APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 39
HCA/2017/612/XC

Lord Justice General
Lady Paton
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION

by

ROSS KENNETH WILKINSON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg QC, CM Mitchell; Faculty Services Ltd (for Bridge Litigation, Glasgow)
Respondent: P Kearney AD; the Crown Agent

27 June 2018

Introduction

[1] This case once more raises the issue of jury directions in rape cases in which the complainer has maintained that forcible intercourse has taken place and the accused states that the intercourse was consensual.

General

[2] On 15 August 2017, at the High Court in Dumbarton, the appellant was found guilty of an offence, which libelled that:

> "on 3 April 2016 at ... Cottage ... Balloch you ... did assault [CS] and did insert your finger into her vagina, force her head towards your erect penis, pull her onto her back, pull her legs apart, lie on top of her, punch the pillow next to her head, repeatedly demand that she insert your penis into her vagina, seize hold of her wrists and restrain her on a bed there, and penetrate her vagina with your penis and you did thus rape her: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009."

The appellant was sentenced to 5 years detention.

The evidence

[3] The complainer, who was aged 20 at the time of the trial, was a close platonic friend of the appellant. He was also aged 20. On Saturday 2 April 2016, they had gone, along with a group of others, to a nightclub in Glasgow. At about 3.00am they boarded a taxi. Although the complainer lived in Dumbarton, she was not dropped off there, but continued in the taxi to Balloch, where the appellant lived. She went with the appellant into an unoccupied bungalow in the grounds of his parents' house. The bungalow was cold. They got under the bedcovers, fully clothed.

[4] According to the complainer, as she lay on her side with her back to the appellant, he attempted to put his fingers into her vagina. She seized him by the wrist and pushed his hand away. He pushed harder and inserted his fingers. She told him that she did not want him to do this and that he should stop. He did stop momentarily, before grabbing the back of her head and pulling her towards his crotch area. She was resisting, but he was attempting to force her to perform oral sex. She again told him not to force her to do that.

The appellant pulled her hand so that she was lying on her back. He knelt in front of her and undid his trousers. He told her to put his penis into her vagina, but she told him more than once not to make her do this. He shouted his demand again. She placed his penis at the entrance to her vagina. He seized her by the wrists at either side of her head. He penetrated her and had sexual intercourse for a few minutes. During this she was crying.

[5] After he had ejaculated, the complainer took his mobile phone, phoned a taxi, grabbed her bag and ran out onto the main road. She got into a taxi. This was about 5.00am. When she got home, she contacted a friend, namely MB, and told him generally what had happened. At about 9.00am she spoke to her sister, NS. The appellant had telephoned her in NS's presence and apologised for what he had done. He had also sent her text messages in the same vein.

[6] The taxi driver who had picked the complainer up in the early hours of the morning described the complainer as upset. She had been crying. MB described her as quite distressed and crying, rather than talking, when she had phoned him at about 5.00am. NS described the complainer as shaky, strange and not herself.

[7] A text message from the appellant to the complainer, at about 1.00pm on Sunday 3 April, included the phrase "my actions were horrendous a don't know what was going thru my head". On 8 April another text read "I am so sorry for all I have caused ... my mind was elsewhere under the influence of drugs". The appellant had, however, texted his male friends, apparently boasting of having had sexual intercourse.

[8] There was forensic evidence disclosing the presence of the appellant's semen on the complainer's skirt, containing light blood staining.

[9] When charged, the appellant denied the offence. He gave evidence in which he admitted sexual intercourse, but maintained that everything had happened with consent.

This had involved cuddling and kissing. The complainer had performed oral sex on him and then lain on her back. He had got on top of her and they had had sexual intercourse for between 5 and 10 minutes, at the start of which she had assisted him in putting his penis into her vagina. His text messages were apologies for taking the relationship from one level to another.

The judge's charge

[10] The trial judge gave the jury standard directions on the general need for corroboration. He focused the issue as being whether there was a lack of consent by the complainer at the material time and an absence of reasonable belief by the appellant that the complainer was consenting. Having set that context, he continued:

> "... [T]his case stands or falls principally on the evidence of the complainer ... [T]o convict the accused you would have to regard her as a credible and reliable witness. If you did not believe her, or had a reasonable doubt about the truthfulness or accuracy of her evidence, then you could not convict the accused. But if you think that she was credible and reliable then there must be other supporting evidence, corroborative evidence that you find confirms her account of what happened. This brings me to the question of distress.
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> ... [T]here has been evidence from other people that [the complainer] was distressed shortly after the incident. That evidence ... comes from the taxi driver ... from [MB] and from [NS] ... [E]vidence of a complainer's distress is just a piece of circumstantial evidence. You can accept or reject it as you wish, but if you do accept it, it cannot corroborate her evidence about what happened during the incident. For example, it could not corroborate evidence of fingering and sexual intercourse but that's admitted here so there's no problem with that. But it can confirm that she had just suffered some distressing event and it could corroborate her evidence about her state of mind at the time of or soon after the incident. So it can corroborate her evidence that she did not consent to what happened ...
>
> The distress in itself can corroborate her lack of consent and his lack of any reasonable belief that she was consenting. That's one possible source of corroboration."

