HIGH COURT OF JUSTICIARY

[2024] HCJ 5
IND/2021-130

OPINION OF

LORD MATTHEWS

in the Minute

by

DF

Minuter

against

HER MAJESTY'S ADVOCATE

Respondent

Minuter: McConnachie QC, Glancy; George More & Company
Respondent: Prentice QC AD, Cameron AD; the Crown Agent

10 August 2021

[1] The minuter is indicted at the instance of the respondent on three charges. The first libels a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010; the second a charge of assault to injury on various occasions against the same complainer as in charge 1; and the third, a contravention of section 1 of the Domestic Abuse (Scotland) Act 2018, involving a different complainer. That charge is in the following terms:

> "on various occasions between 1 June 2019 and 22 September 2019, both dates inclusive, at (addresses in Edinburgh) and elsewhere you DF did engage in a course of behaviour which was abusive of your partner or ex-partner JR, c/o Police Service of Scotland, Edinburgh in that you did control what clothing and make-up she was allowed to wear and where she was allowed to go, prevent her from seeing her family and friends, criticise her, repeatedly make mobile telephone calls and send her messages designed to monitor her activities, movements and behaviour, shout, swear, utter violent, inappropriate, derogatory and abusive comments concerning

> her and her child, behave in an aggressive manner towards her, punch a cupboard door, threaten her, repeatedly make payments from her bank account using her bank card without her permission, repeatedly seize and pull her by the hair, push her on the body, restrain her against a wall, seize her by the head, seize her by the hair, place your arm across her throat, stamp on her foot, seize her by the face, push her on the body, butt her on the head, blow cigarette smoke into her face, place a lit cigarette against her arm, spit on her face, punch her on the head and bite her on the face, pin her down, force her legs apart, penetrate her vagina with your penis without her consent, seize her by the head, hair and body and forcibly penetrate her mouth with your penis without her consent, seize hold of her body and hair, force her face down onto a bed, restrain her, spit on her buttocks and on your penis and penetrate her anus with your penis without her consent, and, having engaged in consensual penile/anal penetration, penetrate her anus with your penis after consent thereto had been withdrawn, threaten to kill her and to kill yourself, penetrate her mouth with your fingers, seize her by the body and restrain her on a bed, struggle with her, place your hands around her neck and compress same, cause her to lose consciousness and urinate whilst unconscious, and you did abduct said JR, pursue her, seize her by the body and drag her by same, lock the front door and remove the keys preventing her from leaving and detain her against her will, and remove her mobile telephone and keys from her possession, all to her severe injury, permanent impairment and to the danger of her life: CONTRARY to the Domestic Abuse (Scotland) Act 2018, section 1."

[2] In relation to charge 3, the minuter has raised a plea in bar of trial in terms of section 79(2)(a)(iii) of the Criminal Procedure (Scotland) Act 1995. The basis of the plea is that penetration by the minuter of the mouth, vagina and anus of the complainer with his penis is by definition the crime of rape, contrary to the Sexual Offences (Scotland) Act 2009, section 1 and that the Crown seek to corroborate the evidence on charge 3, including the acts which amount to rape, by application of the doctrine of mutual corroboration involving the evidence on charge 2, which libels only physical violence. Reference is made to *Duthie* v *HM Advocate* [2021] HCJAC 23 where, at paragraph [21], the Lord Justice General said the following:

> "Rape is a crime which is distinct from physical assault. It requires a particular act of a sexual nature, *viz.* penetration. It is not capable, at least in the circumstances of this case, of being corroborated by evidence which relates only to physical assault, however repeated and in whatever context. Although the Domestic Abuse (Scotland) Act 2018 reflects important advances in society's understanding of the

> nature and effects of sexual abuse, it does not alter the position that rape is different from a physical assault, given the need for penetration."

It is said that the Crown is seeking to prove the crime of rape without calling it such and to have the minuter convicted and punished for that crime without corroboration, despite the clear *dicta* of the court in *Duthie*. The Crown's prosecution of charge 3 in its current terms is oppressive, unfair and prejudicial.

[3] The case called before me for a hearing on the minute on 20 July 2021. Both parties had lodged written submissions, which were very helpful, and supplemented the submissions in oral argument.

