APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 5
HCA/2019/216/XC and HCA/2019/121/XC

Lord Justice General
Lord Justice Clerk
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTES OF APPEAL AGAINST CONVICTION

by

(FIRST) JAMES ADAM and (SECOND) BRIAN DAISLEY

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant (Adam): O'Rourke QC, Harvey; Paterson Bell (for Black & Markie, Dunfermline)
Appellant (Daisley): CM Mitchell QC, McElroy; Paterson Bell
Respondent: Borthwick AD; the Crown Agent

24 January 2020

Introduction

[1] These two appeals raise a question about the application of mutual corroboration in cases involving charges libelling the sexual abuse of children by adults, when there is a significant gap in time between the abuse of the different complainers. This involves a

consideration of whether there requires to be a special or compelling feature in such cases and whether a jury must be directed specifically in those terms.

Mr Adam

General

[2] On 28 March 2019, at the High Court in Edinburgh, Mr Adam was found guilty of seven charges involving the sexual abuse of three complainers. These can be divided into two blocks; with the earlier of these enveloping four charges. The first charge involved lewd, indecent and libidinous practices in the years 1975 to 1977 towards LC, who was then aged between 10 and 12. The second libelled similar practices in the years 1977 to 1981, when LC was aged between 12 and 16, contrary to section 5 of the Sexual Offences (Scotland) Act 1976. The third involved one occasion of lewd, indecent and libidinous practices in 1976 towards AH, who was then aged 12. The libel of this charge also involved the use of the same practices towards LC, contrary to section 4(1) of the Criminal Law Amendment Act 1922. The fourth charge was the rape of LC some time in 1980 or 1981, when she would have been aged 15.

[3] The later block of charges involved, first (charge 5), lewd, indecent and libidinous practices in the years 1988 to 1996 towards LD, [redacted] when she was aged between the ages of 4 and 13. Secondly (charge 7) it involved the same practices in the years 1996 to 2000, when LD was aged between 12 and 16, contrary to section 6 the Criminal Law (Consolidation) (Scotland) Act 1995. The final charge (8) was a libel of a single episode of indecent assault on LD, in 2001, by digital penetration.

[4] On 23 April 2019, the trial judge sentenced Mr Adam, who was then aged 81, to 8 years imprisonment.

Evidence

[5] LC had a difficult and deprived upbringing. She was extremely vulnerable. From the age of about 7 until she was 10 or 11, she was in residential care, but returned home at weekends. From 11 until 13, she lived at home, but was seldom at school. From 13, she was again in residential care, but returning home at weekends. She eventually moved to a hostel, where she stayed from 15 until she was 18.

[6] LC was in the habit of visiting a neighbour of her mother. It was during these visits that she met Mr Adam. He lived nearby. He would take LC to Glasgow, where he would invite her to watch prostitutes soliciting for work. He would ask LC whether she wanted to do this work. She was only aged between 10 and 13. On the return car journeys, Mr Adam would stop in laybys and induce LC to masturbate him and to perform oral sex on him. This continued on a regular basis from when she was about 10 until she was about 15. During these episodes, Mr Adam displayed a particular interest in LC's vagina, notably the amount of her pubic hair. Mr Adam would give LC cigarettes and money, along with other inducements during this time.

[7] On one of the occasions, when Mr Adam had taken LC to Glasgow, they were accompanied by a childhood friend of the complainer's, namely AH. They had all watched the prostitutes. On the way home Mr Adam had induced LC to masturbate him. AH had been present and had seen this happening. She gave evidence that Mr Adam had asked her if she wanted to do this, but she had declined. Both LC and AH were able to describe the same unusual feature of Mr Adam's penis.

[8] When LC was about 15 (1980-81), and beginning to understand that what had been happening to her was wrong, Mr Adam had taken her to his home and had raped her in his

bedroom. Many years later in 2008, LC had met LD (see *infra*). She had learned that LD had also been abused by Mr Adam. In 2016, during a period of bereavement counselling, LC had received help from an organisation which supported the survivors of sexual abuse. It was at this stage that she reported matters to the police and told both LD and AH that she had done this. They too then reported what had happened to them.

