APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 69
HCA/2017/229/XC

Lord Justice General
Lord Drummond Young
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL FROM THE SHERIFF APPEAL COURT

by

DAVID WOTHERSPOON

Appellant

against

PROCURATOR FISCAL, GLASGOW

Respondent

Appellant: A Ogg, Solicitor Advocate; Paterson Bell
Respondent: Niven Smith, AD; the Crown Agent

23 August 2017

Introduction

[1] On 8 July 2016, at Glasgow Sheriff Court, the appellant was convicted of a charge which libelled that:

> "on various occasions between 01 January 2015 and 08 August 2015, ... at ... Rutherglen you … did conduct yourself in a disorderly manner, stand in your house in full view of the lieges whilst wearing female underclothing, rub your nipples, place the lieges in a state of fear and alarm and commit a breach of the peace."

On 5 August 2016, the court imposed a Community Payback Order with a Supervision Requirement of 18 months.

[2] The issue raised in the appeal to this court is, ultimately, whether the appellant's behaviour amounted to a breach of the peace, in terms of the test in *Smith* v *Donnelly* 2002 JC 65.

Procedure on appeal

[3] The application for a stated case specified the matter which the appellant wished to bring under review as:

> "2 ... a. The sheriff erred in law in repelling the Defence no case to answer submission and misdirected himself on the requirements for a conviction of breach of the peace".

The stated case does not pose a question relating to that matter, at least in so far as directed to the no case to answer submission. The questions are whether: (1) the sheriff was entitled to hold that the appellant's conduct constituted a breach of the peace; and (2) on the facts stated, the sheriff was entitled to convict. Although these questions may raise "virtually the same" issues as one directed to a no case to answer submission (see *Wingate* v *McGlennan* 1991 SCCR 133 (LJC (Ross) at 136(2)), that will not be the case where, as here, there are material differences in the sheriff's findings in fact and his narrative of the evidence. In this case, there was no attempt at challenging any of the findings in fact by the appellant by adjustment. That being so, following the form of the questions, there ought to be little or no recourse to that narrative. The case, ie the manner in which the questions should be

answered, ought to be capable of resolution simply by reference to the facts found and without recourse to any other material. However, as will be seen, material differences between the findings in fact, the sheriff's narration of the evidence, which he appears to have accepted, and the facts which he alludes to in the Note which explains his reasoning, have rendered that difficult, if not impossible.

[4] The difficulties which arise from the failure to pose the appropriate question are compounded by the manner in which the case was dealt with at second sift. The sift judges determined that leave is "only sought on ground one". Without seeking to be over pedantic, the problem with this is that in stated case procedure there are no "grounds". It is the questions posed that define the scope of the appeal and not the content of the application for a stated case (*Wallace* v *Thomson* 2009 SCCR 421, Lord Carloway, delivering the Opinion of the Court, at para [13]). Once the stated case is finalised, the application normally has no relevance in the absence of a complaint about the manner in which it has been stated. At the sift stage, if leave is to be limited to particular aspects of the case, any restriction requires to be defined under reference to the questions posed. In this regard, the reference by the Sheriff Appeal Court (*infra* at para [3]) to the "note of appeal" is erroneous, if understandable standing the sift decision. There is no such note. The SAC appear to have attempted to ride two different horses by: (i) looking at the evidence, which is usually only legitimate where there is a question posed about a no case to answer submission or a challenge to a specific finding in fact; and (ii) answering the questions actually posed, which depend only upon the facts found.

[5] The appeal was refused by the SAC on 14 February 2017 (SAC/2016/000678/AP).

The evidence

[6] The *locus* was a ground floor flat occupied by the appellant in a residential area. In front of the building, directly in front of the appellant's flat, there were access paths and grassed areas which were open to the public and where children played. On four occasions between 1 January and 8 August 2015, residents observed the appellant, either at his front door or the windows of his flat, bare chested but wearing a bra. The appellant was within his flat, but he could be seen from public areas.

[7] The sheriff provided a narrative of the testimony of the witnesses without adverse comment. IB (aged 48) was a male resident in one of the upper flats. On a Saturday morning in August 2015, he was passing the appellant's flat. The front door was three quarters open and the appellant was in the hall. He was wearing trousers, but was bare chested and wearing a white bra. The appellant walked up and down the hall, but made no attempt to close the door. IB did not stop and continued home. He did not feel threatened, but was "uneasy" and "concerned", especially as children were resident in the building and played in the area near the appellant's door. He discussed the matter both with his partner and his neighbour and reported it to the local council on the Monday.

[8] CF (aged 22), was a female resident in one of the flats. She had observed the appellant on two occasions. The first occurred one evening in the Spring, 2015. From the access corridor to her flat, she saw the appellant for a split second at his living room window, bare chested and wearing a bra. The second was on a Summer evening in 2015, as she passed the appellant's living room window. The curtains were open and a light was on. A figure stood in the middle of the room, bare chested and wearing a bra. CF found the conduct "strange".

