APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 47
HCA/2021/284/XC

Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

APPEAL AGAINST SENTENCE

by

GRPW

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Findlater; McKenzies, Solicitors, Kirkcaldy
Respondent: Edwards QC AD; the Crown Agent

4 November 2021

[1] On 15 June 2021 the appellant pleaded guilty to four charges, as follows:

Charge (1): on 2 December 2016 at (an address) he assaulted his wife and punched her on the head to her injury;

Charge (2): on two occasions between 1 December 2018 and 10 November 2019, at the same address and in a motor vehicle he assaulted his wife, punched her to the head, threw a dog cage at her causing it to strike her on the head, seized her by the throat and compressed her throat restricting her breathing and causing her to lose consciousness, and repeatedly struck her head against a floor, all to her injury, and aggravated by involving abuse of his partner or ex-partner, in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016;

> Charge (3): on two occasions between 1 August 2015 and 25 December 2019, at the same address, he assaulted his son C, born 4 April 2007, and struck him on the body with his knee, causing him to fall down a stair case, seized him by the clothing and threw him to the floor, all to his injury; and
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> Charge (5): on 19 January 2020 at the same address or elsewhere he sent abusive, offensive and threatening messages to his wife via social media applications, contrary to section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010, all aggravated in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

The *locus* of the offences was the family home.

[2] The sheriff continued the case until 20 July for the preparation of background reports and to enable the parties to consider submissions in relation to the Crown's motion for a non-harassment order. On that date, he sentenced the appellant to a total of 2 years imprisonment, discounted from 30 months. That is not challenged in this appeal. He also made a non-harassment order ordering the appellant to refrain from: (i) approaching or contacting the complainer or the children C and L and (ii) entering their home – all for a period of 3 years.

[3] The only element of the sentence which is appealed is the non-harassment order in as much as it prohibits the appellant from approaching or contacting the children.

The circumstances of the offences

[4] The appellant and his wife had been in a relationship for approximately 24 years and separated at the end of November 2019. They had, until that point, lived together at the *locus* along with their two sons C, born 4 April 2007 and L, born 15 October 2010.

[5] As far as charge (1) is concerned, all the parties were at home on 2 December 2016. C did not wish to wear certain clothing which his mother had picked out for him, and went into a huff. The appellant challenged him and his wife defended their son. This led to an argument between the couple, which culminated in the appellant punching his wife on her

face, causing her upper denture to fall out. She was crying. C did not witness the assault, but heard arguing and a bang. The appellant came downstairs appearing to be angry and had a clenched fist.

[6] In relation to charge (2), on an occasion in December 2018, the appellant, his wife and the boys were in the family car when an argument began. The wife was driving and at some point during the argument the appellant punched her on the face, causing her top lip to bleed.

[7] The appellant and his wife went to a friend's house, and at some point she went upstairs to lie down. At around 3.00am on 10 November 2019 she received certain information about the appellant and she returned home. The appellant was in bed and she challenged him. This led to an argument and the appellant picked up a dog cage, which he threw at her, striking her on the left temple and causing it to bleed. He then approached her from behind, grabbed her throat with his forearm and applied pressure. She was unable to speak and was choking. Her eyes were bulging and she was losing consciousness. When she came to, the appellant was crouched down beside her with her head in his hands. He banged her head on the ground several times and she screamed and cried. She woke up a few hours later in the bedroom with bruising on her neck and arms. The couple separated the following day.

[8] As far as charge (3) is concerned, on an occasion when C was around 8 years old, he and the appellant were at home when the appellant asked him to go downstairs and do the dishes. The boy told his father he would do them in 5 minutes and the appellant struck him on the back with his knee, causing him to fall down the stairs backwards and strike his head on the floor. The appellant later apologised to him.

[9] On Christmas Day 2019, the family were all at home and the appellant and C were play fighting, as they often did. In the course of this, C kicked the appellant in the groin. The

appellant picked him up by the clothing and threw him to the ground, causing the back of his head and neck to be sore and his T-shirt to be ripped. Again, the appellant later apologised to him.

[10] The circumstances of charge (5) are that, on Sunday 19 January 2020, the appellant's wife accessed his Google account and was able to obtain certain information about him. She contacted the appellant to let him know about this, and he replied, "I hope you die of cancer", "The things I'm going to do to you, I'm not scared to do time for you", "Make sure your doors are locked and make sure you have one eye on your back, you'll get what's coming to you". She contacted the police, who attended at her home to take a statement. While she was there, she received a phone call from the appellant and he was argumentative even when speaking to a police officer.

