

SHERIFFDOM OF LOTHIAN AND BORDERS AT LIVINGSTON

[2021] SC EDIN 54

NOTE OF SHERIFF DOUGLAS A KINLOCH, Advocate

in the cause

PROCURATOR FISCAL LIVINGSTON

Pursuer

against

JH

Defender

Pursuer: Mr Marshall, Procurator Fiscal

Defender: Ms Simpson; Wilson McLeod Solicitors

[1] This case raises a question as to the operation of corroboration in a charge under Section 1 of the Domestic Abuse (Scotland) Act 2018 and as to whether corroboration is required for each separate act specified in the libel. It is the first time I have had to consider the point, and so far as I am aware there have not been any reported decisions regarding the Act. I have accordingly prepared this Note to set out my decision on the no case to answer submissions which were made to me. The accused was represented by Ms Simpson, Solicitor, Wilson McLeod Solicitors, Edinburgh, and the Crown by Mr Marshall, Procurator Fiscal Depute.

[2] The charge against the accused was in the following terms:

“(001) between 1st October 2020 and 13th January 2021, both dates inclusive at [address] you JH did engage in a course of behaviour which was abusive of your partner or ex-partner [X], c/o the Police Service of Scotland, in that you did repeatedly strike her on the body; strike her on the head; persistently demand intercourse and refuse to use contraception during sex; demand that she cease

contact with male acquaintances; accuse her of infidelity; demand that she meet you and utter threats of violence when she refused to do so

CONTRARY to the Domestic Abuse (Scotland Act 2018, Section 1”

[3] It is perhaps appropriate to mention at this stage, that in terms of section 1 of the Domestic Abuse (Scotland Act 2018 the behaviour which is the subject of a section 1 charge must involve behaviour which is abusive of the accused’s partner or ex-partner. The offence cannot be committed by a single, isolated, incident. Incidents only become criminal when there is “a course of behaviour”, that is where there is more than one incident. For behaviour to be abusive it has to be behaviour that a reasonable person would consider to be likely to cause the partner to suffer physical or psychological harm. Behaviour which causes fear, alarm and distress is sufficient to be seen as causing psychological harm. Abusive behaviour is behaviour which is violent, threatening or intimidating, and also includes behaviour which causes the partner to be dependent on the accused, isolated from friends, controlled by the accused, restricted in terms of freedom of action, or frightened, humiliated or degraded by the behaviour. Thus, acts which might otherwise not be connected, or even criminal, become connected and criminal by virtue of being part of a course of behaviour which is abusive of a partner or ex-partner.

Crown evidence

[4] The Crown evidence against the accused was led on 27 July 2021. The complainer was asked about the background to the relationship. Thereafter, in very brief summary, and set out in the order in which it was given, the complainer’s evidence was that the accused pestered her for sex constantly. She said “Yes” to get him to leave her alone. This happened a lot. This made her feel as if she had no value. He had also punched her on the arm for no

reason a number of times. He had also slapped her on the leg. She had complained about this and he had done it again. Because of this she became scared of him. She had continued to keep in touch with an ex-partner called [S], and he would ask her why she was still in contact with him. There was one incident on 13 January 2021 when she phoned the police. She was ready for bed and got a text from the accused saying he would be over in 30 minutes. The text said that she had better be ready and that if she wasn't ready he would come over and "boot the door in". She became very worried. She spoke to a friend who told her to phone the police.

[5] The evidence from the only other Crown witness was that the accused and the complainer were not taking any precautions although they were having a sexual relationship. She had told them that they had to get advice about contraception. The accused had a flippant attitude towards the complainer. She said that she saw "other incidents" but was not asked what these were. She said that she had once picked the complainer up from her house and that the complainer was "really upset".

[6] It had also been agreed by way of a Joint Minute of Agreement, that the accused had been interviewed by the police. During the course of the interview the following exchanges took place:

"Q. Did you ever slap [X] to the thigh hard enough to leave a handprint?

A. No. Actually maybe as a joke but other than that, not at all.

Q. Did you send [X] text messages from last night (12/01/21) in this morning threatening to kick the door in and take her away in the car?

A. Yes, it was basically just for a chat, because I was raging, it was a moment of madness. I was trying to get her away from her house because the person she stays with doesn't want me talking to her."

