SHERIFF APPEAL COURT

[2016] SAC (Crim) 18
SAC/2016- 68/AP

Sheriff Principal CAL Scott QC, Vice President
Sheriff Principal M Lewis
Sheriff Morrison QC

OPINION OF THE COURT

delivered by SHERIFF MORRISON QC

in

APPEAL BY STATED CASE

by

MALCOLM AIEN

Appellant;

against

PROCURATOR FISCAL, LIVINGSTON

Respondent:

Appellant: Mackintosh, Advocate; John Pryde & Co, Edinburgh
Respondent: Niven Smith, A-D; Crown Agent

31 May 2016

Introduction

[1] This is an appeal against conviction on 3 September 2015, and sentence imposed on 2 November 2015, by the sheriff at Livingston for an offence under section 38(1) of the Criminal Justice and Licencing (Scotland) Act 2010 and an offence of having an offensive weapon, namely, a metal bar, contrary to section 47(1) of the Criminal Law (Consolidation)

(Scotland) Act 1995. The first charge included allegations of shouting, swearing, uttering threats of violence and repeatedly striking the windscreen of a motor car with the metal bar. The charge did not libel damage to the car. The appellant was sentenced to a community payback order with a supervision requirement and a requirement to perform 150 hours of unpaid work in respect of the two charges and was ordered to pay compensation of £1,000 to the complainer in respect of charge 1.

[2] The issue in this appeal was whether the case was one in which the court could, exceptionally, go behind the sheriff's assessment of credibility and reliability. At the end of the hearing of the appeal, we quashed the conviction and indicated that we would give reasons later.

The facts and background

[3] The undisputed facts were that the complainer, Mr Nicol, went, on 20 December 2013, to collect his daughter for contact from the child's mother, Miss Aien, at her house. There was a disagreement about when contact was to start. Mr Nicol then waited in his car with his partner, Miss Harkins. There was a telephone call between Miss Aien's house and the appellant, Miss Aien's brother, at his work. The appellant drove in his van to his sister's house. There had been civil proceedings between Mr Nicol and Miss Aien and Mr Nicol had contact rights. Relations between the two families, including the appellant's mother, were strained.

[4] There were disputes in the evidence as to who telephoned whom and whether it was about the birthday of Miss Aien's son or about Mr Nicol being at the house, and as to what the appellant did, whether he had a metal bar and what he did with it if he had.

[5] By joint minute, Mr Nicol's statement to the police shortly after the incident was admitted as evidence, as was the appellant's interview with the police; both these documents were included in the appeal print. The statement of the appellant's mother, who died in the Summer of 2014 but was present in the house at the time of the incident, was admitted in evidence under section 259 of the Criminal Procedure (Scotland) Act 1995. That statement was not included in the appeal print but was produced, without objection, by counsel for the appellant in this appeal. A statement of Miss Aien is included in the appeal print, without explanation.

[6] The sheriff found that Miss Aien telephoned the appellant and that he, after he arrived at his sister's house, shouted, swore and uttered threats of violence towards Mr Nicol, went to his van, returned to Mr Nicol's car carrying a metal pole and repeatedly struck Mr Nicol's car, principally on the window (in fact, the windscreen), with the metal pole. Mr Nicol and Miss Harkins were terrified and Mr Nicol called 999.

[7] The sheriff accepts, in paragraph [18] of the stated case, that there was no evidence that there was damage to Mr Nicol's vehicle. The sheriff made no finding of fact that there was damage.

[8] In the application for a stated case, the ground of appeal against conviction was that the sheriff erred in ignoring the lack of damage to Mr Nicol's car and, accordingly, no reasonable sheriff properly directed could have returned a verdict of guilty. Though not express, the implication is that, in the absence of evidence of damage, the sheriff could not have found Mr Nicol and Miss Harkins credible and reliable witnesses in relation to the charges. The sheriff directed her attention to the question of whether there was evidence that there was no damage and concluded that she could not find it established that there was no damage to Mr Nicol's car. She records in her note that Mr Nicol did not answer the

question whether there was damage, Miss Harkins said that as far as she knew there was no damage, and PC McCartney, who arrived at the scene shortly after the incident, did not recall looking at the car and could not speak to the question of damage.

[9] In finding Mr Nicol and Miss Harkins credible and reliable witnesses, the sheriff had regard to the fact that the appellant was not known to Miss Harkins before the incident and not involved in any dispute with the Aien family. The sheriff found in paragraph [12] that the statement of the appellant's mother was, in a number of respects, consistent with the accounts given by the Crown witnesses, Mr Nicol and Miss Harkins, and, in paragraph [13], that the statement supported the Crown case that the appellant had gone to his sister's house to "sort out" Mr Nicol. Furthermore, the sheriff stated that the appellant's evidence did not sit well beside the other evidence, most notably, that contained in his mother's statement.