The non-harassment order

[11] On 15 June the procurator fiscal depute asked the court to make a non-harassment order, telling the sheriff that the complainer wished to have the protection of such an order for as long as possible. The sheriff points out in his report that he would have been required by section 234AZA(4)(a) of the 1995 Act to consider the imposition of such an order, even if the motion had not been made and section 234AZA(4)(b) required him to hear both parties before doing so. Neither side of the bar was prepared to address him in relation to the matter, particularly in relation to the potential inclusion of the children and he continued consideration of the motion until the next diet.

[12] On 20 July the procurator fiscal depute said that he had spoken to the complainer, the appellant's wife, with a view to ascertaining the children's views. She had told him that there were times when they wished to see their father and times when they did not. He submitted

that it would be appropriate to include the children in any order made, because they had witnessed significant domestic violence against their mother. The complainer had told him that the experience had had an emotional impact on them.

[13] For the appellant, it was pointed out that he had had no contact with the children, because of special conditions of bail. A review had been lodged before Christmas, on the basis that the appellant's parents had provided information that the children were missing their father, but that application had been refused, because they were vulnerable witnesses. It was submitted that section 234AZA(3) imposed a different test when the court was considering whether children should be included in a non-harassment order. The court had to be satisfied that it was appropriate for the children to be protected by the order. It was not appropriate because the views of the children had not been properly and independently investigated. It was further submitted that the appellant intended to raise civil proceedings for contact and that would be the appropriate forum in which to decide whether contact should be allowed, taking account of the children's views.

The legislation

[14] It might be helpful at this stage to note the legislation, which governs the making of non-harassment orders.

[15] Non-harassment orders in general are dealt with in section 234A of the Criminal Procedure (Scotland) Act 1995 but, for present purposes, it suffices to refer to section 234AZA, which provides for such orders in domestic abuse cases. That section, so far as relevant, is in the following terms:

> "234AZA-(1) Section 234A applies subject to this section if an offence referred to in sub-section (1) of that section is one listed in sub-section (2)(c).

(2) For the purposes of this section–

(a) 'victim' has the same meaning as in section 234A,
(b) 'child' has the same meaning as given by section 5(11) of the Domestic Abuse (Scotland) Act 2018,
(c) the list is–
(i) an offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018,
(ii) an offence that is aggravated as described in section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

(3) A non-harassment order in the person's case may include provision for the order to apply in favour of any of the following, in addition to the victim–

(a) in any circumstances, a child usually residing with the person or a child usually residing with the victim (or a child usually residing with both the person and the victim),
(b) where the offence is one under section 1(1) of the Domestic Abuse (Scotland) Act 2018, and is aggravated as described in section 5(1)(a) of that Act, a child to whom the aggravation relates,

if the court is satisfied that it is appropriate for the child to be protected by the order.

(4) The court must–

(a) without an application by the prosecutor, consider the question of whether to make a non-harassment order in the person's case,
(b) after hearing the prosecutor as well as the person, make such an order unless of a negative conclusion on the question,
(c) if of a negative conclusion on the question, explain the basis for this.

(5) Here, a negative conclusion on the question is the conclusion by the court that there is no need for–

(a) the victim, or
(b) the children (if any) in mind by virtue of sub-section (3), to be protected by such an order."

It is not necessary to refer to the remainder of the section, but it might be helpful to look briefly at certain provisions of the Domestic Abuse (Scotland) Act 2018, which, amongst other things, introduced section 234AZA into the 1995 Act. In particular, reference should be made to section 5:

"5 Aggravation in relation to a child

(1) This sub-section applies where it is, in proceedings for an offence under section 1(1) –

(a) specified in the complaint or libelled in the indictment that the offence is aggravated by reason of involving a child, and
(b) proved that the offence is so aggravated.

(2) The offence is so aggravated if, at any time in the commission of the offence–

(a) A directs behaviour at a child, or
(b) A makes use of a child in directing behaviour at B.

(3) The offence is so aggravated if a child sees or hears, or is present during, an incident of behaviour that A directs at B as part of the course of behaviour.

(4) The offence is so aggravated if a reasonable person would consider the course of behaviour, or an incident of A's behaviour that forms part of the course of behaviour, to be likely to adversely affect a child usually residing with A or B (or both).

