SHERIFF APPEAL COURT

[2017] SAC (Crim) 1
SAC/16/000713/AP

Sheriff Principal Stephen QC
Sheriff Principal Turnbull
Sheriff Arthurson, QC

OPINION OF THE COURT

delivered by SHERIFF ARTHURSON, QC

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

MUZAFFAR HUSSAIN

Appellant

against

PROCURATOR FISCAL, GLASGOW

Respondent

Appellant: McKenzie; PDSO
Respondent: Niven-Smith; Crown Agent

13 December 2016

[1] The appellant appeals against a conviction dated 1 August 2016 and related sentence imposed on 29 August 2016 comprising a Community Payback Order with supervision and unpaid work requirements and a 3 year Non Harassment Order.

[2] The single charge on the complaint alleges a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. The factual background to the events

alleged on 1 April 2016 are set out in the sheriff's findings numbered 3 to 6; the conduct of the appellant at findings 7 to 9; and the response of the complainer at findings 11 and 12. Absent questions for the court being set out in the Stated Case, Ms McKenzie invited us to answer the following question: whether the evidence at trial was sufficient to entitle the sheriff to convict the appellant of the charge?

[3] On close reading of the sheriff's detailed account of the evidence, it becomes clear that the complainer, although she assumed that the appellant was likely to be present with his mother, did not actually know of his presence at the locus until the police arrived (para 6 of the stated case). Thereafter, on the complainer's evidence, the buzzer continued to be pressed, albeit on her account as narrated by the sheriff it was the appellant's mother who was doing this. Accordingly, it is only in retrospect that the complainer actually knew with certainty that the appellant was present at the door with his mother. No conduct or words were attributed by the complainer to the appellant and her reaction was based on her assumption until the police arrived that he must have been present with his mother. There is however an additional component to the evidence available to the sheriff which comprises the evidence from the police witness who observed both the appellant and his mother at the door pressing the buzzer and talking through the intercom. This of course occurred after the appellant and his mother were refused entry: finding in fact 8.

[4] In our view context is critical in assessing the standpoint of the reasonable person referred to in section 38(1) of the 2010 Act: see *Paterson* v *Harvie* 2015 JC 118. The problem which we have described above concerning the lack of actual knowledge on the part of the complainer about the presence of the appellant at the locus and accordingly the source of her fear and alarm prior to the arrival of the police is a slightly different point but one which in our view nevertheless can and should be read in the context of the fuller family

background which was before the sheriff as fact finder in the evidence at trial. In addition, and in our view significantly, the sheriff had available to him contemporaneous police evidence about what was happening outside the flat at the time. Further, the conduct of the appellant at the locus was persistent and lasted for a prolonged period. We think that in these particular and unusual circumstances the sheriff was entitled to convict the appellant as libelled relying (i) on the contextual position as set out by him at paragraphs 34 to 38 of the Stated Case from the standpoint of the complainer inside the flat, together with (ii) the said police evidence about the conduct of the appellant outside the front door. In these circumstances we conclude that we require to answer the question posed for us by Ms McKenzie in the affirmative and refuse the appeal. For completeness, we do not consider that the sheriff erred in holding that the statutory defence was not made out.

[5] Turning to sentence, while it appears to us that the imposition of a Non Harassment Order was an appropriate disposal, and indeed we note that Ms McKenzie did not challenge this component of the sentence before us, standing the nature of the index offence itself it also appears to us that the sheriff has erred in imposing a Community Payback Order with supervision and an unpaid work tariff of 250 hours. We propose in the whole circumstances quashing that Community Payback Order and substituting therefor a level 1 Community Payback Order of 3 months duration with the full period of hours of unpaid work available at that level, namely 100 hours.