



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 30
(1) HCA/2019/693/XC
(2) HCA/2019/717/XC
(3) HCA/2020/90/XC

Lord Justice General
Lord Turnbull
Lord Matthews

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEALS AGAINST CONVICTION AND SENTENCE

by

(1) KEVIN MILLER and (2) LAUREN MILLER

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

(1) Appellant: S McCall QC, D Adams; John Pryde & Co (for Blackwater Law, Glasgow)

(2) Appellant: CM Mitchell QC, L Lawrie; PDSO Edinburgh

Respondent: A Edwards QC AD; the Crown Agent

6 May 2021

[1] This appeal principally concerns the circumstances in which a father and his adult daughter came to be convicted of two lengthy charges specifying breaches of section 39(1) of the Criminal Justice and Licensing (Scotland) Act 2010, otherwise known as the crime of

stalking. The complainer in both charges was the first appellant's wife and the second appellant's mother, Linda Miller, who was estranged from the family at the time.

[2] The appeal highlights the difficulties which can ensue when the parties to a case fail properly to isolate and identify the essential legal components of such a charge and when the Crown fail to set out a coherent and logical analysis of the basis upon which they invite the jury to be satisfied that the accused persons engaged in conduct which was criminal and did so whilst acting in concert.

The indictment

[3] The appellant Kevin Miller (KM), who is now aged 52, appeared on an indictment containing 14 charges along with his two daughters Lauren Miller (LM), now aged 26, and Courtney Miller (CM), now aged 23. The case went to trial in the Sheriff Court at Inverness commencing on 30 October 2019 and concluding 12 court days later on 14 November. Linda Miller was the complainer in each of the charges

[4] KM appeared on six charges of assault (charges 1, 2, 3, 4, 9 and 13), one charge of abduction and assault (charge 11), one charge of attempting to pervert the course of justice (charge 7) three charges alleging breaches of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 (charges 5, 6 and 12) and three charges of breaching section 39(1) of the same Act (charges 8, 10 and 14).

[5] LM was charged along with KM on two of the charges of assault (charges 9 and 13) and the charge of abduction and assault (charge 11). CM was charged along with KM and LM on one charge of assault (charge 9) and both daughters were also charged along with KM on two of the charges of stalking (charges 10 and 14). At the close of the Crown case all

charges were withdrawn against CM, all except charges 1, 10 and 14 were withdrawn against KM and all charges except charges 10 and 14 were withdrawn against LM.

[6] The former accused CM was led as a defence witness by the solicitor appearing for KM. Neither KM nor LM gave evidence on their own behalf but reliance was placed on the content of a police interview given by LM in the course of which she had given some account of her interactions with her mother.

[7] The terms of charge 1 of which KM was convicted were as follows:

“(001) between 01 May 1994 and 30 June 1994, both dates inclusive, at 4 Obsdale Gardens, Alness you KEVIN MACKAY MILLER did assault Linda Helen Miller, your wife, then residing there and did repeatedly strike her on the body, seize hold of her by the body and cause her to strike her head against a wardrobe, all to her injury.”

[8] Both KM and LM were convicted in identical terms on charges 10 and 14 as follows:

“(010) between 28 May 2017 and 21 July 2017, both dates inclusive, at 30 Obsdale Park, Alness, Creag Dubh, Balconie Street, Evanton, Kenny Murray Cars, South Harbour Road, Fraserburgh and 4 Mitchell Street, Lossiemouth you KEVIN MACKAY MILLER, LAUREN AIRD MILLER did engage in a course of conduct which caused the said Linda Helen Miller fear or alarm in that you did, in an attempt to prevent her from leaving family home at 30 Obsdale Park, Alness and thereafter to induce her to return to the said family home;

(b) on 7 July 2017, following said Linda Helen Miller's departure from the family home to live at a new address, attend at the home address of Jane MacPherson, Creag Dubh, Balconie Street, Evanton and repeatedly ask for the said Jane MacPherson to disclose the whereabouts of the said Linda Helen Miller;

(c) between 7 July 2017 and 21 July 2017 repeatedly contact the said Jane MacPherson by telephone and through social media, asking her to disclose the whereabouts of the said Linda Helen Miller;

(d) on 7 July and 8 July repeatedly telephone the said Linda Helen Miller;

(e) on 11 July 2017, having established that the said Linda Helen Miller had sold her car to Kenny Murray Car Sales, South Harbour Road, Fraserburgh, telephone the said Kenny Murray and tell him that the said car had been stolen by an employee and you did demand that the said Kenny Murray tell you the address of the person who sold him the car and you did

induce him to prove the new address of the said Linda Helen Miller;

(f) between 11 July 2017 and 21 July 2017 repeatedly attend at the new address of the said Linda Helen Miller at 4 Mitchell Street, Lossiemouth and did shout, repeatedly ring the doorbell and bang on the door and windows, ask her to return to the said family home and you KEVIN MACKAY MILLER did tie a cable tie around your neck and tighten the said cable tie, putting the said Linda Helen Miller in fear for your life to the extent that she was required to cut said cable tie;

and you did induce the said Linda Helen Miller to return to the said family home;

CONTRARY to Section 39(1) of the Criminal Justice and Licensing (Scotland) Act 2010

and it will be proved in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 that the aforesaid offence was aggravated by involving abuse of your partner or ex-partner

and

(014) between 21 July and 3 April 2019, both dates inclusive at 30 Obsdale Park, Alness, Evanton Car Sales, 12C Evanton Industrial Estate, Evanton, Creag Dubh, Balconie Street, Evanton, Burnett Road Police Station, Inverness, 64 Souter Drive, Inverness, Ivanhoe Avenue, Inverness, Inverness Retail Park, Eastfield Way Inverness, Carsegate Road North, Inverness, 129 Westford, Alness, High Street, Inverness, Blacksmiths Bar, Culloden, Inverness, Netherlea, Keith Hall, Inverurie and elsewhere in Grampian, Highland and Islands you KEVIN MACKAY MILLER, LAUREN AIRD MILLER did engage in a course of conduct which caused the said Linda Helen Miller fear or alarm in that you did;