Legislation

[4] Sections 1, 2 and 10 of the 2018 Act are in the following terms:

> "1 **Abusive behaviour towards partner or ex-partner**
>
> (1) A person commits an offence if –
>
> (a) the person ('A') engages in a course of behaviour which is abusive of A's partner or ex-partner ('B'), and
>
> (b) both of the further conditions are met.
>
> (2) The further conditions are –
>
> (a) that a reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm,
>
> (b) that either –
>
> (i) A intends by the course of behaviour to cause B to suffer physical or psychological harm, or
>
> (ii) A is reckless as to whether the course of behaviour causes B to suffer physical or psychological harm.
>
> (3) In the further conditions, the references to psychological harm include fear, alarm and distress.
>
> 2 **What constitutes abusive behaviour?**
>
> (1) Subsections (2) to (4) elaborate on section 1(1) as to A's behaviour.
>
> (2) Behaviour which is abusive of B includes (in particular) –

(a) behaviour directed at B that is violent, threatening or intimidating,

(b) behaviour directed at B, at a child of B, or at another person that either –

(i) has as its purpose (or among its purposes) one or more of the relevant effects set out in subsection (3), or

(ii) would be considered by a reasonable person to be likely to have one or more of the relevant effects set out in subsection (3).

(3) The relevant effects are of –

(a) making B dependent on, or subordinate to, A,

(b) isolating B from friends, relatives or other sources of support,

(c) controlling, regulating or monitoring B's day to day activities,

(d) depriving B of, or restricting B's, freedom of action,

(e) frightening, humiliating, degrading or punishing B.

(4) In sub-section (2) -

(a) in paragraph (a), the reference to violent behaviour includes sexual violence as well as physical violence,

(b) in paragraph (b), the reference to a child is to a person who is under 18 years of age.

10 **Meaning of references to behaviour**

(1) Subsections (2) to (4) explain what is meant by the references to behaviour in this Part.

(2) Behaviour is behaviour of any kind, including (for example) –

(a) saying or otherwise communicating something as well as doing something,

(b) intentionally failing –

(i) to do something,

(ii) to say or otherwise communicate something.

(3) Behaviour directed at a person is such behaviour however carried out, including (in particular) –

(a) by way of conduct towards property,

(b) through making use of a third party,

as well as behaving in a personal or direct manner.

(4) A course of behaviour involves behaviour on at least two occasions."

No further elaboration is given as to the meaning of a course of behaviour.

Submissions for the minuter

[5] I was told that the evidential position in relation to the first complainer was that over the course of a three year relationship the minuter is said to have subjected her to both physical and verbal abuse, the majority of the violence being of a minor nature involving pushing. On one occasion, however, it is alleged that he grabbed her by the throat for a period of 10 seconds. No other witness observed this. As far as the second complainer is concerned, it is said that over the course of a three month relationship with her the minuter verbally abused her, some of which appears to have been spoken to by other witnesses. She alleges that he physically assaulted her on a number of occasions and that while these were not independently witnessed, it is accepted that the evidence as to them may be capable of being corroborated by mutual corroboration. She also alleges two instances of penile/anal rape, one of penile/oral rape and one of penile/vaginal rape. None of these sexual incidents was witnessed nor is there any other evidence that they occurred. These rapes are included in the libel of charge 3 as part of the alleged contravention of section 1 of the 2018 Act.

[6] From the analysis of the evidence it seems that the Crown will require to rely on mutual corroboration or alternatively in relation to charge 3 that the corroboration of the verbal abuse would be sufficient to prove the whole charge, including the various rapes, if it is all considered to be a course of behaviour.

[7] As far as mutual corroboration is concerned, the evidence about the rapes could not be corroborated by evidence of physical abuse (*Duthie* v *HM Advocate* [2021] HCJAC 23).

[8] There was no evidential basis for including the rapes as part of the complainer's wider allegations of physical assaults as they are not so inextricably linked evidentially that

to fail to include them in the libel would prohibit the complainer giving a full account of the non-sexual conduct she alleges.

[9] The Crown cannot seek to prove the uncorroborated crime of rape by calling it something else, namely a contravention of section 1 of the 2018 Act. The minuter would effectively, if convicted, be sentenced for rape and subject to the notification provisions of the Sexual Offences Act 2003 for an indefinite period.