[9] AC (aged 19) was a female resident in the same block. One evening in the Summer, 2015, she had walked past the appellant's flat. A noise of plates/crockery clattering caused her to look at the appellant's windows. She could see through the windows (plural) and saw the appellant at a door close to "the window" peeking out. The room light was on. He was bare chested and wearing a bra. She was "confused" and found the conduct "weird". She phoned her mother to tell her about the incident.

[10] On 24 August 2015, the appellant was detained. He said "If it's what I think it's about, it's because I've been wandering about in a bra." He did not give evidence.

The findings in fact

[11] The findings in relation to IB differ from his evidence in that there is no reference to the door being only three-quarters open. They refer to IB feeling "uncomfortable".

[12] The findings in relation to CF differ from her evidence in that the reference to a split second is omitted from the first incident. In the second, a light becomes lights and it is said that "attention was drawn to the room". The positioning of the figure changes from being in the middle of the room to "in the window" and this time it was rubbing its nipples. The conduct was not sufficiently upsetting to prompt a report to the police.

[13] The findings in relation to AC differ from her evidence in that there is no reference to crockery. The hall and kitchen lights were on. The appellant was at the kitchen door looking (not peeking) out. She felt "unsettled" but not "confused" and the conduct was not described as "weird".

[14] Although the narrative of the evidence does not refer to anyone being alarmed or disturbed, finding in fact 8 reads:

> "The appellant's conduct was genuinely alarming and disturbing to members of the public and would be alarming and disturbing in its context to any reasonable person".

Had that finding been challenged, it would have been difficult to say where the evidence was to support that of actual alarm or disturbance.

[15] In his Note, the sheriff describes the appellant's conduct as "provocative", "designed to draw the attention of members of the public" and "exhibitionist". He made no findings to that effect, nor in relation to his view that the conduct was "perverse". He stated that the evidence from the witnesses was that there was concern or alarm, but the latter does not coincide with his narrative of the evidence. He states that, if a child had reported the conduct to a parent, conflict may have arisen. That is not a finding either.

[16] The sheriff considered what he perceived to be the changing "social and sexual standards" in society, but was unable to view the appellant's actions as "anything other than deliberately provocative" and conduct which was "genuinely alarming and disturbing to a reasonable member of the public". On that basis, which does not set out the full test, he concluded that the test set down in *Smith* v *Donnelly* (*supra*), had been met.

The Sheriff Appeal Court

[17] The SAC at first correctly observed that the test to be applied was that set out in *Smith* v *Donnelly* (*supra* at paras [17] to [18]). It required proof of conduct which was severe enough to cause alarm to ordinary people and to threaten serious disturbance to the community. Whether conduct was capable of fitting that definition was a matter of fact and degree and primarily one for the court of first instance (*Montgomery* v *Harvie,* 2015 JC 223, citing *Russell* v *Thomson*, 2011 JC 164). If there was no evidence of actual alarm, the conduct had to be flagrant. "Flagrant" conduct was that which was severe enough to cause alarm to

ordinary people and to threaten serious disturbance to the community. The reactions of the witnesses, whilst not determinative (*Montgomery* v *Harvie (supra)*), were important factors.

[18] The SAC accepted that it was important to guard against criminalising innocent, albeit unusual, behaviour which took place within a person's own home. The SAC stated (para [9]) that:

> "… Parading (*sic*) at an open door and in front of the living room window bare chested apart from a visible pink (*sic*) brassiere and on one of those occasions rubbing his nipples, places this conduct beyond simply relaxing at home and beyond that which was merely annoying or uncomfortable. He conducted himself in this fashion repeatedly, a factor which adults *might* reasonably regard as exhibitionist and perverse. Where that conduct is considered objectively, we are of opinion that it *could* readily cause alarm in *a* reasonable person and *disturbance* in the community" (emphases added).

The SAC entertained certain submissions based upon Articles 5, 8 and 10 of the European Convention. However, no issue arises in the stated case about whether the law on breach of the peace is compliant with Convention jurisprudence. In any event, it is so compliant (*Gough* v *United Kingdom* 2015 SCCR 1 at para 155, following *Lucas* v *United Kingdom* [2003] ECHR 717).

