SHERIFF APPEAL COURT

[2016] SAC (Crim) 26
SAC/2016/000293/AP
SAC/2016/000292/AP
SAC/2016/000288/AP

Sheriff Principal M M Stephen QC
Sheriff Principal M Lewis
Sheriff P J Braid

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

APPEALS AGAINST CONVICTION BY STATED CASE

COLIN MILNE

First Appellant

and

AMY ELIZABETH JAY LILBURN

Second Appellant

and

BEVERLY GWEN BERNICE MILNE

Third Appellant

against

PROCURATOR FISCAL, PERTH

Respondent

Appellants: Mackintosh
Respondent: McCormack, Advocate Depute, Crown Agent

26 July 2016

[1] The appellants appeal by stated case their convictions on Charge 1 of the complaint, namely, a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010.

[2] Following trial at Perth Sheriff Court which concluded on 27 January 2016 the appellants were found guilty of Charge 1 as amended in the following terms:

> *"(001) On 13 March 2015 at various roads from Snaigow Estate, including Blairgowrie to Dunkeld Road, A923 you did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear and alarm in that you did with your faces masked repeatedly follow Angus Broad and Edward Broad….then in their vehicle on various roads within Perthshire from Snaigow Estate including the Blairgowrie to Dunkeld Road A923 all to their fear and alarm; CONTRARY to section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010.*"

We observe that the appellants were charged in the alternative with the common law offence of breach of the peace.

[3] At the close of the Crown case the appellants made a submission of no case to answer in terms of section 160 of the Criminal Procedure (Scotland) Act 1995 which the sheriff repelled in respect of Charge 1 and sustained in respect of Charge 2 being a contravention of section 68(1) of the Criminal Justice and Public Order Act 1994 – (Aggravated Trespass).

[4] The first and third appellants are a married couple and the second appellant is the daughter of the third appellant and the step-daughter of the first appellant.

[5] The questions posed for the opinion of this court in each of the stated cases are in identical terms as follows:-

> *"(1) Did I err in rejecting the submission by the appellant's agents in terms of section 160(1) of the Criminal Procedure (Scotland) Act 1995?*

(2) On the facts stated, was I entitled to convict the appellant?"

Counsel for the appellants addressed us on questions of law 3 and 4 proposed by the first and third appellants and rejected by the sheriff at the stage of adjustment of the stated case. He did not insist on question 4 but argued that proposed question 3 ought to be allowed as it addressed the question of "*reasonableness*" found in the statutory defence in terms of s.38(2) of the 2010 Act. We considered it was proper to allow the additional question 3 in the stated case for the first and third appellants, but restricted as follows:-

> "*Question 3 Did I err in rejecting as a s.38(2) defence the appellants' position that he/she was acting reasonably in monitoring the activities of the witnesses Edward Michael Broad and Angus Edward Broad?*"

We reject the remaining parts of the proposed question as unnecessary or as the sheriff states superfluous. No such question was proposed on behalf of the second appellant.

[6] The context to events on 13 March 2015 is a fox hunt which had been organised by the head gamekeeper to the Snaigow Estate and comprised a number of people armed with shotguns, two houndsmen who managed a pack of 22 dogs and the gamekeeper who was in charge of the hunt. The complainers, Angus and Edward Broad, are the houndsmen who controlled the pack of dogs. As narrated in Finding in Fact 2 the gamekeeper had identified two woods where foxes might be found and the hounds, under the control of the complainers, would be put in at one end of the wood with a view to flushing the fox out of the wood where it would be shot by those participants with guns. The sheriff found, in Finding in Fact 3, that the hunting of foxes in the planned manner is lawful. He went on to find, in Finding in Fact 12 (re-numbered from (11) as there are two Findings in Fact (9)), that the Crown evidence failed to show that the hunting on this occasion was lawful in the manner specified under the Protection of Wild Mammals (Scotland) Act 2002. The significance of this (which is not truly a finding in fact at all) is doubtful standing the

charges on the complaint, but we mention it in deference to the submissions of counsel for the appellant, who placed some reliance on it.

