APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 37
HCJ/2019/609/XC

Lord Justice General
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

ADNAN MUNIR AHMED

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: C Mitchell, QC, Armstrong; Paterson Bell for Graham Walker, Solicitors, Glasgow
Respondent: Prentice QC (sol adv) AD; the Crown Agent

18 September 2020

Introduction

[1] In September 2019 the appellant went to trial in the Sheriff Court at Glasgow on an indictment libelling 18 charges. The offences were said to have taken place between May 2016 and January 2019. All of the charges concerned conduct directed towards young women. Two of the offences were said to have taken place in Uddingston and the remainder in Glasgow city centre. Three of the charges alleged sexual assault of a relatively

minor nature and one concerned a minor non-sexual assault. The remaining charges all libelled contraventions of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010.

[2] After the Crown case had been concluded the sheriff upheld no case to answer submissions in relation to nine of the charges and the Crown withdrew a further four charges. After giving evidence on his own behalf the appellant was convicted of the remaining five charges. He received a sentence of two years imprisonment. The sheriff concluded that there was a significant sexual aspect to the behaviour of which the appellant had been convicted and made him subject to the notification requirements of Part II of the Sexual Offences Act 2003 for a period of ten years. The appellant has appealed, with leave, against both conviction and sentence.

The convictions

[3] The charges of which the appellant was convicted were as follows:

> "(4) on 10 July 2016 at Buchanan Galleries Shopping Centre, Stockwell Street, both Glasgow and elsewhere in Glasgow you 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 approach NB, attempt to engage her in conversation, make comments about her appearance, repeatedly request her phone number, tap her on the shoulder, touch her cheek and attempt to kiss her;
>
> Contrary to Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010;
>
> (5) on an occasion between 1 August 2016 and 31 December 2016, both dates inclusive at the lane near to Holmwood Road, Uddingston you 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 whilst within a secluded lane, approach LS, a schoolgirl then aged 17 year old, repeatedly utter unsolicited personal comments towards her, take hold of her hand, and request her telephone number;
>
> Contrary to Section 38 (1) of the Criminal Justice and Licensing (Scotland) Act 2010;

(6) on an occasion between 1 August 2016 and 30 September 2016, both dates inclusive at the lane near to Holmwood Gardens, Uddingston you 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 whilst within a secluded lane, approach JG and did persistently attempt to engage her in conversation;

Contrary to Section 38 (1) of the Criminal Justice and Licensing (Scotland) Act 2010;

…

(16) on various occasions between 10 November 2018 and 16 November 2018, both dates inclusive at Buchanan Street, Glasgow and elsewhere in Glasgow you 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 shout at AI, approach her, make unsolicited personal comments towards her, stand in front of her, blocking her path and thereby prevent her from terminating the conversation, make comments about her appearance, and thereafter did repeatedly contact her on a social media platform, demand that she meet you, send offensive comments towards her, and cause her to change her route home;

Contrary to Section 38 (1) of the Criminal Justice and Licensing (Scotland) Act 2010;

…

(18) on 8 January 2019 at Buchanan Street, Glasgow you 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 approach KJ, stand in front of her, blocking her path, repeatedly attempt to engage her in conversation, make comments about her appearance and cause her alarm and annoyance;

Contrary to Section 38 (1) of the Criminal Justice and Licensing (Scotland) Act 2010;".

The evidence

[4] Each of the charges concerned unsolicited comments which the appellant made to young women who were strangers to him. He variously asked their name, told them his name and complimented them on their appearance. In the case of LS, he asked her for her telephone number and invited her to join him for a coffee. In the case of AI he invited her to join him for some wine. He also subsequently sent text messages to AI. It was accepted that one of these could be construed as being of an abusive nature.

[5] The complainer in charge 4 was aged 21, the complainer in charge 5 was aged 17, the complainer in charge 6 was aged 16, the complainer in charge 16 was aged 20 and the complainer in charge 18 was aged 24. At the respective times the appellant was aged 35 (charges 4, 5 & 6) and 37 years old (charge 16 & 18).

[6] None of the complainers welcomed the appellant's approaches. They described themselves as feeling overwhelmed, or uncomfortable, shaken up, intimidated or stressed.