Submissions

Appellant

[19] The appellant submitted that the sheriff and the SAC had erred in determining that there was a case to answer. Thus the issue focused ostensibly on a question not posed. Nevertheless, the argument was not based on sufficiency but on a contention that the appellant's conduct as described by the witnesses was not severe enough to cause alarm and serious disturbance to the community. The appellant had not acted in a way which was exhibitionist or perverse. The only incident which could be described as such was when the appellant had rubbed his nipples. Whilst this behaviour could be described as strange or

embarrassing, it was not so alarming or disturbing that it could amount to a breach of the peace. The SAC had mischaracterised the actions of the appellant in walking up and down his hallway as "parading". The sheriff had not described it as such. The SAC had erred in holding that the reaction of the witnesses provided positive assistance in determining whether or not the test in *Smith* v *Donnelly* (*supra*) had been met. As there was no evidence of actual alarm (cf *Montgomery* v *Harvie* (*supra*)) the conduct required to be "flagrant". The SAC had not addressed that issue. The appellant's conduct was not genuinely alarming and disturbing in its context to a reasonable person. Older cases such as *Stewart* v *Lockhart* 1990 SCCR 390 had tenuous significance in the modern era.

Respondent

[20] The respondent's Case and Argument maintained that neither the sheriff nor the SAC had erred in concluding that there was a case to answer. The lower courts had applied the correct test. It was accepted that there had been no evidence of alarm, but the nature of the conduct and its repetition on four occasions had allowed it to be properly categorised as flagrant. However, at the appeal hearing, the terms of the Case and Argument were expressly departed from.

[21] It was accepted that the SAC had not applied the test in *Smith* v *Donnelly* (*supra*) when referring (*supra*) only to conduct which might be regarded as exhibitionist and perverse and which could, rather than would, cause alarm in a reasonable person and disturbance, but not serious disturbance, in the community. In the absence of finding in fact 8, the evidence would not justify a conviction given that the witnesses had not been alarmed and the conduct required to be flagrant. Neither the sheriff nor the SAC described it as such.

Decision

[22] The test of whether conduct constitutes a breach of the peace remains that in *Smith* v *Donnelly* 2002 JC 65 (Lord Coulsfield, delivering the Opinion of the Court at para [17], following *Ferguson* v *Carnochan* (1889) 2 White 278). It is whether it is:

> "severe enough to cause *alarm* to ordinary people and threaten *serious* disturbance to the community ... What is required ... is conduct which does present as genuinely alarming *and* disturbing, in its context, to *any* reasonable person ..." (*ibid* at para [18]) (emphases added).

[23] That test was framed so as to enable the crime of breach of the peace to be formulated with sufficient certainty to meet the requirements of the European Convention on Human Rights. Consequently it is very important that the precise language is followed when applying the test. The conduct requires to be genuinely alarming *and* disturbing to *any*, that is to say not just to one, some or even many, reasonable persons, and the potential disturbance has to be classified as *serious.* If there is no evidence of alarm, the conduct must be found to be flagrant; in the sense of being alarming or seriously disturbing to any reasonable person. The test is an objective one and must involve some public element (*Montgomery* v *Harvie* 2015 JC 223, LJC (Carloway), delivering the Opinion of the Court at para [13]).

[24] The court has already set out its views on the deficiencies of both the stated case and the procedure which followed thereon. In the context of summary appeals, it is critical that the drafting of a stated case and the subsequent procedure thereon complies with what ought to be well known rules. However, standing the stage at which the case has reached, the court will attempt to address the merits notwithstanding the differences in the sheriff's findings in fact, narrative of the evidence and note of his reasoning.

[25] The sheriff held, as a matter of fact (ff 8), that, as he phrased it, the conduct was "genuinely alarming and disturbing to members of the public and would be alarming and disturbing in its context to any reasonable person". As already observed, none of the witnesses spoke to the conduct being alarming. In the absence of a question challenging them, the court is nevertheless bound by the facts as stated. However, if the sheriff intended this finding to be conclusive of the test, it singularly fails. It does not address the need for the conduct to threaten serious disturbance. On this basis, strictly, the questions in the stated case ought to have been answered in the negative.

[26] The SAC expressed the view (*supra*) that the appellant's conduct could readily cause alarm in a reasonable person and disturbance in the community. That again, as was conceded by the Crown, is not the correct test. It is, first, whether the conduct presented as genuinely alarming *and* disturbing to *any* reasonable person and, secondly, whether it would threaten *serious* disturbance to the community.

[27] The appellant's conduct may have been exhibitionist, provocative and even perverse. None of these descriptions render it criminal. Although the wearing of clothing more suited to a different gender has been held to constitute a breach of the peace in certain circumstances (*Stewart* v *Lockhart* 1990 SCCR 390), the court is unable to hold that a man wearing a bra in his own home amounts to conduct which is either genuinely alarming to *any* reasonable person, although it may be to some, or that it threatens *serious* disturbance to the community. It may, as the witnesses said, cause concern or be regarded as weird or strange, and be classified, as the sheriff described it, as provocative, exhibitionist or even perverse, but that is some distance from conduct meeting the *Smith* v *Donnelly* criteria. The appeal is therefore allowed. The questions will be answered in the negative.