APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 36
HCA/2018/275/XC

Lord Justice General
Lord Drummond Young
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

CHRISTOPHER WILSON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: A Ogg (sol adv); Nigel Beaumont & Co
Respondent: Borthwick AD; the Crown Agent

14 June 2019

Introduction

[1] On 27 April 2018, at the Sheriff Court in Edinburgh, the appellant was convicted of a charge which libelled that:

> "(3) between 1 ... and 24 November 2017 at ... Lawfield Road ... Laurelbank Place and ... Kippielaw Park, all Mayfield; ... Parkhead Place and Easthouses Road, both Easthouses, all Dalkeith ... you ... did assault [CC], your partner ... and did repeatedly

> punch and kick her on the head and body, repeatedly cause her to fall to the ground, seize her by the hair and drag her across the floor, seize her by the throat and apply pressure causing her to struggle to breathe, seize her by her clothing and drag her by same, repeatedly kick her on the head, push her into a bath, forcibly pin her down and turn on the tap of said bath, throw a remote control at her, throw a television at her, spit on her, empty the contents of an ashtray on her ... strike her on the body with a vacuum cleaner, repeatedly chase her, push her on the body all to her injury;
>
> you ... did commit this offence while on bail, having been granted bail on 4 September 2017 at Edinburgh Sheriff Court
>
> and it will be proved in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 that the aforesaid offence was aggravated by involving abuse of your partner or ex-partner."

He had been acquitted, following a no case to answer submission, of a breach of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 by, between the same dates and at the same *loci*, damaging various household items (see complainer's evidence on the first incident (*infra*)). On 16 May 2018, the sheriff imposed a Community Payback Order on the appellant, with 150 hours unpaid work, a supervision requirement for 24 months, a Restriction of Liberty Order for a period of 6 months and a Non-Harassment Order of 3 years.

[2] The appellant was also convicted (charge (5)) of breaching his bail condition not to approach the complainer on the dates and places libelled in charge (3). He was sentenced to 6 months imprisonment on this charge.

[3] The appeal raises the issue of what is required to corroborate the complainer's testimony concerning the assault libelled when the Crown have elected to libel a number of assaults within one omnibus charge. The case falls to be analysed in light of the principles which were recently set out in *Spinks* v *Harrower* 2018 JC 177.

The complainer's evidence

[4] The principal evidence came from the complainer, who was aged 20. She had been

in a relationship with the appellant "on and off" for a period of 4 years. They had two children, who were respectively aged 2 years and 8 months at the material time. In September and October 2017, the complainer and the appellant were separated. The complainer was living with the children in her flat in Laurelbank Place, Mayfield. The appellant was staying nearby at his flat in Lawfield Road.

First incident (the complainer's flat)

[5] The complainer began her evidence by describing the first incident; the commencement date for the inclusive charge being 1 November 2017. The complainer said at first that this incident occurred "in October ... maybe a bit sooner than October ... August ... September time ... It was ... round about the end of September, start of October". She was "pretty sure it was October". She did not think that she could have been mistaken about that. This led to the introduction of the complainer's statement to the police, which had been given on 26 November 2017. It stated that the incident had taken place on 1 November. The complainer said that this was a mistake, since by then she would have been living at the appellant's flat. The incident would have been in the first week of October, since she was in the appellant's flat the second week of October until two weeks after 5 November ("fireworks night"). Notwithstanding that any such incident would have fallen outwith the libel, the procurator fiscal depute was permitted, without objection, to continue to examine on it.

