APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 29
HCA/2019/000379/XC

Lord Glennie
Lord Turnbull
Lord Pentland

OPINION OF THE COURT

delivered by LORD GLENNIE

in

APPEAL AGAINST CONVICTION

by

MICHAEL FINLAY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg (sol adv); McCusker, McElroy & Gallagher, Solicitors
Respondent: Prentice QC, (sol adv) AD; Crown Agent

25 June 2020

Introduction

[1] On 18 June 2019 at Glasgow Sheriff Court the appellant was convicted by a jury on two charges, the first (charge 1) being a charge of threatening or abusive behaviour directed towards his wife contrary to section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act"), and the second (charge 3) being a charge of repeatedly assaulting his baby daughter over a period of some three months. The remaining charges against the

appellant, charges 2 and 4, were withdrawn at the conclusion of the Crown's case. After deferral for reports, the sheriff pronounced a *cumulo* sentence in respect of charges 1 and 3 of five years imprisonment. This appeal against conviction relates only to charge 1, other grounds of appeal against conviction and sentence not having passed the sift.

[2] Charge 1 provides as follows (omitting parts which were deleted at trial):

> "(1) on various occasions between 01 February 2014 and 28 December 2017, both dates inclusive at [various addresses] you MICHAEL FINLAY did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did conduct yourself in a disorderly manner, shout, swear, issue threats towards your wife … c/o Police Service of Scotland, behave in a controlling and coercive manner towards her, monitor her use of social media, access her social media accounts and personal mobile, discourage her interaction with friends and family and isolate her and place her in a state fear and alarm for her safety;
> CONTRARY to Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010;"

[3] To give some context to the events libelled in charge 1, it should be noted that the complainer and the appellant first met in February 2014. They moved in together in June of that year and were engaged in August. They married in November 2016, over two years later. Their daughter was born in October 2017 and the allegations concerning her, which were the subject of charge 3, focused on the period between her birth and 28 December 2017.

[4] The evidence in support of charge 1 came principally from the complainer. She spoke to the various incidents. Her evidence was supported, so far as concerns the majority of the incidents spoken to by her (though not all of them), by her sister, who spoke to the appellant's abusive and controlling behaviour towards the complainer. Further corroboration came from messages exchanged between the appellant and the complainer on social media, the recurring theme of which was of the appellant apologising for his behaviour and promising that it would not continue. In addition there was evidence from a

friend of the complainer, who provided some corroboration of the complainer's account of events towards the end of December 2017.

The no case to answer submission

[5] At the conclusion of the Crown's case, a submission of no case to answer was made in terms of section 97 of the Criminal Procedure (Scotland) Act 1995 on the grounds that there was insufficient evidence to allow charges 1 and 3 to proceed to the jury for their consideration. It was argued *inter alia* that there required to be corroboration of each individual incident in the charge before the jury could convict. The sheriff determined that there was sufficient evidence on each of those charges and repelled the submission. His reasoning, in short, was that the jury was entitled, on the evidence, to find that charge 1 libelled "a single episode of multiple instances of abusive and threatening behaviour", while charge 3 libelled "a single episode of multiple assaults" (see the sheriff's report at para [73]). In those circumstances it was open to the jury, if they did so find, to go on to find that corroboration of some of the individual incidents libelled in the charge was sufficient to amount to corroboration of the whole charge.

The sheriff's charge to the jury

[6] The sheriff adopted the same approach in his charge to the jury. Unsurprisingly, in view of the relative seriousness of the two charges, he first focused his attention on the evidential requirements in relation to charge 3, but he then explained to the jury that a similar approach had to be taken in respect of charge 1. He commented that because these incidents were alleged to have taken place within the home, there was inevitably a lack of corroboration of some of the individual incidents, and that this had shaped the Crown's approach. The approach taken by the Crown could be summarised in this way:

> "Now, the Crown says that each charge describes a single episode of multiple criminal actions in which [the complainer] was the victim in charge 1 and [the baby daughter] was the victim in charge 3, and the Crown says they were each subjected to continuous criminal activity. Now each of these charges stands apart from the other. In charge 3, the Crown says that describes a single episode of multiple criminal assaults on [the baby daughter] in which she was subjected to continuous criminal activity. … And the Crown says that, looking at all the circumstances, taking all the circumstances into account, looking at it in the round, what happened to [the baby daughter] amounted to a single episode. Now, episode here means a group of events as part of a sequence. It means a set of incidents which are connected. It's a course of conduct, where the individual incidents are connected and the idea is that the behaviour was persisted in and had some continuing and some underlying unity."