[7] The appellant gave evidence in his own defence. He accepted speaking to each of the complainers and acknowledged that each was a stranger to him. In relation to NB he explained that he passed a compliment to her as she was passing and spoke to her again briefly a little later when their paths crossed again. On this second occasion he described the conversation between the two as flirting and they exchanged telephone numbers on Snapchat.

[8] He explained that he encountered each of the complainers LS and JG on separate days when making his way to Uddingston train station from his parent's house where he was living at the time. He did not realise that either girl was at school until he spoke to them. No one else was around at the time and it was later in the morning than would be expected for someone making their way to school. He engaged in some general conversation with each in the course of which he gave them his name.

[9] He acknowledged speaking to the complainer AI at around six in the evening at a set of traffic lights as she was waiting to cross the road in Glasgow city centre. He complimented her on her appearance and explained that he engaged briefly in conversation with her during the course of which she gave him her Instagram contact details. In relation to KJ he again accepted complimenting her on her appearance, speaking to her for no more than a few moments.

[10] He testified that he had not behaved in a threatening or abusive manner towards any of the complainers and had no intention of upsetting any of them. In evidence-in-chief, and in cross-examination, the differences, such as there were, between the respective complainers' accounts and the account given by the appellant were put to him.

Procedure

[11] The trial had commenced on Tuesday 17 September 2019. The Crown case closed before lunch time on Friday of that week. At that stage counsel for the appellant indicated that she had submissions to make. The sheriff instructed the jury to leave at that point and not to return until 10am on Tuesday 24 September. Rather than then proceeding to hear counsel, in circumstances which are not explained in the minute, the court adjourned at that stage until Monday 23 September. On that date the court heard submissions from counsel for the appellant and from the procurator fiscal depute in response. The sheriff upheld the submissions on three charges and thereafter the procurator fiscal advised the court that he would no longer be seeking a conviction in respect of a further four charges.

[12] The next day, Tuesday 24 September, the court convened and the sheriff advised the jurors that there were further submissions to be made to the court and dismissed them until 2pm. Further no case to answer submissions appear to have been presented, with the result that the accused was acquitted of another six charges. The appellant's evidence began at 14:27 hours and was completed at 15.46, taking approximately an hour and a quarter. This was the only evidence which the jury had heard since Friday morning. At the conclusion of the appellant's evidence the sheriff explained that he wished to ask some questions in clarification. Without explaining why, he informed parties that he would conduct that exercise at 10 o'clock the following morning.

[13] When the court reconvened on Wednesday 25 September the sheriff questioned the accused for a period of 10 minutes, whereupon the defence case was closed and parties addressed the jury. Transcripts of the evidence given by the complainers in each of charges 5, 6, 16 and 18 were available to this court, as were transcripts of the appellant's evidence and of the proceedings which took place on the morning of 25 September.

The appeal

[14] The appellant challenged the convictions on three grounds. First, it was contended that the content and manner of the questions which the sheriff asked of the appellant at the conclusion of his evidence constituted improper cross-examination, such as would have led the independent observer to reach the view that the sheriff had formed an adverse view of his credibility and that as a consequence the appellant was denied a fair and impartial hearing resulting in a miscarriage of justice. Second, the directions given by the sheriff in relation to the doctrine of mutual corroboration were said to have been inadequate. Third, the appellant contended that the sheriff erred in repelling the submission of no case to answer made in respect of each of charges 5, 6 and 18. A sub-heading of this ground was that if this first limb of the argument succeeded then the evidence given in respect of charges 4 and 16 did not permit corroboration as between those charges on the basis of the doctrine of mutual corroboration.

[15] The sentence imposed was also challenged, both as being excessive and on the basis that the sheriff was wrong to have concluded that there was a significant sexual aspect to the offender's behaviour in committing the offences.

Ground 1

Appellant

[16] Senior counsel appearing for the appellant submitted that the exercise which the sheriff had engaged in was not one of clarification. He asked questions which were unnecessary, questions which were irrelevant, questions which sought comment and he contrasted the appellant's evidence with the evidence as given by each of the complainers. Counsel submitted that the exercise was plainly one of cross examination, the effect of which was to undermine the appellant's evidence and to create the impression of bias. The effect of the questioning was enhanced by the fact that the process had been delayed until immediately before parties addressed the jury. There was no reason why the sheriff could not have asked any relevant questions at the conclusion of the appellant's evidence the day before.