[6] The appellant had appeared at the complainer's door. He thought that she had started a relationship with another man and that the man was in the flat. He began by shouting at the complainer and destroying the kitchen; tearing worktops and radiators off walls, throwing food about and spraying "stuff" on the walls. He broke every photo frame

and mirror. He emptied rubbish bins and kitchen drawers and cupboards. He then told the complainer to clean things up before attacking her. He started "strangling" the complainer. He punched her repeatedly on the face, so that her cheeks, forehead, eyes and chin were "all black and blue". He kneed her in the ribs

[7] The complainer moved through to the bedroom with her son, who had woken up, followed by her daughter. The appellant was watching that she "was not going to run away". He poured a bottle containing coca cola, ash and cigarette ends over her and the boy, whom she was holding. He began breaking everything in the room; pulling clothes out of drawers before attacking her once more. He pushed her repeatedly onto a bed and again "strangled" her. He punched her repeatedly. He pulled her hair; tearing out her hair extensions. He threw a television at her. He hit her on the legs with a bit of wood, which she kept to barricade the door. The complainer was crying hysterically. Her son was screaming. Her daughter looked on unmoving, as she was "used" to it.

[8] The appellant went for a shower. He locked the main door of the flat. He called the complainer into the bathroom to give him a towel. When she did so, the appellant grabbed her and again punched her on the left side of her face. He pulled a ring off her finger and flushed it away. The complainer went into the bedroom before going back to the bathroom. The appellant pushed the complainer into a bath, and attempted unsuccessfully (because of a lack of gas) to pour hot water over her. He started punching her again. She was bleeding from the scratches to her face.

[9] The complainer went into the children's bedroom. The appellant followed her and pinned her by the neck against a chest of drawers. He punched her again a few times. He told the complainer to pack. The family were to go to his flat. He emptied the fridge/freezer and put the contents of it and items of clothing in a pram. The complainer had to wear a

scarf to cover her face, which was a mess of cuts, scratches and bruises, before setting off at about 4.00 or 5.00pm on the five minute walk with the two children to the appellant's flat.

Second incident (the appellant's flat)

[10] After the family had arrived at the appellant's house, they all had to leave to go to a local shop to buy electricity and cigarettes. On their return, the complainer was to help the appellant move a furniture unit. In the course of this exercise, the unit broke. The appellant hit the complainer on the legs and back with parts of the unit. He pushed her against a wall. Her head banged off the wall. He punched her and dragged her about. Things calmed down after the appellant had ordered a take-away. He told the pursuer to undress so that he could see the damage which he had done. This was about 10.00pm. She was covered "from head to toe" with bruises. She had lumps on her forehead and "half" her hair was gone. She could not leave because she was locked in.

Third incident (the appellant's flat)

[11] After some, possibly only 4, days, the family went to the appellant's mother's house, which was about ten minutes away. The complainer had to wear clothing and make-up which would conceal her injuries. The purpose of the visit was to wash clothes in advance of "bonfire night". The visit was on 4 November. They returned to the appellant's house. The appellant had threatened to kill the complainer if she left and went to the police. He said that he would slit her throat, harm her sister and set her flat on fire.

[12] On 5 November the family went to the appellant's nan's house. At the end of the evening, they returned to the appellant's flat. He was in a bad mood because he had lost his keys, although he did manage to open the door somehow. He pushed the complainer to the floor, so that she was sitting against a unit, and kicked her three times in the face, breaking

her nose. There was blood "everywhere" including on the complainer's daughter, who was wearing a pink Peppa Pig jacket. The appellant began to panic in case the complainer had to go to hospital. He told her that she could not go. He locked the pursuer in the flat while he bought her some sweets from the Co-op.

Fourth incident (the appellant's mother's house and Morelli's Fish and Chip Shop)

[13] After about a day or two, the complainer had taken the children, as requested by the appellant, to his mother's house in Parkhead Place, Dalkeith. He would time her journey by insisting that she texted him on arrival. He had been sleeping most of the day but, on his arrival at his mother's house, he maintained that, instead of staying at his mother's, the complainer should have left the children and returned to his flat. He assaulted the complainer by punching her, pulling her hair, kicking her and throwing a TV remote at her. He had hit her with a hoover. He had used her belt to whip her.

