the effect that the police officers took the threats seriously because of their prior knowledge of the appellant. Thirdly, whilst the threats were largely not directed to the police personally, to some extent they were. The case is not, accordingly, authority for the proposition that there is no requirement, under section 38(1), for any person to suffer actual fear or alarm and it can, in any event, be distinguished on its facts.”

The present appeals

Ewan Paterson v PF Airdrie

[8] On 27 September 2013, at Airdrie sheriff court, this appellant was convicted of the following charge:

“On 25 May 2013 at Lochinvar Road, Cumbernauld, you EWAN PATERSON did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did shout and swear and challenge police officers to a fight;

CONTRARY to section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010.”

[9] Two police officers said that the appellant shouted and swore at them and acted in a threatening and aggressive manner before his arrest and thereafter when he was in the police vehicle. There was no evidence that the police officers suffered fear or alarm. One of them said that he was not annoyed by the appellant’s behaviour and that that was simply a matter to be dealt with. The sheriff refused a submission that because there was no evidence that anyone had been alarmed, there was no case to answer. He convicted the appellant. He considered that in circumstances where the behaviour occurred in a public residential area, known as a problem area for youth disorder, where the appellant was already out of control and where because of his behaviour there was the potential for further disorder to erupt, there was sufficient evidence that his behaviour would be likely to cause a reasonable person to suffer fear and alarm. Moreover, it could be inferred from the evidence that the appellant either intended to cause fear and alarm or was reckless as to whether his behaviour would have that effect. The sheriff distinguished *Jolly v HM Adv (supra)* on its facts.

David Bow v PF Airdrie

[10] On 25 October 2013 at Airdrie sheriff court this appellant was convicted of the following charge:

“On 8 May 2013 at Langmuirhead Road, Auchinloch you DAVID BOW did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did repeatedly swear and shout racial abuse at Sukhjinder Dhillon, c/o Cumbernauld police Office CONTRARY to Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 and it will be proved in terms of section 96 of the Crime and Disorder Act 1998 that the aforesaid offence was racially aggravated.”

[11] On 8 May 2013 the complainer was driving his car on Langmuirhead Road to collect his daughter from her nursery. A stationary bin lorry was blocking the road. The complainer tried to get past. As he edged out, one of the bin men shouted at him to stop. The complainer stopped. The appellant, who was one of the other bin men, approached the driver's window of the car and screamed and shouted abuse at the complainer, saying "Whit do you think you're doing? You're speeding. I'm going to drag you out the car and kick your fucking head in." He called the complainer a "black bastard". The abuse lasted a minute or less. One of the bin men took the appellant away. The complainer stopped his car and photographed the bin lorry with his mobile phone. The appellant again came over and said "Get out of the car. I'm going to smash your head in and beat you up, black bastard." The complainer said "Is that the best you've got? Do you think I've not heard that before?" The appellant replied with "Paki". The complainer said "I'm actually Indian, but it's all one to you." The complainer then collected his daughter. On the way back, he encountered the bin lorry again. The appellant was driving it. It looked to the complainer as if the appellant was calling him a black bastard again. The appellant drew up next to the complainer and said "You're a wanker. You're just a fucking wanker."

[12] There was no evidence that the complainer suffered fear or alarm.

[13] It was argued that there was insufficient evidence of an offence under section 38(1). It was submitted for the appellant that the Crown required to prove that a reasonable person had suffered fear and alarm and that there was no evidence of that. The sheriff repelled a submission based on *Jolly v HM Adv (supra, at para 29)* that the Crown had failed to prove that a reasonable person had suffered fear or alarm. She held that there was sufficient evidence that the appellant had behaved in a threatening or abusive manner. In the circumstances in which he did so, there was sufficient evidence that his behaviour would be likely to cause a reasonable person to suffer fear and alarm. It could be inferred that the appellant either intended to cause fear and alarm or was reckless as to whether his behaviour would cause fear and alarm. The sheriff was satisfied that there was sufficient evidence that the offence was racially aggravated. There was evidence from the complainer that the appellant evinced malice and ill-will towards the complainer based on his membership of a racial group. Evidence from a single source was sufficient in this respect, but there was also an adminicle of evidence from the appellant's police interview that he was not a stranger to using terms of racial abuse.

[14] Separately, counsel for the appellant submitted that even if *Rooney v Brown (supra)* was the correct interpretation of section 38(1), there was insufficient evidence to corroborate the complainer.

