SHERIFF APPEAL COURT

[2022] SAC (Crim) 2
SAC/2021/000375/AP

Sheriff Principal M Lewis
Appeal Sheriff T McCartney
Appeal Sheriff F Tait

OPINION OF THE COURT

delivered by APPEAL SHERIFF T McCARTNEY

in

Appeal by Stated Case

by

KWM

Appellant

against

PROCURATOR FISCAL, EDINBURGH

Respondent

Appellant: Macintosh QC; Thorley Stephenson
Respondent: Prentice QC, Advocate Depute; Crown Agent

18 February 2022

[1] The appellant was convicted of behaving in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm by entering the property at an address in Edinburgh uninvited, in a state of undress and cupping his naked genitals; contrary to section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act").

[2] That section is in the following terms:

> "Threatening or abusive behaviour
>
> 38.–(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."

[3] Two questions are posed in the Stated Case: "Did I err in repelling the no case to answer submission? Did I err in convicting the accused?"

[4] The Crown case consisted of evidence of Mrs B, aged 44, and her two sons aged 24 and 16. As at 14 September 2019 they lived in a flat one floor above the flat occupied by the appellant. Their evidence was to the effect that around 11pm on that date the appellant entered their home through the unlocked main door.

[5] He was uninvited. The appellant was completely naked. He was cupping his genitals with his hands. He was intoxicated. He was soaking wet with blades of cut grass attached to parts of his body. The appellant attempted to open the door to a bedroom. Mrs B remonstrated with the appellant and then ushered him out of the flat.

[6] The appellant made no attempt to physically resist. He was in the flat for no more than a few minutes. He was largely silent and anything he did say was mumbled and incoherent. He did not behave aggressively whilst in the flat.

[7] Upon conclusion of the Crown case a submission of no case to answer was made on the basis that there was insufficient evidence that the behaviour of the appellant had been threatening or abusive. That submission was repelled by the sheriff.

[8] The appellant gave evidence to the effect that he had long-standing problems with insomnia which he combated with alcohol. He had no recollection of the events spoken of by the Crown witnesses and was not in a position to contradict their evidence.

[9] Having considered the evidence and submissions, the sheriff found the appellant guilty as charged.

Submissions for the appellant

[10] For the appellant it was submitted that the sheriff erred in repelling the submission of no case to answer on the basis that the sheriff had failed to properly address the first and third constituent parts of an offence in terms of section 38(1), namely (a) that the appellant had behaved in a threatening or abusive manner and (c) that the appellant intended by his behaviour to cause fear or alarm or was reckless as to whether the behaviour would cause fear or alarm. It was submitted that if the sheriff concluded that behaviour was threatening or abusive it was essential to explain what it was that characterised it as such. A bland assertion that behaviour was threatening or abusive is inadequate. The cases of *Baig* v *Harvie* 2016 SLT 67 and *Burnett* v *PF Hamilton* SCL 569 were said to be examples of cases where considerable detail was provided as to the threatening or abusive nature of behaviour. It was submitted that in this case there was nothing in the prosecution evidence to support a conclusion that the behaviour was threatening or abusive and thus the sheriff erred in repelling the submission of no case to answer.

[11] In respect of conviction it was submitted that the facts as stated do not include findings in fact necessary to convict of an offence in terms of section 38(1). It was said that a finding in fact that the appellant intended to cause fear or alarm or was reckless that such would be caused was removed from the draft Stated Case on adjustment and re-inserted

within the sheriff's Note. It was submitted that the absence of any explanation as to why the behaviour found established was considered threatening or abusive undermined the conviction.

[12] It was further submitted that in order to convict the appellant the sheriff required to be satisfied beyond reasonable doubt that the appellant intended by his behaviour to cause fear or alarm or was reckless as to whether the behaviour would cause fear and alarm. Several aspects of the evidence as set out in the sheriff's Note were referred to as evidence countering any inference as to intention or recklessness. These included the short duration of the incident, the evidence that the appellant looked confused, looked as if he did not know where he really was or what he was doing, did not appear to understand what was being said and that the appellant had not been physically confrontational during the incident. It was submitted that there was no basis on the evidence on which the sheriff could be satisfied beyond reasonable doubt as to section 38(1)(c) and thus the sheriff was not entitled to convict the appellant.

Submissions for the respondent

[13] For the Crown it was submitted that the sheriff did have proper regard to the separate elements of section 38(1). The facts of other cases are of little assistance given the wide range of conduct that could amount to an offence in terms of section 38(1). What is required is to have regard to the principles involved and apply them to the evidence in the particular case.

[14] The simple proposition in this case is that a naked man entered a private home late at night and attempted to gain access to a bedroom. It is well established that intoxication is no defence and so the actions of the appellant have to be regarded as deliberate conduct. In

essence the defence position of having no recollection presents no real challenge to the Crown case. The sheriff in his Note has addressed the correct legal test {at paragraph 85}. There was sufficient evidence to repel the no case to answer submission and the findings in fact as to the appellant's conduct entitled the sheriff to convict the appellant.