[14] The appellant had been daring the complainer to "run for it". She did so when he had threatened to stab her and had gone to get a knife. The appellant chased and caught her outside Morelli's "chippy" which was nearby in Easthouses Road. He tried to drag her back to his mother's house. He had seized her by the neck. A man from the Easthouses Miners' Welfare Club came across the road to intervene. He punched the appellant. The complainer ran up to the end of the street. The appellant caught up with her again. Both the complainer and the appellant were seen running up the road in CCTV images. He took her to his nan's house, where a separation agreement, which involved dividing the custody of the children, was drawn up. The couple then returned to his flat where they were "all night arguing and stuff".

The escape

[15] On 23 November, the complainer left the house on the pretext of buying nappies for her son. She took the boy in his buggy. After several failed attempts to find a phone, she managed to call her mother from Newtongrange Leisure Centre, some twenty minutes away from the appellant's flat. Her mother arrived and took her away in her car. An arrangement was made whereby the complainer had to go to the appellant's mother's house to tell him that she did not want to be with him. On that basis her daughter was returned to her care, but not without the appellant trying to obtain custody of his son. During this exchange the appellant was shouting and screaming at the complainer and her mother.

[16] The complainer spoke to a number of photographs which showed her face in a mess with a scar to her forehead, her nose malformed, her hair torn out and her eyes looking "off"; one being yellow and (another) bloodshot. A fading bruise to her forehead had been caused by the appellant punching her. The scar had been caused by the appellant's nails or by being hit by something thrown. A bruise on her leg had been caused by the hoover and others had also been caused by the appellant. A hair extension was shown on the floor of the complainer's flat.

[17] At the conclusion of her examination-in-chief, the procurator fiscal depute proposed, and the sheriff permitted, the screen, which had been between the witness box and the dock, to be removed. This was apparently to enable the complainer to identify the appellant.

[18] The cross-examination, which was somewhat argumentative in tone, proceeded on the erroneous basis that the complainer had said that the initial incident had occurred on 1 November, as it had been libelled, because of the date of a Children's Hearing which the appellant's mother had noted as being on that date. The complainer seemed to resist this suggestion, but the defence agent persisted in which appeared to be an attempt to squeeze

the first incident within the dates in the libel. It was put to the complainer, on more than one occasion, that she had said in evidence that the first incident had happened on 1 November, but she said that this was incorrect. The cross did appear to establish that the complainer had gone to two nursey school appointments on 2 and 16 November, although where they fitted into the incidents was not clear.

Potential corroboration

[19] The complainer's mother gave evidence that her daughter had been out of touch for several days before the message to contact her. She was hysterical on the phone. When her mother had arrived at the leisure centre, the complainer was terrified. She was "minging". Her clothes were dirty. Her hair was like a "burst brillo". She had no makeup on. She was normally immaculately turned out. She had fading bruises on her head. She had bruises to her face, on the right side. She looked like a gaunt skeleton. She had a bruise on her cheek. Although she owned a mobile phone, the complainer said that she had lost or broken it. Her mother had last contacted the complainer in October. Throughout November the complainer had not been in touch.

[20] The younger child had been with the complainer. The complainer's mother went to the appellant's mother's home to collect the older child. When she did so, the appellant had a volatile demeanour. He said that he was not handing over the older child. He wanted to speak to the complainer to "get this sorted out". His demeanour was "manic". He was shouting about lie detectors and DNA. He was screaming abuse. The "volume" was very, very high.

[21] Photographs, which were agreed as having been taken in the complainer's flat, showed it to be in a state of extreme disarray, with clothing and toys strewn about

throughout the rooms. Objects, including a large mirror and photo frames, were broken, items pulled off walls and drawers removed from their settings. A television was seen on a bed and a large plank of wood was standing in the hallway. There was what was said to be ketchup on the walls. A clump of hair was shown on the floor.