The sheriff directed the jury that it was not enough for the Crown to describe the events in this way; they, the jury, would have to be satisfied about that on the evidence. Turning his attention to charge 1, he told the jury that in relation to that charge:

> "… your approach would have to be similar. Again, you would have to accept the testimony of [the complainer] and you would have to find evidence independent of her account which was capable of supporting or confirming her account of a single episode of continuing threatening or abusive conduct, which makes the test in terms of section 38 as I've described it to you.
>
> So you would have to find that [the complainer] was subjected to continuous criminal activity by being repeatedly abused and that [there is] independent corroboration of that to allow you to hold that what happened amounted to a single episode of multiple abuse or threatening behaviour."

The appeal

[7] The appellant applied for leave to appeal against conviction on both charges and against sentence, but leave to appeal was granted at second sift only on ground (iii) and only so far as that ground related to charge 1. That ground of appeal, as so restricted, reads as follows:

> (iii) That the learned sheriff erred in directing the jury that if it found in … Charge 1 … that there was a single episode of multiple criminal acts then it could find corroboration of the entire charge if it found there to be corroboration *aliunde* of the evidence of [the complainer] in relation to a single element of [the] charge …"

Having read carefully the transcript of the sheriff's charge to the jury, we are not persuaded that the sheriff did in fact direct the jury that sufficient corroboration could be found by evidence in relation to a single element of the charge. That would be sufficient to dispose of this appeal, but we do not think it appropriate to deal with the matter in such a peremptory way. We return to this point later.

Submissions

[8] For the appellant, it was submitted that the incidents narrated in charge 1 were separate and distinct criminal acts, each of which required to be corroborated either directly or by application of the principle of mutual corroboration. Reference was made to *Spinks* v *Harrower* 2018 JC 177, *Wilson* v *HM Advocate* 2019 SCCR 273 and *Rysmanowski* v *HM Advocate* 2020 JC 84. Under reference to *Wilson* at para [37], it was accepted that whether a series of incidents amounted to a single episode or course of conduct was a matter of fact and degree. But it was submitted that in the present case the conduct libelled in charge 1 could not amount to a single episode of threatening or abusive behaviour; the narrative in the libel was that the threatening or abusive behaviour occurred on various occasions between the two dates, spanning a period of nearly 4 years, and there was no suggestion, unlike in the case of *Wilson*, that the complainer had been held captive or was for some other reason unable to leave during this period. The incidents libelled in the charge were in fact separate incidents, separate criminal acts, each of which required corroboration. It was not arguable that they constituted one single episode of criminal behaviour, and the sheriff ought not to have left that question to the jury. The appeal should be allowed and the conviction on charge 1 quashed. The jury was not directed on the basis that they should look for

corroboration of the individual incidents or as to the principle of mutual corroboration, and the court should not seek to uphold the conviction by either of those routes.

[9] For the respondent, the Advocate Depute drew the court's attention to the terms of section 38 of the 2010 Act and emphasised that, in terms of subsection (3)(1)(b)(ii) thereof, the behaviour constituting an offence under that section could consist of a single act or "a course of conduct". What was libelled in charge 1 was a course of conduct, a pattern of abusive behaviour by the appellant spanning the period of the libel, causing her fear and alarm. Many of the incidents narrated in the charge were individually corroborated. There was sufficient corroboration of individual incidents to provide a sufficiency and to justify the verdict even if the charge was regarded as comprising a number of single events each of which required corroboration. The Crown's primary case, however, was that the individual incidents were all part of a single episode capable of being corroborated as a whole by the evidence of the complainer's sister and the messages on social media even if that evidence and those messages did not corroborate each individual event. What amounts to a single episode or separate episodes of criminal acts is a question of fact and degree*: Wilson* at para [37]. That was a matter for the jury to determine and the sheriff was right to leave it to the jury. The sheriff did not err in directing the jury that if they found in charge 1 that there was a single episode consisting of multiple criminal acts, they could find corroboration of the entire charge if there was corroboration *aliunde* of the evidence of the complainer in respect some but not all of the incidents libelled in the charge.

