



SHERIFF APPEAL COURT

**[2018] SAC (Crim) 11
SAC/2017/000154/AP**

Sheriff Principal M W Lewis
Sheriff Principal C D Turnbull
Sheriff P J Braid

OPINION OF THE COURT

delivered by

SHERIFF PRINCIPAL C D TURNBULL

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

DAVID ORR

Appellant

against

PROCURATOR FISCAL, PAISLEY

Respondent

**Appellant: A.Ogg (sol adv); Tod & Mitchell
Respondent: L.Gillespie AD; Crown Agent**

14 August 2018

[1] Following trial, the appellant was convicted of a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010, aggravated by religious prejudice.

[2] Shortly after 9 am on Sunday, 26 February 2017, various members of the public telephoned or called at the public counter of the main police office in Paisley, complaining about, or reporting, the behaviour of the appellant, who was then standing outside St Mirin's Cathedral.

[3] Police officers attended the cathedral (which is in close proximity to the main police office) and observed the appellant standing outside the main gate. The bishop and a member of the public were seen standing beside the appellant. Mass was due to start at 10 am and several members of the public were going into the cathedral.

[4] The appellant was seen holding a placard, approximately three feet by three feet in size, which in large lettering bore the words "God hates Catholics". The attending police officers asked the appellant to hand over the placard, which he did. The appellant said that it was a peaceful protest and that he was not there for violence. The other side of the appellant's placard bore the legend "God hates the Kirk".

[5] The issue in this appeal is whether or not the appellant's conduct constitutes a breach of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010.

Section 38(1) is in the following terms:

- "(1) A person ("A") commits an offence if-
- (a) A behaves in a threatening or abusive manner,
 - (b) the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and
 - (c) A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm."

[6] As observed by the Lord Justice General (Gill) in *Paterson v Harvie* 2015 JC 118 at paragraph [18]:

"Section 38(1) sets out three clear and concise constituents of the offence. Paragraphs (a) and (b) define the *actus reus* of the offence. 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. Paragraph (c) sets out the *mens rea* that is required.”

[7] With that guidance in mind, we turn to consider the relevant findings in fact in this case, namely numbers 8 and 9, which are in the following terms:

“8. The wording of the placard and the fact that the Appellant was holding it in a very visible way outside a Catholic Cathedral a short time before Mass was due to start constituted the offence charged under section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. The conduct was threatening or abusive and led to complaints by members of the public to the police.

9. The Appellant’s behaviour was likely to cause a reasonable person to suffer fear or alarm. The Appellant was reckless as to whether his behaviour would cause fear or alarm. The Appellant’s behaviour was not reasonable.”

[8] Those are the findings upon which the conviction is based. In finding that the conduct was threatening or abusive, the sheriff clearly placed reliance on the wording of the placard and the circumstances in which it was being displayed. In the appeal, the appellant argued that the sheriff had erred in holding that the appellant’s conduct was abusive and was likely to cause a reasonable person to suffer fear and alarm.

[9] The first issue to address is whether the appellant’s behaviour was abusive. It was conceded by the solicitor advocate for the appellant that the context in which the appellant behaved as he did was important. Here, the appellant stood outside a place of worship, shortly before a religious service was scheduled to begin, conveying to all who could read his sign a message that was the antithesis of that which those attending the service believed. God’s love is a matter of considerable significance to followers of Christian religions. Even leaving that aside, the appellant’s sign conveyed the message that all those attending the service (in other words, on a Sunday morning at that location, most of those reading the sign) were hated. In that context, it is perhaps worth noting that (unlike the message on the other side of the placard) the message

was aimed directly at the persons likely to be reading it. Such behaviour is unacceptable in a tolerant, civilised society. Such conduct can only be characterised as abusive.

[10] The second issue is whether the appellant's behaviour would be likely to cause a reasonable person to suffer fear or alarm. As noted above (see paragraph [2]) the appellant's behaviour was such that it caused a number of people to contact the police, some of whom complained about his behaviour. That in itself, although not conclusive, is a pointer towards alarm. The fact that there was no violence or aggression displayed by any person at the locus is immaterial. As observed in *Paterson* at paragraph [21], the essence of the statutory offence is that the appellant's conduct is to be judged by an objective test in which the actual effect of the threatening or abusive behaviour on those who experience it is irrelevant. The hypothetical reasonable person would, in our view, be alarmed by the appellant's behaviour, given its timing and location. It was insulting to followers of the Roman Catholic faith. It had the potential to give rise to a confrontation outside a place of worship. To the extent that the appellant may have had a genuine message which he wished to put across – that the Roman Catholic Church was not following God's teaching – the placard in no way, shape or form conveyed that message.

[11] The third issue was not argued before us. No issue was taken with the sheriff's finding that the appellant was reckless as to whether his behaviour would cause fear or alarm.

[12] Each of the constituent elements of a charge under section 38(1) having been satisfied, we shall answer questions 1 to 4 inclusive in the affirmative and refuse the appeal against conviction.

[13] Additionally, leave to appeal against the sentence imposed has been granted.

The appellant was fined the sum of £400 (payable by instalments of £20 per week). It

was contended that the sentence is excessive in the whole circumstances of the case.

Having regard to the appellant's personal circumstances, including his previous convictions (and the procurator fiscal fine imposed in September 2016 for an analogous matter), it cannot be maintained that the sentence imposed is such as to constitute a miscarriage of justice. The sentence imposed fell well within the discretion available to the sheriff.

[14] We shall, accordingly, answer question 5 in the negative and refuse the appeal against sentence.