[22] There was medical evidence from Dr Rachel Miller, forensic physician, about bruising and injuries to the complainer's head and nose. Dr Miller had seen the complainer on 27 November. She spoke to a detailed report. Bruising to the forehead, right temple, left arm and left leg were observed, as was scarring to the forehead, left ear and right leg. The complainer had a nasal bone deformity with bruising. The complainer's extension combs had bent pins, which was consistent with the complainer's hair having been pulled. Dr Miller found missing or shortened hair. She said that the injuries were consistent with the complainer having been assaulted in a manner which involved a number of acts, including punching, kicking, dragging by the hair and manual strangulation. The photographs, which were agreed by joint minute, illustrated Dr Miller's evidence. Dr Miller spoke to the medical records of the complainer's attendance at hospital on 26 November 2017 which described symptoms which were consistent with a fractured nose.

[23] The secretary of the Miners' Welfare Club spoke to CCTV images, which had captured the events outside the club on 18 November. They showed the complainer and the appellant. There was no sound, but at one point two men left the club for a smoke. They looked across to the complainer and the appellant. One of them jumped a barrier to go across to the couple. The complainer was seen running up the street. A violent exchange took place between the appellant and the club member. The appellant had then run down the road towards the complainer.

[24] There was evidence from police officers about finding a clump of human hair in the complainer's flat and red staining, which looked like blood, on a Peppa Pig jacket recovered from the flat.

The No Case to Answer submission

[25] The sheriff took the view that the CCTV images provided sufficient corroboration that the appellant had assaulted the complainer in the manner which she described during the period of the libel. It corroborated that she had been assaulted in the way that she said she had been on 18 November. The case was distinguishable from *Spinks* v *HM Advocate* (*supra*) since the period of the libel was much more restricted than in that case. In any event, the jury would at least have been entitled to convict of an assault on 18 November.

The appellant's testimony

[26] The appellant gave evidence. Although the sheriff reports that the appellant denied all culpability, there is no record of what his position had been in relation to his whereabouts during the earlier period of the libel. It had been put to the complainer in cross that she had been with the appellant voluntarily throughout November, but it is not clear whether the appellant gave evidence to that effect. The appellant admitted that he was the person shown on the CCTV images. He maintained that the complainer had gone "mental" and had run out the house. He had gone after her and caught her. He had not hit her, but he had put his hand on her shoulder. He had been trying to calm her down. In relation to the incident on 24 November, he said that he had been upset. There had been a lot of shouting and he had told the complainer's mother to "f... off".

The charge to the jury

[27] The sheriff directed the jury that no-one could be convicted on the evidence of one witness alone. There required to be corroboration. He continued:

> "every incidental of a charge such as the narrative of how the crime was committed does not need evidence from two sources. But there are two essential matters that must be proved by corroborated evidence and these are that the crime charged was committed and secondly, that the accused was responsible for committing it. Those are the two crucial facts in each charge which must be corroborated".

The sheriff told the jury that the evidence from the complainer's mother of the complainer's distress could not corroborate her account of what had happened to her, but it could:

> "confirm that she suffered some distressing event, for example, that she was being held against her will ... [It] could corroborate that aspect of what she said ...".

[28] On the CCTV images, the sheriff said that it:

> "is crucial because it is the only evidence which is capable of corroborating [the complainer's] evidence that she was assaulted by [the appellant]. That's the only source of evidence that can provide the corroboration ...
>
> The medical evidence is capable ... of corroborating the evidence of [the complainer] that she was assaulted. The evidence of distress from her mother, if accepted, is capable of corroborating that something distressing happened to her about the time that the distress was seen. But, and this is important ... in this case, the only source of evidence capable of corroborating the evidence of [the complainer] that her assailant was [the appellant] is the CCTV or video evidence but that will depend on what you consider it shows. If you consider that evidence does not corroborate that an assault was taking place, or it is not evidence from which you could infer that [the complainer] was being assaulted in the street as she said she was, or if you have a reasonable doubt about that then there is no corroboration of her evidence and you must acquit. But if you conclude ... that either an assault was taking place, or you can infer that an assault was taking place because the man from the Miners Social Club left the ramp and intervened to stop it. If you thought that that's what happened then it would be open to you to find corroboration in the CCTV evidence and convict."