(5) For it to be proved that the offence is so aggravated, there does not need to be evidence that a child–

(a) has ever had any–
(i) awareness of A's behaviour, or
(ii) understanding of the nature of A's behaviour, or
(iii) has ever been adversely affected by A's behaviour."

It is not necessary to refer to the remainder of that section. Amongst the effects of the legislation is that the problem identified in *S* v *HM Advocate* 2016 JC 1 will no longer arise. In that case it was held to be incompetent for a sheriff to make a non-harassment order under Section 234A not only in respect of the victim named in the charges but also in respect of her children. While they were doubtless distressed by the conduct which they witnessed, the charge libelled could not be said necessarily to involve misconduct towards them.

The sheriff's approach

[16] The sheriff took the view that, notwithstanding the wording of section 234AZA(3), he

was required by section 234AZA(5)(b) to include the children in the order unless he could conclude that there was no need for them to be protected by it. He could not reach that conclusion. He reasoned that it is not uncommon for children in the middle of domestically abusive relationships to feel conflicted, so he was not surprised to be told that there were times when the children wished to see the appellant. The fact that the complainer was prepared to tell the prosecutor that suggested to him that he could have confidence in what she also told the prosecutor about times when they did not want to have contact with him. This tended to confirm in the sheriff's mind that the domestic abuse which the children had witnessed had indeed had an adverse emotional impact upon them. He considered it to be within judicial knowledge that children who witnessed one parent being domestically abused by the other can be traumatised by the experience and that further contact with the abusing parent can reawaken that trauma. The appellant had inflicted significant levels of violence on the complainer on more than one occasion when the children were either actually present or within earshot in the family home. The appellant also assaulted his son C on more than one occasion. According to the Criminal Justice Social Work Report, the appellant did not understand the effect that his behaviour had on his children. That heightened the sheriff's concern that attempts by the appellant to interact with them would carry a material risk of exposing them to further trauma. He considered that it was highly likely that the children would become aware of the fact that the court had made an order in favour of their mother and it was necessary to provide them with the reassurance that their status as victims had also been recognised by the court. It was necessary to try to remove from them the burden of carrying any responsibility for the decision as to whether they should have contact with the appellant for an appropriate period of time.

The Note of Appeal

[17] The nub of the appeal is that prohibiting all contact for three years with the children was inappropriate and excessive, especially in circumstances where their views had not been taken directly and information that they did not want any contact with the appellant came from the principal complainer. That information was contradicted by letters written by the children to their father and from information provided by the mother of the appellant.

[18] The sifting judge also considered that the sheriff's construction of sections 234AZA(3), (4) and (5) was arguably wrong and also granted leave to appeal on that basis.

[19] Both parties provided helpful written submissions for which we are grateful.

Submissions

Appellant

[20] It was submitted that the sheriff's approach, which, according to the appellant, by-passed sub-section (3), was incorrect. Two conditions had to be met. One was that the court was satisfied that it was appropriate for a child to be protected by an order and, secondly, that the court was not of a negative conclusion in response to the statutory question. While the sheriff did not reach a negative conclusion on the question, he had not considered whether provision for the children was appropriate. He noted that the elder of the two children, C, was the complainer in charge (3) and that both children were present during acts of violence committed by the appellant on his former partner. That may well have been traumatic for the children. This did not go, however, to the centre of the consideration of whether the children should be protected from "harassment or further harassment" by their father. They were protected from witnessing domestic harm in that the principal complainer, their mother, was protected by the order. The children could not witness domestic violence between the appellant and the complainer while that order was in place. The sheriff's concerns to reassure

them that their status as victims would be recognised and to relieve them of the responsibility of deciding whether they should have contact with the appellant were irrelevant. They had nothing to do with the question of harassment or further harassment by the appellant. A non-harassment order involving the children was not appropriate, nor was it "not unneeded".

[21] With reference to the child C, while he was a complainer in charge (3), which narrated two incidents of assault, the incidents were not such as would have justified solemn proceedings on their own and were followed shortly afterwards by apologies by the appellant to his son. The appellant had a limited schedule of previous convictions and had never previously offended against any child. He enjoyed the continuing support of his family and had a strong employment history. He was either a low or a moderate risk of further offending, depending upon the risk assessment tool used. He recognised that he needed to make changes in his life. He had adhered to special conditions of bail relating to his former partner and the children. The children had maintained a relationship with him through their paternal grandmother, sending messages through her, including cards. They wished to see him. If an order was nonetheless appropriate, three years was an excessive period.

