APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 33
HCA/2022/000017/XC

Lord Justice Clerk
Lord Pentland
Lady Wise

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

CA

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Paterson, Sol Adv; Paterson Bell, Solicitors
Respondent: Solicitor General QC, AD; Crown Agent

23 August 2022

Introduction

[1] The appellant was convicted of two charges. The first was a contravention of section 1 of the Domestic Abuse (Scotland) Act 2018 and the second was a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. He was sentenced to imprisonment for 3 years on charge 1 and admonished on charge 2. The appeal relates to

charge 1, and alleges a misdirection by the sheriff in relation to the requirements for corroboration where a contravention of section 1 of the 2018 Act is alleged. It is also maintained that the sentence was excessive. The charge narrates a series of different types of abusive behaviour, (i) to (xiii), which were alleged to constitute part of a course of abusive behaviour under the Act. There was corroborative evidence for at least four types of behaviour alleged.

The Legislation

[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 a partner or 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 offender 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.

[3] 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; has as a purpose, or would be considered by a reasonable person to be likely to have, certain effects on a 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. References to violent behaviour include sexual violence. The instances of behaviour alleged in the charge were all capable of coming within the ambit of this guidance.

[4] Section 10 provides that behaviour means "behaviour of any kind", and includes doing, saying or otherwise communicating something as well as intentionally failing to do, say or otherwise communicate something. It includes behaviour carried out directly, but also through a third party or by conduct towards property. Section 10(4) provides: "A course of behaviour involves behaviour on at least two occasions."

The directions

[5] The sheriff gave directions as to the necessary ingredients of an offence under section 1 and these are not challenged. These included directions that a course of behaviour involved behaviour that the accused had engaged in on at least two occasions, followed by a list of examples of the kind of behaviour which might constitute the offence, under reference to the statutory definition. General directions on corroboration, given in the written directions at the commencement of the case, were supplemented by the directions which are the subject of challenge. These directions were:

> "Finally, on the question of corroboration, the essentials of the charge which must be established by corroborated evidence are: firstly, that the persons concerned were at the time partners or ex-partners, and there is no dispute about that in this case; secondly, that the accused engaged in a course of abusive behaviour towards X. On this second matter you should note that each incident of allegedly abusive behaviour does not need to be proved by corroborated evidence. Different incidents might be spoken to by different witnesses. What is crucial is that the course of behaviour is corroborated by evidence coming from at least two independent sources. That requires corroboration of at least two incidents forming the alleged course of behaviour. Provided that is the case, then whether you can convict of other uncorroborated elements of the charge depends on whether you are satisfied that those uncorroborated events or elements were part of the same course of abusive behaviour as I have defined it. So, two incidents at least must be corroborated in the way I have described."

[6] These directions were taken from the Jury Manual under reference to the approach adopted by Lord Matthews in an unpublished and currently embargoed first instance opinion dated 10 August 2021 [*DF* v *HM Advocate.*]

Submissions

[7] The Case and Argument for the appellant asserted that the subheadings of the charge each amounted to a separate allegation of criminality each of which required to be corroborated before a conviction could be recorded: *(Dalton* v *HM Advocate* 2015 SCCR 125, *Spinks* v *Harrower* 2018 JC 177, *Wilson* v *HM Advocate* [2019] HCJAC 36 and *Rysmanowski* v *HM Advocate* 2020 JC 84). The effect of the direction, however, was that an individual could be convicted of uncorroborated acts of criminality so long as the libel asserted a course of conduct. It was submitted that although the issue of a course of conduct was considered in *Finlay* v *HMA* 2020 SCCR 317 in the context of section 38, that case can be distinguished from the current appeal, although the basis for doing so was not clear from the Case and Argument. Whilst it was recognised that the purpose of the Act was to allow prosecution of matters which might not be considered to be criminal at all, or at least might be difficult to prosecute, it was submitted that it could not have been the intention to abolish a need for corroboration for individual acts which were of a criminal nature.

[8] The Crown argued that the rationale of *Finlay* applied equally to offences under the 2018 Act and that the directions were correctly given.

Analysis and decision

[9] The cases relied upon by the appellant confirm that in general corroboration is required to prove what may properly be regarded as separate crimes, including different episodes of assault, even where these have been libelled as part of one composite charge.

This does not apply where the components are correctly to be regarded as simply component parts of a single offence of assault, where they are "all of a piece" (*Campbell* v *Vannet* 1998 SCCR 207, at p209). That this is so was recognised in *Wilson* v *HMA* 2019 SCCR 273, a case involving an omnibus charge of assault, including several incidents occurring over a period of a month. The court concluded that these had to be viewed as separate crimes, requiring corroboration, rather than as elements of the one assault. It is quite clear from the opinion of the Court in *Wilson,* delivered by Lord Carloway, the Lord Justice General, that the court considered this requirement did not apply to an offence under section 1 of the 2018 Act. At para 37 the court stated:

> "Separate episodes of assault do not constitute a separate crime known as a course of conduct in which only one incident requires to be corroborated as if it were an element in a single episode of assault as in *Campbell* v *Vannet* (cf. lewd and libidinous practices: *Stephen* v *HM Advocate* and now the Domestic Abuse (Scotland) Act 2018 s.1(1))."