[10] In as much as the Crown argued that it could rely on the terms of the 2018 Act by seeking to establish that all of the conduct currently libelled in charge 3 formed part of a "course of behaviour which is abusive of his partner or ex-partner" such an approach would be illegitimate.

[11] Where a charge libels a number of separate criminal acts, each such act requires to be corroborated (*Dalton* v *HM Advocate* [2015] HCJAC 24, *Spinks* v *Procurator Fiscal, Kirkcaldy* [2018] HCJAC 37, *Wilson* v *HM Adv*ocate [2019] HCJAC 36 and *Rysmanowski* v *HM Advocate* [2019] HCJAC 88). If the Crown position is correct then no such consideration would require to be given in situations where the accused and the complainer were partners or ex-partners where a course of behaviour could be shown to exist. Corroboration of two acts of verbal abuse, for example, would provide a basis for including within the same charge an allegation of rape, as here. The behaviour could involve a failure to do something, so failure to feed the family pet on two occasions, if proved, could support a charge of rape. Some assistance could be derived from the case of *R* v *Patel* [2004] EWCA Crim 3284; [2005] 1 Cr App R 27. In order to constitute a "course of conduct" for the purposes of section 2(1) of the Protection from Harassment Act 1997, the incidents had to be so connected in type and in context as to justify the conclusion that they amounted to a course of conduct. Counsel referred also to the footnotes to Renton & Brown's *Statutory Offences* dealing with the 2018

Act. These pointed out that the Revised Explanatory Notes attached to the Bill recorded that it would be for the court to determine in the particular circumstances of a case whether two incidents occurring far apart in time, with no evidence that they formed part of any wider pattern of behaviour, truly amounted to a course of behaviour. The footnotes went on to say that that seemed to imply that the phrase "course of behaviour" involves some connection between the episodes, some underlying unity and it was hard not to fall into the language of *Moorov*. In the case of *Finlay* v *HM Advocate* [2020] HCJAC 29, which the respondent relied on, the conduct forming the libel was all of a similar nature. If Parliament had intended effectively to abolish the need for corroboration in a domestic setting then that could have been made explicit. The point of the Act was to allow prosecution of matters which, apart from the Act, might not be considered to be criminal at all or at least might be difficult to prosecute. It was a giant leap for a serious crime such as rape to be prosecuted where it could be proved only by reliance on other corroborated behaviour, no matter how minor that was.

[12] The Crown's prosecution of charge 3 in its current terms was oppressive, unfair and prejudicial.

Submissions for the Crown

[13] The plea-in-bar should be repelled. The Crown was not seeking to prove the crime of rape but a very serious example of a new offence which was entirely distinct from rape, namely a contravention of section 1(1) of the 2018 Act. The new offence was a single crime committed over a period of time by a course of behaviour as defined by section 2. It was not necessary to corroborate every component aspect of that single crime and it was enough that two individual instances of "behaviour" were corroborated (*Wilson* v *HM Advocate* and

Finlay v *HM Advocate*). Non-consensual penile penetration could be viewed as "behaviour" for the purposes of the Act and was capable of forming a component part of one statutory "course of behaviour" along with other instances of non-sexual "abusive behaviour". Provided that at least two other instances of such behaviour were corroborated, it would be open to a jury to convict the accused of the whole course of behaviour which was abusive of his partner or ex-partner provided that the conditions set out in section 1 were met.

[14] There was no dispute that the allegations of verbal abuse and physical violence were corroborated, or at least could be corroborated on the evidence.

[15] A plain reading of the Act showed that the term "behaviour" was habile to cover acts of non-consensual sexual intercourse. The real issue was whether it could form part of the same "course of behaviour" as the verbal abuse and physical violence. There was a dearth of any authoritative guidance on the issue. While the footnotes in Renton & Brown's *Statutory Offences* suggested that an approach similar to that taken in *Patel* might be appropriate, namely that the incidents had to be "so connected in type and context as to justify the conclusion that they amounted to a course of conduct", it was not very clear what was meant by that phrase or how the approach suggested by the Court of Appeal in England would be applied in the context of the 2018 Act.

