SJA E-NEWS

Fifty-Second Issue – September 2014

SJA NEWS

AGM:

DON'T FORGET THAT THE AGM WILL BE HELD IN STIRLING ON 22ND NOVEMBER.

SEE YOU THERE!

The Executive has not met in the last month.

OTHER NEWS

IT RULES OK

We are all (it is to be hoped) getting used to the SCS email system, and the Judicial Hub. But there will be more to follow.

There is, as you may have read on the Judicial Hub, a "Digital Strategy for Justice in Scotland". This was launched by Lady Dorrian, who observed in a speech entitled "Digital Justice Strategy: A view from the courts", that technological innovation provides

> "an opportunity to make justice more accessible to a wider number of people, to make evidence more reliable and more readily available, and to make processes and procedures more efficient"

and that

> "... both the judiciary and the Scottish Court Service are keen to pursue, and pursue vigorously the current agenda to ensure that our justice system embraces the digital revolution – and indeed anticipates where it might take

us next".

So watch this space …

(The full text of Lady Dorrian's speech is on the Judiciary of Scotland website at http://www.scotland-judiciary.org.uk/26/1301/Speech-by-Lady-Dorrian-at-the-launch-of-The-Digital-Strategy-for-Justice-in-Scotland?utm_source=Newsletters&utm_campaign=51ac0b6ef3-SLN_21_08_14&utm_medium=email&utm_term=0_1eedb22a32-51ac0b6ef3-65406933.

JP e-BENCH BOOK

As you may recall, the July issue of E-News recorded that the Judicial Institute is producing a new JP e-Bench Book, hoped to be available in Spring 2015.

The drafting team (which last met on 26th August) is making progress, but would still welcome any comments from justices on this project, and in particular, **What was in your court today? Did you need information that was not there? What unusual or interesting cases have you seen? What would you have liked to have known before today?**

Please email any comments to the judicialinstitute@scotcourts.gov.uk marked for Gillian Mawdsley's attention.

SOME CLARIFICATION ON "STATUTORY BOP": *PATERSON v PF, AIRDRIE, BOW v PF AIRDRIE, LOVE v PF STIRLING*: [2014] HCJAC 84

Common law breach of the peace has been partly replaced by the offence of behaving in a threatening or abusive manner, likely to cause a person fear and alarm, and intending to do so or recklessly doing so, under s38 of the Criminal Justice and Licensing (Scotland) Act 2010.

As readers may know, the precise wording of the provision has caused some difficulty. A new decision of the High Court on three appeals heard together has removed one such difficulty, and as this is an offence regularly cropping up before us, it is worth looking at the issue in some detail.

First, the history: in *Rooney v Brown* 2013 SCCR 334, the accused made sectarian and racist threatening remarks in front of police officers. These remarks were taken

seriously by them, and were offensive to them, but they were not actually put in a state of fear or alarm by them. The sheriff convicted the accused of the s38 offence.

On appeal, the High Court agreed with the sheriff, saying that the context of the events was important, and the context in this case included that the accused was struggling with the police and had to be handcuffed. This behaviour meant that (whether or not the police in this case actually did so) it was likely that a reasonable person would suffer fear and alarm.

However, shortly thereafter, in *Jolly v HMA* 2013 SCCR 511, the *Rooney* interpretation was narrowed in an important way. In interviews with social workers, the accused in *Jolly* had threatened revenge upon his girl-friend and her family, and this was passed to the police.

It was in fact found inadmissible evidence (because the accused had been promised there would be no repercussions from what he said in the interviews). But of more immediate interest, the High Court declared that while a "reasonable person" test was appropriate, as *Rooney* had decided, this reasonable person must be someone actually present at the events, and not a hypothetical person who would have suffered fear and alarm if s/he had been present. The Court in *Jolly* decided that *Rooney* had passed this narrowed test because the police had been present, and although there were not in fact put in fear and alarm, they had taken the threats seriously, and the threats had been in part directed against them. So, the Court decided, *Rooney* should not be taken to mean that it was not necessary for anyone to suffer actual fear and alarm for the offence to be committed.

Not everybody was persuaded by the interpretation of s38 in *Jolly*, so, turning to these three latest appeals, a Court of Five Judges (in other words, an enlarged Court, on this occasion including both the Lord Justice General and the Lord Justice Clerk, designed to give a conclusive decision) considered the matter again.

The first of the three new appeals was *Paterson v PF, Airdrie*. The accused had shouted and swore at police before and after being arrested. There was no evidence of the police actually being in fear or alarm. The sheriff refused a submission that there was no case to answer, and convicted of the s38 offence. He took into account that the events were in a public residential area known for disorder, that the accused was already out of control, and that there was potential for further trouble.

In the second, *Bow v PF, Airdrie*, the accused had shouted racist abuse and threats at a motorist. There was no evidence that the complainer had suffered fear and alarm. Again, the sheriff refused a submission of no case to answer, concluding that there was evidence that the behaviour would be likely to cause a reasonable

person to suffer fear and alarm, and it appears that she convicted the accused of the s38 offence.

In the third, *Love v PF, Stirling*, the accused had posted on Facebook several sectarian messages, and these were seen by the complainer, who was upset and offended. The sheriff found that the messages would be likely to cause a reasonable person fear and alarm and also, it appears, convicted the accused of the s38 offence.

In its opinion covering appeals against conviction in all three cases, the Court of Five Judges concluded that there is no ambiguity in s38. It does not require actual fear and alarm, as the provision clearly gives the objective test that the behaviour is likely to cause it to a reasonable person, that is, a person not of "abnormal sensitivity".

Thus, the fact that no individual ("for example, an intrepid Glasgow police officer") actually suffered fear and alarm is neither here nor there. Thus *Jolly* was wrongly decided, and the narrowing of the reasoning in *Rooney* overruled. And thus, all three appealed cases, which relied on *Rooney*, were correctly decided and the appeals should be refused.

PREVARICATION AND CONTEMPT OF COURT AGAIN: *BOWIE V PF, PAISLEY*

In last month's E-News, *Bowie v PF, Paisley* [2014] HCJAC 65, a case on prevarication amounting to contempt of court was reported. This month, there is another, *Hood v HMA* [2014] HCJAC 85.

Mr Hood was found guilty of contempt of court by reason of prevarication while giving evidence in a trial, and sentenced to 4 month's imprisonment.

The sheriff found him in contempt because he concluded that Mr Hood was pretending ignorance and lack of memory. Further, his demeanour, and the similarity of his evidence to that of another witness, meant his account was not only not credible, but was "ludicrous"; he gave the impression of being "someone doing all he could to avoid assisting the prosecution and the court'" and could be inferred to have colluded with the other witness. The sheriff provided a very full report of the circumstances, and the procedure he followed.

The High Court noted that *Bowie*, which relied, among other things, upon *Robertson and Gough v HMA* 2008 SCCR 20, had recently emphasised the correctness of the view that the judge in the proceedings was best placed to decide if there had been contempt of court.

The full report can be found at http://www.scotcourts.gov.uk/search-judgments/judgment?id=0e6e9ba6-8980-69d2-b500-ff0000d74aa7.

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