[17] A further aspect of what took place was founded upon. At an early stage in the sheriff's questioning one of the answers given by the appellant caused the sheriff to respond in a manner which suggested he was about to develop the point further by challenging what the accused had said. Counsel for the appellant sought to object but the sheriff would not hear her. When she sought to insist, and stated that she would be entitled to take objection, the sheriff responded by saying:

> "No, would you sit down please. You will be given an opportunity, and you know the rules Miss Armstrong."

[18] All of this had taken place in the presence of the jury. In support of her criticisms of the sheriff's conduct counsel drew attention to what had been said in the cases of *Green* v *HM Advocate* 2020 SCCR 54 at paragraphs 47 to 50 and 52, *SG* v *HM Advocate* 2020 SCCR 79 at paragraphs 26 and 27 and *Carberry* v *HM Advocate* 2014 JC 56 at paragraph 43. In all the

circumstances it was submitted that the appellant had been denied a fair and impartial hearing and a miscarriage of justice had resulted.

Crown

[19] In the written submissions tendered in advance of the hearing the Crown contended that the questions posed by the sheriff constituted legitimate clarification. At the hearing of the appeal the advocate depute departed from this submission and conceded that no clarification had taken place. The sheriff had entered into an exercise of cross-examination which he was not entitled to do. It was also conceded that he ought to have heard counsel on the objection tendered.

Discussion

[20] In his report to this court the sheriff stated, in response to this ground of appeal, that he was simply seeking to clarify matters which were not sufficiently clear from the evidence given earlier. He does not explain what he considered remained unclear or what his questioning was designed to elucidate. Nor does he explain why he adjourned the case until the following morning at the conclusion of the appellant's evidence when there was ample time left to complete any relevant questioning.

[21] An examination of the transcript demonstrates that the sheriff's explanation is incorrect. Nothing which he raised with the appellant constituted clarification. The first question which he asked sought confirmation that the complainers were all strangers to the appellant. This had been at the heart of the case for the Crown. Each complainer had given this evidence and, when asked, the appellant accepted that he had never met them before. Thereafter, the sheriff asked the appellant if he was in a relationship when any of these

incidents took place, a matter of no relevance to the issues at trial and which had not been raised with the appellant in cross examination.

[22] The sheriff then embarked upon a process of summarising critical aspects of the evidence as given by each complainer, contrasting this with the account which the appellant had given in evidence, and asking him whether the witness was mistaken or lying. This was a process which had all the hallmarks of cross-examination designed to undermine the testimony of the witness, although we would observe that, in our opinion, it would be objectionable to ask a witness for comment of this sort and such evidence would be inadmissible.

[23] As this process continued, certain of the propositions which the sheriff put to the appellant incorrectly stated the evidence as given by the respective complainers and by the appellant. On one such occasion, when the appellant accurately corrected the sheriff's account of what the complainer LS had said about his conduct, the sheriff simply ignored the appellant's correction and asked him if he was contending that the witness was mistaken in what she had said, to which the appellant responded, again accurately, that he didn't think the witness had said any such thing. Immediately after this exchange the sheriff referred to the evidence given by each of LS and JG that they had spoken to teachers at their school after their encounters with the appellant. The exchange was as follows:

> "Okay. And she, both of them, I think, spoke to guidance teachers afterwards. Anything to say on that?
>
> So there was no guidance teachers or anyone that's came here to confirm that at all.
>
> Okay. So is your take on it that they're making that up or mistaken or lying?
>
> You know, all this happened in 2016, then there's, in 2019 its been reported and there's a reason."

