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Case Comment

Now or never? How imminent must a fear of violence be for the purposes of s.4A of the Protection from Harassment Act 1997? R. v Qosja (Robert)

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Protection from Harassment Act 1997 (c.40) s.4A

Case:

R. v Qosja (Robert) [2016] EWCA Crim 1543; [2017] 1 W.L.R. 311 (CA (Crim Div))

***J. Crim. L. 17** The complainant in this case, KL, began working in a bar in Nunhead on 9 July 2015. Soon thereafter, she came across the appellantwho was a regular at the bar. A relationship developed between the two, although this was platonic and somewhat unwelcome as far as KL was concerned. Between the periods of 10 July to 31 July the following events took place. The complainant reluctantly gave the appellant her number when he requested it and then subsequently accepted his offer for a replacement phone when she lost hers. One evening, she accepted a lift home from the appellant and he offered her a job opportunity as a babysitter or cleaner for one of his friends. On arriving at the complainant's home, the appellant stayed to use the toilet and have a cup of tea. He then offered the complainant a room in his house rent-free, which she duly declined. On one occasion, when the complainant was ill, she was visited by the appellant, who stayed and chatted for over two hours, although the complainant did not expect him to stay for so long. During the friendship, the appellant made various phone calls and sent text messages to KL, some of which she found inappropriate and unwelcome. One particular text referred to her as "baby girl'.

The events culminated on the evening of 31 July when, during her shift at the bar, KL and the appellant entered into a public argument. The appellant was unhappy that she had not returned his phone calls and text messages and in response, KL returned the phone to him. Angry, the appellant threw the phone out outside and words were exchanged. At this stage, another customer and the bar manager intervened. Later, the appellant confronted the complainant and asked her why she had turned down his job offer. She responded that she was happy in her current job and the appellant left, having bought some beer to take home with him.

***J. Crim. L. 18** Of importance in this case were the two subsequent events on 1 August. On the evening of the argument, the complainant returned home and went to bed. She awoke at 5.30 am on 1 August to find the appellant sitting at the foot of her bed. He had apparently gained entry through the kitchen window. He was angry and rude and the complainant's evidence was that she was in fear that he was going to beat her or sexually assault her. When she resisted his attempts to hug her, he slapped her twice across the face. The complainant's housemate then returned home, prompting the appellant to leave.

Later that afternoon, the appellant returned to the complainant's house. He wanted to return a set of keys which he had removed from the complainant's home. This revelation scared KL and it was her evidence at trial that she was fearful that he may come back at any time to her room as he had in the early morning of that day.

The appellant was charged with one count of stalking involving fear of violence contrary to s. 4A(1)(b)(i) of the Protection from Harassment Act 1997 ("the Act') and one count of assault contrary to s. 39 of the Criminal Justice Act 1988. At trial, it was argued that the Crown had failed to establish that the complainant had been in fear of violence on two separate occasions on the basis that, during the second meeting on 1 August when the keys were returned, there was an absence of fear on

behalf of KL. A submission of no case to answer was made at trial but rejected by the judge on the grounds that, in the context of the escalating course of conduct from 10 July culminating in the events on 1 August, a jury would be entitled to find that the complainant was in fear of violence when the appellant returned her house keys and that he had the requisite intention to frighten her at the time. The appellant was convicted on both counts and sentenced, in totality, to two years' imprisonment. He appealed against his conviction on the grounds that the fear of violence was too speculative in relation to the second incident, and there must be a fear that violence will occur imminently on both occasions in order to satisfy the *actus reus* of the offence under s. 4A(1)(b)(i) of the Act.

HELD, DISMISSING THE APPEAL, the trial judge's initial approach was correct. Under s. 4A of the Act, it was open to the jury to consider not only whether the complainant feared imminent violence, but also whether she feared that violence would take place in the future.