No case to answer submissions

[7] At the conclusion of the Crown case the defence made no case to answer submissions. They submitted that the complainer had only spoken to three parts of the libel, namely that he had struck her to the body, that he persistently asked for sexual intercourse, and that he had demanded that she meet him and had issued a threat at the same time. The submission was that these were separate incidents that had to be corroborated separately. It was submitted that there was no corroboration of any of these incidents. Although the accused had said things to the police about hitting the complainer on the leg, read properly this was not an admission which could be used as corroboration. It was actually a denial that there had been any assault. Also, although he had admitted sending the text message demanding that she see him during one night in January, this was not really to be seen as an admission of abusive behaviour.

[8] The contention of the Crown was that corroboration of each incident was not required. There was a connection between these acts, and they were not just unconnected and separate incidents. They were all said to be instances of a course of abusive behaviour amounting to a single crime under Section 1 of the Domestic Abuse (Scotland) Act 2018. As such corroboration of each separate incident was not necessary.

Case law

[9] In relation to the submissions, I was referred to some case law. I have had regard to the following cases:

Stephen v HMA 2006 JC 61

Dalton v HMA 2015 SCCR 125

Spinks v Harrower 2018 SCCR 179

Wilson v HMA 2019 SCCR 273

HMA v Taylor 2019 SLT226

Finlay v HMA 2020 SCCR 317.

[10] None of the above cases deal with the way in which corroboration is to operate in respect of a charge under the Domestic Abuse (Scotland) Act 2018. They do, however, provide assistance in this regard.

[11] In the case of *Stephen* it was held in 2006 that it is competent to libel as a single crime repeated acts of lewd and libidinous practices, and where such conduct is libelled as a single crime, corroboration may be found in evidence of particular instances of it. So, a number of separate incidents can be seen to be a single crime, the crime in the *Stephen* case the crime taking the form of a course of indecent conduct.

[12] In the case of *Dalton*, the accused was charged with a number of assaults and a charge of assaulting and repeatedly raping the complainer. It was confirmed that there could be a case of repeated rapes over such a short period of time that they might be considered to be all part of one episode of repeated rape. In the *Dalton* case, however, there were substantial periods of time between each rape and it was held that each required to be proved by corroborated evidence.

[13] In the case of *Spinks v Harrower* the accused was charged with assaulting the complainer in various ways over a period of four years. The complaint contained one single charge which contained the allegations of these assaults. The Appeal Court took the view in *Spinks* that the repeated assaults had to be seen as separate assaults, each requiring separate corroboration.

[14] In *Wilson v HMA* the accused faced a single charge of assaulting the complainer in various ways over a period of less than a month. It was held that that separate assaults

occurring at separate times could in fact be seen as a single episode of multiple assaults, with the result that separate corroboration of each separate assault would not be necessary. It was said that what amounts to a separate episode requiring separate corroboration was a question of fact and degree.

[15] In the case of *HMA v Taylor* it was confirmed that the *Moorov* doctrine can be applied where individual offences said to constitute a single course of criminal conduct were all committed against the same complainer. So a single complainer's evidence regarding a number of separate **incidents of criminal behaviour** could be corroborated by the evidence of one other witness provided that the separate incidents of criminal behaviour libelled in a composite charge **showed** similarities in time, place and character such that they can properly be said to form part of a single course of criminal conduct.

[16] Finally, in the recent case of *Finlay v HMA* the accused was charged in a single charge with a contravention of s38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 by behaving in a threatening or abusive manner over a period of four years. It was held that where a charge libels a number of separate criminal acts, each such act requires to be corroborated, but that in some cases there might be room for uncertainty as to whether the events set out in the libel constituted a single criminal act or a succession of separate criminal acts, and in every case that is a matter of fact and degree. It was also said in the *Finlay* case, it is not possible to "avoid the need for each such act to be individually corroborated simply by asserting that they were all part of a single course of conduct".

Analysis

[17] The effectiveness of the Act depends to a very large extent on whether corroboration is needed for each separate act specified in the libel. In the cases which have called before

the Appeal Court it has been said that it is a matter of fact and degree as to whether a number of incidents set out in a criminal charge are to be seen as separate criminal acts requiring separate corroboration, or, on the other hand, as separate incidents which nevertheless amount to a single crime committed by means of a course of conduct, in which case corroboration of every incident is not required.

[18] There is, however, it seems to me, an immediate difficulty which arises with applying the approach set out in these cases to an offence under section 1 of the Act. It is that the offence is only committed if it involves “a course of behaviour”, which the Act defines as being behaviour on at least two occasions. To my mind, it follows from this that although a charge under section 1 will always include an allegation that a number of incidents took place, a charge under section 1 really has to be seen as a charge that the accused committed a single crime, namely the crime of engaging in a course of abusive behaviour. Without a course of behaviour there is no crime.