[24] The appellant could not possibly have offered any legitimate comment on the evidence that the complainers had spoken to their guidance teachers. It was inappropriate and contrary to the law of evidence for him to be invited to do so. He did, however, accurately respond that no such evidence had been led. It did not follow from this observation that the appellant was challenging the evidence of the complainers, far less that he was accusing them of lying. When challenged by the sheriff to this effect the appellant went on to allude to a BBC documentary which had been broadcast in 2019, which the Crown had intended to lead evidence about, but which had been the subject of a successful defence objection at an earlier stage. The sheriff knew all about this as he had adjudicated on the submissions. The appellant had understood that all evidence about this issue was to be excluded and this, it was explained, was the reason for his guarded explanation.

[25] The sheriff's questioning continued with him moving on to the evidence given by another of the complainers during the course of which he raised an issue about whether certain text messages were or were not sent. In exploring the appellant's position in relation to this issue the sheriff asked him if the messages which he claimed had been sent would still have been available on his phone, whether or not he raised this with his representatives and whether he asked them to lodge that phone. As with the previous passages, there was no issue of clarification. The sheriff recounted the competing evidence and the only questions which he asked appear to have been designed to address the appellant's credibility in the account which he gave.

[26] The whole exercise came to an end with the Sheriff stating:

> "So, in effect, what your saying is that all these situations were cordial?"

To this the appellant responded with a lengthy and oblique reference to the documentary broadcast in 2019 and how, in his view, this caused the perspective of the individuals

concerned to change from thinking of the situations as normal to something else. We agree with the submission of counsel for the appellant that this must have been a mystifying explanation to the jury who had heard nothing about this matter earlier. The sheriff ought to have been put on notice by the appellant's response to the question about the guidance teachers but he continued to probe the appellant and concluded by asking a question of such a broad nature as to invite the appellant to give his explanation. This put the appellant in an impossible situation where he could only answer by alluding to material which he understood had been ruled inadmissible. The result was a partial and largely incomprehensible explanation which was likely to have been viewed by the jury as an attempt on the appellant's behalf to obfuscate. When the appellant had concluded attempting to provide this explanation the sheriff asked parties whether anything arose out of his questioning. Counsel for the appellant wisely, and with good professional judgement, declined to revisit any of the issues raised by the sheriff.

[27] In the case of *Green* v *HM Advocate*, in giving the opinion of the court at paragraphs [50] and [51], the Lord Justice General (Carloway) summarised the import of earlier authorities on the extent to which judicial intervention by way of questioning was legitimate. He explained that the trial judge was entitled, if not required, to clear up any ambiguities that are not being cleared up either by the examiner or the cross-examiner. He was also entitled to ask questions which were relevant and important for the proper determination of the case, but which remained unanswered. However, this later entitlement was qualified by the following guidance:

> "These situations ought to be rare. A judge ought to be very careful before asking a question about some new matter, which the parties may have deliberately not probed. As the Lord Justice Clerk said in *Livingstone* (*Livingstone* v *HM Advo*cate 1974 SCCR (Supp) 68), the judge must act with discretion and only when the occasion requires it."

[28] By way of contrast, what a judge must not do, was explained by the Lord Justice General in the following paragraph of the opinion:

> "[51] The judge should not take over the role of examiner or cross-examiner. Nevertheless, provided that the judge does not stray into the realms of cross-examination, and thereby be perceived by the informed and impartial observer as having an adverse view on the accused's credibility or reliability, it will be difficult for an accused to demonstrate that the interventions have been so oppressive as to constitute a miscarriage of justice either by destabilising the accused or indicating apparent bias."

[29] In the present case the concession made by the advocate depute could not sensibly have been withheld. The trial sheriff engaged in an exercise which could only be described as cross-examination. The informed and impartial observer would readily have concluded that the sheriff had formed an adverse view on the credibility of the appellant's evidence. The result was a miscarriage of justice and the appeal against conviction on each charge must be upheld on this ground.

[30] Before turning to consider the remaining grounds of appeal the court wishes to address the matter of the objection taken by counsel for the appellant. It is part of the professional responsibility of any representative acting on behalf of an accused person to state an objection to the eliciting of inadmissible evidence, or to any other questioning which appears to contravene the law of evidence and procedure, should they consider that it is in the interests of the person whom they represent to do so. The presiding judge or sheriff is required to hear any such objection unless it is patently misconceived.