(b) cause for the said Linda Helen Miller's mother, namely Dorothy Aird, care of the Police Service of Scotland, to be informed that the said Linda Helen Miller wanted no contact with her;

(c) on 27 July 2017 send an email to Police Scotland, purporting to be from the said Linda Helen Miller, stating that she was safe and well, but that she was being harassed by her said sister and mother;

(ci) on 25 August 2018, following the said Linda Helen Miller's departure from the family home at 30 Obsdale Park, Alness, report her vehicle as missing on social media and encourage anyone who had seen said vehicle to contact you with its whereabouts;

(e) attend at the home address of Jane MacPherson, Creag Dubh, Balconie Street, Evanton and ask the said Jane MacPherson about the said Linda Helen Miller's whereabouts;

(f) repeatedly contact the said Jane MacPherson by mobile telephone and through social media, to enquire about the said Linda Helen Miller;

(g) attend at the home address of Iain Murray and Joanne Murray, Netherlea, Keith Hall, Inverurie and ask the said Iain Murray and Joanne Murray about the said Linda Helen Miller's whereabouts;

- (h) repeatedly contact the said Iain Murray and Joanne Murray by mobile telephone and through social media, to enquire about the said Linda Helen Miller;
- (i) repeatedly send emails to the said Linda Helen Miller;
- (j) on 31 August 2018 attend at Burnett Road Police Station, Inverness to report the said Linda Helen Miller missing to Police Scotland;
- (k) repeatedly send the said Linda Helen Miller letters at the said family home, in the knowledge that they would be redirected to her new address, which was not known to you;
- (m) on 11 September 2018 send an email to Inverness Women's Aid, looking for information on the said Linda Helen Miller;
- (o) on 13 September 2018, having discovered the said Linda Helen Miller's new address at 64 Souter Drive, Inverness, attend at said address with flowers for the said Linda Helen Miller;
- (q) on 19 September 2018 cause for a family friend, namely Samantha Rocke, care of the Police Service of Scotland, Inverness, to attend at 64 Souter Drive, Inverness to speak to the said Linda Helen Miller;
- (r) on 21 September 2018 attend at Inverness Retail Park, Eastfield Way, in the knowledge that the said Linda Helen Miller may be there;
- (s) on 8 October 2018 and 15 October 2018 arrange for flowers to be delivered to the said Linda Helen Miller;
- (t) following the said Linda Helen Miller blocking your emails, repeatedly send messages to her by contacting her through her ebay account;
- (u) following the said Linda Helen Miller blocking you from sending her messages through her ebay account, repeatedly transfer money to her bank account and send messages to her within the reference details of each said transfer;
- (v) on 21 October 2018 attend at Inverness Retail Park, Eastfield Way, Inverness in the knowledge that the said Linda Helen Miller would be there and ask for her to discontinue civil proceedings against the said KEVIN MACKAY MILLER;
- (w) repeatedly post messages on social media that were abusive and threatening towards the said Linda Helen Miller;
- (y) on 27 November 2018, attend at 64 Souter Drive, Inverness and deliver balloons for the said Linda Helen Miller
- (aa) send photographs of the said Linda Helen Miller and Steven Rose, care of Police Service of Scotland, taken at Caledonian Public House, High St, Inverness on 30 December 2018 to Paula Cray, care of Police Service of Scotland, the partner of the said Steven Rose and also send said

photographs to the said Loma Clark, the said Steven Rose and the said Joanne Murray;

(ab) on 31 March 2019 drive past the home address of Dorothy Aird, mother of the said Linda Helen Miller at 129 Westford, Alness in the knowledge that the said Linda Helen Miller would be there and stare at the said Linda Helen Miller; and

(ac) on 3 April 2019 telephone Roy Cumming, care of the Police Service of Scotland, the new partner of the said Linda Helen Miller, at Blacksmiths Bar, Culloden, Inverness

CONTRARY to Section 39(1) of the Criminal Justice and Licensing (Scotland) Act 2010

and it will be proved in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 that the aforesaid offence was aggravated by involving abuse of your partner or ex-partner”.

[9] On 12 December 2019 KM received a sentence of 6 months imprisonment in respect of charge 1, 12 months imprisonment in respect of charge 10 and 16 months imprisonment in respect of charge 14. The sentences were ordered to run consecutively and were backdated to 15 May 2019 the date on which he was first remanded in custody. A non-harassment order was also imposed. The sheriff imposed a community payback order on LM requiring her to undertake 280 hours of unpaid work within nine months. A non-harassment order for the period of one year was imposed in her case. KM was released on interim liberation on 12 May 2020.

The grounds of appeal

[10] The appellant KM was granted leave to appeal against both conviction and sentence. He challenged his conviction on charge 1 on the basis that there was insufficient evidence to establish that he was the perpetrator of that offence and that the sheriff had been wrong to refuse the section 97 submission made on his behalf.

[11] In relation to charges 10 and 14 he contended that there was no, or insufficient evidence to establish that he and LM had been acting in concert and that the sheriff's directions on concert were inadequate and in part incorrect.

