Ahmed v H.M Advocate, public harassment of women and girls and the Criminal Justice and Licensing (Scotland) Act 2010 section 38(1).

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Ahmed (Adnan) v H.M Advocate, public harassment of women and girls and the Criminal Justice and Licensing (Scotland Act 2010) s 38(1)

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Abstract

The Working Group on Misogyny in Criminal Justice in Scotland recommended in March 2022 that there should be a Misogyny and Criminal Justice (Scotland) Act which would inter alia create a new statutory offence of public misogynistic harassment. This article examines the decision of the High Court of Justiciary in Ahmed v H.M. Advocate [2020] HCJAC 37 to show that the offence of behaving in a threatening or abusive manner contained in s38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 is not designed to deal with lower-level misogynistic abuse and public harassment of women. It also highlights the difficulties faced by police and prosecutors in deciding whether the threshold of criminality has been crossed in cases where the accused's behaviour is not overtly abusive but is alarming and disturbing to the complainer and may have been intended by the accused to be so.

I. Introduction

In her introduction to *Misogyny- A Human Rights Issue* Baroness Helena Kennedy QC, the Chair of the Working Group on Misogyny in Criminal Justice in Scotland stated "The daily grind of sexual harassment and abuse degrades women's lives, yet it seems to be accepted as part of what it means to be a woman. The failure to understand the ramifications of what is seen as low-level harassment and abuse is just one of the ways in which the criminal justice system falls down for women".[1]

[1] Baroness Helena Kennedy QC, *Misogyny- A Human Rights Issue,* (Scottish Government, 2022) p7 https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2022/03/misogyny-human-rights-issue/documents/misogyny-human-rights-issue/misogyny-human-rights-issue/govscot%3Adocument/misogyny-human-rights-issue.pdf?forceDownload=true accessed 16/8/2022

The report concluded that the range of offences available to police and prosecutors, including the Criminal justice and Licensing (Scotland) Act 2010 s38, of behaving in a threatening or abusive manner, do not adequately address the type of abusive, threatening and potentially sexually predatory behaviours described by women and girls for the Working Groups own *Lived Experience Survey Analysis*[2] and in other existing evidence. The Working Group recommended the creation of a Misogyny and Criminal Justice (Scotland) Act which would create a new statutory misogyny aggravation and three new criminal offences of stirring up hatred against women and girls, committing public misogynistic harassment, and issuing threats of or involving rape or sexual assault or disfigurement of women and girls online and offline. In response to the report, The Scottish Government has undertaken to publish draft legislation for consultation prior to the introduction of a Bill in the Scottish Parliament.

Ahmed v H.M. Advocate[3] is one such case which demonstrates the lack of applicability of s38 in some instances of potentially misogynistic harassment or sexually predatory behaviour in public places, even where it is established that the complainer felt threatened, and a reasonable person in that position would have been likely to have suffered fear and alarm, and it could be inferred that the accused intended to cause fear and alarm and may have been motivated by hostility towards women. This article focuses on the impact of the High Court of Justiciary's decision, in quashing the convictions, that the conduct complained of was not threatening or abusive. The article notes the difficulties the decision could pose for the police and prosecutors in deciding where the threshold lies between apparently innocuous unsolicited and unwelcome interactions, and activity that meets the test for the *actus reus* of s38(1) or any other criminal

[2] Working Group on Misogyny in Criminal Justice *Lived Experience Survey Analysis* (Scottish Government 2022) https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2022/03/misogyny-human-rights-issue/documents/working-group-misogyny-criminal-justice/working-group-misogyny-criminal-justice/govscot%3Adocument/working-group-misogyny-criminal-justice.pdf accessed 16/8/2022

[3] [2020] HCJAC 37, 2021 J.C 19, 2021 S.L.T 442 2020 S.C.C.R 382

offences used to address the type of behaviour complained of. It also highlights the disconnect between the Court's reaction to the conduct and the concerns of women and girls described so vividly throughout *Misogyny- A Human Rights Issue*. The misogynistic harassment of women and girls has attracted attention in the published literature in particular in the context of online abuse and the reform of hate crime legislation.[4] Barker and Jurasz address public harassment in Scotland in work published before *Misogyny a Human Rights Issue*[5]. Both s38 and the decision in *Ahmed* have thus far attracted limited comment.[6]

II. S38 *actus reus* and *mens rea*

S38(1) of the Criminal justice and Licensing (Scotland) Act 2010 states that a person commits an offence

a) if that person behaves in a threatening or abusive manner,

b) the behaviour would be likely to cause a reasonable person to suffer fear and alarm, and

c) the person intends by the behaviour to cause fear and alarm or is reckless as to whether it would do so.

The interpretation of s38 was authoritatively determined by a bench of five judges in *Paterson v Harvie*[7] in which Lord Justice General Gill stated that s38(1) set out "three clear and unambiguous constituents of the offence. 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

[4] See for example, Jennifer Schweppe and Amanda Hayes, 'You can't have one without the other one: gender in hate crime legislation', 2020 Crim L.R 2 148-166, Kim Barker, 'Misogynistic Harassment- A stumbling block for Scots hate crime reform', 2021 Jur Rev 1-17, Clare McGlynn and Kelly Johnson 'Criminalising cyberflashing: options for law reform' 2021 J Crim L, 85(3) 171-188

[5] Kim Barker and Olga Jurasz, *Violence against Women Hate and Law Perspectives from Contemporary Scotland* (Palgrave Macmillan 2022).