[16] In view of *Patel*, which approved an earlier judgment in the case of *Pratt* v *DPP* (2001) EWHC Admin 483, and the observations made in the footnotes, it might be contended that the test should be one which reflected the approach taken for the purposes of mutual corroboration as discussed in *Duthie*. That did not follow. *Moorov* had no application in the English system of criminal justice and was not referred to in *Patel*. Given the uncertainty, it was legitimate to look at the guidance given during the passage of the Act through the legislative process. When this was examined it became apparent that section 1 was designed

to be interpreted in a broad manner which permitted the many and different forms of abusive behaviour encompassed by section 2 to be included within one criminal charge.

[17] In the consultation paper on the Bill at paragraphs 3.7 to 3.10 the following is said about the scope of the proposed offence:

> "Scope of the Offence
>
> 3.7 We considered that two different broad approaches to developing the scope of the defence are possible.
>
> 3.8 The first approach would be to create an offence which is specifically limited in scope to dealing with psychological abuse and coercive and controlling behaviour in a relationship which is of a kind that could not necessarily be prosecuted under the existing criminal law.
>
> 3.9 The second approach, which we have taken with the draft offence that we are seeking views on in this consultation, is to provide for a general offence of 'domestic abuse' that covers the whole range of conduct that can make up a pattern of abusive behaviour within a relationship: both physical violence and threats which can be prosecuted using the existing criminal law and other behaviour amounting to coercive control or psychological abuse, which may or may not be possible to prosecute under existing law.
>
> 3.10 Our reason for taking this second approach is that, where the criminal conduct in coercion consists of an on-going 'campaign' of abuse which may comprise physical and or sexual assaults, threats, the placing of unreasonable restrictions on the victim's day-to-day life and acts intended to humiliate or degrade the victim, we consider there is a strong case for allowing the prosecution the flexibility to treat it as 'all of a piece' and enabling the entire ambit of an offender's abusive behaviour to be libelled within a single offence, where considered appropriate to do so. The alternative would require that certain aspects of the course of conduct amounting to domestic abuse must be libelled as separate offences because they fall outwith the scope of the "domestic" abuse offence."

[18] Paragraph 5 of the Policy Memorandum accompanying the Bill says the following:

> "By enabling abuse of various types which takes place over a period of time to be prosecuted as a single course of conduct within a new criminal offence of domestic abuse, the criminal law will better reflect how victims actually experience such abuse. The Bill will also ensure that a course of conduct of entirely non-physical abuse of a person's partner or ex-partner is criminalised."

[19] At paragraph 58 the Memorandum says this:

> "In such cases, while it would remain possible for prosecutors to libel especially serious individual incidents as separate offences where they consider it appropriate to do so, it is considered extremely useful for the prosecutor to be able to libel the accused's whole course of conduct under a single charge of domestic abuse. "

[20] During a parliamentary debate on the Bill on 28 September 2017 the Cabinet Secretary for Justice said the following:

> "The centrepiece of the Bill is the new offence of domestic abuse. The new offence modernises the criminal law to reflect our understanding of what domestic abuse is by providing for a specific offence that is intended to be comprehensive, so that abuse in its totality can be prosecuted as a single offence. It is a course-of-conduct offence that enables the entirety of the perpetrator's abusive behaviour to be included in a single charge. That will allow the court to consider the totality of the abuse that is alleged to have taken place. It will enable the court to consider behaviour that would be criminal under the existing law, such as assault and threats, as well as psychological abuse and coercive and controlling behaviour, which can be difficult to prosecute under our existing law."

A similar comment was made by the Cabinet Secretary during the stage 3 parliamentary debate on 1 February 2018.

[21] The Act should be interpreted in a purposive way giving effect to the basic objective of the legislation. Sexual violence was specifically included in the term "abusive behaviour" and it was clear that averments of sexual violence could be competently averred alongside all other forms of abuse in the one charge. To fail to interpret the legislation in that way would subvert the intention of the legislation.

[22] The proper approach would be to determine whether individual incidents could validly form part of a course of behaviour for the purposes of the Act. Did they form part of a pattern of abusive behaviour perpetrated by the accused against the complainer? That was the appropriate approach rather than asking the same questions as would be necessary to determine whether the common law doctrine of mutual corroboration applied.