[9] LD [redacted] had first met him after her mother had separated from an abusive husband in 1988. LD described a grooming process, consisting of tickling and touching initially, before progressing to more invasive conduct by the time she was aged 8 or 9. By the time she was 12, Mr Adam was constantly touching her inappropriately upon every opportunity; particularly when she was in the bath. He took a particular interest in her vagina, notably her pubic hair. From when LD was about 12, Mr Adam would digitally penetrate the complainer's vagina. From the age of 14 or 15, Mr Adam would offer to buy her items, such as new clothes, in return for sexual activities of one sort or another. LD described being sexually abused by Mr Adam on many occasions in his car. In 2005, when LD became engaged, she told her mother of the abuse which she had suffered. Although the matter was reported to the police, it was said that there was insufficient evidence to take matters forward. This changed in 2017, following contact with LC.

Sufficiency

[10] The trial judge reports that the underlying pattern and character of the abuse which was perpetrated against the two main complainers, namely LC and LD, was very similar. In each case, it included: touching their private parts; penile or digital penetration of their vaginas; making indecent remarks to them; and Mr Adam exposing or touching his penis in

their presence. Of greater importance was the surrounding context of the abuse. Each of the complainers was a young and vulnerable girl with whom Mr Adam had come into contact. Mr Adam had seized his opportunities to develop an abusive relationship with both complainers. Both complainers were vulnerable, in that neither of them had a father figure in their lives. Although the abuse was separated by a period of some years, that did not detract from the underlying similarity of Mr Adam's conduct. He had embarked on a process of grooming; giving the complainers treats and rewards in order to gain their trust and abusing them with increasing intensity and gravity. This occurred both in domestic settings and in his car. The judge took the view that there was sufficient evidence from which a systematic course of criminality could be discerned. A pertinent aspect was the particular interest of Mr Adam in the private parts of the two main complainers.

Charge to the jury

[11] The trial judge gave the jury the standard direction on mutual corroboration, as follows:

> "... if you are satisfied that the crimes are so closely linked by their character, the circumstances of their commission and time so as to bind them together as parts of a single course of criminal conduct systematically pursued by the accused, then the evidence of one witness about the commission of one crime is sufficiently corroborated by the evidence of one witness about the commission of another crime or crimes."

[12] The trial judge directed the jury that they had to apply mutual corroboration "with caution". It was not sufficient if all that had been shown was that the accused had a general disposition to commit the kind of offences under consideration. The jury had to be satisfied that the appellant had pursued a systematic course of criminality over a period of time during which the offences were linked together by their character, the circumstances of their

commission and time. The judge reminded the jury that the advocate depute had identified a number of features which she said had demonstrated the requisite link, notably that: the complainers were all young girls; the sexual abuse was prefaced by grooming behaviour; there were gifts and inducements; the abuse occurred in domestic residences and in cars in the same part of the country; and the complainers all described penetrative vaginal abuse, either by fingers or penis. The advocate depute had identified an unusual circumstance, notably what she described as "a perverted preoccupation" with the vaginas of the girls and with their pubic hair.

[13] The trial judge dealt with the defence position in relation to the testimony of each complainer. He referred generally to the defence speech and its references to "the passage of time and to the substantial delays in reporting". He focused upon the defence's contentions about the opportunities which the complainers had had to report the abuse and the risks which the appellant would have been running if the abuse was as frequent as had been claimed.