[29] The sheriff went on to say that, if the jury did not consider that the images were "sufficiently compelling to persuade you beyond reasonable doubt" of the appellant's guilt

to the full extent of the complainer's evidence, then they could restrict their verdict and delete those parts of charge (3) that were not established to their satisfaction. He concluded this matter by saying:

> "... I said to you that every incidental detail of a charge such as the narrative of how the crime was committed does not need evidence from two sources. What requires to be corroborated is that there was an assault by [the appellant] on [the complainer]. The extent of that assault is a matter for you to decide whether or not you're satisfied that the CCTV is sufficient to bring home guilt to him in relation to charge 3 as libelled. Or whether or not you do not consider that that would be sufficient of guilt and you wish to restrict your verdict in some way".

Grounds of appeal and sift

[30] The Note of Appeal contained five grounds. The first was that the sheriff erred in repelling the no case to answer submission on charge (3). This was a contention that the CCTV images could not corroborate separate instances of assault on separate dates and different *loci*, nor could it corroborate the complainer's account of what happened in the appellant's mother's house on the same date as the images. The second was that the sheriff misdirected the jury to the effect that the images could corroborate the complainer's evidence of a number of assaults on separate dates at different *loci*. The third was that the sheriff erred in directing the jury that the images could corroborate the complainer's evidence of an assault on the same date of the images. The fourth was that the sheriff misdirected the jury that the specification in charge (3) was narrative of how the crime was committed and that every detail did not require corroboration. The fifth related to the consequences of a successful appeal on charge (5).

[31] The first sift judge's decision did not address each ground separately. He reasoned:

> "... the sheriff was entitled to let the jury decide whether the CCTV footage corroborated the assault at the 'chippy' of 18 Nov. ... [T]his is unarguable.

> ... [I]t can be argued in connection with other assaults on different days and separate loci even though the time period is shorter than the time period in *Spink* that the CCTV footage was not sufficient corroboration. The fact that the Crown libelled an omnibus charge does not alter that state of affairs. It can be argued that this is not truly a jury question but a question arising from the law of evidence.
>
> ... [C]harge 5 ... is not arguable."

This is ambiguous. It does not make it clear which grounds were not being allowed through the sift. The decision seems to mean at least that leave to appeal was being refused in relation to any argument that the CCTV images could not corroborate the complainer's evidence of being assaulted in the appellant's mother's house on the same date as the images.

[32] An application under section 107(8) of the Criminal Procedure (Scotland) Act 1995 followed. The appellant accepted the meaning attributed to the sift decision set out above and sought leave to argue that there was insufficient evidence of the assault at the mother's house. The second sift judges refused this, although no written reason is recorded. They did give leave to appeal the conviction on charge (5), which had also been argued. Leave thus appears to have been granted on all except the third and part of the first ground of appeal.

Appellant

[33] It was accepted that there was no leave to argue the third ground of appeal or the related element in the first ground. It was maintained that the only available corroboration for the earlier assaults in charge (3) was the CCTV images. These had not shown any assault, but merely that the complainer and the appellant had been in each other's company. The images could not corroborate separate instances of assault on different dates and at different locations. The complainer's account of what had occurred, and the gaps in time

between the incidents, meant that the assaults which she described were separate episodes. The complainer had not been held continuously over the month of November with no opportunity for escape or to contact others. The CCTV images could not corroborate the appellant's involvement in separate assaults or that the assaults had occurred over the period from 1 to 24 November, apart from that outside the chip shop on 18 November. The principle in *Spinks* v *HM Advocate* (*supra*) was applicable. In *Spinks*, the court had distinguished between a situation in which what had been libelled was a course of indecent conduct towards children and where there were separate instances of assault on an adult (*Stephen* v *HM Advocate* 2007 JC 61 and *Dalton* v *HM Advocate* 2015 SCCR 125). *Spinks* had been confirmed in *Procurator Fiscal, Aberdeen* v *Taylor* (*sub nom HM Advocate* v *Taylor*) 2019 SCCR 96. *Taylor* had been about the application of mutual corroboration, which was not the position in *Spinks*.