[23] The issue could only be resolved after hearing the evidence of the case. While the approach might be similar to that in *Moorov*, this was not in fact *Moorov*. The issue was

whether the conduct was carried out as part of a course of behaviour which was abusive of the complainer which was likely to cause her to suffer physical or psychological harm, provided the necessary intent was established. Abusive control for the accused's own gratification could be the sort of nexus which bound the various individual acts together. Where there was no challenge to the competency or relevancy of the charge, and while it would be easy to figure extreme cases, it would always be open to an accused to submit that on no view of the evidence could particular acts form part of the alleged course of behaviour.

Analysis

[24] This minute is framed as plea in bar of trial on the basis of oppression. The oppression when it is analysed is that the Crown are said to be seeking to prove a serious charge knowing in advance that they cannot do so. There are a number of problems with this approach. In the first place it has never been the practice of the courts to examine the sufficiency of evidence before hearing it, unlike the position which may obtain in other jurisdictions. It is frequently the case that indictments and complaints contain charges which can never be proved in order to give the accused fair notice of evidence which may be led. I am not aware of any suggestion that the inclusion of such charges is somehow unfair or oppressive. The novel approach which is urged upon me by the minuter is unsupported by authority.

[25] The second difficulty is that for a plea of oppression to succeed there must be identifiable prejudice. Counsel did not refer to any in this case.

[26] These considerations of themselves suffice in my opinion to lead to the refusal of the plea. As I understood both counsel, however, it was thought that given the lack of guidance

on what is meant by a course of behaviour, this might be an issue which could be resolved with advantage before the trial (section 79(2)(b)(vi) of the 1995 Act).

[27] With that in mind I should turn to the arguments presented on behalf of the parties. The Crown are not seeking to corroborate the allegation of sexual conduct using the doctrine of mutual corroboration. *Duthie* makes it quite clear that that cannot be done and the Crown accept that there is no basis for applying the doctrine in this case. The advocate depute conceded that there was no corroboration of the sexual elements.

[28] The Act clearly covers sexual behaviour and there is nothing incompetent in libelling what could also be libelled as rape within a charge under section 1 of the 2018 Act. It is not suggested, nor could it have been, that the indictment is incompetent or irrelevant.

[29] The issue boils down to one question namely what is the proper interpretation of a course of behaviour. Other than in a statutory context, one cannot be convicted of a course of conduct. It is, though, a phrase with which lawyers are familiar. For example, it is frequently prayed in aid by the Crown in opposing bail where an accused person has allegedly indulged in similar behaviour over a relatively short period of time such as breaking into houses in the same area over the course of a few days. Each of these individual crimes however requires to be corroborated whether independently or by application of the doctrine of mutual corroboration or the principle enunciated in the case of *Howden*. As was said in *Rysmanowski* at para 17, except in the context of mutual corroboration the phrase "course of conduct" has no significance in relation to sufficiency of evidence. Where a number of separate criminal acts are libelled within the same charge, each will require to be corroborated in the normal way and one cannot avoid the need to corroborate each act simply by asserting that they were all part of a single course of conduct. That view was endorsed in the case of *Finlay* to which I have already referred (see

paragraph 13). In *Finlay*, however, the court was dealing with a statutory offence, a charge under section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 and the allegation was that the appellant had behaved in a threatening or abusive manner over a substantial period, his behaviour over that period consisting of "a course of conduct". That expression was not used in the charge but was clearly implicit and was part of the statutory definition of one manner of committing the crime (see section 38(3)(b)(ii)). Many, perhaps most, of the incidents narrated in the libel would not of themselves necessarily amount to a criminal act but they took on the characteristic of being threatening and abusive because they were all part of a course of conduct which, taken together, went to demonstrate a pattern of controlling and coercive behaviour. At paragraph 14, the opinion of the court runs as follows:

> "The expression 'course of conduct' used in this context better conveys the idea of there being a single crime in accordance with the wording in the 2010 Act, that single crime being committed over a period by a course of conduct, and being capable of corroboration by independent evidence of two or more of the incidents narrated in the libel. In such circumstances, when the alleged commission of the crime is by a course of conduct, there would require to be corroborating evidence of that course of conduct, i.e. evidence relating to two or more of the incidents referred to in the libel from which the jury could conclude that these were not isolated acts but truly part of a course of conduct. Corroboration of one incident alone might be sufficient for corroboration of the crime restricted to that one incident, or single act, (see s 38(3)(b)(i)) but not for a course of conduct."