Mr Daisley

General

[14] On 29 January 2019, at the High Court in Glasgow, Mr Daisley was convicted of three charges involving the sexual abuse of persons. [redacted] over a period of some 14 years. The first charge libelled lewd, indecent and libidinous practices and behaviour towards AM between September 2003 and January 2004, when AM was aged 5, at an address in Gourock. The behaviour included digitally penetrating the boy's anus, placing the boy's private parts in his mouth and biting him on the groin. The second libelled various occasions between October 2012 and February 2016, at addresses in

Wemyss Bay and Greenock. They involved sexually assaulting a girl, HC, who was aged between 9 and 13, contrary to section 20 of the Sexual Offences (Scotland) Act 2009. The acts involved kissing her, licking her vagina and inducing her to masturbate him. The third libelled various occasions between February 2016 and May 2017, at addresses in Gourock, again involving HC, then aged between 13 and 14, and included both sexual assault and rape, contrary to section 1 of the Sexual Offences (Scotland) Act 2009.

[15] On 5 March 2019, the trial judge imposed an extended sentence of 10 years, with a custodial element of 8 years.

Evidence

[16] The complainer in the first charge, namely AM, was aged 5 at the material time. He was the son of JM, with whom the Mr Daisley had begun a relationship in about 2002. They lived at an address in Gourock, until their separation in January 2004. JM gave evidence that, in the months prior to the separation, she had been working long hours. She required considerable assistance in relation to AM's care. Although Mr Daisley was also working, he had responsibility for looking after AM on the odd occasion. In January 2004, when JM had returned from work, the appellant had told her that he had been lying on a bed beside AM. He had dozed off and woken to find AM naked, with his genitals over Mr Daisley's mouth. He told her that he had "got a fright" and had proceeded to bite AM's testicles. Not surprisingly, JM was both dumbfounded and bewildered. She decided to speak to AM and to examine his testicles. To her horror, she found two bites marks on them. A separation immediately followed.

[17] AM gave evidence of his mother forming a relationship with Mr Daisley. Mr Daisley had a habit of wearing only a dressing gown and leaving this open. AM was encouraged to

play with him; a fact which, in retrospect, he thought was a deliberate ploy. Mr Daisley had asked him if he had ever wondered what the inside of his bottom looked like. This had resulted in Mr Daisley feeling him in that area. AM had some recollection of being bitten on the groin. This had been on a different occasion. It had also involved Mr Daisley touching his anus. He did not recall Mr Daisley actually biting him, but did recall Mr Daisley's head being in the area of his groin.

[18] Charges 2 and 3 involved HC, when she was between the ages of 9 and 14. HC was the daughter of AC, with whom Mr Daisley had formed a relationship in about 2008, when she had been aged about 5. Mr Daisley had been absent from work for lengthy periods and took over the childcare responsibilities while AC was at work. In May 2017, HC told her mother that she did not want to go to school. On enquiry, she told her that Mr Daisley had been abusing her for some time and that they had "slept together". A joint investigative interview followed and this became the evidence in chief. It involved a harrowing tale of escalating abuse starting in the house with Mr Daisley kissing her, and progressing, first, to touching her genitals, breasts and other parts of her body every week or so. Mr Daisley would lick HC's vagina and induce her to masturbate him. The behaviour then extended to having sexual intercourse with HC when she was 12. This started in the family home, but continued to occur after the parties had separated in 2016 and HC had gone to Mr Daisley's house for certain reasons.

Sufficiency

[19] The trial judge reports that there was sufficient evidence on charge 1 without the necessity of applying mutual corroboration. The same did not apply to charges 2 and 3; proof of which depended on mutual corroboration from the evidence on charge 1. The

judge reasoned that there were a number of similarities between the behaviour in respect of each complainer. These were that: (1) each course of conduct involved sexual abuse of pre-pubescent children; (2) each was carried out for Mr Daisley's sexual gratification; (3) each child was susceptible to abuse because of the family context; (4) Mr Daisley stood *in loco parentis*; (5) each complainer [redacted]; (6) each was not his blood relation; (7) each course of abuse occurred, or at least began, in the family home; (8) each course of abuse occurred, or at least began, when the mother of the complainer was out at work; (9) each incident involved the child being naked or partially clothed; (10) each course of abuse involved penetrative sexual activity, either digital or penile; (11) each course of conduct involved kissing the genitalia of the complainers; (12) each involved Mr Daisley having formed a relationship with the complainer's mother. The jury could infer that Mr Daisley had exploited an apparently innocent means of having access to children in order to satisfy his predilection. This could be a compelling factor in concluding that, notwithstanding the passage of time, this was a course of conduct; and (13) the jury would have been entitled to infer that the serious abuse of each child was proceeded by a period of preparation or grooming.