[31] In the present case counsel was correct to object to the sheriff's questioning when she did. The exercise which the sheriff was engaged in had already lacked any element of clarification and at the point when she rose to her feet the sheriff appeared to be in the process of arguing with the appellant. It is unacceptable for a judicial office holder to

address a responsible practitioner by telling her to sit down. Such behaviour carries the risk of demeaning the standing of the judiciary in the eyes of both the legal profession and of the public.

Ground 2

Appellant

[32] In advancing this ground counsel for the appellant submitted that the essential directions given by the sheriff in relation to the application of the doctrine of mutual corroboration were inadequate. The sheriff had not explained that the behaviour founded upon required to be systematically or persistently pursued as part of a course of conduct and had failed to explain that something more than a general disposition to commit crimes of that sort had to be demonstrated. He had failed to convey that there required to be something more than a series of individual episodes and that there had to be an underlying course of conduct. Counsel founded upon the essential nature of the doctrine as described in the opinion of the court in *MR* v *HM Advocate* 2013 JC 212 given by the Lord Justice Clerk (Carloway) at paragraph [20] and what had been said by Lord Brodie in giving the opinion of the court in *H* v *HM Advocate* 2015 SLT 380 at paragraphs [26] and [27]:

> "[26] What Lord Justice General Clyde wished to emphasise was that where what was in issue was the availability of evidence of one act to provide mutual corroboration of another, 'a course of criminal conduct' had to be understood as something more than simply the repetition by one accused of a series of similar crimes 'over a period of (say) three years' (Moorov *supra* at p.73 (p.599)). Rather (*supra*, p.74(p.599)): '… It is of the utmost importance to the interests of justice that the 'course of criminal conduct' must be shown to be one which not only consists of a series of offences, the same in kind, committed under similar circumstances or in a common locus - these are after all no more than external resemblances - but which owes its source and development to some underlying circumstance or state of fact …'
>
> [27] the existence of any underlying course of conduct will usually have to be inferred from the evidence led in support of the individual charges, but more is

> required than simply an indication of a general disposition to commit a particular sort of offence: *Ogg* v *HM Advocate supra* at p.158(p.515)"

Crown

[33] The advocate depute acknowledged that the sheriff had not adopted the guidance given in the Jury Manual in delivering his directions on the application of the doctrine of mutual corroboration. Nevertheless, it was submitted that the directions which were given between pages 8 and 12 of the transcript of the sheriff's charge were adequate to convey an appropriate understanding of the application of the doctrine. The sheriff had explained that the doctrine contemplated a single course of conduct. He had directed that it was essential that there be an underlying unity of purpose which made the offences part of one course of criminal conduct and that there had to be a link which bound the crimes together. He had explained that the rule required to be applied with caution.

Discussion

[34] In his report to this court the sheriff accepted that he did not explain in his directions that the doctrine envisaged a course of conduct "systematically pursued". He also accepted that he did not direct the jury that the doctrine would not apply if all that was shown was that the person concerned had a general disposition to commit crimes of this sort. However, the sheriff expressed the view that what he did say was sufficient and adequate to convey the essential requirements for the application of the doctrine.

[35] In the present case we are persuaded that the absence of the generally used terms from the directions which the sheriff did give was not fatal. We are persuaded that by looking to the totality of the directions given it can be said that the essential elements of the doctrine were adequately conveyed to the jury. The appeal based on this ground must

therefore be refused. However, as the Lord Justice General observed in the course of the hearing in the present case, judges and sheriffs sitting in solemn cases tend to find themselves having to give directions on the application of the doctrine of mutual corroboration on a regular basis. As he noted, there is a straightforward style direction for this purpose contained within the Jury Manual at page 15.4/117. If this style was adopted then appeals such as feature in this ground could not be taken and time and expense would be saved.

Ground 3

Appellant

[36] In submitting that the evidence led in support of charges 5, 6 and 18 did not disclose the commission of a crime, counsel summarised the relevant conduct by stating that the appellant had approached the various complainers in daylight hours in public places. The incidents took place separately and each on one occasion only. There had been no abusive language used and no threats had been issued. There was nothing in the appellant's manner, or in what he had said, which would permit an inference of any underlying threat or abusive behaviour. Although the two complainers in charges 5 and 6 were schoolgirls, one was aged 16 and the other was aged 17. Whilst he had asked the older one for her telephone number and had invited her to join him for coffee, these were not sinister remarks. They were politely communicated and had not been persisted in.