Jamie Love v PF Stirling

[15] On 23 September 2013 at Stirling sheriff court this appellant was convicted of the following charge:

"Between 5 August 2011 and 30 September 2011, both dates inclusive, at 27 Charter Street Stirling and elsewhere, the precise location to the Prosecutor unknown you Jamie Love did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did post comments on an internet website that were of a sectarian and abusive manner nature; CONTRARY to section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 and it will be proved in terms of Section 74 of the

Criminal Justice (Scotland) Act 2003 that the aforesaid offence was aggravated by religious prejudice.”

[16] The appellant was charged in consequence of a complaint to a police officer by a woman who had seen the appellant’s Facebook page, on which he had posted the following remarks.

“O GIVE ME A HOME WHERE’S THERE’S NO POPE OF ROME, NO CHAPELS TO SADDEN MY EYES, NO ROSARYBEADS, AND FLUTE BANDS PLAY THE SASH EVERYDAY, AND EVERYDAY IS LIKE THE 12TH JULY ...

WE ALL LIVE IN A PRODDY HOUSING SCHEME, THE PAPES THEY THINK IT’S GREEN BUT IT’S A PRODDY HOUSING SCHEME. GOD BLESS YER BLUE ND FUCK YER GREEN ...

C’MOAN RANGERS SHOW THESE CUNTS HOW IT’S DONE. W.A.T.P. HULLO HULLO WE ARE THE BILLY BOYS. HULLO HULLO WE ARE THE BILLY BOYS, YOU’L KNOW US BY OUR NOISE, WHEN WE’R UP TO OUR KNEES IN FENIAN BLOOD SURRENDER OR YOU’L DIE ...

MOAN THE HEARTS 2-0 GERRON. CRIS COMMONS DIRTY FENIAN SCUM CAN’Y TAKE DEFEAT DESERVES THE RID CAIRD. SHOWER AE ARSEHOLES. NO SURRENDER.”

[17] The complainer and the police officer to whom she had reported the matter both said that they were upset and offended by the comments. The appellant told the police that his comments were “intended as banter with mates rather than harm caused to anyone” and that when he compiled the remarks he did so out of “pure stupidity”.

[18] The sheriff concluded that the comments would have caused a reasonable person to have suffered fear or alarm. He considered that in the circumstances it was clear that the comments were threatening and abusive, that the reasonable person was likely to suffer fear or alarm and that the appellant was at least reckless as to whether such comments would cause fear or alarm. He had no difficulty in accepting that the offence was religiously aggravated as the comments were motivated by malice and ill will towards Roman Catholics.

Conclusions

Interpretation of section 38(1)

[19] Counsel for the appellants submitted that there was a patent ambiguity in section 38(1). They therefore urged us to refer to the statements of the Cabinet Secretary for Justice at Stages 2 and 3 of the Bill, and to the amendments made to it, in order to ascertain the intention of the Parliament. I do not agree that there is any ambiguity in section 38(1). Section 38(1) sets out three clear and concise constituents of the offence. Paragraphs (a) and (b) define the *actus reus* of the offence. Whether the accused has behaved in a threatening or abusive manner and whether that behaviour would be likely to cause a reasonable person to suffer fear or alarm are straightforward questions of fact. Paragraph (c) sets out the *mens rea* that is required.

[20] It seems to me that the question under paragraph (b) is not whether the complainer suffered actual fear or alarm. If it had been the intention of the Parliament that the complainer must have suffered actual fear or alarm, paragraph (b) could have said exactly that. On the contrary, paragraph (b) sets an objective test. It provides that the requirement of the subsection is made out if the behaviour would be likely to cause a reasonable person to suffer fear or alarm. A reasonable person is someone who is not of abnormal sensitivity. If a reasonable person would have suffered fear or alarm, it follows on the objective test that it is no defence if the behaviour causes no fear or alarm to the individual complainer, who might be, for example, an intrepid Glasgow police officer.

[21] In each of these cases the defence at the trial took its stand on the statement of the law in *Jolly v HM Adv (supra)* that I have quoted. I am in no doubt that that statement is incorrect. The error in the logic in that case is, I think, fairly clear. Having quoted section 38(1)(a), (b) and (c), Lady Smith says that “Accordingly, where (i) a person behaves in a threatening or abusive manner which (ii) in fact causes another person to suffer fear or alarm, (iii) in those circumstances, a reasonable person would have suffered fear or alarm and (iv) causing that fear or alarm is either what the person intended or was a consequence in relation to which they were reckless, then but only then has an offence been committed.” In my opinion, the use of the word “accordingly” is fallacious. Elements (i), (iii) and (iv) of her Ladyship’s formulation reflect paragraphs (a), (b) and (c) of section 38(1); but element (ii) is an element that is simply not in the subsection. In my view, the essence of the statutory offence is that the accused’s conduct is to be judged by an objective test in which the actual effect of the threatening or abusive behaviour on those who experience it is irrelevant. If the requirements of paragraphs (a) and (c) are made out, the crime is complete if the accused’s behaviour would be likely to cause fear or alarm to the hypothetical reasonable person.

