



SHERIFF APPEAL COURT

**[2018] SAC (Crim) 18
SAC/2018/000403/AP**

Sheriff Principal D L Murray
Appeal Sheriff S F Murphy QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D L MURRAY

in

SUMMARY APPEAL AGAINST SENTENCE

by

JAMES SHANKS

Appellant

against

PROCURATOR FISCAL, GLASGOW

Respondent

**Appellant: Ogg (sol adv); Paterson Bell Solicitors
Respondent: H M Carmichael, AD, ad hoc; Crown Agent**

10 October 2018

[1] The appellant pled guilty, at the diet of trial, to a charge of threatening to disclose a number of photographs of his former partner, the complainer, in an intimate situation in contravention of section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. The appellant appeals against sentence. A community payback order with an offender supervision requirement for 12 months and a headline period of 150 hours of unpaid work

was imposed and discounted to 135 hours to take account of the timing of the appellant's plea. A non-harassment order was also imposed.

[2] As noted by the High Court of Justiciary in *Sutherland v HMA* 2017 SCCR 268 at paragraph 26, it is clear that individuals who disclose intimate images on a private basis have little or no control of the image once it has been sent and are vulnerable to considerable embarrassment and upset if that anticipant privacy was not maintained.

[3] We note the statutory offence introduced by section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 provides for a maximum sentence of 12 months imprisonment on summary complaint or up to 5 years imprisonment if prosecuted on an indictment. It is therefore clear that Parliament views these offences extremely seriously. As noted by the High Court in *Sutherland* such offences have effectively been recalibrated by the new statutory offence. While it may be that the appellant made the threat while under the influence of alcohol it clearly had immediate impact upon the complainer. As the sheriff notes an individual who has entrusted a partner with an intimate image is entitled to a reasonable expectation that the court will deal severely with those who perpetrate this type of offence, implicit in which is deliberately caused distress. The legislation has been enacted specifically to deal with behaviour such as that carried out by the appellant. The question for the court is whether the threat in this case as opposed to actual distribution of the image to others warranted this level of penalty, there being no subsequent distribution of the image. The terms of section 2 are:

- “(1) A person (“A”) commits an offence if—
- (a) A discloses, or threatens to disclose, a photograph or film which shows, or appears to show, another person (“B”) in an intimate situation,
 - (b) by doing so, A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress, and
 - (c) the photograph or film has not previously been disclosed to the public at large, or any section of the public, by B or with B's consent.”

[4] We disagree with the submission made by the appellant that this was not an abusive act. The appellant's action was clearly an unwelcome and uninvited threat to publish this photograph to the complainer's children. Parliament has specifically legislated for such an offence.

[5] In all the circumstances we have no doubt that a CPO is warranted and are satisfied that the 135 hour CPO which the sheriff imposed with a supervision element falls within the upper end of the range open to him. In relation to the non-harassment order we have reached the view that given the discrepancy about the position of the complainer the sheriff might reasonably have sought clarification of her position. In the circumstances now narrated to us we shall therefore revoke the non-harassment order.