Submissions

Mr Adam

[20] The appeal concerned only the sufficiency of evidence on charges involving LD (charges 5, 7 and 8). The first question was whether a gap in time of at least six and a half years required compelling similarities before mutual corroboration could apply. If it did, the next question was whether these similarities existed. The authorities supported four broad propositions. First, although there was no maximum interval of time beyond which

the principle of mutual corroboration cannot apply (*Stewart* v *HM Advocate* 2007 JC 198 at para 23, applying *Dodds* v *HM Advocate* 2003 JC 8 at 11), it was generally recognised that four years was a substantial gap (*Dodds* v *HM Advocate* (*supra*) at para [41]). Where there was a long interval, there had to be compelling similarities before the principle could apply (*KH* v *HM Advocate* 2015 SCCR 242 at paras 28, 30 and 31; *JL* v *HM Advocate* 2016 SCCR 365 at paras 30 and 31; and *Stewart HM Advocate* (*supra*) at paras 23 and 24). A special feature of the behaviour, which made the similarities compelling, was required (*CS* v *HM Advocate* 2018 SCCR 329 at para [11]). Thirdly, periods of between four and eight years have been regarded as long enough to require compelling similarities (*Stewart* v *HM Advocate* (*supra*); *JL* v *HM Advocate* (*supra*); and *KH* v *HM Advocate* (*supra*)). Fourthly, where there was a long time gap, further guidance to the jury was necessary, notably a clear mention of the need for some special or compelling feature of the conduct (*CS* v *HM Advocate* (*supra*) at para [11], see *RMY* v *HM Advocate* 2018 SCCR 253, commentary at 259; *RF* v *HM Advocate* 2016 JC 189 at para [24]). It was accepted that the jury had not been addressed on the basis that such a feature had been required, but that was because the trial judge had already ruled upon sufficiency and it had been anticipated that any such address would simply have been the subject of correction.

[21] The time gap of six and a half years could not be explained, for example, by a prison sentence or a generational gap (see *RBA* v *HM Advocate* [2009] HCJAC 56 at paras [36] and Appendix at para [43] citing *CW* v *HM Advocate* 2016 SCCR 285 at para [53]; *HM Advocate* v *ER* 2016 SCCR 490 at para [13]). Mr Adam had been of previous good character. LC and AH were not family members. The search was for conventional similarities in time, place and circumstances (*MR* v *HM Advocate* 2013 JC 212 at para [20]). At some point, if the time factor was great, there was a need for compelling factors, beyond the regular, in order to

draw the necessary inference of unity of conduct (*CS* v *HM Advocate* (*supra*) at paras [8]-[9] and [11]; *RB* v *HM Advocate* 2017 SCCR 278 at para [22]). The judge ought to have given the jury a specific direction on the need for a special or compelling feature of the conduct.