Crown

[34] The advocate depute submitted that the complainer had been unable to escape from the appellant's control during the relevant period. The appellant had retained possession of at least one of her children at any given time to ensure her return to his control. The abuse had only ended on 24 November, when the complainer had managed to escape. In relation to the incident on 18 November, the assault had not stopped inside the house, but had continued into the street. Corroboration was available from the CCTV images. There were other adminicles of evidence which were available to support the complainer's account of a lengthy period of domestic abuse perpetrated by the appellant. This included the evidence of the complainer's mother that she had not heard from her daughter for a period of weeks. She had found her daughter extremely distressed and dishevelled. She described the

complainer's house as looking as it did in the photographs. The complainer's mother spoke to the appellant shouting, swearing and refusing to give the child back.

[35] Dr Miller had given evidence about the bruises and injuries to the complainer's head and nose, the bent extension combs and the missing or shortened hair. She spoke to the nasal fracture. There was police evidence that the child's jacket, which had been found in the complainer's flat, had staining consistent with blood. This corroborated the complainer's account that on 5 November the appellant had repeatedly kicked her on the face. There was police evidence about the finding of the clump of hair.

[36] Charge (3) was an omnibus charge, comprising four incidents of violent domestic abuse. Each was similar in terms of time, place and character, so that they could properly be said to form part of a single course of conduct. Accordingly, a sufficiency of evidence could be provided by applying the principle of mutual corroboration. Evidence in relation to one incident could be used to corroborate evidence given in relation to others, provided that there was relevant evidence from more than one source. There was a cogent body of evidence available to the jury which was capable of supporting the complainer's account of the single course of conduct.

Decision

[37] *Spinks* v *Harrower* 2018 JC 177 confirmed the well-established principle in the law of evidence that corroboration is required to prove separate, that is distinct, crimes including different episodes of assault. What amounts to a separate episode is a question of fact and degree (*Spinks*, LJG (Carloway), delivering the opinion of the court, at para [13]); *Dalton* v *HM Advocate* 2015 SCCR 125, LJC (Carloway), delivering the opinion of the court, at para [42]). The mode of providing a sufficiency may be by the application of conventional

or mutual corroboration (*PF (Aberdeen)* v *Taylor* 2019 SCCR 96); but where the crimes are separate, corroboration of each must exist in one form or another. Separate episodes of assault do not constitute a separate crime known as a course of conduct in which only one incident requires to be corroborated as if it were an element in a single episode of assault as in *Campbell* v *Vannett* 1998 SCCR 207 (cf lewd and libidinous practices: *Stephen* v *HM Advocate* 2006 SCCR 667 and now the Domestic Abuse (Scotland) Act 2018, s 1(1)). However, if one incident involving one complainer is proved by corroborated evidence to have been committed by the accused, then other incidents, which are themselves proved to have happened by corroborated evidence, will also be proved to have been perpetrated by the accused if the evidence yields an inference that they must have been committed by the same person (*Howden* v *HM Advocate* 1994 SCCR 19).

[38] Leaving aside the issue of the dates in the libel, and subject to one qualification, there was a sufficiency of evidence in relation to charge (3) for two separate reasons. First, the jury could have accepted, as a matter of fact, that the whole period from the appellant's appearance at the complainer's door at Laurelbank Place to her escape from Lawfield Road, constituted a single episode of multiple assaults during which the complainer was effectively held captive and thus subjected to continuous criminal activity. The qualification is that he was not charged with this form of conduct. Nevertheless, the complainer's evidence, which was given without objection, was that she was, in practical terms, unable to escape from the appellant's constant attention during this time, even if she was not always in direct physical contact with him.