The trial judge continued by stating that there were two possible sources of corroboration; the first being distress and the second being the apologies contained in the text messages,

which might be regarded as admissions of having intercourse with the complainer without her consent.

Submissions

[11] The ground of appeal is in the following terms:

> "The ... judge erred in failing to direct the jury that distress can only be used to corroborate the *mens rea* of the accused where the jury is satisfied that the distress was being exhibited at the time of the offence, as only then can distress be used to inform a jury as to the *mens rea* of the accused at the time of the incident. Whilst the jury returned a verdict that this was a rape where the threat of force was used, it cannot be said that the jury would not have considered the distress displayed, along with other adminicles of evidence to negative the appellant's position that this was consensual sex or that he had a reasonable belief that it was a consensual [*sic*] ...".

[12] In submissions, the appellant recognised that *Graham* v *HM Advocate* 2017 SCCR 497 had said that section 1 of the Sexual Offences (Scotland) Act 2009, which expressly defined rape as requiring not only an absence of consent but also an absence of reasonable belief that the complainer consented, was not intended to add a new requirement which required to be proved by corroborated testimony, but simply to alter the mental element from the absence of an honest belief to the absence of a reasonable one. Nevertheless, it was submitted, under reference to *Winton* v *HM Advocate* 2017 SCCR 320 (at paras 7 and 8), that this construction failed to recognise the terms of the section itself.

[13] As with all rape charges, the issue of reasonable belief arose. The jury ought to have been directed that they had to be satisfied that, in order to find corroboration of a lack of reasonable belief, the complainer had to have been exhibiting distress at the time of the incident. Only then could distress, which was observed by another, provide corroboration to negate the appellant's reasonable belief at the time. Distress exhibited after the event was not capable of providing corroboration of a lack of belief at the time. Although the text

messages were an alternative, it could not be said that the jury would have taken that route in the absence of the required direction.

[14] The advocate depute maintained that the case was one in which the appellant had used force to overcome the complainer's will. The use of force was a circumstance from which *mens rea* could be inferred (*Graham* v *HM Advocate* (*supra*) at para 23). *De recenti* distress was independent evidence capable of corroborating the complainer's account that something had been done without her consent. Where her account was that she had been forcibly raped, distress was capable of corroborating the use of force (*Smith* v *Lees* 1997 JC 73 at 80). *Mens rea* could be inferred from the fact that force was used. This had not been changed by the replacement of the common law with the statutory definition.

[15] The complainer had testified that she had made it clear to the appellant that she did not want to have sex with him. The appellant's account was one of normal consensual sex. There was no room for holding that, although the complainer had not consented, the appellant had reasonably believed that she had. In such circumstances, it was sufficient that the judge directed the jury that the complainer's account of being forcibly raped was adequately corroborated by distress, observed by another person.

[16] Even if there had been a misdirection, that had not produced a miscarriage of justice. Standing the fact that the jury must have accepted the complainer's account, it was inevitable that the jury would have found corroboration in the text messages. There was no realistic prospect of the jury returning a different verdict had the direction sought been given.

Decision

[17] As in *Graham* v *HM Advocate* 2017 SCCR 497, the issue for the jury was whether, as

the complainer maintained, the appellant had had sexual intercourse with the complainer by force and thus without her consent. The complainer's account was that she had been crying at the time and repeatedly telling the appellant to stop. The appellant's account was that the intercourse had been entirely consensual and actively participated in by the complainer. In such circumstances it was sufficient that the trial judge, whilst properly defining rape, directed the jury that the complainer's account of being forcibly raped was adequately corroborated by either distress, observed by another person after the incident, or by an admission of the type here contained in the text messages. As was said in *Yates* v *HM Advocate* 1977 SLT (Notes) 42 (LJG (Emslie), delivering the Opinion of the Court at 43):

> "The search ... is simply to see whether there is evidence in general which supports the broad proposition of force, details of which have been given by the girl".

[18] Even in a case in which reasonable belief is properly before the jury, as was said in *Drummond* v *HM Advocate* 2015 SCCR 180 (LJC (Carloway) at para [16]), proof that the complainer was distressed shortly after the event could lead to the inference that that distress had been exhibited shortly beforehand (ie at the relevant time) and that this would have been clear to the appellant. It would thus have been evident that the complainer was not consenting to intercourse. In either event, the directions of the trial judge in this case were, if anything, favourable to the appellant. Even if they had amounted to a misdirection, the court would have held that no miscarriage of justice had occurred. The jury clearly accepted the evidence of the complainer as truthful, rejected that of the appellant, and there was clear corroboration deriving from the texts alone.

[19] This appeal must accordingly be refused.