[10] The sheriff had directed the jury that if they were not satisfied that the conduct libelled in the charge constituted a single episode of multiple criminal acts, then they must acquit the appellant of the entirety of the libel. That was a misdirection, albeit one in favour of the appellant. There was sufficient corroboration of individual incidents to allow the jury

to convict of that charge either in whole or in part. Nor were the jury directed, as they should have been, that the doctrine of mutual corroboration could apply in this case.

[11] The Advocate Depute drew our attention to the fact that there had been no evidence before the jury of any incident at the Gleddoch House Hotel, Renfrewshire. That locus should therefore be deleted from the libel. *Quoad ultra* the appeal should be refused.

Decision

[12] It is not in dispute that where a charge libels a number of separate criminal acts, each such act requires to be corroborated: *Dalton* v *HM Advocate* 2015 SCCR 125, *Spinks* v *Harrower* 2018 JC 177, *Wilson* v *HM Advocate* 2019 SCCR 273, *Rysmanowski* v *HM Advocate* 2020 JC 84. Nothing in what we say in this case in any way detracts from that. However in some cases there may be room for uncertainty as to whether the events set out in the libel constitute, on the one hand, a single criminal act or, on the other hand, a succession of separate criminal acts. It is in every case a matter of fact and degree: *Wilson* v *HM Advocate* 2019 SCCR 273 at para [37].

[13] In *Rysmanowski* the Lord Justice General, delivering the Opinion of the court, in the context of discussing the need to corroborate each separate criminal act, emphasised that, except in the context of mutual corroboration, the phrase "course of conduct" has no significance in relation to sufficiency of evidence: see para [17]. In other words, where a number of separate criminal acts are libelled within the same charge, each will require to be corroborated in the normal way; and, except where the doctrine of mutual corroboration is available, one cannot 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. We endorse that view.

[14] But that is not this case. We are here dealing with a particular statutory offence. In the present case the charge was a charge under section 38(1) of the 2010 Act, 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". The expression "course of conduct" is not used in the charge as libelled, but is clearly implicit in how the libel is framed. It is part of the statutory definition of one manner of committing the crime: see section 38(3)(b)(ii). As the sheriff pointed out in his charge, many, perhaps most, of the incidents narrated in the libel would not of themselves necessarily amount to a criminal act. They take on their characteristic of being threatening and abusive because they are all part of a course of conduct which, taken together, go to demonstrate a pattern of controlling and coercive behaviour. In his decision on the no case to answer submission and in his charge to the jury, the sheriff identified the question as being whether the appellant's behaviour in relation to the events libelled in charge 1 amounted to "a single episode" of multiple abuse, threatening behaviour, criminal acts, etc., and this terminology was adopted by the Advocate Depute in his submissions before this court. The sheriff used that expression interchangeably with "course of conduct"; and the jury could have been in no doubt that he was talking about a "course of conduct". We would deprecate the use of the phrase "single episode" in this context as apt to cause confusion. 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, where 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.

[15] On a proper reading of charge 1 on the indictment, it is impossible to say that the conduct there narrated could not amount to a single course of conduct capable of being corroborated by the evidence from the complainer's sister and the messages on social media. The matter being one of fact and degree, it was for the jury to decide on the evidence whether the charge libelled a single course of conduct and, if so, whether it was corroborated by that evidence – and the sheriff was right to leave that matter to the jury. There is no merit in the challenge to his direction on this matter.

[16] In those circumstances there is no need for us to consider the question raised by the Advocate Depute of whether there was in any event sufficient corroboration of the individual incidents narrated in the libel to justify the conviction on this charge or whether the matter might have been resolved against the appellant in any event by reference to the principle of mutual corroboration. We simply note that the jury was not directed on either of these points.

[17] We shall give effect to the concession by the Advocate Depute that no evidence was given about anything having occurred at the Gleddoch House Hotel, Renfrewshire, by deleting that locus from the libel in charge 1. Save for this one change, the appeal is refused.