[30] The question of mutual corroboration was not left to the jury in that case, although on the face of it, it could well have been. The importance of the case lies in the fact that it is authority for the proposition that where a statute creates a criminal offence of pursuing a course of conduct only two incidents of that course of conduct require to be corroborated. Once that was done, the issue in a trial would be whether the jury would be entitled to

convict of the uncorroborated incidents by finding that they formed part of that course of conduct.

[31] The offence under section 1 is committed by engaging in a course of behaviour of the appropriate kind and subject to the statutory conditions. Following *Finlay*, it would be sufficient to prove two incidents of that course of behaviour and if that were done the jury would be entitled to convict of the remainder, albeit uncorroborated, if they could find that it was part of the same course of behaviour.

[32] However, all of this begs the question. Can the sexual offending be found by the jury to be part of the same course of behaviour as the other offending? If that question is to be answered by reference to the rule of mutual corroboration then the answer is plainly no. *Duthie* is clear authority for that. In *Duthie*, however, the court was satisfied that the passing of the 2018 Act could not affect a common law rule of corroboration. By the same token, can it be said that a common law rule of corroboration can affect how that statute is to be construed? Reference has already been made to the footnotes in Renton & Brown's S*tatutory Offences.* They go on to say the following:

> "Writing about s 39 of the Criminal Justice and Licensing (Scotland) Act 2010, the learned authors of the 4th Edition of Gordon's *The Criminal Law of Scotland* note that 'In other jurisdictions, the requisite nexus has been provided by a continuity of purpose, and there is some support for this in English law as well." (Para 48.18).

The Revised Explanatory Notes at paragraph 57 record that it would be for the court to determine in the particular circumstances of a case whether two incidents occurring far apart in time, with no evidence that they formed part of any wider pattern of behaviour, truly amounted to a course of behaviour. The English cases of *Patel* and *Pratt* suggest that there must be some connection in type and in context so as to justify the conclusion that there was a course of conduct. Incidents which were entirely separate with no connection

could not, in my opinion, be said to be part of a course of conduct. The real issue, it seems to me, is what that connection requires to be. Does it need to involve the repetition of similar conduct as does the doctrine of mutual corroboration? That requires also that the course of conduct be systematically pursued but no such requirement appears in the 2018 Act.

[33] Paragraph 48.18 of Gordon, dealing with section 39 of the Criminal Justice and Licensing (Scotland) Act 2010, refers to the Protection from Harassment Act 1997 which uses the same terminology as the 2010 Act and points out that it has proved very difficult in England to determine what constitutes a course of conduct, as opposed to a single incident. Reference is made to a number of authorities, including *Patel*, all of which indicate that some factor or nexus linking the incidents together is required. These cases turn very much on their own facts and it is not clear, as counsel for the minuter conceded, that the same result would necessarily follow in Scotland as in England were the same facts to be replicated here.

[34] In a footnote, Gordon refers to an article entitled "Stalking the Perfect Stalking Law: An evaluation of the efficacy of the Protection from Harassment Act 1997" 2002 Crim. L.R. 703. Discussing the requirement in the English cases of a nexus between the composite elements, the author says the following:

> "Despite the restriction in the scope of the offence of harassment, the requirement of a nexus between the composite elements appears an entirely sensible approach to the definition of a course of conduct. The difficulty lies in identifying the nature of the connecting factor. Clearly, the identities of the parties alone cannot suffice to establish a connection and, in any case, the courts have held that two incidents directed at different victims may constitute a course of conduct. Proximity in the nature and timing of the incidents may be indicative of a nexus but, given the deliberately wide approach of the Act with regard to these factors, they should not be taken as determinative. Logic dictates that there must be some nexus between the incidents but the nature of that nexus is somewhat elusive.
>
> Some insight may be provided by an examination of the approach taken in stalking legislation in the United States where an association between the incidents comprising a course of conduct is required. For example, section 646.9(e) of the Californian Penal Code defines a course of conduct as 'a pattern of conduct

> composed of a series of acts over a period of time, however short, evidencing a continuity of purpose'. It is clear from this definition that the nexus between the incidents is provided by the motivation of the stalker in engaging in the conduct hence the elusive fact that would appear to be continuity of purpose. The notion that the purpose underlying the conduct may provide the requisite nexus has received some support in English law. For example, in *Baron* v *Crown Prosecution Service*, it was held that the defendant's ulterior purpose in sending two letters four months apart would provide the necessary link between what would otherwise be regarded as two incidents. An alternative method of establishing a nexus between what is often wholly disparate conduct can be seen in Australia. State legislation defines stalking by reference to a list of *prima facie* lawful conduct when it is undertaken for a particular prohibited purpose, such as an intention to intimidate or the intention to cause apprehension or fear of serious harm."
>
> *Baron* is an unreported case from the Divisional Court dated May 9, 2000.