[12] KM also advanced a third ground of appeal against conviction in which he contended that there was additional evidence now available which had not been presented at the trial but which would have assisted in undermining the credibility of the complainer. That evidence comprised complaints which had been made to the police by LM and CM in April and May 2019 concerning allegations of assault made by them against their mother. In addition, the ground extended to a complaint that in June 2019 LM had provided video footage to the Crown in support of her complaint demonstrating that her mother and her new partner repeatedly attended in the area of her house and work and followed her in a car. KM contended that all of the information provided by his daughters to the prosecution authorities ought to have been disclosed to his solicitors prior to the trial.

[13] In support of his appeal against sentence the ground of appeal on KM's behalf identified that he was a first offender and contended that a non-custodial sentence ought to have been imposed or, in the alternative, that the custodial sentence imposed was excessive.

[14] The appellant LM was granted leave to appeal against conviction on a ground identical to KM's challenge to the sheriff's directions on concert and a ground similar to KM's challenge based on additional and undisclosed evidence. She was also granted leave to appeal against the sentence selected in her case on the basis that the community payback order imposed constituted an excessive sentence.

The evidence

[15] In order to place the issues which arise into a proper context it will be necessary to set out a summary of the principal evidence upon which the Crown relied.

[16] In support of charge 1, the complainer gave evidence that around a year before her marriage to KM, which was in 1995, she and he had moved to live together at 4 Obsdale Gardens, Alness. Her family also lived in Alness. She described the events of an evening in around the summer of 1994 when she had been out with her two sisters in Alness. At the end of the evening she parted company with her sisters and walked home to 4 Obsdale Gardens. She felt unwell when she arrived home and was sick on the bedroom floor. She then described KM being angry at what she had done and assaulting her in the manner described in the charge.

[17] After a while, when KM had left the bedroom, she put on a coat over her otherwise naked body and ran out of the house, barefoot, intending to go to her parents' home. She met a neighbour, Mr Adam, who comforted her and tried to persuade her to return home. As he was doing so they met KM who made a jocular observation about the state she was in through drink. On the complainer's evidence all three then returned to her house and Mr Adam joined KM for a drink in the living room, at which stage she again left and made her way, this time successfully, to her parents' home.

[18] Mr Adam was led in evidence and recollected meeting a distressed lady coming towards him in Obsdale Gardens a number of years ago when he lived at number 9. She had bare feet but he could not remember what she was wearing. She walked with him until they met a man whom she seemed to know. On Mr Adam's evidence the man and the lady then entered a house at number 3 or number 4 Obsdale Gardens together. He made his own way home. He did not identify KM.

[19] The complainer's mother and her younger sister both gave evidence about an incident in 1994 at a time when she was living at 4 Obsdale Gardens. Her sister described being out with the complainer and her leaving to head for her home at the end of the evening. Her mother described the complainer arriving in a distressed condition barefoot wearing nothing but a long black coat. She had many bruises all over her body and she spent the night at her parents' home.

[20] The second chapter of the complainer's evidence concerned events between June 1998 and December 2017 encompassing charges 2 to 8 inclusive. In broad terms, she described being assaulted on a number of occasions until an event around the end of May 2013 when she left home with her daughter Courtney, who was at that time a teenager, and drove to the local police station. She made a statement about KM's conduct and then arrangements were made for her and her daughter to go to a Women's Aid refuge in Dingwall where they stayed for around two nights before returning home. Shortly after she did so, on a date around the beginning of June, police officers attended at her home and detained KM who then appeared in court and was granted bail on a special condition not to contact the complainer or CM.

[21] Thereafter the complainer described threats made against her by KM in an attempt to persuade her to withdraw the charges. She described the circumstances in which she came to write a letter to the procurator fiscal claiming that the charges which had been made against KM were false and had been made up by her and requesting that his bail conditions could be varied so as to permit him to return home. On her evidence the terms of the letter were dictated to her by KM. She was also taken through other letters concerning her sister Lorna Clark and her husband Steven, some of which formed the subject matter of charge 8. In due course proceedings were discontinued against KM and he returned home,

whereupon he forbade her from having any contact with her family as he had blamed them for their involvement in the proceedings which had been instigated against him.

[22] The third chapter of the complainer's evidence concerned the circumstances in which she next came to leave the family home, on 7 July 2017, before returning home again on 17 July. This evidence encompassed charges 9 and 10. She described being assaulted by KM and both of her daughters at the end of May 2017, as set out in charge 9, following which she sought to make contact with Women's Aid through the help of her friend Jane MacPherson. Due to difficulties which Women's Aid had in providing accommodation the complainer came to secure private accommodation at an address in Lossiemouth and moved there in secret on 7 July.

[23] In this chapter of her evidence the complainer stated that after leaving home KM telephoned her constantly. Although she did not explain what he said, the context made it clear that he was asking her to return. She gave evidence of an event occurring a few days after she had left home when KM, LM and CM all arrived unexpectedly at her address in Lossiemouth one night. They were banging on the windows and door and one of the girls was saying:

"Mam, I know you're in there. Please let us in. We love you. Come home".

The complainer's evidence was that she was absolutely terrified by this event and called the police by dialling 999, whereupon officers arrived and took KM and her two daughters away. A few days later a similar event took place when KM and her two daughters again attended and were banging on the doors. She described KM and LM looking in through the living room window at her and begging her to come home saying that they were so sorry. She described LM as being really upset and hysterical and saying:

“it won’t happen again. I’m so sorry. Honest mum please come home we can’t manage without you”.

She then described KM taking a cable tie and placing it around his neck pulling it tight, which caused her to go outside with a pair of scissors and cut it off. LM was particularly distressed and the complainer took her into the house to calm her down. KM came in and, as the complainer described it, “they were just, like, lovely, we are so sorry”. Since they had found where she was living the complainer came to the view that there was no point in staying there and she decided to go home with them.