[6] Laura Sharp, 'The Criminal Justice and Licensing (Scotland) Act 2010 sec 38, the Implications of *Paterson v Harvie'*, 2016 Jur Rev 117-128, Peter Ferguson QC, 'Ahmed v H.M. Advocate Ahmed v HM Advocate [2020] HCJAC 37; 2020 S.C.C.R. 382; 2021 S.L.T. 442', 2021 SLT 48-40, Frank Crowe 'Criminal Court: The Limits of Moorov', 2020 JLSS 65(10) https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-10/criminal-court-the-limits-of-moorov/ accessed 16/8/2022

[7] [2014] HCJAC 87, 2015 J.C 118, 1

of fact. Paragraph (c) sets out the *mens rea* that is required."[8] The accused's conduct is to be judged using an objective test.[9] The focus of the objective test is on how a disinterested observer would react to the behaviour rather than on the reaction of the complainer in each case. As was noted there is a need to strike a balance between the reaction a person of "abnormal sensitivity"[10] who felt afraid and alarmed for no good reason, and the "intrepid Glasgow police officer" who did not in circumstances when many in their shoes would have.[11]

Decisions reported since *Paterson v Harvie*[12] have emphasised the relevance of context, and the importance of the facts and circumstances of each case in determining whether the conduct complained of was indeed threating or abusive.[13] In *Burnett v Procurator Fiscal Hamilton*[14] the Sheriff Appeal Court noted that, "Context is crucially important and whether or not the conduct in question amounted to a contravention of s38 is a matter of fact and degree having regard to the totality of the circumstances."[15]

The decision of the High Court of Justiciary in *Ahmed v H.M. Advocate*[16] raises questions about the limitations of fact and degree and the totality of the circumstances where the conduct complained of was not abusive when the word is used in its normal everyday sense, and was not, on the face of it, threatening. The court does not appear to have considered, that even so, the complainer may have felt threatened, vulnerable and at risk as a result of the conduct, a reasonable person would have been likely to have suffered fear and alarm had they been in the same situation.

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[8] [2014] HCJAC 87, 2015 J.C 118, per Lord Justice General Gill at para [19]
[9] [2014] HCJAC 87, 2015 J.C 118, per Lord justice General Gill at para [20]. On this, see Laura Sharp, 'The Criminal Justice and Licensing (Scotland) Act 2010 sec 38, the Implications of *Paterson v Harvie'*, 2016 Jur Rev 117-128
[10] *Paterson v Harvie* [2014] HCJAC 87, 2015 J.C.118, per Lord Justice General Gill at para [20]
[11] *Paterson v Harvie* [2014] HCJAC 87, 2015 J.C.118, per Lord Justice General Gill at para [20]
[12] [2014] HACJAC 87, 2015 J.C 118,
[13] See, for example, *Hussain v Procurator Fiscal Glasgow* [2017] SAC (Crim) 1, per Sheriff Arthurson QC at para [4] and *Moneagle v Procurator Fiscal Elgin* [2017] SAC (Crim) 17
[14] [2017] SAC (Crim) 4, 1
[15] [2017] SAC (Crim) 4, per Sheriff Principal R A Dunlop QC at para [8]
[16] [2020] HCJAC 37, 2021 J.C 19

The next section of the article reviews the history and facts of *Ahmed*, explores the problem with s38. It then considers whether there are other alternative offences which could be used, and the difficulty in ascertaining where the threshold of criminality might lie.

III. History and facts of the case

In *Ahmed v H.M. Advocate,*[17] the High Court of Justiciary was called upon, among other issues to decide whether the appellant's conduct came within the ambit of the *actus reus* of s38(1). The appellant had originally faced 18 charges. Three concerned sexual assault described in the opinion of the court as being of 'a relatively minor nature' and one alleged minor non -sexual assault. The remaining charges were contraventions of s38 of the Criminal Justice and Licensing (Scotland) Act 2010, which were alleged to have taken place between May 2016 and January 2019. At the conclusion of the Crown case, the Sheriff upheld submissions of no case to answer on nine of the charges. The Crown then withdrew four more. The appellant gave evidence on his own behalf. The jury found him guilty of the remaining five charges. The appellant was sentenced to two years imprisonment and, because the Sheriff held that there was a significant sexual aspect to the conduct of which he had been convicted, he was made subject to the notification requirements of Part II of the Sexual Offences Act 2003 for a period of 10 years.

It is not possible to tell from the case report in what respects the evidence fell short in the 13 charges that were either dismissed or withdrawn. However, the shortcomings in the evidence led in court were not the only issues with the case. The trial had commenced on a Tuesday. The Crown evidence had concluded before lunchtime on Friday. The jury were sent away until the following Tuesday for reasons that were not explained in the Sheriff's minute. The appellant's

[17] [2020] HCJAC 37, 2021 J.C 19

evidence began on the Tuesday afternoon and was concluded in around an hour and a quarter. The sheriff then stated that he wished to ask some questions in clarification and adjourned the trial until the next morning. The sheriff's questioning lasted around 10 minutes. The defence case was closed, and the parties addressed the jury. The unexplained intervals between the conclusion of submissions and the jury hearing the defence evidence, the nature of the Sheriff's questioning and his refusal to hear an objection by defence counsel on this point were strongly criticised by the Appeal court.

The Appeal Court concluded, the Crown conceding that particular ground of appeal, that the Sheriff's prolonged questioning of the appellant amounted to cross examination, as a result of which an informed and impartial observer would have concluded that the sheriff had formed an adverse view of the credibility of the appellant's evidence and may have been influenced by that observation. The likelihood of this may have been compounded by the sheriff's refusal to hear counsel for the appellant's objection to the line of questioning and telling her to 'sit down' when she sought to insist. Accordingly, the appeal succeeded, and the convictions were quashed.