Discussion

[15] The leading case of *Paterson* v *Harvie* 2015 JC 118 sets out the approach in respect of an offence in terms of section 38(1) of the 2010 Act as follows:

> "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."

[16] We have little difficulty in concluding that the sheriff did not err in refusing the section 160 submission. There was corroborated evidence that the appellant had entered his neighbours' flat uninvited at around 11pm, that he was completely naked, he was intoxicated and he was cupping his genitals with his hands. Contrary to the submission on behalf of the appellant we consider that such behaviour viewed objectively could properly be characterised as inherently threatening thereby meeting section 38(1)(a). It was not disputed that viewed objectively a naked man entering a private home uninvited late at night would be likely to cause a reasonable person to suffer fear or alarm thereby meeting section 38(1)(b). Having regard to the evidence of three eye-witnesses as to the behaviour of the appellant, there was a sufficiency of evidence taking the Crown case at its highest to enable the inference to be drawn as to section 38(1)(c), being the *mens rea* that is required. Whether such an inference should be drawn was not a matter for consideration at the stage

of a section 160 submission. Therefore the sheriff did not err in repelling the no case to answer submission and we answer question one in the negative.

[17] Turning to the second question as to whether the sheriff was entitled to convict, the sheriff found in fact that the appellant entered his neighbours' home uninvited at around 11pm through the unlocked front door. He was completely naked. He was cupping his genitals with his hands. He was intoxicated. He was soaking wet with blades of cut grass attached to parts of his body. He attempted to open a bedroom door. The occupiers remonstrated with the appellant and then ushered him out of the flat.

[18] We consider that on those findings in fact the sheriff was entitled to conclude, judging the appellant's conduct by an objective test, that it was threatening behaviour. Threatening behaviour does not require a verbal threat or gesture. Invasion of a person's private home, where they are entitled to expect to feel safe and secure, by a naked and intoxicated male is in our view eloquent of threatening behaviour. It was not disputed that such behaviour would be likely to cause a reasonable person to suffer fear or alarm and indeed there was some evidence of it actually having such an impact on those present.

[19] However for an offence in terms of section 38(1) it is a further essential component in terms of section 38(1)(c) that the person intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm. We consider that having regard to the Stated Case as presented and, in particular, the findings in fact therein the sheriff did err in convicting the appellant of an offence in terms of section 38(1).

[20] There is no finding in fact that the appellant intended by his behaviour to cause fear or alarm. There is no finding in fact that the appellant was reckless as to whether the behaviour would cause fear or alarm. That essential aspect of the tripartite test for an offence in terms of section 38(1) is barely considered within the sheriff's Note. There is

nothing more than a bare assertion in one sentence that the appellant either intended to cause fear or alarm or was reckless as to whether his behaviour would cause fear or alarm. No consideration of the evidence from which that essential inference was drawn is provided.

[21] In many cases the intention or recklessness is likely to be a clear and inescapable inference from what has been established as said or done. That is not so in the particular and unusual circumstances of this case. In this case there was evidence from the Crown witnesses which on one view could have countered any such inference depending on the sheriff's view of that evidence.

[22] Intention or recklessness in terms of section 38(1)(c) is an essential component of a section 38(1) offence. The absence of any relevant finding in fact or explanation as to the sheriff's consideration and conclusions on this aspect of the test within the Stated Case causes us to conclude that this component part of a section 38(1) offence has not been adequately considered based upon the evidence and that a miscarriage of justice therefore arises. For that reason we answer question two in the affirmative, and quash the conviction and sentence.

Postscript

[23] In this case, a no case to answer submission was made and rejected. The appellant proceeded to give evidence and was thereafter convicted. The Stated Case contained a question as to whether the sheriff was justified in rejecting the submission of no case to answer. Guidance as the format of the Stated Case in these circumstances was provided by the High Court in *Wingate* v *McGlennan* 1992 SLT 837:

> "If the stated case contains a question as to whether the sheriff was justified in rejecting the submission of no case to answer, the stated case will require, first, to set out the evidence adduced by the prosecution and any inferences drawn therefrom, and, secondly, to set out the findings in fact which, of course, must be made on the whole evidence that has been led before the sheriff (*Bowman* v *Jessop*). As was observed in *Keane* v *Bathgate*, if the defence have led evidence, findings in fact can only be made by considering the evidence led by the prosecution against any evidence which the defence have thereafter adduced. In a case where the accused has led evidence, the question whether the sheriff was justified in rejecting the submission of no case to answer raises a different issue from that raised by the question whether the sheriff on the facts stated was entitled to convict."

[24] That guidance was not followed by the sheriff in this Stated Case. That did not assist the court in consideration of the appeal.

[25] In an appeal against conviction, the well-established question is "On the facts stated, was I entitled to convict the appellant?". A question in those terms appropriately focusses the issue for the appeal court rather than the much more nuanced second question posed in this Stated Case. In framing and adjusting a Stated Case it is important to remember that the appeal court is constrained by the terms of the Stated Case and the questions contained therein.