[24] Other evidence led in support of charge 10 established that KM and LM had attended at Jane MacPherson’s home asking her if she knew where the complainer had moved to and repeatedly contacted her by telephone and social media asking her to tell them where the complainer was. Evidence was also led of KM’s conduct in trying to ascertain the complainer’s whereabouts, as described in paragraph (e) of charge 10.

[25] The final chapter of the complainer’s evidence concerned events in July 2018, which she explained caused her to leave the family home for the final time, and subsequent events from August of that year onwards. She described being shouted at, assaulted and locked in the family business premises with KM and LM on 7 July. The family ran a second hand car business from commercial premises. She described KM behaving in an alarming fashion during the course of this episode, all as encompassed by charges 11 and 12. At the end of this incident she decided that she was leaving for good and was able to find a room to rent at an address in Inverness, to which she moved on 25 August 2018.

[26] Although they were unaware of the complainer’s new address, KM and LM were able to contact her by writing letters to the complainer at her home address which were then

redirected to her new address in Inverness. Evidence was led about the content of certain of these as follows:

“Mam, don’t worry, none of us, especially dad, know what is happening right now. It isn’t you. It’s your mental health again we don’t blame you at all. We love you. Realise it”

“Love you and sorry for everything. Linda, I have been thinking about every day since we met, anything that’s ever happened between us. I’m deeply sorry for ever hurting your feelings, blaming you for stuff that clearly wasn’t your fault. I know I’m stupid and can say daft things. I will never say anything again. When you think about things, we have had a lot of great times together. I think every other couple argue more than we ever did. It’s mostly other people interfering that caused any arguments. Just wish everyone left us alone. No matter what, I will always love you and do anything I can to help you as you are the love of my life. I know why you left and would do anything to have you back, even just to call you and hear your voice. I’ve never been away from you this long in 30 years and it hurts more everyday. I couldn’t see why you left at the start and was annoyed with you but now realise why you left. I wish I went too. I wish you could have talked to me and let me know how bad things were. It’s such a shame on you to have all these feelings bottled up inside. It must be tearing you apart. Please let me fix everything. I can’t stand the fact of you being alone. I want to love and protect you and make you happy. We have more than most families to be grateful for so let’s make the most of it. Lauren is gutted you are not here and she blames herself. I could go on just writing to you but it will annoy you even more. Please read your emails. Love you always Kevin xxx.”

“Mam, we need you to know we love you. We will never hurt you in any way. Dad got his letter through for court. I don’t know how, but he hasn’t got a bad word to say about you. He still loves you. I really don’t know how you can do this to him again. You really need to look up borderline personality disorder and research it, mam. I’m not saying that to be nasty but it’s at the stage now you need help to help yourself as there is nothing I can or we can do for you now. We’ve tried it all. You are destroying our lives because you can’t get help, miss psychiatrists appointments, skip medication or seek advice from anyone. Lots and lots of love Lauren.”

[27] Divorce proceedings were initiated by the complainer and in September 2018 she obtained an interdict against KM prohibiting him from contacting or approaching her. On 13 September LM was observed driving into the street in Inverness where the complainer lived and dropping off a bunch of flowers at the complainer’s door. Further flowers were delivered to the complainer on subsequent occasions. Evidence of one particular occasion

was elicited from the complainer who explained that she received a bunch of flowers with balloons attached and a card which contained the message:

“Linda, we will all do everything to make your life like a fairytale. You can stay home, no work, anything else you wish. You are now the boss at home. You can make all the decisions. You’ll love it. XXXX”

[28] On 19 September a friend of LM’s called Samantha Rocke arrived at the complainer’s home unexpectedly, as the complainer explained, to relay a message from KM. Although the message was not described, the complainer explained that she handed over to Ms Rocke the keys and registration document to a motor home in order that these could be returned to KM. The complainer considered this vehicle to be a marital asset but explained that on advice from her solicitor she had agreed that the keys and documents should be returned to KM.

[29] On 26 September the complainer met LM and CM at a restaurant in a retail park in Inverness by arrangement which she had made through a mutual friend. Again this was a meeting which took place in consequence of advice provided to the complainer by her solicitor and was to enable her to return two more sets of keys and registration documents to CM in order that they could be passed on to KM.

[30] The complainer went on to describe other forms of communication which she received, apparently from one of her daughters, through an eBay account and through reference messages attached to small deposits made into her bank account. The general tenor of these was that the complainer was being encouraged to return home. On one occasion there was a message from LM seeking the return of her tickets to an Enrique Iglesias concert.

[31] On 21 October the complainer encountered CM in the car park area of a cinema complex. She described being induced to follow CM to an area of the car park where she came upon LM and KM sitting in LM's car. Her evidence as to what occurred was that:

“Kevin was really upset and he was begging me to come back, drop everything, how much he loved me, how the girls wanted me back, everything. Just pleading with me to drop everything, stop the interdict, don't be silly, cancel everything, come home, will fix it all, and I just wasn't listening to any of it. I wasn't interested.”

[32] In addition to the evidence given by the complainer, some further evidence was elicited demonstrating contact by KM with friends of the complainer shortly after her departure seeking to ascertain her whereabouts. Evidence was led about social media messages posted by LM shortly after the complainer's departure stating, incorrectly, that the vehicle which she had left in had been stolen and asking anyone who happened to see it to contact her.

Submissions

Appellants

[33] On behalf of the first appellant it was submitted that there was insufficient evidence to provide corroboration of the complainer's identification of KM as her assailant in respect of charge 1.