Mr Daisley

[22] The ground of appeal was that the trial judge erred in failing to sustain the submission of no case to answer in relation to charges 2 and 3. It was accepted that, where there were both similarities and dissimilarities, the matter ought often to be left to the jury (*Donegan* v *HM Advocate* 2019 SCCR 106 at para [39]-[40]; *RB* v *HM Advocate* (*supra*) at para [18]) citing *Reynolds* v *HM Advocate* 1995 JC 142). Under reference to *Moorov* v *HM Advocate* 1930 JC 68 at 73; *MR* v *HM Advocate* (*supra*) at 218, and *Dodds* v *HM Advocate* (*supra*), it was contended that mutual corroboration could not apply between charge 1, on the one hand, and charges 2 and 3 on the other. Compelling similarities were required (*JL* v *HM Advocate* 2016 SCCRC 365 at para [31], citing *Stewart* v *HM Advocate* (*supra*) at para [23]). A propensity to commit the type of crime libelled did not permit an inference of a course of conduct systematically pursued (*RB* v *HM Advocate* (*supra*) at para [18]). This was a procedural safeguard. Where there was a substantial gap in time, this was, in the absence of some extraordinary feature, destructive of the notion of such course of conduct (*ibid* at para [31] citing *RF* v *HM Advocate* (*supra*), *KH* v *HM Advocate* (*supra*), *Reilly* v *HM Advocate* 2017 SCCR 142 at paras [38]-[39]).

[23] The differences between the charges were stark. In charge 1 the complainer was male, aged 5. There was no kissing or masturbation. In relations to charges 2 and 3, the complainer was a female aged 9. There was evidence of kissing, masturbation and, most importantly, of vaginal penetration. Charge 1 was separated from charges 2 and 3 by a

period of 8 years and 9 months. There was no evidence of the necessary underlying unity. Mr Daisley would have been in a position to have sexually abused HC from 2008, but no complaint had been made that abuse had occurred until four years later. Mr Daisley had access to other children, including as a result of his involvement with the cub scouts, but no complaint had been made in that regard. All that could be drawn from the evidence was a propensity to engage in sexual activity with young children (see *Pringle* v *Service* 2011 JC 190 and *RF* v *HM Advocate* (*supra*)at para [24]). The issue of access to other children, about whom no complaint of sexual assault had been made, had not been addressed by the trial judge, notwithstanding the fact that it had been raised in submissions. The lack of similarities in relation to the behaviour, the limited number of charges and the opportunity to have engaged with other children sexually, meant that the Crown case at its highest was not sufficient to allow the trial judge to find the necessary underlying unity.

The respondent

Mr Adam

[24] The advocate depute contended that, although there was a time gap of some six and a half years, that period was well within the accepted parameters for the operation of mutual corroboration. There was no fixed period of time lapse beyond which it was necessary to identify special features (*Reilly* v *HM Advocate* (*supra*) at para [40]). In any event, there were special and compelling features. These demonstrated that the separate instances of criminal conduct, which were spoken to by each of the complainers, were bound together as component parts of a single course of criminal conduct persistently pursued by Mr Adam. The case did not fall into the category of those involving a long time gap, such as required a specific direction on special or compelling features. *CS* v *HM*

Advocate (*supra*) was distinguishable as the time gap there was 11 years. The gap in this case was similar to that in *JL* v *HM Advocate* (*supra*), namely six years and six months. In *JL* it had been held that there was no requirement on the trial judge to identify specific elements in the evidence which might make the case sufficiently compelling. In *JL* the judge had directed the jury that the principle required to be applied with caution and that a general disposition was not sufficient. That is what the judge had done in this case. He had directed the jury on the need for caution; that it was not enough simply that the accused had a general disposition to commit the type of offence under consideration and that there were unusual and compelling elements within the evidence. The judge drew attention to passage of time as a material factor for the jury's consideration. For the reasons reported by the trial judge, there were sufficient similarities between the two principal complainers. The case did not fall into the category in which it could be said that on no possible view of the evidence were the jury entitled to return a conviction (*Reynolds* v *Stewart* v *HM Advocate* (*supra*) at 146). No miscarriage of justice had occurred.