[35] I recognise at once the difficulties inherent in the use of foreign law and foreign statutes to interpret a Scottish statute, but the idea of a nexus is one which is recurrent. If there is to be a nexus, the answer to what it could or should be can be found nearer home. The court in *Duthie* held that the acts of rape in each charge were only capable of being corroborated by both complainers speaking to the rapes, and in particular the acts of penetration. However, at para 23 the court said the following:

> "The domestic context of the relationships could be an important factor in determining whether the three acts, some eight or more years apart could be classified as component parts of a course of conduct persistently pursued by the appellant. The existence of the time gap, and the absence of intervening complaints of sexual offending, could also be a significant feature, but the jury were entitled to take into account events which they were satisfied had occurred in the intermediate domestic relationships when deciding this issue."

[36] Giving the Opinion of the court in *McAskill* v *HM Advocate* 2016 SCCR 402 at para 27, the Lord Justice General said this:

> "The facts in charge 1 encapsulated violence towards JC in 1981 and threats of violence in 1992. In charge 6 there was further violence involving the use of a car. Taken along with what might also be regarded as sexual violence in relation to JC in charges 2, 4 and 5, the charges can all be viewed as a course of sustained abuse against a partner in a domestic setting designed, within a context of jealousy, to humiliate and control. The behaviour libelled in charge 11 against LMcD, involving the insertion of objects, falls into a similar category and occurs in the same setting.

> The violence in charge 13, involving the use of a car to terrify his wife can be seen, along with the sexual abuse of this complainer in remarkably similar circumstances to that involving JC, as part of this course of conduct"

The sexual offending included rape.

[37] What I take from these authorities is that, while the doctrine of mutual corroboration has specific requirements such that evidence of physical violence cannot corroborate evidence of rape, all of this offending, at least in a domestic setting can be viewed in appropriate circumstances as a course of conduct. The context of jealousy, humiliation and control echoes very closely the conditions in the 2018 Act and, in my opinion, where the conditions are met, disparate offences can be considered as part of a course of behaviour, there being no significant difference between the words "behaviour" and "conduct".

[38] If the matter is thought to be unclear then resort to the parliamentary proceedings as urged upon me by the Crown leads me to the same conclusion. If, once two incidents of behaviour are corroborated, parts of a charge which are otherwise uncorroborated must fall away if they are of a different type, then the 2018 Act is nothing but a cosmetic change.

[39] Drawing all this together, in my opinion the acceptance by the jury on corroborated evidence that two episodes of the abusive behaviour had been proved would suffice to warrant a conviction of the new offence. Whether they could also convict of uncorroborated elements would depend on whether or not they were satisfied that those uncorroborated elements formed part of the same course of behaviour. There requires to be some sort of nexus or link between the various elements otherwise they would be simply separate incidents and not part of a course of behaviour. Whether or not that link exists will depend on the evidence in each case and may not be capable of delineation *ab ante*, although it might be found if the jury were satisfied, for example, that there was a continuity of purpose in that the accused intended or was reckless as to whether his behaviour, whatever it was,

caused the complainer to suffer physical or psychological harm, in other words if the accused was pursuing the sort of campaign described in *McAskill*. In my opinion it is not necessary that the individual incidents require to be of the same kind or of a similar kind to the full extent required by *Moorov* . That is part of the law of evidence rather than a substantive requirement of an offence. It will always be open to an accused person to submit that there was no case to answer where the evidence did not support a course of conduct.

[40] I am not persuaded by the argument (based on the facts) that the accused in this case, if convicted, will find himself subject to the notification requirements of the Sexual Offences Act 2003. That can happen in any case where there is a significant sexual element, even if not libelled as a sexual offence.

[41] In all the circumstances the plea in bar of trial is repelled.