[19] Moreover, and just as importantly, often much of the behaviour founded upon by the Crown in a charge under s1 of the 2018 Act will not amount to criminal behaviour at all when looked at in isolation. It seems to me that it will not therefore be possible to try and determine whether there have in reality been a number of separate crimes. There will always be separate incidents, but there will not always be a number of separate crimes. Some of the incidents will only become criminal conduct if seen as being part of a course of abusive behaviour. So while the case law mentioned above appears to make it clear that in a single charge involving separate crimes it is necessary to assess the behaviour complained of to see whether it can be said to be a single crime committed by a course of conduct, or alternatively whether it is a number of separate crimes, it does not seem to me that this assessment can be undertaken for a charge under section 1. There can only be a single

crime. On this analysis there will never be a need for separate corroboration of separate incidents for a conviction under section 1.

Present case

[20] In the present case, the acts founded upon by the Crown in complaint are said to have taken place during a relatively short period of time, namely from 1 October 2020 to 13 January 2021, that is a period of about three and a half months. There is, to my mind, little connection between the acts which are the subject of the charge in terms of their nature. The first act referred to is an assault by striking the complainer on the body and on the head. The second act is described as a persistent demand for intercourse. The next act is a refusal to use contraception. The next one is a demand that the complainer cease contact with male acquaintances. The next is that the complainer was accused of infidelity. The next is that the accused demanded that the complainer meet him and that he uttered threats of violence when she refused to do so. Some of the matters founded upon by the Crown do not seem to me to be crimes at common law or under any statute. As I have suggested, they are only said to be criminal by virtue of being said to be a contravention of section 1 of the 2018 Act. Nevertheless, as the charge is a charge under s1 of the Act to my mind this results in these incidents having to be seen as a libel that a single crime was committed.

[21] The Crown accepted that the complainer's evidence was limited to allegations of the accused striking her, persistently demanding sexual intercourse, and demanding that she meet with him and issuing threats as to what he would do if she did not. Each of these three acts, in my view, falls within the definition of abusive behaviour as given in the 2018 Act. The assaults by persistent striking is violent behaviour. Persistently demanding sexual intercourse is either behaviour which is controlling and regulating or is behaviour which

deprives the complainer of her freedom of action, and which on her evidence made her feel humiliated. The demand that the complainer meet with the accused, accompanied by a threat, is behaviour which is threatening or intimidating.

[22] It seems to me that the evidence in the present case can therefore be seen as evidence which in law is sufficient to show that the accused committed the single crime of engaging in a course of abusive behaviour. On this reasoning, it follows that corroboration of each separate incident is not required. What is required is corroboration of two or more instances of behaviour, whether or not the behaviour looked at in isolation would amount to a crime.

[23] For corroboration the Crown found on what are said to be admissions by the accused to the police that he struck the complainer. I agree with the Crown submission that, taking the evidence at its highest, in his interview the accused made admissions to the police that he had struck the accused, even though he explained that he meant it as a joke. It is nevertheless an admission of striking her. He also made admissions that he had threatened to kick in her door. It seems to me that for these two matters set out in the libel the complainer's evidence is corroborated by the accused's statement to the police.

[24] In the present case I find, for the purposes of the submissions, that the evidence, taken at its highest, provides corroborated evidence of two or more instances of abusive behaviour. That, on the view which I take, is sufficient as a matter of law to allow for a conviction on the charge of a course of conduct involving a single crime being committed on a number of occasions.

[25] In any event, even if my analysis is wrong (and the matter is perhaps not without difficulty) section 8 of the Act specifically provides that an accused may be convicted of the alternative offence of a contravention of s38 of the Criminal Justice and Licensing (Scotland) Act 2010 (threatening or abusive behaviour), or an offence under s39 of the 2010 Act

(stalking). No doubt it would also be possible to convict of an alternative offence of assault.

There is corroboration at the very least of a threat, and so a conviction under s38(1) would be competent. For no case to answer submissions to succeed there must be no conviction of any nature which would be open to the court if the evidence is accepted after trial. For this reason also the defence submissions fail.

[26] I would also mention that it seems to me that the *Moorov* doctrine could not have been used by the Crown to seek to corroborate the charge, as looked at in traditional terms there is insufficient connection in terms of their nature between the incidents set out in the complaint.

[27] For all these reasons the defence submissions are repelled.