[10] That the rule in *Spinks* v *Harrower* does not apply to offences under the 2018 Act is a necessary consequence of the way in which that Act is framed. The Act specifically creates a new offence which, in the words of the Lord Justice General, constitutes "a separate crime known as a course of conduct". It is the course of behaviour which is the core of the offence, and it is thus the course of behaviour – in other words proof of behaviour "on at least" two occasions - which must be established by corroborated evidence. Once there is corroborative evidence of this kind it is open to the jury to determine that other incidents equally form part of the course of conduct, even though spoken to by only one witness. Where the commission of a course of conduct is the core element of an offence, it is the proof of a course of conduct which constitutes the relevant essential element of the offence.

[11] In these circumstances the "course of behaviour" may be equiparated with the evidential position which applies in relation to a single charge of assault: in the case of a

single episode of assault, there is no need for every element of the libel to be corroborated. In the same way that one must look for corroboration of a single charge of assault, without demanding corroboration of every individual element thereof, in a case such as this it is the course of behaviour which must be established, without any requirement for corroboration of every single element of that course of behaviour. There is one single offence which lies in a course of conduct.

[12] All this was correctly recognised in *Finlay* v *HMA,* a case which dealt with an offence of threatening and abusive behaviour under section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010, which provides (section 38(3)(b)(ii)) that the behaviour may be constituted by a course of conduct. At para 14 the court stated:

> "The expression "course of conduct" used in this context better conveys the idea of there being a single crime in accordance with the wording in the 2010 Act, that single crime being committed over a period by a course of conduct, and being capable of corroboration by independent evidence of two or more of the incidents narrated in the libel. In such circumstances, where the alleged commission of the crime is by a course of conduct, there would require to be corroborating evidence of that course of conduct, i.e. evidence relating to two or more of the incidents referred to in the libel from which the jury could conclude that these were not isolated acts but truly part of a course of conduct."

[13] This reasoning applies with equal, in fact greater, force to an offence under section 1 of the 2018 Act. The matter was examined in detail in the decision of Lord Matthews of *DF* (currently embargoed pending trial)*:*

> [29] Other than in a statutory context, one cannot be convicted of a course of conduct. It is, though, a phrase with which lawyers are familiar. For example, it is frequently prayed in aid by the Crown in opposing bail where an accused person has allegedly indulged in similar behaviour over a relatively short period of time such as breaking into houses in the same area over the course of a few days. Each of these individual crimes however requires to be corroborated whether independently or by application of the doctrine of mutual corroboration or the principle enunciated in the case of *Howden*. As was said in *Rysmanowski* at para 17, except in the context of mutual corroboration the phrase "course of conduct" has no significance in relation to sufficiency of evidence. Where a number of separate criminal acts are libelled within the same charge, each will require to be corroborated in the normal way and

> one cannot avoid the need to corroborate each act simply by asserting that they were all part of a single course of conduct … In *Finlay*, however, the court was dealing with a statutory offence, a charge under section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 and the allegation was that the appellant had behaved in a threatening or abusive manner over a substantial period, his behaviour over that period consisting of "a course of conduct".
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> …
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> [31] The offence under section 1 is committed by engaging in a course of behaviour of the appropriate kind and subject to the statutory conditions. Following *Finlay*, it would be sufficient to prove two incidents of that course of behaviour and if that were done the jury would be entitled to convict of the remainder, albeit uncorroborated, if they could find that it was part of the same course of behaviour."

[14] The submission for the appellant that it could not have been Parliamentary intention that such an approach to corroboration would follow is contrary to the clear terms of the statute creating one single offence consisting of a course of behaviour of any kind which otherwise meets the terms of the Act. In any event, the policy memorandum accompanying the Act makes it clear (para 5) that the intention was to enable abuse of various types, taking place over a period of time, "to be prosecuted as a single course of conduct". The Memorandum repeats that a "course of behaviour" involves behaviour on at least two occasions, and states that it is the course of behaviour which is an essential element of the offence and which requires to be corroborated. Para 41 states: "The requirement for a "course of behaviour" is an essential element of the offence and will therefore require to be corroborated."

[15] The directions suggested in the Jury Manual, and adopted by the sheriff, are consistent with both *Finlay* and *DF*, as well as the principles behind cases such as *Campbell* v *Vannet.* They do not in any event contradict the principles specified in *Spinks* v *Harrower* and similar cases. They are entirely appropriate to the nature of the offence created under the 2018 Act. The appeal against conviction will therefore be refused.

[16] As to the appeal against sentence, the grounds of appeal accept that a custodial sentence was merited but assert that a sentence of three years imprisonment was excessive, the appellant having no previous convictions. We disagree. The behaviour persisted over a period of six months, and included repeated and serious acts of violence, to injury, permanent disfigurement and the danger of life, all in the context of emotionally abusive and controlling behaviour. The sentence cannot be described as excessive and the appeal against sentence must also be refused.