Mr Daisley

[25] The advocate depute contended that, notwithstanding the 8 year time lapse between charge 1 and charges 2 and 3, the nature of the offences permitted the application of mutual corroboration. Time had an elasticity. There was a particular course of criminal conduct involving the grooming and abuse of young children of the women with whom Mr Daisley had been in a relationship. Mr Daisley had formed a relationship with the second complainer's mother some four years after his relationship with the first complainer's mother had broken down. The grooming element was significant. All of this could take some time. The trial judge had identified the similarities in the conduct. The principle to be

applied had been set out in *HM Advocate* v *SM (No. 2)* 2019 SCCR 262 (at para [6]). The correct approach, when incidents were separated by a period of years, was to look at the character and circumstances as a whole and not in a compartmentalised way. Where there were similarities and dissimilarities, the issue should be left to the jury unless on no view could the inference of an underlying course of conduct be reached (*Donegan* v *HM Advocate* (*supra*) at para [39], following *Reynolds* v *HM Advocate* (*supra*) at 146). The more striking the similarities the greater the latitude in time may be (*Dodds* v *HM Advocate* (*supra*), citing *Tudhope* v *Hazelton* 1984 SCCR 455 at 460). There was no maximum (*AK* v *HM Advocate* (*supra*) at para [14]). The conduct had to be viewed as a whole (*HMcA* v *HM Advocate* 2015 JC 27 at para [11]) notwithstanding a generational interval (*AS* v *HM Advocate* 2015 SCCR 62 at para [12]; *JW* v *HM Advocate* [2018] HCJAC 10 at para [21], citing *DS* v *HM Advocate* 2017 SCCR 129; *RF* v *HM Advocate* (*supra*) at para [18]; *Reilly* v *HM Advocate* (*supra*); *RB* v *HM Advocate* (*supra*) at para [33]; *RMY* v *HM Advocate* 2018 SCCR 253; *JM* v *HM Advocate* 2018 SCCR 149; *HM Advocate* v *SM (No. 2)* (*supra*) at para [3]). The children, who had not been involved in any allegations of abuse, were not in a familial relationship. There was a compelling picture of a course of conduct systematically pursued. The appellants had tried to elevate the need for compelling features into a legal test, thus requiring the jury to be directed on that test. This was not legitimate. In any event the abuse of children was always a special feature (*Moorov* v *HM Advocate* (*supra*) at 89).

Decision

[26] Two areas of the law of evidence require to be distinguished *in limine*. The first is the situation in which the similarities between the commission of two different crimes can yield an inference that they were committed by the same person. In such a situation, proof that an

accused committed one of the crimes will be sufficient to prove that he committed both. This situation involves the application of the general principles of circumstantial evidence (eg *Howden* v *HM Advocate* 1994 SCCR 19). It is an example of what is often called, in common law jurisdictions, similar fact evidence. Such evidence is not otherwise generally admissible in this jurisdiction if all that it does is prove a general propensity on the part of an accused to commit a specific type of crime. The reason for the principle is one of public policy. It is thought to be unwise to allow such evidence to be put before a factfinder, especially a jury, lest it unduly influence their decision-making. The prohibition on revealing previous convictions is an example of this. This area of the law is not directly concerned with the requirement for corroboration.

[27] The second area of the law of evidence is concerned with corroboration; that "No-one shall in any case be convicted on the testimony of a single witness" (*Morton* v *HM Advocate* 1938 JC 50, LJC (Aitchison) delivering the opinion of the Full Bench, at 52, and citing Hume: *Commentaries* ii, 383). In this area, a subsidiary principle may be applicable. This is that of mutual corroboration. It was not created by *Moorov* v *HM Advocate* 1930 JC 68, but the judges (again a Full Bench), who were exercising what was at that time a relatively new appellate jurisdiction in solemn cases, did set out its parameters, albeit using slightly different phraseology (see eg LJG (Clyde) at 73, LJC (Alness) at 80).