[7] The hunt began on the morning of 13 March 2015 and after one fox had been successfully hunted and shot the hunt moved on to another area. At that stage the hunt was interrupted by the arrival of the appellants who entered a field on the estate "*wearing dark jackets, combat style trousers, hats and snoods. The latter were pulled up over their faces, and their hats were pulled down to just above their eyes*". [Finding in Fact 4] Following the arrival of the appellants the incident described in Finding in Fact 5 involving the appellants and a member of the hunting party took place and the hunt was then aborted for lunch. By the time this incident occurred the complainers had already left the field for Snaigow House. The hunt party were followed by the appellants to Snaigow House where the lunch took place. In light of the continued presence of the appellants a decision was made to discontinue the hunt for the day.

[8] The evidence led by the Crown in support of Charge 1 related to the activities of the appellants and the complainers after lunch. The complainers left Snaigow House in their vehicle towing a trailer with the 22 fox hounds. Their evidence described being followed by the appellants over the next two hours or so on various country roads, including a private road, in Perthshire. The evidence relating to Charge 1 came from the complainers and the third appellant. Neither the first nor second appellant offered any evidence. The behaviour of the appellants can be summarised as following the complainers in their vehicle and on foot whilst dressed in the manner described with their faces covered by what may reasonably be described as balaclavas. The evidence of the third appellant regarding events on the day in question has been summarised by the sheriff at paragraph 26 of the stated case in the following terms:

> "*On 13 March 2015, they had gone to the Snaigow Estate because someone had told them that an illegal fox hunt was going to take place. Their intentions were to find out if the fox hunt was indeed illegal and, if so, to investigate that, gather evidence and report it to the police. …..They watched them drive into another field and, as they could not see what was going on, they decided to enter the field with a view to having a conversation with them. Both she and the second accused had cameras in order to document events. Shortly after they entered the field, the majority of the vehicles left."*

At paragraph [28] the sheriff narrates this of the evidence of the third appellant – "*At no stage did they intend to follow the houndsmen and the hounds to their home or to the kennels.*" At [29] and [30] the sheriff narrates evidence under cross-examination when the third appellant spoke about witnessing a terrier savage a fox on another occasion; however, that earlier incident had occurred some two years previously in Fife and to her knowledge had not involved the same people. "*She thought that the hunt might be illegal simply because the person who called them said it was.*" Furthermore, "*[s]he maintained that her face was covered in order to protect her from possible reprisals, although she accepted that the car registration remained visible. As a result of this activity, there had been no reprisals. She accepted that she and her co-accused had followed the hounds vehicle for some miles. She confirmed that she never saw the occupants of the hounds vehicle getting out nor did she see them meet anyone else.*"

[9] It can therefore readily be understood that the appellants were protesters or hunt saboteurs and in the submissions before the sheriff it was posited that it was entirely possible that the hunt would have been illegal and the purpose of the appellants' presence there had to have been to observe the lawfulness of the hunt.

[10] Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 is in the following terms:-

> "**38 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."

[11] Counsel for the appellants acknowledged that the correct analysis of the statutory offence in terms of s.38 of the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act") may be found in *Paterson* v *Harvie* 2015 JC 118. The constituent parts of the offence are set out in s.38(1)(a)(b) and (c). These appeals are concerned with threatening, rather than abusive, behaviour. The sheriff erred in respect of his decision on the no case to answer submission and also in convicting the appellants by failing to set out in what way the appellants' behaviour was threatening. For the purpose of question 1 the appellants had to show that the evidence was insufficient to convict of either a contravention of s.38(1) of the 2010 Act or the alternative charge of the common law offence of breach of the peace. In respect of the latter we were referred to *Smith* v *Donnelly* 2002 JC 65 and *M* v *Harvie* [2015] HCJAC 7. It was argued in respect of question 2 that the sheriff was not entitled to find the necessary *mens rea* of recklessness to convict the appellant. Reference was made to *Allan* v *Paterson* 1980 JC 57, a well known authority on s.2 of the Road Traffic Act (dangerous driving) to provide the meaning of "*reckless"* namely "*a complete disregard for any potential danger*". Finally, in addressing the statutory defence afforded by s.38(2) of the 2010 Act we were referred to the decision of the UK Supreme Court in *Hayes* v *Willoughby* [2013] UKSC 17, which involves an analysis of the Protection from Harassment Act 1997 and the place of "*reasonableness*" where an alleged harasser's conduct was said to be for the purpose of preventing or detecting crime (which is a specific defence in terms of section 1(3) of that Act). In these appeals the appellants' conduct should be considered "*reasonable*" as their purpose on the day in question was preventing or detecting crime ie investigating and

monitoring the lawfulness of the hunt. The Protection of Wild Mammals (Scotland) Act 2002 section 1 makes it an offence for a person to deliberately hunt a wild mammal (including foxes) with a dog unless the activity falls within the exception provided by section 2. Accordingly, the sheriff, having accepted that the appellants did not intend to cause fear and alarm, did not apply his mind to the provisions of s.38(2) and erred in concluding that the appellants' conduct was not reasonable in the circumstances.