Even though the appeal succeeded due to the Sheriff's questioning of the appellant, the court then considered two further grounds of appeal and held that the Sheriff had erred in repelling submissions of no case to answer in respect of three of the charges that the appellant's behaviour was neither threatening nor abusive. This is explored in the next section of the article. The convictions on the two remaining charges were also quashed because even though the conduct could have been construed as abusive, the charges were held not to be capable of corroborating each other. [18]

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18 For comment on this ground of appeal see Peter Ferguson QC, 'Ahmed v H.M. Advocate Ahmed v HM Advocate [2020] HCJAC 37; 2020 S.C.C.R. 382; 2021 S.L.T. 442', 2021 SLT 48-40, Frank Crowe 'Criminal Court: The Limits of Moorov', 2020 JLSS 65(10) https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-10/criminal-court-the-limits-of-moorov/ accessed 16/8/2022

IV. The charges

It is worth examining the facts of the charges to see how the Appeal Court reached its decision that the sheriff had erred in repelling the submissions of no case to answer. In each charge, the accused who was in his thirties was alleged to have approached four considerably younger women who were strangers to him. Two of the complainers were young women aged 16 and 17.

In the first of the charges before the jury, the appellant had approached the woman aged 21 in the Buchanan Galleries shopping mall in Glasgow, attempted to engage her in conversation, made comments about her appearance, requested her phone number, tapped her on the shoulder and attempted to kiss her on the cheek. In the second, he had approached the complainer aged 17 in a secluded lane in Uddingston, made unsolicited comments of a personal nature to her, taken hold of her hand, and asked for her phone number. In the third, he had approached the complainer aged 16 in the same lane and repeatedly attempted to make conversation with her. He asked for her phone number and invited her to go with him for coffee. In the next charge, the appellant had approached the complainer aged 20 in Buchanan Street, Glasgow on various occasions over the course of a week, shouted at her, made unsolicited comments about her appearance, and thereafter contacted her on a social media platform, demand that she meet him, and sent offensive comments about her causing her to change her route home. Finally, he had approached the complainer aged 24 in Buchanan Street Glasgow, stood in front of her, repeatedly tried to make conversation with her and made comments about her appearance. He invited the woman to join him for some wine. It was accepted that one of the text messages he subsequently sent her could have been interpreted as being abusive in nature.

In evidence, the women stated that the appellant's approaches were unwelcome. They variously testified that they felt "overwhelmed or uncomfortable, shaken up,

intimidated or stressed" by the incidents.[19] One complainer stated that the behaviour was "very full on, very intense and quite intimidating,"[20] and she had to sidestep the appellant to get away from him. Another, when asked by the procurator fiscal if she had responded to his compliment about the dress she was wearing "No I didn't engage at all really. I was just trying to get away as quickly as possible because I just didn't have the time to be chatted up on the street."[21] This reply could be said to show that the complainer was not particularly concerned by the conduct. However, it could also be said to capture the resignation felt by those women and girls accosted and "chatted up" in public places whether they wish to be or not; namely that the behaviour is unwelcome but is not recognised in wider society as a problem and its impact is not taken seriously.[22]

Most of the information in the case report concerning the conduct complained of comes from the appellant's evidence in his own defence. He accepted that he had spoken to each of the complainers who were previously unknown to him. In one case, he admitted making a complimentary remark to the complainer as he passed her and spoke to her once more when he saw her again. He described the second encounter as flirtatious. He admitted that he had come across the youngest complainers on different days when he was going to Uddingston train station. He had told the young women his name. He claimed not to know that either of them was still attending school until he spoke to them, even though the report notes that both were in uniform at the time. He accepted that he had spoken to another woman at a set of traffic light in Glasgow City Centre. He complimented her on the way she looked and claimed that she had given him her

[19] *Ahmed v H.M. Advocate*, [2020] HCJAC 37, 2021 J.C 19
[20] *Ahmed v H.M. Advocate,* [2020] HCJAC 37, 2021 J.C 19
[21] *Ahmed v H.M. Advocat*e, [2020] HCJAC 37, 2021 J.C 19
[22] See House of Commons Women and Equalities Committee Sexual Harassment of Women and Girls in Public Places 2019 https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/2148/2148.pdf accessed 16/8/2022, Tackling Violence Against women and Girls Strategy https://www.gov.uk/government/publications/tackling-violence-against-women-and-girls-strategy/tackling-violence-against-women-and-girls-strategy accessed 16/8/22, Baroness Helena Kennedy QC, *Misogyny- A Human Rights Issue* Scottish Government 2022 https://www.gov.scot/publications/misogyny-human-rights-issue/pages/8/ accessed 16/8/2022

Instagram contact details. It is not clear whether that is indeed the case or whether the appellant had seen the woman's name on her phone case. He stated that he had spoken only briefly to a further woman but accepted that he had complimented her on her appearance.