[22] I am confirmed in this view by the wording of section 39 of the 2010 Act, which creates the offence of stalking. Section 39(2)(c) creates as an element of the offence the requirement that “A’s course of conduct causes B to suffer fear or alarm.” That confirms me in the view that the Parliament, having expressly required actual fear or alarm on the part of the complainer in section 39, cannot be held to have created such a requirement by implication in section 38.

[23] I conclude therefore that *Jolly v HM Adv (supra)* was wrongly decided and that it should be over-ruled. On the other hand, Lady Dorrian’s formulation in *Rooney v HM Adv (supra)* is an accurate reflection of the requirements of the subsection and should be approved.

[24] In each of the three cases before us, the sheriff has followed the lead given in *Rooney v HM Adv (supra)*. In my view the decision in each case proceeds on a correct appreciation of the requirements of the sub-section and is warranted by the findings in fact. I would therefore refuse the appeals of the first and third appellants; and refuse that of the second appellant on this ground.

Corroboration

[25] The second appellant also has a ground of appeal to the effect that the appellant’s police interview did not provide corroboration of the complainer’s evidence. The Crown required to prove, by corroborated evidence, that the appellant had acted in a threatening or abusive manner, that the behaviour would be likely to cause a reasonable person to suffer fear or alarm and that he intended or was reckless as to whether the behaviour would cause fear or alarm. The complainer

gave direct evidence of the appellant's behaviour. It can properly be described as threatening or abusive behaviour. That behaviour would be likely to cause a reasonable person to suffer fear or alarm. It can be inferred from that evidence that the appellant intended to cause fear or alarm or was reckless as to whether he did.

[26] In his police interview, the appellant said (1) that there was a bit of shouting and swearing; (2) that there were raised voices and that the appellant was a wee bit upset; (3) that the appellant had called the complainer a "fucking idiot, or something" (4) there had been a 30-second heated argument that was a bit out of order; (4) that the appellant accepted that he was probably shouting and bawling and was "probably out of order, shouting at the guy – just out of order"; (5) that the appellant said that he couldn't understand the complainer "because the guy was a Pakistani" and (6) that the appellant's neighbour is a "Paki guy". In my opinion, that evidence was sufficient to corroborate the complainer on the *facta probanda*. In my opinion, this ground of appeal is unfounded. I would therefore refuse the appeal.

Postscript on *Jolly v HM Adv*

[27] Section 38(2) of the 2010 Act provides that:

"It is a defence for a person charged with an offence under sub-section (1) to show that the behaviour was, in the particular circumstances, reasonable."

[28] In *Jolly v HM Adv* (*supra*) the appellant was advised by the social worker at the outset of the first interview that it was not compulsory for him to attend the interview; that no penalty would follow if he did not; that it was a matter of his free will if he attended, and that he could leave the meeting if he wished (at para [9]). We may reasonably suppose that the appellant felt that it was in his interests to be co-operative in the interviews. The remarks for which the appellant was prosecuted were made by him only because they were elicited by specific questioning that encouraged him to articulate his hidden feelings. Moreover, having answered such questions, he was asked several times to clarify what he had said.

[29] The sheriff decided that the evidence of the appellant's statements at the interviews was inadmissible on the ground of fairness. This court took the same view. I am not suggesting that the decision on that point was necessarily wrong; but in that case section 38(2) was not cited. My own view is that it would have presented an irresistible defence to such an unreasonable prosecution.

Disposal of these appeals

Ewan Paterson and David Bow

[30] In both of these cases the sheriff has submitted three questions; namely (1) whether she was entitled to repel the submission of no case to answer; (2) whether she was entitled to find that the appellant behaved in a threatening and abusive manner, that in the circumstances his behaviour would be likely to cause a reasonable person to suffer fear or alarm, and that he intended by his behaviour to cause fear and alarm or was reckless as to whether his behaviour would do so; and (3) whether she was entitled to convict. I propose to your Lordships and to your Ladyship that we should answer all three questions in the affirmative.