[34] Senior counsel for each appellant made similar submissions in respect of charges 10 and 14 in support of the ground of appeal contending misdirection. A breach of section 39(1) of the 2010 Act could only be established if a course of conduct was demonstrated on the basis of actions undertaken with the necessary intent to cause fear and alarm, as required by subsection (3), or in circumstances where the individual concerned ought to have known that engaging in such conduct would be likely to cause the complainer to suffer fear or

alarm. This was of particular importance, since almost the entire evidence relied upon by the Crown comprised behaviour which would not necessarily be unlawful on its own. The jury required to have a clear understanding that it would not necessarily be a crime for a husband, or a daughter, to attempt to persuade an estranged partner or mother to return home, even if it was clear that she did not wish to do so. The conduct specified in paragraphs (e), (f), (g) and (h) of charge 14 did not involve the complainer at all. It was all the more important therefore that the jury should be clear as to how any of the behaviour libelled could constitute the statutory offence charged.

[35] The importance of all of this became even more obvious since the case against each appellant was based on concert. Despite this, the evidence demonstrated that the conduct specified in the sub heads of each charge was on some occasions engaged in by KM alone and on other occasions engaged in by LM alone. Whilst the trial sheriff directed the jury that concert could arise by prior agreement, or spontaneously, she gave no assistance as to how, or on what evidence, the jury could conclude that a common plan had been entered into, on either basis. The jury was given no assistance with working out what the scope of the relevant criminal purpose was. In his speech the procurator fiscal had made no submissions as to the evidential basis upon which the jury could conclude that either appellant acted with the necessary intent required for the statutory offence. The presentation of the Crown case appeared to proceed upon the basis that if the conduct described was proven to have taken place then the crime charged was established. The Crown made no submission concerning the scope of any alleged criminal purpose and made no submission as to the basis upon which concert could be seen to have been established, either by antecedent agreement or on the basis of spontaneous conduct. It was therefore all

the more important for the sheriff to have given adequate directions in these crucial areas for the jury's consideration.

[36] On 17 April 2019 LM had provided a statement to the police alleging that she had been the subject of physical and sexual abuse by her mother over many years. On 14 May 2019 CM provided a statement alleging she had been the subject of assaults by her mother. On 19 April 2019 KM provided a statement about these matters to the police. Subsequently, in June 2019, LM complained again to the police and to the procurator fiscal that her mother was repeatedly attending at her house and work and following her in a car. Video footage in support of her complaint was provided on a USB memory stick by LM.

[37] Each of KM, LM and CM claimed that the police officers taking their statements had told them that they must not discuss the content of what they had reported with anyone else. Each accepted that instruction and in compliance with it mentioned nothing about these matters to their own solicitors in advance of trial. It subsequently transpired that the Crown had commenced an investigation into the allegations made against the complainer but did not disclose to any of the solicitors acting the fact that police statements were made in April and May 2019. The USB memory stick and letter from LM had been disclosed to the original solicitors acting for both appellants. Each subsequently changed agents. There was no subsequent disclosure to the new agents of the video footage contained on the memory stick.

[38] It was contended that had the relevant information been disclosed the solicitors acting for KM and LM would have been able to undermine the complainer's evidence about her state of fear and alarm and about her being under the control of the appellants. It was submitted that, properly advised of the complaints which had been made, those acting for the appellants would have been able to present evidence of a different dynamic within the

family home. It could have been shown that it was in fact the complainer who presented as the abusive party. Counsel appearing for LM acknowledged that her submissions could only extend to the use which might have been made of the statements, since she was plainly aware of the availability of the video footage and had not been instructed to refrain from discussing this matter.

Crown

[39] In relation to charge 1, the advocate depute submitted that the evidence of the complainer identifying KM as her attacker was corroborated by the evidence of Mr Adam taken together with the surrounding facts and circumstances.

[40] The advocate depute conceded that the procurator fiscal ought to have outlined what the Crown contended the nature and scope of the common plan was. However, she submitted that the general situation set out was one which would be familiar to members of the jury. The charges and the evidence disclosed a picture in which one part of a family aligned themselves together to achieve their own interests. In the Crown submission, this would be a picture of family dynamics with which the jury would be familiar.

[41] The advocate depute submitted that the common plan alleged could be seen from what was set out in the narrative to charge 10. Whilst charge 14 did not contain a similar narrative, it could be seen that the common plan was to stop the complainer from leaving and to get her to come back after she had left. That plan then developed into one whose purpose was to terminate the civil action and divorce proceedings which the complainer had initiated. The Crown's submission was that the sheriff had given directions on concert which were correct in law. Whilst she could have said more on this subject the directions given were adequate.

[42] The advocate depute explained that when the counter allegations made by the complainer's two daughters were brought to the Crown's attention a misconceived instruction was issued to the police requiring them to pause their investigations into these allegations until the conclusion of the proceedings against the appellants. This was an incorrect instruction as there is general guidance available which requires that such counter allegations should be investigated to a certain point and requires disclosure to be considered. In the present case the advocate depute accepted that had the investigation continued information would have been provided which would have met the disclosure test. However, in the Crown submission this was all information known to the appellants and, despite the fact that it was accepted that they were told in general terms not to discuss the content of their statements, there was nothing to prevent them from fully discussing all of this material with their agents acting in the trial. In any event the information contained within the statements provided by LM and CM would have been collateral and inadmissible at trial.

Discussion

[43] The court is satisfied that there was adequate evidence to demonstrate that the complainer was living with KM at 4 Obsdale Gardens, Alness in the timescale covered by charge 1. Her sister's evidence that the complainer left to go home at the end of their evening together, as combined with the evidence given by Mr Adam, provides sufficient by way of circumstantial evidence to corroborate the complainer's evidence that KM was her assailant. In the context of an assessment of the sufficiency of the available evidence, it is of no consequence that the complainer gave an account of what the neighbour whom she met did after encountering KM which differed from the account given by Mr Adam of what he

did after leaving the woman with the man she seemed to know. The ground of appeal challenging conviction on this charge must therefore be refused.