[39] The second method would have been by employing the principle in *Howden* (*supra*). There was ample evidence to prove that the complainer had been assaulted repeatedly in the manner in which she described. The assault in the appellant's mother's house was part of

the same incident as continued into the street outside. There was corroboration of the occurrence of that assault by virtue of, first, the evidence of certain of the injuries from Dr Miller, coupled with the photographs, including the one showing the bruise which the complainer said had been caused by being struck by the hoover. Secondly, there were the images of the complainer being at least grabbed and chased. The appellant's participation in this episode, in which the assault in the appellant's mother's house formed a part, was corroborated by the CCTV images showing the appellant as the person who was involved with the complainer. On the assumption that there was some evidence, for example from the complainer's mother, that the appellant was in a relationship with the appellant, it may have been possible to draw a legitimate inference that the earlier assaults, or at least that occurring in the appellant's flat, must have been committed by the same person, given the domestic context and the clear devastation apparent in the photographs of the complainer's flat.

[40] Whether that was ultimately so or not, the evidence was enough to justify the sheriff in repelling the no case to answer submission. For these reasons, the first ground of appeal falls to be rejected. In that context, section 97 of the Criminal Procedure (Scotland) Act 1995 provides that a submission can be made on the basis that the accused has no case to answer on "an offence charged in the indictment" and "on any other offence of which he could be convicted under the indictment". Where there are separate assaults libelled in a single charge (ie those occurring on different occasions) an accused is entitled to make a section 97 submission in relation to each one. The spirit of the provision cannot be circumvented by libelling an omnibus charge (*Cordiner* v *HM Advocate* 1991 SCCR 652, Lord McCluskey at 671).

[41] The problem remains, however, that the sheriff did not direct the jury on how they might be able to convict the appellant on one or other of the two bases set out above. He directed them that they could find corroboration of the whole libel of charge (3) if they accepted that the CCTV images showed the appellant assaulting the complainer outside Morelli's. This is a material misdirection, proceeding as it does on the error that all that is required to be corroborated, so far as the identity of the perpetrator is concerned, is that the appellant played some part in one element of the libelled course of conduct. In order to find the libel as a whole proved, the jury would have had to have been directed on a quite different route to verdict along the two lines which have been described. The jury would have had to have been satisfied either that the contents of the libel constituted a single continuing crime by virtue of the complainer being held captive throughout or that there was sufficient proof that the earlier assaults must have been committed by the same person as he who had perpetrated the assault on 18 November (ie the appellant). Since it was open to the jury to have reached the view that the incidents at the three locations constituted separate episodes of assault and that those in which the complainer alone identified the appellant were not proved to their satisfaction, the court is satisfied that a miscarriage of justice has occurred by virtue of a material misdirection on the nature of the required proof.

[42] It follows that the fourth ground of appeal is sustained. The effect is that the conviction on charge (3) requires to be restricted by libelling only: (i) 18 November 2017 as the date; (ii) the addresses at Parkhead Place and Easthouses Road as the *loci*; and (iii) repeatedly punching and kicking her on the head and body, seizing her by the hair and throat, dragging her, throwing a remote control at her, striking her on the body with a vacuum cleaner and chasing her as the *modus*. The conviction on charge (5) requires modification *mutatis mutandis*.

Postscript

[43] The procedure adopted by the procurator fiscal depute, and assented to by the sheriff, in removing the screen at the conclusion of the evidence in chief, should not go without comment, having been correctly raised by Lord Turnbull at the appeal hearing. Section 271A of the 1995 Act provides that a person such as the complainer is entitled as a vulnerable witness (s 271(1)(iv)) to give evidence with the benefit of standard special measures, including the use of a screen which conceals the accused from her view (s 271K(1)). The procedure adopted defeated the purpose of the legislation and should not have occurred (see *Brotherston* v *HM Advocate* 1995 SCCR 613). There was no need for a dock identification by the complainer of the appellant as her partner. It was, in any event, capable of simple proof *aliunde* or by agreement.