Commentary

The offence in question is that of stalking involving fear of violence. Under s. 4A of the Protection from Harassment Act 1997:

(1) A person ("A') whose course of conduct--

(a) amounts to stalking, and

(b) either--

<DPA5>(i) causes another ("B') to fear, on at least two occasions, that violence will be used against B, or</DPA5> <DPA5>(ii) causes B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities,</DPA5> <DPAC4>is guilty of an offence if A knows or ought to know that A's course of conduct will cause B so to fear on each of those occasions or (as the case may be) will cause such alarm or distress.</DPAC4>

(2) For the purposes of this section A ought to know that A's course of conduct will cause B to fear that violence will be used against B on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause B so to fear on that occasion.

The key issues here were, first, whether under s. 4A(1)(b)(i) the appellant had caused the complainant to fear that violence would be used against her during the encounter on the afternoon of 1 August and ***J. Crim. L. 19*** secondly, if this was the case, whether the appellant possessed the requisite *mens rea* during this occurrence, applying the objective test in s. 4A(2).

Counsel for the appellant submitted that s. 4A(1)(b)(i) ought to be narrowly construed and, in order to satisfy the *actus reus,* the prosecution must prove that the complainant feared that violence would take place immediately. It would not be sufficient that violence may take place in the future. The respondent submitted that a wider approach must be taken and that, in line with the decision at first instance, it would be sufficient that the complainant feared that violence would occur sometime in the future.

Of relevance here are two cases which were considered by the Court of Appeal. The first is *R* v *Henley* [2000] Crim LR 582, where the judge directed the jury that fear of violence may constitute fear as to "what might happen' (at 582). The conviction was overturned as the judge had erred in his attempts to define violence and in directing the jury that a threat of violence extended to threats to family members, but in commentary, Professor Ormerod submitted the following:

The violence requirement in section 4 is left undefined (cf. section 8 of the Public Order Act 1986). It is distinguishable from an assault, because that requires proof of an apprehension of immediate personal violence. On one view, the absence of an element of immediacy in section 4 creates a very broad offence: there is no need for any physical proximity between the victim and defendant, and the fear can be created by communication through any medium.' (at 583)

Professor Ormerod concluded that the exclusion of the term "immediate' from the Act was intended by Parliament to encourage a broad interpretation regarding the timing of the violence, unlike the approach taken in relation to common assault.

The second case of importance is that of *R* v *DPP* [2001] EWHC Admin 17, which involved a neighbour who subjected the complainant to two incidents. During the first incident he threatened to

slash her throat, and on the second occasion he told her he would "blow the bastard dog's brains out' (*R* v *DPP* at [8]). The Acting Stipendiary Magistrate convicted the appellant, stating: "By [the complainant's] demeanour in court I reached the inevitable inference that Linda Baker lived in fear of the residents and visitors to 185 Sutton Way' (at [15]). The Divisional Court held that, when determining whether the complainant feared violence during the second incident involving the threat to her dogs, the whole course of events, in light of the previous threat that the appellant would slit the victim's throat, could be taken into account. This would suggest a broad interpretation of s. 4A of the Act; any fear that violence will take place, whether imminently or in the future, would suffice for the purposes of the offence.

The conclusion of the Court of Appeal in the present case seems to endorse both Professor Ormerod's interpretation of the Act and the approach taken by the High Court in *R* v *DPP.* Mrs Justice Carr stated:

[A] a plain and natural reading of the wording of section 4A … reveals that [it] is wide enough to look to incidents of violence in the future and not only to incidents giving rise to a fear of violence arising directly out of the incident in question. Nor is there any requirement for the fear to be of violence on a particular date or time in the future, or at a particular place or in a particular manner, or for there to be a specific threat of violence. There can be a fear of violence sufficient for the statute where that fear of violence is of violence on a separate and later occasion. (at [34])

The Court of Appeal were careful to point out that it is a key component of the test that the complainant fears that violence *will* take place, whether imminently or in the future, rather than fearing that violence *may* take place. The latter would be insufficient for the purposes of stalking involving fear of violence under s. 4A of the Protection from Harassment Act 1997.

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J. Crim. L. 2017, 81(1), 17-19