[44] The statutory crime of stalking another person occurs when the accused person engages in a course of conduct, meaning engages in relevant conduct on at least two occasions (2010 Act section 39(2)(a) and (6)). Conduct constituting the offence can include following the person, entering premises, loitering in any place, interfering with property, giving anything to the person concerned or leaving anything where it may be found by, given to or brought to the attention of that person, watching or spying on the other person and other behaviour. However, for any such conduct to constitute the offence there are two other critical requirements which must be established. The first concerns the effect of the course of conduct. The offence is only committed where the accused's behaviour in fact causes the person being stalked to suffer fear or alarm (section 39(2)(c)). The second requirement concerns intention or knowledge. The course of conduct must be engaged in by the accused with the intention of causing the person being stalked to suffer fear or alarm, or where the accused knows or ought in all the circumstances to have known, that engaging in that course of conduct would be likely to cause the person concerned to suffer fear or alarm (section 39(3) and (4)).

[45] It follows that it is not in itself a contravention of section 39 of the 2010 Act for a husband or a daughter to contact an estranged wife or mother to proffer apologies, or to seek to persuade her to return home. Such conduct could only constitute a contravention of section 39 of the 2010 Act if in fact it had the necessary effect, and the necessary intention or knowledge on the part of the accused was established. Far less is it in itself a contravention of section 39 for a husband or a daughter to seek to learn from friends the whereabouts of an estranged wife or mother. Such conduct could only constitute a contravention of section 39

if it was established that the person alleged to have been stalked was made aware of the contact, was frightened or alarmed on learning of it, and it was established that the accused person engaged in that conduct with the necessary intention or knowledge as to the effect of their conduct.

[46] It is plainly not in itself a contravention of section 39 for a daughter to leave, or have flowers delivered at the house of her estranged mother. For such conduct to be classed as criminal, the Crown would need to identify a clear basis in the evidence upon which the necessary intention or knowledge was, on their submission established. Thereafter, the jury would require to be satisfied beyond reasonable doubt that the necessary criminal intent or knowledge was in fact established on the basis of that evidence. This demonstrates the need for the jury to be instructed as to the importance of considering the evidence available as to intention, or knowledge, and for the jury properly to analyse any such evidence. This becomes all the more important where two accused are charged on the basis of acting in concert. An accused person can only be guilty of a crime on the basis of concert if the actions of his or her co-accused in fact constitute the crime charged. Even then, the next question to be determined would be whether what was done was done within the scope of the criminal plan as established by the Crown.

[47] In the present case the complainer gave evidence that she was frightened of the appellants and that the conduct which she described did cause her to be alarmed and upset. What is far less clear is the basis upon which the Crown contended that the remaining element of the crime was established. An examination of the considerations which arise in respect of charge 10 provides a good illustration of the complexities which were inherent in the charge brought. Paragraphs (b) and (c) of charge 10 described conduct which did not involve the complainer. As far as the court can ascertain, there was no evidence that the

complainer was aware of the appellants having contacted Jean MacPherson in the ways specified and no evidence of the complainer being alarmed or frightened because of them doing so. It is not therefore clear why the Crown contended that the behaviour specified in these paragraphs constituted the criminal behaviour alleged. Nor is it clear from her report to this court why the sheriff considered that the evidence available entitled the jury to treat this conduct as criminal. Paragraph (e) also described conduct which did not involve the complainer but of which, on the evidence given, she did become aware.

[48] Entirely separately, before treating any of the behaviour specified in paragraphs (b) and (c), or in paragraph (e), as constituting evidence of the crime charged, the jury would have to understand and accept the basis upon which the Crown contended that in behaving in the way set out in each of those paragraphs either of the appellants was doing so with the intention of causing the complainer to suffer fear and alarm, or was doing so in circumstances where he or she ought to have known that this would be the result.

[49] The evidence which the complainer gave in support of charge 10 about conduct on the part of either appellant is summarised at paragraph [24] above. It comprises telephone calls from KM apparently asking her to return and two occasions on which he and her two daughters arrived at her address and LM was apologising and pleading with her to return. The question which is immediately focused is: on what basis did the Crown invite the jury to conclude that this was conduct engaged in with the necessary criminal intent rather than genuine efforts to persuade the complainer to return home? To put this more bluntly, on what basis were the jury invited to treat an apology by LM as constituting behaviour intending to cause alarm and upset to her mother?

[50] In addition to being able to distinguish between conduct which had the necessary criminal intent, and behaviour which was designed to appease or to repair family bonds, the

jury would require to have an understanding of the basis upon which the Crown contended that each of the appellants was jointly responsible for the criminal conduct of the other. For example, the conduct described in paragraph (e) of charge 10 was engaged in by KM alone over the telephone. Despite this, the charge sets out to establish that this was behaviour for which both KM and LM were jointly responsible. There appears to have been no suggestion that LM was present and associated herself with her father's telephone call.

[51] This brief analysis of charge 10 demonstrates the complex nature of some of the issues which arose for the jury's consideration. Matters became more complex still in relation to charge 14. The conduct specified in paragraphs (b), (c), (e), (f) (g) and (h) all appears to have been engaged in by KM alone. Assuming for the moment that this conduct satisfied the statutory requirements for intent and effect, in the absence of evidence demonstrating, or permitting the inference to be drawn, that the appellants had engaged in an antecedent plan to behave in this fashion, it is difficult to understand how LM could be said to share criminal responsibility. It is particularly difficult to see how she could be responsible for KM's conduct on the basis of spontaneous concert. Paragraphs (s), (t) and (u) each specify conduct which was engaged in by LM alone. Again the question of the basis upon which KM was said to be acting in concert with her requires to be ascertained.

