



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 50
HCA/2020/28/XC

Lord Justice General
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION

by

LW

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Findlater; John Pryde & Co (for Brazenall & Orr, Dumfries)
Respondent: Gillespie AD; the Crown Agent

6 November 2020

Introduction

[1] On 31 October 2019, at the High Court in Glasgow, the appellant was found guilty of the rape of his step-daughter, namely RM, on various occasions between October 1988 and March 1992 when RM was aged between 16 and 19. At the material time, the appellant would have been aged between 28 and 31. He was also found guilty of incest under

section 2B of the Sexual Offences (Scotland) Act 1976. Only the rape conviction is challenged.

[2] The appeal raises a stark issue of whether a complainer's allegation that she was raped by an appellant, who had fathered her child, was corroborated by the very nature of the familial relationship and general domestic circumstances.

The Evidence and No Case to Answer Submission

[3] The complainer had died before the trial. She had given a statement to the police that, over the period in the charge, the appellant had repeatedly raped her. From an early age, she had been physically abused both by her mother and the appellant, who were married in 1978 when the complainer was five. She had always referred to the appellant as "dad". The sexual abuse had started when she was 13 (cf the libel of 14). It began by the appellant inserting his fingers, and latterly objects, into her vagina several times a week. When she was 16, he began to rape her. This all occurred in the family home.

[4] It was agreed by joint minute that the complainer had given birth to the appellant's son on in March 1992 when she was 19 years old. This had been established by DNA testing.

[5] The complainer's mother described the domestic setting. She confirmed that the complainer called the appellant "dad". She maintained that, as she could no longer have children, the complainer had offered her services as a surrogate, by artificially inseminating herself with the appellant's semen in return for financial support. When she had initially been asked about the complainer's allegations, the complainer's mother had made no reference to this arrangement. The jury clearly rejected it.

[6] The trial judge determined that there was a case to answer.

Submissions

Appellant

[7] The appellant submitted that there was insufficient evidence of rape. Although an act of sexual intercourse had been proved by virtue of the conception of the appellant's child, there was no corroboration of lack of consent. The evidence of the domestic circumstances did not confirm or support the complainer's account (*Fox v HM Advocate* 1998 JC 94 at 100 and 109). It was not enough for the evidence to be consistent with the complainer's account (*ibid* at 112, approving *Smith v Lees* 1997 JC 73 at 109). Although corroboration could be supplied by circumstantial evidence (*Spendiff v HM Advocate* 2005 1 JC 338). Sexual attraction between parent and child (Oedipus and Electra complexes) was not unknown. The use of general background circumstances could not assist in considering a specific allegation of sexual crime (*GW v HM Advocate* 2019 JC 109 approving *R v Cooper* [2009] 1 WLR 1786; cf *GWP v HM Advocate* 2005 SCCR 764 at para [18]). Proof that the intercourse amounted to incest did not corroborate lack of consent.

Respondent

[8] The advocate depute argued to the contrary. Evidence of the parental relationship was independent evidence which was capable of supporting the complainer's evidence that she did not consent. Corroboration of lack of consent could be found by drawing an inference from the nature of the parties' relationship (*Spendiff v HM Advocate (supra)*). The domestic circumstances were not merely consistent with the complainer's account, they confirmed or supported that account. A jury would be entitled to hold that a girl would not choose to have sex with a man whom she considered to be, and called, her father and who was living with her mother in the family home.

Decision

[9] The evidence of the complainer, in so far as demonstrating the occurrence of sexual intercourse, was corroborated by the joint minute of agreement that the appellant is the father of the complainer's child. The issue is whether the relationship of, in effect, father and child, between the appellant and the complainer, and their living in the same household as the complainer's mother, had the potential to provide corroboration of the complainer's lack of consent. The resolution of this issue depends upon whether these circumstances "support or confirm" the complainer's account of lack of consent (*Jamal v HM Advocate* 2019 JC 119, LJG (Carloway) delivering the opinion of the court, at para [20] and following *Fox v HM Advocate* 1998 JC 94, LJG (Rodger) at 100, see also LJC (Cullen) at 109). This inevitably depends on the particular facts and circumstances of the case.

[10] The fact that a rape complainer is the daughter or step-daughter of an accused can be an important element in a circumstantial proof (*RWP v HM Advocate* 2005 SCCR 764, LJG (Hamilton), delivering the opinion of the court, at para [18]). A significant difference in age, as is present here, may also play a part (*Wilson v HM Advocate* 2017 JC 135, LJG (Carloway), delivering the opinion of the court, at para [32]). These are factors which, depending on the other circumstances, may demonstrate the inherent unlikelihood of consent. However, the mere fact that a relationship was incestuous, or that there was a significant age gap, cannot of itself corroborate a complainer's account of a lack of consent. There must be more to it for the incest, even combined with the age gap, to be regarded as confirming or supporting the lack of consent.

[11] In analysing this, it is not the likelihood of the offender's behaviour which is under scrutiny but that of the complainer. The starting point is that incest is a cultural taboo (see

Scottish Law Commission Memorandum (No 44): *The Law of Incest in Scotland* (1980) para 1.1). Hume (*Commentaries* i. 446) describes the source of the law as not being societal policy or discipline but the “native feelings of the human constitution”. Alison (*Principles* 562) refers to “Nature herself” inspiring “an abhorrence of the act”. In more modern times, as described by the Finnish anthropologist Edvard Westermarck in 1891¹, the vast majority of humans feel an intense aversion to the idea of having sexual relations with close family members with whom they have grown up in a family setting, even if they are not related by blood². Empirical research has confirmed this to be the case.

[12] Where absence of consent is to be corroborated by circumstantial evidence, the question will be whether the circumstances are capable, in combination, of yielding an inference which supports or confirms the complainer’s testimony. When this arises as a question of sufficiency, the evidence relied upon by the Crown is to be taken at its highest. It is to be interpreted in the way most favourable to the Crown (*Mitchell v M Advocate* 2008 SCCR 469 LJG (Hamilton), delivering the opinion of the court, at para [106]).

[12] In the complainer’s situation, not only had she been in a close family relationship with the appellant, which was in effect one of parent and child, she had also been in that relationship since childhood. There was a significant age gap between the appellant and the complainer, albeit not one that would cause concern in relationships involving adults. The complainer’s mother was in a continuing relationship with the appellant. It is the combination of these circumstances, which permits an inference to be drawn, that provides

¹ The Westermarck Effect: from *The History of Human Marriage* [1891]

² Green, Stuart P., *How to Criminalize Incest* 11 May, 2017 (available at SSRN: <https://ssrn.com/abstract=2967280> or <http://dx.doi.org/10.2139/ssrn.2967280>) citing the 5th edition (1921) of Westermarck

confirmation or support for the complainer's account that sexual relations with her step-father took place without her consent.

[13] The jury must have accepted this analysis of the available corroboration. That being so, the appeal must be refused.