V. What was the problem?

The appellant had previously held himself out to be a lifestyle coach going by the name of "Addy A- Game" who offered advice on how to pick up young women.[23] A BBC Scotland documentary featuring the appellant had been broadcast in 2019.[24] The practices adopted by the appellant appear to match the types of the conduct described, for example, in *Misogyny a Human Rights Issue.* The Crown had intended to lead evidence about the programme, presumably to place the appellant's behaviour in context, but the evidence was ruled inadmissible following a defence objection prior to the trial. Despite this, the Sheriff's intervention in questioning the appellant had, in the Appeal Court's view, placed the appellant in the awkward position of having to allude to the programme in a way that would have been likely to have led the jury to draw an unfavourable view of the conduct; conduct that the Appeal Court apparently viewed as unremarkable. However, in this writer's view, this is only the case if the words and actions are viewed in isolation, divorced from the circumstances of the complainers and from the impact of the behaviour on the complainers, or the reasonable observer in the shoes of the complainer.

[23] Frank Crowe 'Criminal Court: The Limits of Moorov', 2020 JLSS 65(10) https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-10/criminal-court-the-limits-of-moorov/ accessed 16/8/22

[24] BBC *Disclosure: The Seduction Game* broadcast on BBC Scotland and the BBC NewsChannel 7th-12th October 2019. See also Mona McAlinden, 'How a Social Media film exposed a pick up artist' 29th September 2019 https://www.bbc.co.uk/news/uk-scotland-49757930 accessed 16/8/2022

Counsel for the appellant addressed the Court, at its suggestion, on *Angus v Nisbet*[25] and *McConachie v Shanks*[26] as being similar on their facts to *Ahmed*. In both cases, convictions for breach the peace concerning approaches by adult males towards young or teenage children, had been quashed. In *Angus* the appellant had approached a 15-year-old girl given her a note of his mobile phone number and asked her to stay in touch. In *McConachie* a 65-year-old male had smiled and winked at a 12-year-old boy on a bus. He had put his contact details on a bus ticket and placed it on the complainer's gym bag. He motioned "phone me" to the boy after he got off the bus. He had originally faced trial for a contravention of s38 or alternatively breach of the peace. The s38 charge was withdrawn by the Crown at the conclusion of its case, presumably because the conduct in its context was not considered to be threatening or abusive. Counsel for the appellant argued that the behaviour in *Angus* and *McConachie* was worse, more serious, and potentially more disconcerting than Ahmed's and yet those convictions had been quashed. However, as the Advocate Depute noted, the test for the *actus reus* for breach of the peace is different from, and since the decision of the High Court of Justiciary in *Smith v Donnelly*[27], the conduct required is more serious than that envisaged by s38. The Appeal Court appears not to have been addressed on two similar fact cases concerning s38, for reasons that are not explained. [28] As decisions of the Sheriff Appeal Court, neither *Burnett* nor *Moneagle* were binding on the High Court of Justiciary. However, they could have given the High Court a benchmark against which to measure the appellant's conduct in *Ahmed* to show in what respects it did not cross the threshold of criminality.

[25] [2010] HCJAC 76, 2011 J.C 69
[26] [2018] SAC (Crim) 10,
[27] 2002 JC 65,
[28] *Burnett v Procurator Fiscal Hamilton* [2017] SAC (Crim) 4, *Moneagle v Procurator Fiscal Elgin* [2017] SAC (Crim) 17

The court in *Ahmed* held that in the circumstances of each charge, there was nothing in the conduct of the appellant that could be described as threatening. There was no evidence that the appellant's language either in what he said or how it was said was threatening. There was no overt or implied sexual undertone to his remarks. His comments about the complainers' appearance were complimentary. All the encounters took place in public and in daylight. "It does not seem to us that a polite conversational request or compliment can be construed as threatening merely because it is uninvited or unwelcome. There was nothing in the appellant's behaviour as spoken to…which was overtly threatening, or which could reasonably be construed as threatening. Apart from one text message nothing said by the accused could be described as abusive." [29] The Sheriff had not explained why in repelling the submission of no case to answer at the original trial they had reached the conclusion that the behaviour was threatening or abusive, and this may have been a contributory factor in the court reaching its decision.

VI. Discussion

The definition of 'threatening'

Threatening and abusive are not defined in s38(1). Subs(1) applies to "behaviour of any kind including, in particular, things said or otherwise communicated as well as things done, a single act or a course of conduct "[30] Dictionary definitions of 'threatening' include having a hostile or deliberately frightening quality or manner, indicating an intention to cause bodily harm, causing someone to feel vulnerable or at risk[31] and giving the impression that something unpleasant or violent may occur.[32] As noted above, whether the behaviour is threatening or abusive is a

[29] *Ahmed v H.M. Advocate* [2020] HCJAC 37, 2021 J.C 19

[30] Criminal Justice and Licensing (Scotland) Act 2010 sec 38(3)(a)
[31] https://www.lexico.com/definition/threatening accessed 16/6/2022
[32] https://dictionary.cambridge.org/dictionary/english/threatening accessed 16/8/2022

question of fact.[33] The test is conjunctive. The *actus reus* requires both that behaviour be either threatening or abusive and that it would be likely to cause a reasonable person to suffer fear and alarm. Therefore, if what was said or done was, viewed objectively, innocuous, even if a reasonable person would be likely to feel afraid, alarmed or in danger as a result of the conduct, then no offence has been committed. This is not necessarily controversial. There are and should be proper limits to the reach of the criminal law. S38 makes it an offence to behave in a threatening or abusive manner. The questions here are first, whether conduct of the type described in *Ahmed* could legitimately, in its context, be described as threatening or whether to do so is to stretch the normal everyday meaning of the word to breaking point. The second is, even if such behaviour could be brought within the ambit of section 38 by a less restrictive interpretation of threatening, does s38, as currently drafted, properly capture, and fairly label the types of behaviour described in the Working Group's report.