Crown

[22] It was acknowledged that the sheriff's report might raise concerns that he considered he was obliged automatically to include the children without applying the first stage of the two-stage test. However, he did in fact give consideration to the appropriateness of an order before moving to the second stage. Thereafter, he was unable to conclude that there was no need for them to be protected by the order. He considered that ongoing attempts by the appellant to interact with them would carry a material risk of exposing them to further trauma. It was appropriate to provide reassurance to them that their status as victims had

been recognised and remove the burden of responsibility from them in relation to the decision whether or not to have contact with him. Three years was an appropriate period to cover the time the appellant was in prison and a reasonable amount of time following his release. The children resided with their mother in the family home, where much of the domestic violence had taken place and it was necessary for them to be protected. C was a direct victim of the assaults and both children had witnessed or been within earshot of violence on a number of occasions. All of this showed that the sheriff had in fact considered the appropriateness of the order, despite what he seemed to be saying.

Analysis and decision

[23] Since C was a victim in charge 3, it would have been open for the Crown to have moved the sheriff to grant a non-harassment order in respect of him under Section 234A. In such a case the sheriff could only have granted it if he was satisfied on the balance of probabilities that it was appropriate to do so. That is now academic. As far as Section 234AZA is concerned, the qualifying offences are contraventions of Section 1(1) of the Domestic Abuse (Scotland) Act 2018 and those aggravated under Section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. The only charges on this indictment which qualify are charges (2) and (5). The non-harassment order imposed by the sheriff does not specifically relate to any particular charge or charges on the indictment but no point is taken about that and we proceed on the assumption that it was those charges which the sheriff had in mind. Charge (2) is particularly relevant. Both parties were agreed that when considering the position of a child under Section 234AZA there is a two-stage test. There is first the issue of appropriateness under Section 234AZA(3) and second the statutory question referred to in subsections (4) and (5). Mr Findlater pointed out that the purpose of

the statutory provision was protection and, in relation to appropriateness one might pose the question, "Is there a spectre of protection being required?". If that were the case, then one moved on to the statutory question. We agree with counsel and the advocate depute that there is indeed a two-stage process insofar as children are concerned. However, in our opinion the appropriateness "test" is nothing more than a threshold. It is not for us to try to re-write the words of the statute but one approach which commends itself to us is to consider whether the child is within the orbit of the offending and affected or likely to be affected by it. Where the child falls within section 234AZA(3)(b), it is difficult to conceive of any circumstances in which an order will not be appropriate. Less straightforward issues could perhaps arise where the child qualifies for consideration only under sub-section (3)(a). That will obviously depend on the circumstances of each case. Where such a child has witnessed, overheard or been a victim of domestic violence, it will only be rarely that the court should not have that child "in mind" for the purposes of addressing the question posed in section 234AZA(4). Thereafter, issues such as the nature of the offence, the persistence of the offending, the offender's record, steps taken to address any issues the offender might have etc., will come into play when the statutory question is being considered, although there may well be some overlap between the two stages.

[24] In this case, we agree that the sheriff's concerns about recognising the victimhood of the children and relieving them of the burden of making decisions about contact, were not themselves relevant considerations either in relation to the appropriateness test or the statutory question. The sheriff does not appear to have asked himself in terms whether the appropriateness threshold had been crossed. In some cases where there is more than one child, the issue of appropriateness and the answer to the statutory question may not be the same for each. As it happens, we do not consider that this is such a case.

[25] Having said all that, we are satisfied that had the sheriff addressed the appropriateness test, he would have been bound to find in respect of each child that it had been passed. C himself was a victim. While no order was sought in respect of him under Section 234A and the charge in which he was named as a victim did not relate to a qualifying offence, the fact that he was a victim is a relevant consideration. Both C and L were residing with their mother, the victim in charges (2) and (5) and had witnessed or heard at least part of the offending. It is fair to proceed on the basis that they were or would have been affected by it, at least in relation to charge (2). They were entitled to be considered for protection. When it came to the statutory question, the sheriff was not satisfied that he could give a negative answer. On the basis of the material before us, that was a conclusion which was open to him and one with which we are not in a position to interfere. Nor is it appropriate for us to interfere with the length of the order.

[26] The statute does not require that the views of those who might be protected by an order should be sought and we do not ourselves think it is necessary in any event. See *Finlay* v *PF Perth* 2021 SLT (Sh Ct) 133.

[27] It only remains for us to point out that, if circumstances change, the order could be varied or revoked.

[28] The appeal is refused.