SHERIFF APPEAL COURT

[2017] SAC (Crim) 4
SAC/2016-000842/AP

Sheriff Principal M M Stephen QC
Sheriff M O'Grady QC
Sheriff Principal R A Dunlop QC

OPINION OF THE COURT

delivered ex tempore by SHERIFF PRINCIPAL R A DUNLOP QC

in

STATED CASE AGAINST CONVICTION

by

ANDREW BURNETT

Appellant

against

PROCURATOR FISCAL, HAMILTON

Respondent

Appellant: F Mackintosh; John Pryde & Co, Edinburgh (for Douglas Barr & Co, Wishaw)
Respondent: J Keegan QC (sol adv), AD; Crown Agent

28 February 2017

[1] The appellant appeals by stated case against conviction on a single charge of contravening section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. The precise terms of the charge are that:

> "on an occasion in December 2015 and on 20 April 2016 you Andrew Burnett did behave in a threatening and abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did approach A.R.L., born 24 August 2001, did engage her in conversation, did on the occasion in December 2015 invite her to go with you to her home address and did cause her to suffer fear and alarm."

[2] At the close of the Crown case the appellant made a submission of no case to answer in terms of section 160 of the Criminal Procedure (Scotland) Act 1995 which the sheriff repelled. Thereafter no evidence was led by the appellant and the sheriff then proceeded to find him guilty as libelled.

[3] The principal issue in the appeal (question 1 in the stated case) is whether the sheriff erred in law in repelling the submission of no case to answer and, put shortly, the contention advanced on behalf of the appellant was that the nature of the appellant's conduct did not meet the requirements of section 38, specifically that it did not amount to threatening and abusive behaviour which was likely to cause a reasonable person to suffer fear or alarm. This submission was underpinned by a reference to the decision of the Appeal Court in *Angus* v *Nisbet* 2011 JC 69 which it was said displayed factual circumstances closely analogous to those in the present case and in which a conviction of breach of the peace was overturned. Separately, the appellant challenged the verdict of the learned sheriff in proceeding to convict after having first repelled the submission of no case to answer and the remaining questions are directed to that issue.

[4] The sheriff's reasons for rejecting the no case to answer submission are set out in paragraphs 25 to 29 of the stated case. In the first place he distinguished the case of *Angus* v *Nisbet*, firstly on the grounds that that case was dealing with breach of the peace and that in the instant case it was unnecessary to prove that the conduct was serious enough to threaten serious disturbance to the community. In the second place, he took the view that in any

event the conduct went further specifically that the appellant had invited the complainer to go with him to his house and by seeking information about where the complainer lived. The sheriff concluded that in context the evidence was sufficient to establish the essential elements of the offence. There was evidence of persistent conduct of an adult man who had invited a lone child to whom he was a stranger to go with him to his house followed by a second approach in the early hours of the morning. There was evidence, according to his view of the matter, from which it could be inferred that the complainer and her mother were actually alarmed by the appellant's conduct. Furthermore, when the complainer's mother came on the scene on the occasion in April, the appellant had walked quickly away. The complainer's mother went after and caught up with the appellant and asked him what he was doing approaching her daughter, to which the appellant had replied "I'm no like that." This reaction including in particular what he said supported the inference that there was the requisite *mens rea*.

[5] In support of the appeal counsel for the appellant submitted to us that a threat has to include an element of menace and that there has to be some material which supports a sinister intent. He submitted that what we have here is conduct which, just as in the case of *Angus* v *Nisbet*, was below the threshold of criminality. He submitted that, absent the availability of any evidence which supports a sinister intent, the sheriff had been wrong to reject the submission of no case to answer. Separately, in dealing with the sheriff's verdict, the submission was that the sheriff had failed adequately to explain his reasons specifically in relation to the first two constituent parts of section 38 but also in relation to the third and in that regard the contention was that there was no basis upon which the sheriff could conclude that the appellant was reckless as to whether his conduct would cause fear or alarm.

[6] In responding to these submissions the advocate depute referred us to the provisions of section 38(3) which he said gave all the definition that we needed for the meaning of threatening behaviour and he submitted that the evidence was sufficient in the whole circumstances to enable the court objectively to assess the conduct as threatening and likely to cause a reasonable person to suffer fear or alarm.

[7] As appeared to be accepted on both sides of the bar, the proper interpretation of section 38(1) was authoritatively determined in the case of *Paterson* v *Harvie* 2015 JC 118. The section sets out three clear and concise constituents of the offence and the Lord Justice General in that case emphasised that 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. The accused's conduct is to be judged by an objective test and there is no requirement to show actual fear or alarm. Of course that is not to say that evidence of actual fear and alarm may not be an adminicle of evidence which informs the essential question whether the accused's behaviour would be likely to cause fear or alarm to the hypothetical reasonable person. Consistent with the opinion in *Paterson* that the constituent elements of section 38 all raise questions of fact, the court in *Angus* v *Nisbet* emphasised that the essential questions were matters of fact and degree. That observation was made in distinguishing the factual circumstances of the case of *Bowes* v *Frame* 2010 JC 297, another not dissimilar case of breach of the peace where the public element of the crime was in issue. In that case however the court had little difficulty in concluding that the conduct was such as to satisfy the first leg of the conjunctive test in *Smith* v *Donnelly* 2002 JC 65 stating that the nature of the accused's remarks was such as to cause upset and distress to the complainer and that any ordinary person would be justifiably

indignant at such conduct and fearful of the intentions of the perpetrator, a description which it seems to us is apt to the circumstances of the present case.

[8] It seems clear to us therefore that context is crucially important and that whether or not the conduct in question amounted to a contravention of section 38 is a matter of fact and degree having regard to the totality of the circumstances. With that in mind, we have carefully examined the sheriff's reasoning and, in our view, he was well-founded in concluding that the essential requirements of section 38(1) had been satisfied. We agree with him that the present case has certain similarities with those in *Angus* v *Nisbet* but we also share his view that the position here goes further and is much more clear cut. We think it is within judicial knowledge and is certainly widely accepted that sexual abuse of children is a common problem and we venture to suggest that no parent, teacher or indeed child of an age such as the complainer will be unaware of that. In the circumstances here, the complainer clearly concluded, and in our view was entitled to conclude, that the appellant had a sexual interest in her. That that was a reasonable inference is implicitly borne out by what the appellant said to the complainer's mother when she confronted him. The fact of the matter is that on the occasion of the first incident in December the complainer was being invited to go with the appellant alone to an unfamiliar place where the appellant would have control of her and in these circumstances the threat of sexual molestation was in our view clear. That is patently what both the complainer and her mother feared, that if the appellant had the opportunity which he was trying to engineer he would sexually assault her or at least get up to some other form of mischief. In our opinion these circumstances indicate a scenario which is intrinsically threatening and which any reasonable person would objectively find alarming. The second incident in April cements the earlier behaviour and provides evidence that the appellant knew his behaviour was wrong by his reply to the

complainer's mother and by his reaction to her presence, that is to say, in moving off quickly when she appeared on the scene. All of this in our opinion suggests, clearly, that the sheriff was entitled to repel the submission of no case to answer.

[9] Turning to the question of the verdict, we have listened carefully to the submissions advanced by counsel for the appellant with regard to the alleged lack of proper reasoning given by the sheriff. Suffice it to say that we are unable to agree with these submissions.

[10] For these reasons, along with the reasons outlined more fully by the sheriff, we are satisfied that the appeal must fail. As was conceded by counsel for the appellant question 5 does not arise so we will content ourselves with answering the first question in the negative and the remaining questions in the affirmative and refuse the appeal.