Similar fact s38 cases: Burnett v Procurator Fiscal Hamilton[34] **and** *Moneagle v Procurator Fiscal Elgin*[35]

In *Burnett* the appellant had twice approached a 14-year-old girl who was a stranger to him and engaged her in conversation. On one of the occasions, he had asked her to go with him to his home. He had also asked her where she lived. The accused appealed on the grounds that the Sheriff had erred in repelling a submission of no case to answer and having done so, in convicting the accused. At the trial and the appeal, the appellant's representatives had argued that the Sheriff should have followed *Angus v Nisbet*[36] discussed earlier in this article. However, the Sheriff distinguished *Angus* because it concerned breach of the peace which required conduct severe enough to threaten serious disturbance to the community. S38 makes no such requirement. Furthermore, the Sheriff had

[33] [2014] HCJAC 87, 2015 J.C 118 per Lord Justice General Gill at para [19]
[34] [2017] SAC (Crim) 49
[35] [2017] SAC (Crim) 17
[36] [2010] HCJAC 76, 2011 J.C 69

held that Burnett's conduct was more serious than that libelled in *Angus.* The Sheriff Appeal Court agreed. In the circumstances, it stated that the complainer was entitled to conclude that the appellant had a sexual interest in her. The Sheriff Appeal Court were of the view that the circumstances indicated "a scenario that was intrinsically threatening and which any reasonable person would find objectively alarming."[37] The appeal was refused.

There are clear similarities between *Burnett* and *Ahmed* but admittedly some differences. The question is whether these differences are significant. In neither case was the appellant's behaviour abusive. Neither appellant used threatening language as such. Admittedly in *Burnett* the court held that a clear inference could be drawn that the appellant was attempting to set up a situation where he could sexually molest the complainer. His response "I'm no like that", when challenged by the complainer's mother in the second incident, suggested that he knew that his conduct could have been construed in that way. In *Ahmed*, the complainers were all aged 16 or over. However, he did ask the 17-year-old for her phone number and invite her to go for a coffee with him. He asked the 16-year-old for her phone number. Both girls had felt strongly enough about the incidents to report them to their teachers when they arrived at school. In addition, he asked one of the other women to go with him to drink some wine. It is difficult to see how the complainers could have told at the time that the incidents, especially those in the secluded lane, would end well for them. How could they be sure that the appellant's intentions were innocent and would not escalate if they refused to engage with him? In all the circumstances, the young women in Uddingston would have been justified in feeling afraid, vulnerable or at risk. In that regard, it is difficult to distinguish between *Burnett* and *Ahmed*. It is difficult to tell why if Mr Burnett had crossed the line, Mr Ahmed had not. It is not clear why the court held that the complainer in the former case was faced with a scenario that was

[37] *Burnett v Procurator Fiscal Hamilton* [2017] SAC (Crim) 4, per Sheriff Principal R A Dunlop QC at para [8]

intrinsically threatening, while those in the latter merely encountered polite conversational requests or compliments, albeit unwelcome or uninvited.

The court in *Burnett* appears to have adopted a less restrictive interpretation of "threatening" than the court in *Ahmed* to include conduct or a situation that could cause a person to feel vulnerable or at risk. There was nothing in Burnett's exact words that were threatening in the sense of menacing or hostile, or having a deliberately frightening quality, other than that they were spoken to a child in a context which permitted the inference to be drawn that the accused may have had sinister sexual motives for his actions. As noted, two of the complainers in *Ahmed* were themselves schoolgirls, one of whom was invited to go with the appellant for coffee. Had proceedings commenced before they turned 18, they would have been deemed to have been child witnesses and automatically entitled to vulnerable witness special measures in court. However, because the court in *Ahmed* focused on the accused's manner and the nature of what was said rather than the impact on the complainers, the first condition of the s38 test was held not to have been met.

Moneagle also concerns the interpretation of s38(1). The appellant, aged 59, was the 25-year-old complainer's drumming tutor. They were in the same pipe band. The appellant had sent a series of text messages on the eve of the European Pipe Band Championships that had contained, among standard exchanges about travelling arrangements, some sexually inappropriate remarks. The exact nature of the remarks is not disclosed in the report itself but were made clear to the court in the stated case. The report refers to one sexual expression with which the complainer was not herself familiar, but she correctly inferred related to 'something inappropriate'. While the complainer stated that the exchanges were unwelcome but "stated that she did not want to get on the wrong side of the appellant who she described as a powerful person in the piping world, and she

did not want her prospects to suffer," [38] the appellant on the other hand,, considered the exchanges to be "good natured banter on both sides".[39] The court noted that the text exchange began in an innocuous manner until the appellant referred to "after I give you the medical" and later used the expression "munch". [40]

In refusing the appeal, the court held that the sheriff was entitled to infer that the text messages involved inappropriate sexual context and a derogatory and abusive comment about the complainer's sexuality. The appellant appears to have taken advantage of his standing in the local community and his position of authority to behave as he did. In this case the threshold appears to have been crossed because the court judged at least one of the expressions in the text messages to be abusive rather than threatening. Even without the use of that particular term, if someone receives unsolicited text messages of a sexual nature from a person in a position of authority over them, it is arguable that they would be justified in feeling vulnerable and at risk. In other words, the messages could be construed as being threatening in nature.