[52] In his speech to the jury the procurator fiscal said nothing about the basis upon which the Crown invited the jury to conclude that the conduct founded upon was engaged in with the necessary criminal intent. He made no submissions as to how conduct establishing the crime of stalking could be distinguished from otherwise legitimate efforts to contact a wife or parent. He said nothing to explain why the Crown invited the jury to treat expressions of apology, or requests for forgiveness, as evidence of intent to cause fear and alarm, or as otherwise falling within the terms of the statutory offence. He said nothing to

explain why the Crown contended that delivering flowers, without even personal contact, constituted evidence of the crime charged. Almost the entire content of the Crown speech was taken up with recounting the complainer's evidence and submissions as to why that testimony should be believed. The impression conveyed was that, from the Crown's perspective, if the conduct alleged took place then the crime was completed. At a fairly early stage in his speech (page 58 of the transcript) the procurator fiscal framed the issue in this way:

"So I suppose the question for you, ladies and gentlemen, is can you rely on the evidence of Linda Miller?"

[53] This misapprehension appears to have become embedded and to have influenced the Crown's position on appeal. At paragraph 11 of the written submissions for the Crown it is stated that:

"The common criminal purpose, in respect of both charges, was to prevent the complainer from leaving the family home and, she having left home, to induce her to return against her wishes."

As stated, that does not describe a criminal purpose. It certainly does not describe a criminal purpose which comprises a breach of section 39 of the Act. Like the submissions at trial, it fails to engage with the statutory requisites of the offence.

[54] The Crown's submissions to the jury on joint criminal responsibility were equally deficient. Despite the fact that charges 10 and 14 were the principal charges before the jury, and all of the other charges, except charge 1, had been withdrawn, no submissions were made on the crucial issue of how each appellant could be said to be responsible for behaviour engaged in by the other. The only allusion to the concept of concert which was made in the procurator fiscal's speech can be found at page 62 of the transcript when he said:

“There are elements that show where the truth lies and indeed also show that particularly in charge 14 I would suggest, that Lauren Miller and Kevin Miller are working together.”

It is not possible to discern from the procurator fiscal’s speech what the Crown contended the scope of any relevant common criminal plan was. It is not possible to discern what evidence the Crown invited the jury to accept in order to demonstrate that either of the two appellants should be criminally responsible for the conduct of the other.

[55] Unfortunately, the speech on behalf of KM did not take the matter any further. The solicitor acting on his behalf said nothing by way of distinguishing between legitimate conduct, such as apology or request to return, and conduct which would constitute the statutory crime. Like the procurator fiscal, he said nothing about the concept of concert and again his speech was focused almost entirely on the question of whether the complainer should be treated as a credible witness. Although the solicitor acting for the second appellant did suggest that anything done by LM was done with the intention of getting her mother to return home and not with the intention of upsetting her, this submission was at times advanced in the context of what was said to be the statutory defence available under section 39(5)(c). This introduced yet a further dimension which, on the basis of the limited submissions presented, the court considers may have been misconceived. In briefly addressing the issue of concert the solicitor for LM drew the jury’s attention to her proposition that there was no evidence to suggest that LM knew anything about what KM was doing, giving the example of him being responsible for telephoning Mr Murray as specified in charge 10(e).

[56] In all of these circumstances it was crucial that the trial sheriff provided the jury with an adequate route to verdict. It was crucial for the jury to understand that the issue for them was not just whether the conduct described by the complainer in fact took place. It was

crucial for the jury to have a proper understanding of how the concept of concert could apply on the evidence available in support of the Crown case.

[57] In her charge to the jury the sheriff accurately defined the nature of the crime created by section 39 of the 2010 Act. She accurately directed the jury as to the essential components of that crime. However, she said nothing at all about any of the evidence led and accordingly gave the jury no guidance as to how they could distinguish between, for example lawful conduct in the nature of an apology, and the criminal conduct charged. She gave the jury no directions or guidance about the basis upon which the Crown contended that the behaviour established was committed with the necessary intent or knowledge and no guidance as to which evidence they would require to accept in that regard. She gave the jury no guidance on how to determine whether conduct concerning individuals other than the complainer could constitute the crime of stalking her. In a sense this is not surprising, since the Crown speech would have provided the sheriff with no guidance on any of these matters.

[58] In her brief address on the law of concert the sheriff give the jury accurate directions on the general concept in line with the guidance available in the Jury Manual. She gave no examples of how the doctrine operates in practice and gave the jury no guidance as to what evidence was available to determine the question of whether, at any stage, either appellant was acting in concert in committing criminal behaviour with the other. The sheriff explained concert could arise on a pre-planned basis or spontaneously. She gave the jury no guidance as to where they might find evidence of antecedent concert or how, on any given occasion described in the evidence, one appellant could be said to have acted spontaneously in concert with the other. Again, these are not matters on which the sheriff was given any guidance by the Crown.

[59] As was said in *McGartland v HM Advocate* 2015 SCCR 192 (Lord Malcolm, paragraph 31)

“[I]n general the jury manual does not remove the trial judge’s duty to tailor the charge to the specific circumstances of the case, or with a view to giving proper and clear directions to the jury. ... Juries are entitled to a bespoke charge adapted to the evidence and to the particular issues arising in the trial.”