The submissions

[10] Before us, counsel for the appellant argued that (1) given that there was no evidence of damage, the sheriff could not have believed Mr Nicol and Miss Harkins; (2) the sheriff could not have found Miss Harkins to be an independent witness and (3) the sheriff had relied on the section 259 statement of the appellant's mother which in fact contradicted the Crown evidence. In relation to the first argument, the point was, essentially, that the Crown witnesses could not be believed if there was no evidence of damage. In relation to the second argument, it was wrong of the sheriff to treat Miss Harkins as if she were an independent witness because, as was recorded by the sheriff, she was Mr Nicol's partner at the time of the incident and married him before the trial. The sheriff's reasoning for believing Miss Harkins was that the appellant was not known to her and she was not

involved in any Aien family dispute. More importantly, in relation to the third argument, the sheriff was wrong to find support for the Crown case in the statement of the appellant's mother. Our attention was directed to that statement which appeared to be consistent with the appellant's statement to the police and did not appear to contain anything to support the sheriff's assertion that it supported the Crown evidence that the appellant had gone to sort out Mr Nicol. It contradicted the Crown evidence of the appellant having a metal bar.

[11] Mindful of the reluctance of an appellate court to go behind the findings of a judge at first instance on credibility and reliability, counsel referred us to three cases to support the proposition that , exceptionally, the court might do so. These were *Ballantyne v Mackinnon*, 1983 SCCR 97; *Cartner v Farrell*, 2013 JC 251, in particular at paragraphs [14] and [15]; and *McKim v Richardson*, 2011 SCCR 57.

[12] For the Crown, the advocate-depute accepted that there was a difficulty in the analysis by the sheriff of the section 259 statement of the appellant's mother, but that, since it was not mentioned in the grounds of appeal, the issue was not focussed for the sheriff when preparing the stated case. He drew our attention to the reference in *Cartner*, above, at paragraph [14], to an appeal being dependent on the judge at first instance dealing with the reasons for the findings and the "decisions challenged". It was submitted that the court, exercising its powers under section 182(6) of the 1995 Act, could remit to the sheriff for amendment to deal with the issue. He went on to accept that, if the court were minded to find this an exceptional case, there was little that he could say.

Should the appeal be allowed?

[13] A difficulty in this appeal is that the sheriff has not set out the relevant evidence of each witness. The sheriff *refers* to, but does not set out at all, evidence in explaining why a

witness's evidence was consistent or not consistent with other evidence or why the appellant was not credible. In paragraph [12] of her note, it is stated that the section 259 statement was, in a number of respects, consistent with the accounts of Crown witnesses, but only one is mentioned (in the next paragraph) which was that the appellant had gone to "sort out" Mr Nicol. That does not appear to be supported by the section 259 statement. The appellant's mother states that Miss Aien's son telephoned the appellant about his birthday (which is consistent with the appellant's statement at interview). She goes on to state that she told the appellant that Mr Nicol was there. The sheriff states, at paragraph [13] that the appellant's mother asked him to come; but that is not stated in her statement. It is apparent also that that statement contradicts the Crown evidence about the metal bar: the presence and use of a metal bar is expressly denied. The evidence of the appellant's sister and that of her son were said by the sheriff to have inconsistencies; and also the appellant's evidence did not sit well alongside their evidence. The sheriff does not set out what these inconsistencies were.

[14] In *Cartner*, above, at paragraph [14], Lord Bonomy, delivering the opinion of the court, emphasises the need for the judge at first instance to give an account of the material events of the trial, of the evidence led and the court's reasoning for making the findings and decisions challenged though every last word of evidence need not be noted.

[15] We consider that the sheriff was wrong to approach the issue of damage to Mr Nicol's car from the point of view of whether the evidence was that there was no damage rather than considering whether there was evidence of damage (of which she concedes there was none and makes no finding of damage). The sheriff was thus led into considering that the ground of appeal presupposed that damage would be caused if the appellant acted in the way spoken to by Mr Nicol and Miss Harkins. The sheriff goes on to consider what is in

judicial knowledge about whether a windscreen might not be damaged by being struck. She does not deal with the issue of why, given that there was no evidence of damage, Mr Nicol and Miss Harkins should, nonetheless, be believed except to state, in paragraph [25], that the evidence was that the car window was struck with force, there was no evidence that it shattered, but it did not follow that its remaining intact meant that the witnesses were lying. It seems to us that that rather begs the question as there was no evidence that the windscreen was struck other than what Mr Nicol and Miss Harkins said. In relation to the independence of Miss Harkins, we simply comment that she appears to be no more independent than any of the other civilian witnesses; but we do not rest our decision on that ground.

[16] We have come to the conclusion that this is a case in which we can look behind the sheriff's assessment of the evidence of the Crown witnesses. Having regard to the absence of evidence of damage, and the section 259 statement of the appellant's mother, there is not an adequate explanation given by the sheriff for accepting the evidence of Mr Nicol and Miss Harkins. We are not persuaded that we should remit to the sheriff for further reasoning in relation to the section 259 statement. Although this was not a ground of appeal for the stated case, as was submitted by counsel for the appellant, it was the sheriff who introduced the statement and her interpretation of it as part of her reasoning for reaching her conclusions on credibility and reliability. She has given her reasons. We do not consider it necessary, therefore, to remit to the sheriff for her reasons.

[17] Accordingly, we answer the first question for the opinion of the court – was the sheriff entitled to convict the appellant – in the negative. In the light of that decision, and having quashed the conviction, it is not necessary for us to consider the other two questions, whether the sentence was excessive or the compensation order competent.

[18] It remains for us to reiterate the importance of judges at first instance giving a full account, though not every word, of the evidence led, making discrete findings in fact to cover the relevant evidence on which the decision was based, and the reasons for making the findings in fact.