Interpretation of s38(1)

As the Court in *Ahmed* correctly noted, apart from one comment "ya racist" sent in a text message to one complainer when she declined an invitation from the appellant to meet him, nothing the accused said to the women could properly be described as abusive. The difficulty arose in *Ahmed* because it was disputed that the behaviour was threatening in the normal meaning of the term. S38(1) requires three conditions to be met; firstly, that viewed objectively, the behaviour is threatening or abusive, and secondly that that behaviour would be likely to cause a reasonable person to suffer fear and alarm. Lastly it must be shown that the

[38] *Moneagle v Procurator Fiscal Elgin,* [2017] SAC (Crim) 17 per Sheriff Principal M. M Stephen QC at para [8]
[39] *Moneagle v Procurator Fiscal Elgin,* [2017] SAC (Crim) 17 per Sheriff Principal M.M Stephen QC at para [8]
[40] *Moneagle v Procurator Fiscal Elgin,* [2017] SAC (Crim) 17, per Sheriff Principal M. M Stephen QC at para [9]

accused intended the behaviour to have that effect or was reckless as to whether it did. It does not matter that a victim felt at risk from, threatened or terrified by the accused's behaviour, or that a reasonable person would be likely to have had the same reaction if the behaviour is not, viewed objectively, threatening, or abusive in nature.

The court in *Ahmed* appears, quite properly given the terms of the judgment in *Paterson v Harvie*,[41] to have taken a literal approach to the interpretation of the *actus reus* of s38. It concluded that nothing said or done was, on the face of it, threatening or abusive. Certainly nothing said indicated that the complainers were at risk of physical violence. However as discussed above, the appellant's actions and demeanour in accosting the young women could have come within the ambit of behaviour that causes a person to feel vulnerable and at risk or give them the impression that something unpleasant might occur. In other words, the behaviour could legitimately have been construed as threatening in that limited sense of the word. The complainers might reasonably have felt threatened because of the incidents.

It is suggested here that the court in *Ahmed* took an overly narrow approach in its literal interpretation of s38. The bench as constituted will never know what is like to be in the position the female complainers found themselves in, alone and accosted by an unknown older man. Because the court decided the behaviour was not threatening, it did not have to consider whether it would cause a reasonable person to suffer fear or alarm, or whether that reasonable person is some hypothetical objective everyperson or a reasonable person in the shoes of the complainer facing the accused's uninvited and unwelcome attentions at that time and in that place. In the event that the court is required to decide on the point, it is hoped that it would consider the perception of the complainer, the

[41] [2014] HCJAC 87, 2015 J.C 118

facts, and circumstances of the case and whether it was reasonable for the conduct to have had the effect it did.

As previously discussed, the court in *Ahmed* did not consider *Burnett* which remains a binding authority on the Sheriff Appeal Court, the Sheriff and JP courts. *Ahmed* is also binding on all lower courts. Had it done so, the High Court might either have disapproved *Burnett* or recognised the similarities in the conduct in each case, and the broader interpretation of 'threatening'. Since *Ahmed* was decided, the explanation in the Jury Manual on the interpretation of threatening or abusive behaviour has been amended to note that: "For the offence to be committed a person must as a matter of fact behave in an abusive manner. A polite conversational request or compliment will not be construed as threatening merely because it is uninvited or unwelcome" [42]

This bald and not strictly accurate statement makes no reference 'threatening or' in s38(1), or to Lord Justice General- Gill's authoritative interpretation in *Paterson v Harvie,* or to the need to judge each case in light of its facts, circumstances, or context. It suggests though, that where the foundation of the prosecution case depends on the context in which the conduct complained of took place, the courts are being encouraged, if not directed, to hold there is no case to answer unless the conduct is expressly threatening or abusive. *Ahmed* and *Burnett* highlight the difficulty for police, prosecutors and ultimately the courts in determining the point at which conduct of the type complained of in *Ahmed* crosses the threshold of criminal conduct.

What is the impact of Ahmed?

The High Court of Justiciary applied the law as it was enacted by the Scottish Parliament and as directed in *Paterson v Harvie*[43]. *Ahmed* is binding on the lower courts, including the Sheriff Appeal Court. *Burnett* is also binding on the Sheriff

[42] Judicial Institute for Scotland Jury Manual p72.1/122 https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/judicial-institute-publications/jury_manual.pdf?sfvrsn=8c9918e4_6 accessed 16/8/2022

[43] [2014] HCJAC 87, 2015 J.C 118

Appeal Court. The Sheriff Appeal court must now attempt to reconcile the two decisions.

The decision in *Ahmed* highlights the difficulty now facing the police and the procurator fiscal in deciding where the line is crossed between unwelcome, possibly distressing, socially inept interactions and criminal behaviour. This is especially so in cases of the public harassment of women of the type encountered in *Ahmed*. Clearly Police Scotland had considered Ahmed's behaviour sufficiently serious to report it to COPFs who in turn took the decision to prosecute him on indictment. The jury were satisfied beyond reasonable doubt that the accused's actions crossed the threshold of threatening behaviour. While it is accepted that the courts must interpret and not make the law, the decision in *Ahmed* could be viewed at best as underplaying or trivialising the prevalence and impact of such behaviour on women and girls and at worst confirming suspicions that the criminal justice bodies "often do not recognise transgressive conduct for what it is. Nor do they understand the impact that it has on the lives of those at the receiving end."[44] A politely expressed conversational request might be unsolicited and unwelcome and the context might suggest to the complainer or a reasonable observer that there are legitimate grounds for concern. These could be the actions of a sexual predator who is taking care not to raise suspicions by the use derogatory language or threats of violence. If the so called 'chat- up merchant' remains courteous, it is, in the wake of *Ahmed,* immaterial that the complainers feel frightened or under threat, and a reasonable person in the same situation would be likely to suffer fear or alarm at the conduct. No contravention of s38(1) has occurred. This is so even if the accused intended their behaviour to cause fear and alarm or was motivated by misogyny. The decision makes it difficult for the police to decide when to launch an investigation. It is concerning if they are now

[44] Baroness Helena Kennedy QC, *Misogyny- A Human Rights Issue* (Scottish Government 2022) p 13 https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2022/03/misogyny-human-rights-issue/documents/misogyny-human-rights-issue/misogyny-human-rights-issue/govscot%3Adocument/misogyny-human-rights-issue.pdf?forceDownload=true/ accessed 16/8/22

constrained to wait until the behaviour escalates to something more obviously threatening or abusive or until the accused's behaviour is caught by the Sexual Offences (Scotland) Act 2009.