[37] At the suggestion of the court, counsel addressed the cases of *Angus* v *Nisbet* 2011 JC 69, *McConachie* v *Shanks* 2019 SCCR (SAC) 1 and *George Thomson* SCCRC Reference HCA/2019/000010/XJ, each of which concerned approaches by adult males to young or teenage children.

[38] Counsel submitted that the circumstances of the present case could be contrasted favourably with the circumstances in each of *Angus* v *Nisbet* and *McConachie* v *Shanks*, in both of which the convictions for breach of the peace had been quashed. It was also contended that an examination of the circumstances in the case of the case of *George Thomson* demonstrated that the conduct engaged in was distinguishable from that in the appellant's case.

[39] In the whole circumstances it was submitted that the evidence led in support of each of charges 5, 6 and 18 in the present case was insufficient to constitute a contravention of section 38(1) of the 2010 Act and the sheriff ought to have upheld the submission of no case to answer in respect of each.

[40] In relation to charge 16 the appellant had spoken to the complainer at about 6pm in the evening and given her a compliment (as the witness described it). Whilst the complainer was standing at traffic lights waiting to cross the road he told her his name and said that he was going out and invited her to join him and have some wine with him. Although the witness described him as standing in front of her and moving from side to side as she moved to prevent her from curving round him, the whole episode only lasted a couple of minutes before she said more forcefully that she needed to go and left. Counsel submitted that none of this conduct constituted a breach of section 38. This complainer had gone on to give evidence to the effect that the appellant had noticed her name on her mobile phone case as they had been standing together and contacted her a day or two later referring to the meeting and asking her again for drinks. When she did not reply to him he sent a message to her saying "good morning ya racist". Counsel accepted that this amounted to abusive behaviour and would have constituted a single source of evidence demonstrating a contravention of section 38(1) to that extent.

[41] It was accepted that in speaking in support of the libel in charge 4 the complainer NB did give evidence of what was capable of being viewed as a contravention of the section. However, if the submissions in relation to charges 5, 6 and 18 were accepted, along with the submission in relation to the appellant's conduct towards AI in the street, then the only remaining evidence of criminal conduct was that of the abusive remark sent by text two years after the encounter with NB. It followed that there would then be no corroboration for either charge 4 or for the criminal element of charge 16 and the doctrine of mutual corroboration would not be available as between the two episodes. For these reasons counsel submitted that the sheriff erred in failing to give effect to the no case to answer submissions presented in respect of charges 4 and 16 as well.

Crown

[42] In reply the advocate depute referred to the terms of section 38(1) of the 2010 Act. He submitted that an offence is committed if a person behaves in a threatening or abusive manner and the behaviour engaged in would be likely to cause a reasonable person to suffer fear or alarm. The *mens rea* necessary was that the individual either intended to cause fear or alarm or was reckless as to whether the behaviour would cause fear or alarm. The test as to whether a reasonable person would be caused fear or alarm was an objective one. The court had to consider matters from the standpoint of the reasonable person placed in the shoes of the actual witness. Reference was made to *Patterson* v *Harvie* 2015 JC 118 and *Rooney* v *Brown* 2013 SCCR 334.

[43] For the purpose of dealing with a submission under section 97 of the 1995 Act the court must take the evidence at its highest, that is it is to be interpreted in the way most favourable to the Crown - *Mitchell* v *HM Advocate* 2008 SCCR 469 the opinion of the court

given by the Lord Justice General (Hamilton) at paragraph [106]. When assessing the evidence in this fashion it was relevant to bear in mind that the appellant was a stranger to each complainer. The conduct which he engaged in was uninvited and unwelcome. It involved comments about their appearance. In each case the complainers felt uncomfortable or intimidated.

[44] Reliance was placed on the fact that the complainers in charges 5 and 6 were both on their way to school and in uniform. Both reported the conduct to teachers on arrival at school. In relation to charge 16 the appellant was described as standing in front of the complainer and stepping from side to stay to attempt to block her path. His conduct then continued to contacting her on social media, although the complainer had not given him contact details or any reason to do so. In charge 18, reliance was placed on the fact that the complainer found the appellant's behaviour to be "very full on, very intense and quite intimidating." The appellant was very close to her and standing in front of her. She had to physically sidestep him to get away.