[12] The advocate depute pointed to the detailed findings made by the sheriff in the stated case which amply support the appellants' conviction for a contravention of s.38(1) of the 2010. The facts and the sheriff's reasoning would also support conviction of a breach of the peace. It is simply not reasonable for masked individuals to follow people in a car and on foot for two hours and then argue that this did not constitute threatening behaviour. Such behaviour cannot be categorised as reasonable and was reckless as to the consequences.

[13] It is settled law from the dicta of the Lord Justice General (Gill) in *Paterson* v *Harvie* [2014] HCJAC 87 that section 38(1) of the 2010 Act 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."* As Lord Gill went on to observe paragraph (c) sets out the *mens rea* that is required.

[14] Section 38(2) provides a defence, in the following terms:-

> *"It is a defence for a person charged with an offence under sub-section (1) to show that the behaviour was, in the particular circumstances, reasonable."*

The case of *Urquhart v HM Advocate* 2016 SCCR 33, a decision of the High Court of Justiciary Appeal Court, deals with the interaction between the *mens rea* required to establish a

contravention of section 38(1), and the statutory defence afforded by section 38(2). It makes it clear that the defence may be available even where the necessary *mens rea* has been established, and that the essence of the defence is that the accused behaved reasonably in all the circumstances of the case, the assessment of reasonableness being an objective matter.

[15] In presenting his argument relative to the first question, counsel submitted that if the sheriff was not correct in repelling the section 160 submission in relation to the section 38(1) charge, we ought to consider the sufficiency of the evidence in relation to the alternative charge of breach of the peace. The sheriff in determining a submission of no case to answer in terms of s.160 of the 1995 Act requires to apply the test whether the evidence, if accepted, is sufficient in law to convict the accused of the charge. The sheriff will at that stage accept the evidence led by the prosecution and that any inferences to be drawn from that evidence will be favourable to the case for the prosecution. We are satisfied that the sheriff applied that test correctly in determining and repelling the no case to answer submission on the charge of contravention of section 38. The sheriff addresses the submission and the evidence at paragraph [25], having narrated the evidence at paragraphs [5] to [19]. Although the sheriff did not expressly consider parts (a) and (b) of s. 38(1) – the *actus reus* of the offence – we are satisfied that the evidence led by the Crown was sufficient in law to establish both threatening behaviour, and behaviour which was likely to cause a reasonable person to suffer fear and alarm, as well as the necessary *mens rea*, which was capable of being inferred from the actings of the appellants. The sheriff was therefore correct to repel the no case to answer submission in relation to s. 38(1). At that stage, of course, the statutory defence did not arise. We are of the opinion that there was no error in relation to the sheriff's assessment of the evidence led by the Crown in support of Charge 1 and that evidence pointed to conduct which was threatening and would be likely to cause a reasonable person

fear or alarm and would be severe enough to cause alarm to ordinary people and threaten serious disturbance in the community. We accordingly answer the first question of law in the negative.

[16] The second and third questions address whether the sheriff was entitled to convict the appellants of a contravention of section 38(1) of the 2010 Act and whether he applied the correct statutory test having regard to the three parts or ingredients to the offence and the statutory defence set out in section 38(2)? As we have stated paragraphs (a) and (b) of section 38(1) of the 2010 Act define the *actus reus* and they are essentially questions of fact (*Paterson v Harvie, supra*). The findings (7 and 8) of the sheriff concerning the attire of the appellants, their efforts to disguising their facial features, and their activities in undertaking a masked pursuit of the complainers in a vehicle for a period of approximately two hours, amply provide evidence of threatening behaviour. The sheriff then correctly applied the objective test of whether the behaviour would be likely to cause a reasonable person to suffer fear or alarm. In this case there was evidence that the complainers were fearful and alarmed but in any event the sheriff correctly recognises this to be an objective test. The sheriff proceeded to address the *mens rea* and whether the requisite intention or recklessness was present. At paragraph 40 of the stated case the sheriff states:- *"Whilst I am prepared to give the benefit of the doubt to the accused that they did not intend their behaviour to cause fear or alarm, it seems to me that they were entirely reckless as to whether their behaviour would be likely to have that effect."* In the course of submissions as to the meaning of "reckless" in this context, we were referred only to *Allan* v *Paterson* (*supra*), which involved s.2 of the Road Traffic Act 1972 and the definition of "*dangerous driving*". In that context reckless means a complete disregard for any potential dangers (on the road and with regard to public safety on the road). To act recklessly is to have an utter indifference or disregard of what the