If not s 38 in Ahmed type cases, are other offences committed?

Let us assume for the purposes of this article that the police have received several reports concerning the same male person accosting younger women, all over the age of 16 but some still under 18, who are on their own, in places where there are no other people around. The person stands in front of the women making it difficult to move past him, speaks to them, complimenting them on their dress or appearance, makes no comments of a sexual nature, asks them to join him for coffee or drinks, asks for contact details, and is unfailingly polite and courteous to them. The women's responses range from feeling mildly uncomfortable but thinking there was something 'off' about the person's behaviour, worried about being on their own with him at the time, concerned that if they showed they were unwilling to engage that the conduct might escalate, being 'creeped out by the guy' to feeling that they were at risk of being abducted. The conduct is not as a matter of fact abusive. It also does not meet the narrow interpretation of threatening. The perpetrator may have the intention of causing fear and alarm to the women and may nor may not also be motivated by misogyny,[45] but, provided they choose their words carefully, speak politely, do not engage in physical contact, and approach a different woman on each occasion to avoid suggestions of stalking, it appears there is very little in the police and prosecutor's respective toolkits to deal with what could be potentially dangerous conduct.

[45] Given a working definition in Misogyny a Human rights issue as "a way of thinking that upholds the primary status of men and a sense of male entitlement, while subordinating women and limiting their power and freedom. Conduct based on this thinking can include a range of abusive and controlling behaviours including rape, sexual offences, harassment and bullying, and domestic abuse." Baroness Helena Kennedy QC Misogyny a Human Rights Issue Scottish Government 2022 p. 29 https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2022/03/misogyny-human-rights-issue/documents/misogyny-human-rights-issue/misogyny-human-rights-issue/govscot%3Adocument/misogyny-human-rights-issue.pdf?forceDownload=true/ accessed 16/8/2022

The court's observations when considering *McConachie v Shanks*[46] and *Angus v Nisbet*[47] correctly indicate that a prosecution for breach of the peace would also fail. Since *Smith v Donnelly*[48] the test for the *actus reus* of breach of the peace "is conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community…What is required, therefore, …, is conduct which does present as genuinely alarming and disturbing, in its context, to any reasonable person."[49] The court in *Ahmed* stated that it found the observations of Lord Brodie in *Angus*, and Lord Coulsfield in *Smith* of value. Lord Brodie stated in quashing the conviction "However, not everything said and done in public amounts to a breach of the peace, even if it might be said to be indecorous, inappropriate, or irritating in nature…"[50]

It is perhaps unfortunate that the sheriff in *Ahmed* did not explain to the satisfaction of the court "what it was about any aspect of the appellant's behaviour which he considered could be construed as threatening" [51] This is another potentially important difference between *Ahmed* and *Burnett* in which the Sheriff Appeal Court set out in detail the sheriff's reasons for his findings and agreed that the conclusions were well founded.[52] Had the sheriff done the same in *Ahmed*, and had the court been addressed on *Burnett* and *Moneagle,* it may not have felt constrained to take such a narrow approach to its interpretation of threatening. Even if the court had disapproved of the reasoning and conclusion in *Burnett* or distinguished that case from *Ahmed* because for example the complainer in *Burnett* was a younger child or because the conduct was more flagrant, it might have provided greater clarity on the standard of conduct required in cases such as this to cross the threshold of criminal conduct.

[46] [2018] SAC(Crim) 10
[47] [2010] HCJAC 76, 2011 J.C. 69
[48] 2002 JC 650
[49] *Smith v Donnelly* 2002 JC 65 per Lord Coulsfield at para [17]
[50] *Angus v Nisbet* [2010] HCJAC 76, 2011 J.C 69 per Lord Brodie at para [14]
[51] *Ahmed v H.M. Advocate* [2020] HCJAC 37, 2021 J.C 19
[52] *Burnett v Procurator Fiscal Hamilton* [2017] SAC (Crim) 4, paras 4 and 8

The statutory offence of communicating indecently etc., contained in s7 of the Sexual Offences (Scotland) Act 2009 would not apply in Ahmed type situations either. The offence is committed if a person deliberately and for the purpose of obtaining sexual gratification or humiliating another person, sends or directs a written or verbal sexual communication to that other person without the other person consenting to its being sent or directed and without any reasonable belief that the person consents. In the above scenario and in *Ahmed* there was no sexual aspect to the things said to the complainers. Even if the accused does derive sexual gratification from and/ or the victim is humiliated by the communication, if it is not sexual, no offence is committed. For the purposes of the Act, a communication is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual.[53]