Discussion

[45] Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 provides as follows:

> "Threatening or abusive behaviour
>
> (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."

[46] In addressing this ground of appeal in his report the sheriff summarised the evidence given by the respective complainers and stated as his reason for repelling the submissions that:

> "The appellant had behaved in a threatening manner which was likely to have caused fear or alarm and indeed it did on each charge."

The sheriff does not explain what it was about any aspect of the appellant's behaviour which he considered could be construed as threatening. In relation to charge 5, 6 and 18 there was no evidence of any threatening language, manner or tone. None of the comments contained any innuendo, sexual or otherwise. The complainer in charge 6 spoke of general conversation. Insofar as comments about appearance were concerned he told the complainer in charge 5 that she looked pretty and the complainer in charge 18 that she was cute. He also complimented the skirt which she was wearing, saying that it was very fashionable. The encounters took place in daylight and either in the city centre or in the course of a short route to the school or railway station in Uddingston.

[47] In the case of *Angus* v *Nisbet* the court was considering the circumstances of a charge of breach of the peace said to have been caused by an adult male speaking to his 15 year old newspaper delivery girl on a number of occasions, telling her his name, asking for hers, approaching her in his car and handing her a piece of paper with his telephone number and asking her to keep in touch. The appellant in that case had no explanation for his behaviour which he acknowledged was "inappropriate" and which the court described as:

> "… not something that a prudent person who did not wish to excite suspicion would have done."

[48] In quashing the conviction Lord Brodie, giving the opinion of the court, explained at paragraph [14]:

> "However, not everything said and done in public amounts to a breach of the peace, even if it might be said to be indecorous, inappropriate or irritating in nature."

[49] In arriving at its decision the court in *Angus* drew upon what had been said by Lord Coulsfield in giving the opinion of the court in *Smith* v *Donnelly* 2002 JC 65 at paragraphs [18] and [19]:

> "[W]e think it sufficiently clear that something more than mere irritation is involved. … What is required, … it seems to us, is conduct which does present as genuinely alarming and disturbing, in its context, to any reasonable person. … [T]he conduct must be "flagrant" if it is to justify a conviction."

[50] Whilst the observations in each of these cases were made in the context of the common law crime of breach of the peace, we consider that they are also of value in the circumstances of the present case. The gist of the appellant's behaviour in respect of charge 5, 6 and 18 may perhaps best be characterised in the evidence of KJ who replied in answer to a question from the procurator fiscal as to whether she had engaged in the subject of his complement on the dress she was wearing:

> "No I didn't engage at all really. I was just trying to get away as quickly as possible because I just didn't have time to be chatted up on the street …".

[51] It does not seem to us that a polite conversational request or complement can be construed as threatening merely because it is uninvited or unwelcome. There was nothing in the appellant's behaviour as spoken to by the complainers in charges 5, 6 and 18 which was overtly threatening or which could reasonably be construed as threatening. Accordingly, in our opinion, the sheriff erred in failing to give effect to the submissions of no case to answer presented on the appellant's behalf in respect of each of these charges.

[52] There was nothing in the appellant's conduct in the city centre encounter as spoken to by the complainer in charge 16 which constituted threatening behaviour. He told her that she looked like Kim Kardashian, which the witness described as a compliment, although she

asked him if he was joking. He subsequently sent her a text which was abusive. This was the only aspect of this charge which could have constituted an offence under section 38(1) of the 2010 Act. In these circumstances we are satisfied that the doctrine of mutual corroboration would not have been available as between charge 4 and this aspect of charge 16. Accordingly, we are also persuaded that the sheriff erred in failing to give effect to the no case to answer submissions presented on the appellant's behalf in respect of these charges also.

[53] For these reasons the appeal against conviction must be upheld on this ground also.

Sentence

[54] Since the appeal against conviction is upheld on both grounds 1 and 3 in respect of all remaining charges the appeal against sentence flies off.