Jamie Love

[32] The first question in the stated case was not insisted in. We need not answer it. The second and third questions are whether the sheriff was entitled to repel the submission of no case to answer and whether he was entitled to convict. I propose that we answer both questions in the affirmative.

APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Justice General
Lord Justice Clerk
Lord Brodie
Lord Drummond Young
Lady Clark of Calton

[2014] HCJAC 87
Appeal No: XJ1025/13
XJ8/14
XJ1039/13

OPINION OF LORD CARLOWAY, the
LORD JUSTICE CLERK

In the

APPEALS AGAINST CONVICTION

by

(1) EWAN PATERSON

Appellant;

against

PF AIRDRIE

Respondent;

(2) DAVID BOW

Appellant

against

PF AIRDRIE

Respondent;

(3) JAMIE LOVE

Appellant

against

PF STIRLING

Respondent:

For first appellant: C M Mitchell, Hay; John Pryde & Co, Edinburgh
For second appellant: Mackintosh, Ross; John Pryde & Co, Edinburgh
For third appellant: C M Mitchell, Green; Capital Defence Lawyers, Edinburgh
For the Crown: Fairley QC AD; Crown Agent

14 August 2014

[33] I agree with your Lordship in the chair that, for the reasons given, the appeals should be refused.

APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Justice General
Lord Justice Clerk
Lord Brodie
Lord Drummond Young
Lady Clark of Calton

[2014] HCJAC 87
Appeal No: XJ1025/13
XJ8/14
XJ1039/13

OPINION OF LORD BRODIE

In the

APPEALS AGAINST CONVICTION

by

(1) EWAN PATERSON

Appellant;

against

PF AIRDRIE

Respondent;

(2) DAVID BOW

Appellant

against

PF AIRDRIE

Respondent;

(3) JAMIE LOVE

Appellant

against

PF STIRLING

Respondent:

For first appellant: C M Mitchell, Hay; John Pryde & Co, Edinburgh
For second appellant: Mackintosh, Ross; John Pryde & Co, Edinburgh
For third appellant: C M Mitchell, Green; Capital Defence Lawyers, Edinburgh
For the Crown: Fairley QC AD; Crown Agent

14 August 2014

[34] I respectfully agree with the Opinion of your Lordship in the chair and, accordingly, that the case of *Jolly v HM Adv* should be over-ruled and that, for the reasons given by your Lordship, the three appeals should be refused.

APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Justice General
Lord Justice Clerk
Lord Brodie
Lord Drummond Young
Lady Clark of Calton

[2014] HCJAC 87
Appeal No: XJ1025/13
XJ8/14
XJ1039/13

OPINION OF
LORDDRUMMOND YOUNG

In the

APPEALS AGAINST CONVICTION

by

(1) EWAN PATERSON

Appellant;

against

PF AIRDRIE

Respondent;

(2) DAVID BOW

Appellant

against

PF AIRDRIE

Respondent;

(3) JAMIE LOVE

Appellant
against

PF STIRLING

Respondent:

For first appellant: C M Mitchell, Hay; John Pryde & Co, Edinburgh
For second appellant: Mackintosh, Ross; John Pryde & Co, Edinburgh
For third appellant: C M Mitchell, Green; Capital Defence Lawyers, Edinburgh
For the Crown: Fairley QC AD; Crown Agent

14 August 2014

[35] I agree with your Lordship in the chair, both as to the proper construction of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 and as to the disposal of the present appeals.

APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Justice General
Lord Justice Clerk
Lord Brodie
Lord Drummond Young
Lady Clark of Calton

[2014] HCJAC 87
Appeal No: XJ1025/13
XJ8/14
XJ1039/13

**OPINION OF LADY CLARK OF
CALTON**

In the

APPEALS AGAINST CONVICTION

by

(1) EWAN PATERSON

Appellant;

against

PF AIRDRIE

Respondent:

(2) DAVID BOW

Appellant

against

PF AIRDRIE

Respondent:

(3) JAMIE LOVE

Appellant

against

PF STIRLING

Respondent:

For first appellant: C M Mitchell, Hay; John Pryde & Co, Edinburgh

For second appellant: Mackintosh, Ross; John Pryde & Co, Edinburgh

For third appellant: C M Mitchell, Green; Capital Defence Lawyers, Edinburgh

For the Crown: Fairley QC AD; Crown Agent

14 August 2014

[36] I agree that for the reasons given by your Lordship in the chair, these three appeals should be refused.