VII. Conclusion

The court's literal interpretation of s38 and its assessment of the accused's behaviour overlooks the impact of such unwanted attentions on complainers, most of whom, though not all, will be young women and girls. The tone of the decision now seems very much out of step with the Scottish Government's stated policy on Violence against women and Girls[54], *#MeToo*, reports of the normalisation of sexual harassment in schools[55], the *Everyone's Invited* social media platform and the findings and recommendations of the Working Group into Misogyny and Criminal Justice in Scotland[56]. This is because the court did not

[53] Sexual Offences (Scotland) Act 2009 s60(2)(c)

[54] "Our vision is of a strong and flourishing Scotland where all individuals are equally safe and respected, and where women and girls live free from all forms of violence and abuse, as well as the attitudes that perpetuate it." https://www.gov.scot/policies/violence-against-women-and-girls/ accessed 16/8/22

[55] Ofs*ted, Review of Sexual Abuse in Schools, and Colleges June 2021* https://www.gov.uk/government/publications/review-of-sexual-abuse-in-schools-and-colleges/review-of-sexual-abuse-in-schools-and-colleges accessed 16/8/2022, Helen Sweeting and others' Sexual harassment in secondary school: Prevalence and ambiguities. A mixed methods study in Scottish schools' PLoS ONE 17(2): e0262248. February 2022

[56] Baroness Helena Kennedy QC, *Misogyny- A Human Rights Issue* (Scottish Government 2022) p.7 https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2022/03/misogyny-human-rights-issue/documents/misogyny-human-rights-issue/misogyny-human-rights-issue/govscot%3Adocument/misogyny-human-rights-issue.pdf?forceDownload=true

acknowledge the impact of the behaviour on the complainers or couch the reasons for their decision in pointing out the shortcomings of s38 in failing to capture behaviour of the type in *Ahmed*. Rather, by describing some of the appellant's comments as complimentary, the court could be construed as dismissing the concerns of the complainers as trivial.

The decision in *Ahmed* has had wider reaching consequences than have thus far been recognised. The omission of discussion of *Burnett* in *Ahmed* has left the lower courts with two authoritative decisions in which differing approaches to the interpretation of 'threatening' were taken. It appears from the terms of the updated Jury Manual, however, that the narrower approach taken by the High Court of Justiciary in *Ahmed* should prevail, leaving little room for context. Police and prosecutors now face an avoidably onerous task in deciding whether the threshold of threatening behaviour has been crossed or not. They may be unable to take proceedings in situations of genuine concern where the accused targets single women on one occasion only and intends to cause fear and alarm in circumstances where a reasonable person would also suffer fear or alarm. If a person's behaviour were later to escalate to abduction and sexual assault or worse, and for it to become known that the police had been unable to act because the earlier behaviour was not, as a matter of fact, threatening and such behaviour was not recognised as a crime in Scotland, it would be likely to attract considerable adverse public comment.

Instead of the courts revisiting the interpretation of s38 and in doing so possibly stretching the ordinary meaning of 'threatening' to breaking point, or the Scottish Parliament amending s38 so as to catch instances of *Ahmed* type behaviour, the preferable option is for the Scottish Parliament to consider the introduction of a

accessed 16/8/2022, Scottish Government *Working Group on Misogyny and Criminal justice Lived Experience Survey Analysis* https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2022/03/misogyny-human-rights-issue/documents/working-group-misogyny-criminal-justice/working-group-misogyny-criminal-justice/govscot%3Adocument/working-group-misogyny-criminal-justice.pdf accessed 16/8/2022

new offence that better reflects the experiences of women and girls in the public sphere. In the interests of fair labelling, the type of behaviour described in the Working Group's Report and cases such as *Ahmed* should be called out for what it is, harassment of women and girls. It is therefore encouraging that the Working Group has recommended the creation of a new offence of committing public misogynistic harassment. As Baroness Kennedy notes "It is clear to us on the evidence that there is an important role for the law in dealing more effectively with the lesser offending behaviour which is endemic- especially if it is sexualised in nature" [57] She also notes the requirement to balance the need to address this harmful behaviour while avoiding net- widening and overcriminalisation. The Scottish Government agrees in principle with the working Group's recommendations and has undertaken to develop draft legislation for consultation before a Bill is introduced in the Scottish Parliament.[58] Any new offence should be clear, easily understood by perpetrators and witnesses, and a proportionate response to a well identified mischief which is not addressed by the existing criminal law. Instances of behaviour that and are overtly threatening or abusive or have a significant sexual content will continue to be captured by s38 and s7 of the Sexual Offences (Scotland) Act 2009. Consultations and the scrutiny of effective legislation take time, however. In the meantime, the police and prosecution tool kits lack the necessary equipment to address much of what the First Minister Nicola Sturgeon described as "the stark reality of the misogyny faced by women in everyday life."[59]

[57] Baroness Helena Kennedy QC*, Misogyny- A Human Rights Issue p.14 (*Scottish Government 2022), https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2022/03/misogyny-human-rights-issue/documents/misogyny-human-rights-issue/misogyny-human-rights-issue/govscot%3Adocument/misogyny-human-rights-issue.pdf?forceDownload=true accessed 16/8/2022

[58] Scottish Government Justice Directorate Misogyny and Criminal Justice Working Group Recommendations- Scottish Government Response Published 21 April 2022 https://www.gov.scot/publications/misogyny-and-criminal-justice-working-group-recommendations-scottish-government-response/ accessed 16/8/2022

[59] Scottish Government, 'First Minister Welcomes Kennedy recommendations' 8 March 2022 https://www.gov.scot/news/first-minister-welcomes-kennedy-recommendations/ accessed 16/8/2022