consequences of their actings or behaviour may be as far as the public is concerned. In our view the persistence of the appellants' conduct and pursuit of the complainers over a significant period of time when no foxhunt was taking place means that their behaviour may be construed as reckless in the sense of being utterly indifferent to the consequences of their actings to a reasonable person. The sheriff was therefore entitled to conclude that the three elements of the offence had been established.

[17] Turning to the statutory defence (section 38(2)) – was the behaviour of the appellants in the particular circumstances reasonable? The appellants' stated intention from the evidence of the third appellant was to find out if the hunt was illegal and gather evidence. In that context the sheriff places some reliance on the appellants' failure to engage with members of the hunt. They did not ask any questions of the members of the hunt to establish what was proposed by way of hunting foxes. The issue of the likely effect of the appellants' conduct must be tested objectively and the assessment of reasonableness in the context of the statutory defence is primarily one for the court of first instance to determine having regard to the evidence led of all the facts and circumstances. We were referred to *Hayes* v *Willoughby* (*supra*) where the UKSC considered the statutory defence set out in section 1(3) of the Protection from Harassment Act 1997 (similar to the statutory defence available on a charge of stalking contrary to s.39 of the 2010 Act). It is a defence for a person charged with an offence under that section to show that the course of conduct was *inter alia* engaged in for the purpose of preventing or detecting crime or in the particular circumstances was reasonable. We were referred to the *dictum* of Lord Sumption at para 15:

> "*Before an alleged harasser can be said to have had the purpose of preventing or detecting crime, he must have sufficiently applied his mind to the matter. He must have thought rationally about the material suggesting the possibility of criminality and formed the view that the conduct said to constitute harassment was appropriate for the purpose of preventing or detecting it*".

We do not consider that *Hayes v Willoughby* assists the appellants. Firstly, both the Protection from Harassment Act and s.39 relate to a course of conduct and the specific defences which attach to those enactments. Secondly, the facts and circumstances of this case do not support the notion that the appellants' behaviour was the product of rational thought, particularly when regard is had to the evidence of the third named appellant. She indicates that the appellants proceeded firstly, on what another had told them about the foxhunt without satisfying herself as to its correctness and secondly, based on her experience of a hunt some years before in quite another part of Scotland. In any event, rationality is a subjective test, relevant only to the specific statutory defence under consideration in *Hayes*, namely, the purpose of preventing or detecting crime.
Lord Sumption in the preceding paragraph (14) distinguishes reasonableness from rationality:

> "*Reasonableness is an external objective standard applied to the outcome of a person's thoughts or intentions. The question is whether a notional hypothetically reasonable person in his position would have engaged in the relevant conduct for the purpose of preventing or detecting crime*".

Even allowing that a wish to prevent a criminal activity from taking place could, in certain circumstances amount to reasonable behaviour, if, as suggested, the behaviour of the appellants was a response to their belief that an illegal activity was about to take place, there were options available to them such as speaking to the complainers or contacting the police or indeed speaking with police officers, whom we were told were present for a short period at the Snaigow Estate, a matter accepted by the third appellant. In any event, as a matter of fact, there was no imminent illegal activity that required to be stopped and the evidence relied upon by the Crown and accepted by the sheriff is of a persistent pursuit for a lengthy period through country roads in Perthshire. The sheriff's analysis of the evidence and his

reasoning which underpins the crucial Finding in Fact 10 may be found at paragraphs [36] to [40]. The sheriff accepted the evidence of the complainers. Their evidence was not in any material sense contradicted by the third appellant's evidence. The sheriff therefore was entitled to reject the suggestion that the appellants' behaviour was reasonable, in the circumstances.

[18] We therefore answer the first questions of law in all appeals in the negative; the second in the affirmative; the third question in the stated case for the first and third appellants in the negative and refuse the appeals.