**SHERIFF APPEAL COURT**

**[2019] SAC (Crim) 5**
**SAC/2019/000258/AP**

Sheriff Principal D C W Pyle
Sheriff A L Macfadyen
Sheriff S Murphy QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D C W PYLE

in

CROWN APPEAL BY STATED CASE

by

PROCURATOR FISCAL, GLASGOW

Appellant

against

DAVID CALLAGHAN

Respondent

**Appellant: P Kearney (sol adv), AD; Crown Agent**
**Respondent: No appearance**

4 June 2019

[1] The Respondent was tried before the sheriff at Glasgow in connection with an offence of racially aggravated harassment libelled in terms of s 50A of the Criminal Law (Consolidation)(Scotland) Act 1995, as amended. The sheriff acquitted him of that charge solely on the basis that there had been no evidence led to show that the complainer was a member of a "racial group" as defined in subsection (6) of s 50A. He further considered that

an implied common law alternative charge of breach of the peace had not been established because in his view the evidence did not establish that the respondent's conduct had threatened public safety or serious disturbance to the community. The Crown has appealed the sheriff's decision by way of stated case.

[2] The sheriff has reported sixteen findings in fact which he would have made on the basis of the evidence led before him. Findings 1-9 narrate that the respondent and his wife were joint proprietors of the locus, a flat in Rutherglen, which had been rented out to the complainer and his wife through a letting agency. On 17 November 2017 the Respondent called at the property and was admitted by the complainer's wife. The complainer was asleep in the bedroom. The respondent demanded that he be woken so that he could speak to him about non-payment of rent. When she refused to wake her husband the Respondent became increasingly angry. The noise he was making awoke the complainer who said that he had paid the rent to the letting agent and that the Respondent should leave the flat.

[3] The remaining findings in fact are the most significant. Reading shortly, the sheriff was satisfied that the Respondent shouted and swore at the complainer; that as he left the flat he said to the complainer, "you fucking black bastard"; that he told him he had people downstairs who would come up and beat the complainer up in a threat of violence directed towards the complainer; and that he would get the complainer's car vandalised, while acting aggressively towards the complainer. The complainer observed the respondent photographing his car before he drove away. The final finding in fact is in these terms:

> "16. The acts of the accused [Respondent] in shouting and swearing at the complainer and in threatening him with violence caused the complainer to be alarmed."

[4] The sheriff states that he was not satisfied that the Crown had led any evidence to establish that the complainer belonged to a racial group as defined in subsection 50A(6) of the 1995 Act and that is why he acquitted the Respondent . In the light of the evidential findings summarised above we consider that the sheriff misdirected himself in relation to the requirements of s 50A. Subsection (1)(b) states that an offence is committed where someone acts in a manner which is racially aggravated and which causes or is intended to cause a person alarm or distress. Subsection (2)(a) defines racial aggravation by reference to the evincing of malice and ill-will based on a person's membership or presumed membership of a racial group. Subsection (6) defines "racial group" by reference to a number of factors, one of which is colour. In our view the use by the respondent of the phrase "fucking black bastard" infers that the Respondent was evincing malice and ill-will towards the complainer in terms of subsection (2)(a) by reference to his colour and therefore by reference to a presumed membership of a racial group as defined in subsection (6). The sheriff considered that actual alarm had been caused. Intention to cause alarm may be inferred from the language used. It follows that an offence in terms of s 50A(1)(b) has been committed.

[5] The sheriff observed both the complainer and his wife as they gave evidence but did not take into account his observations of their appearance in the absence of specific parole evidence of their colour or racial identity. In our view he was wrong not to do so. The racially offensive remark made by the Respondent opened up the issue for his consideration and we consider that failure to take such a clear observation into account in that context was an artificial exercise in the context of the case. This is in line with the approach taken in *Gubinas* v *HMA* 2018 JC 1 and the antecedent authorities.

[6] We shall therefore answer in the negative the question pose in the stated case and remit the cause to the sheriff and direct him to convict the Respondent.