The importance of adopting or adding to the terms of the Jury Manual in appropriate cases was recently emphasised in the case of *Green v HM Advocate* 2020 JC 90 by the Lord Justice General (Carloway) in delivering the opinion of the court at paragraphs [63] to [64]. There may be many cases based on concert where the relevant issues are straightforward, such as in the case of a group of men going together to rob commercial premises or in the case of a group of men who arm themselves in advance of attending at the house of another in order to assault him. In such cases it *may* be that the relevant considerations applying to concert are obvious from the evidence led or from the speeches on behalf of the parties. In such circumstances it *may* be that the trial judge or sheriff can adequately direct the jury simply by addressing them as set out in the Jury Manual. However, there will be other circumstances in which the evidential basis upon which concert is alleged is far less straightforward or obvious. As was noted by the Lord Justice General (Hope) in delivering the opinion of the court in *Khalid v HM Advocate* 1990 JC 37 at page 39, joint criminal responsibility is not made out where all that the Crown establishes is that one accused may have known what their co-accused might have been doing. In *Fee v HM Advocate* 2017 SCCR 166 at paragraph [46] it was noted that one accused’s knowledge of conduct by another accused is not sufficient to establish joint criminal responsibility. What the Crown must establish is that both accused took active steps to facilitate their joint criminal purpose (Lord Turnbull, delivering the opinion of the court).

[60] In the present case it is plain that there were complicated issues which required to be resolved, by acceptable evidence, as to whether either of the accused engaged throughout, or from time to time, in conduct which satisfied the necessary ingredients of the crime charged. It is plain that there were issues to be resolved, by acceptable evidence, concerning what the scope of any plan which the appellants entered into extended to. It is plain that there were issues to be addressed concerning whether or not either appellant was proved to have been acting in concert with the other, either throughout or at separate stages.

[61] It may well be that there was a basis in the evidence upon which the jury could properly have been satisfied that at least some of what one or other of the appellant's did constituted the commission of the crime charged. It may also be that there was a basis upon which the jury could properly have been satisfied that, on at least some occasions, the appellants were acting on the basis of antecedent concert. But before any of these decisions could have been arrived at the relevant issues needed to be brought into clear focus. On any view it is more difficult to see any basis for a conclusion that they were ever acting on the basis of spontaneous concert. Regrettably, the jury were given no directions as to how they should go about resolving any of these issues and were given no guidance as to what evidence was available to them in order to inform their decision-making. In relation to the conduct specified in a number of the paragraphs in each of charges 10 and 14 it is not obvious that there was in fact any evidence available to permit the conclusion that one appellant was acting in concert with the other. The delivery of flowers by LM on 13 September 2018 (charge 14 (o)) being one obvious example and the visit by Samantha Rocke (charge 14 (q)) being another. In her report to this court the sheriff does not identify the evidential basis upon which she considered that either antecedent or spontaneous concert could be established for any aspect of either charge.

[62] It should be observed that the evidence elicited from the complainer, without objection, about her meeting with LM and CM at a restaurant in Inverness (para. 30 above) did not correspond to any aspect of charge 14. Presumably at the drafting stage it was appreciated that not all contact between the accused and the complainer after she had left home in August 2018 was criminal, or constituted the commission of the statutory offence. It does though beg the question of why this evidence was elicited by the procurator fiscal in evidence and adds to the impression that the distinction between lawful and criminal interaction had fallen out of focus by the time of the trial.

[63] This impression is reinforced when it is noted that the complainer's own evidence in relation to the visit by Ms Rocke, as elicited by the procurator fiscal in evidence in chief, was that the complainer was not scared of Ms Rocke and that she was no threat to her. She voluntarily let Ms Rocke into her house (transcript of evidence given on 31 October 2019 at page 113). On this evidence the necessity for the behaviour founded upon to have caused fear or alarm was not satisfied. There is no explanation available as to why the Crown considered that this evidence remained available in support of paragraph (q) of charge 14, or why this episode should be distinguished from the meeting in Inverness.

[64] The fact that the jury convicted both appellants whilst acting in concert of paragraphs (o) and (q) of charge 14 strongly suggests that they did not appreciate the import of the issues which were live for their determination and that they did proceed upon the misunderstood basis that if the complainer's evidence was accepted as credible and reliable then the crime charged was established.

[65] In the circumstances of this case the court is satisfied that the directions given by the trial sheriff to the jury on the issue of concert were inadequate. It is not obvious, even at this stage, what the common criminal purpose alleged against the appellants by the Crown was.

The court agrees with the submission presented on behalf of the appellants that the evidential and legal complications which arose were such as to require clear guidance from the presiding sheriff as to the route to verdict which was available to the jurors. The bare directions explaining the essentials of the doctrine of concert, coupled with the direction that concert was capable of arising on an antecedent or spontaneous basis, failed to provide the jury with sufficient guidance in this regard. This misdirection constituted a miscarriage of justice. Given the impression which the court is left with as to the manner in which the jury proceeded, the court is satisfied that the miscarriage of justice extended to the entirety of each charge in respect of each appellant and the convictions returned on each of charges 10 and 14 will be quashed. It would not be appropriate to quash the convictions only in respect of the aspects which were apparently based upon the application of the doctrine of concert.

[66] Having reached these conclusions the court does not find it necessary to determine the grounds of appeal based on additional evidence. In light of the time spent in custody by the appellant KM the court will decline to interfere with the sentence imposed on charge 1.

[67] In conclusion, the court would wish to emphasise the importance in anything other than straightforward cases of clear submissions from the Crown as to the basis upon which it contends that the crimes charged have been established and as to the evidence relied upon for that purpose. The court reminds judges and sheriffs of the opportunity to seek submissions from the Crown, or the defence, if the relevant speech does not make it plain upon what basis the party is proceeding.