[28] The settled law on the subsidiary principle is that the testimony of one witness about one crime may be corroborated by a second witness' testimony about another crime where there are similarities in time, place and circumstances in the crimes "such as demonstrate that the individual incidents are component parts of one course of conduct persistently pursued by the accused" (*MR* v *HM Advocate* 2013 JC 212, LJC (Carloway), delivering the opinion of the Full Bench, at para [20] and citing *Ogg* v *HM Advocate* 1938 JC 152, LJC

(Aitchison) at 157 describing the *ratio* of *Moorov*). Expressions of how the law might be changed (eg *RBA* v *HM Advocate* [2019] HCJAC 56, Lord Glennie at para [46]) cannot detract from what the law actually is, as vouched by several Full Bench decisions and the Institutional Writers. As it was aptly put in *KH* v *HM Advocate* 2015 SCCR 242 (Lord Brodie, delivering the opinion of the court, at para [24]), mutual corroboration is not about whether the evidence of a witness should be accepted (although it may assist in that exercise), it assumes that the evidence is accepted. It is about the existence of a sufficiency in terms of the requirement for corroboration.

[29] The general question is then whether the evidence in the two cases under appeal disclosed the conventional similarities in time, place and circumstances, such as demonstrated that the individual incidents were component parts of one course of criminal conduct persistently pursued by the accused. Whether those similarities exist will be a question of fact and degree (*HM Advocate* v *SM (No. 2)* 2019 SCCR 262, LJG (Carloway), delivering the opinion of the court, at para [6] following *MR* v *HM Advocate* (*supra*), LJC (Carloway), delivering the opinion of the court, at para [20]). It is only where "on no possible view" could it be said that the individual incidents were component parts of the one course of conduct persistently pursued by the accused that a no case to answer submission should be upheld (*ibid; Donegan* v *HM Advocate* 2009 SCCR 106, LJC (Lady Dorrian) at para [39], following *Reynolds* v *HM Advocate* 1995 JC 142).

[30] It is correct to say that, where a limited number of charges are separated by a long interval of time, there is a risk that evidence, which points only to a general disposition (ie propensity) to commit a particular type of offence, will wrongly be allowed to be used as corroboration (*RB* v *HM Advocate* [2017] JC 278, LJC (Lady Dorrian) at para [22]). As already noted, such similar fact evidence is ultimately inadmissible as a means of proving a criminal

charge. To be admissible, and used as proof, it must comply with the test for the application of mutual corroboration.

[31] In relation to time, it is undoubtedly correct to say that, although it is accepted that there is no maximum period beyond which mutual corroboration cannot apply, there are *dicta* which suggest that, where there is a substantial gap between two crimes, there must be compelling or extraordinary circumstances in play to allow that application. In *AK* v *HM Advocate* 2012 JC 74, which was concerned with sexual offences against the appellant's 13 year old nephews almost 14 years apart, the Lord Justice Clerk (Gill) referred (at paras [14], [15] and [18]) to the need for a special extraordinary or exceptional feature. He cited *Stewart* v *HM Advocate* 2007 JC 198 in which, whilst confirming the absence of a maximum period, he referred (at para [23]) to the need for other compelling similarities in long interval cases. *Stewart* concerned sexual assaults by a police officer in the course of his duties, involving: a 19 year old whom he had lured into the back of his police van in 1998-99; a 15 year old to whom he had spoken in her bedroom in 1999; and a 23 year old to whom he had also spoken to alone in 2003. Mutual corroboration applied. The Lord Justice Clerk followed what he had said in *Dodds* v *HM Advocate* 2003 JC 8, in which he used the phrase "particularly unusual similarity", referring back to Lord Sands' illustration in *Moorov* v *HM Advocate* (*supra* at 88) of a person obtaining services by pretending that he was George Bernard Shaw (and, curiously, absconding with the family Bible). *Dodds* involved four rapes, involving: a 14 year old in the street in 1969-70; a 28 year old with cerebral palsy in her own home in 1972-73; a mid-20 year old deaf mute, having climbed through a window, in 1977; and a 16 year old in violent circumstances in 1978. In what might now be regarded as a surprising decision, the court determined that mutual corroboration could not apply

having regard, amongst other things, to the time intervals (see Lord Osborne's detailed analysis of the circumstances at para [37] *et seq*).

[32] The Lord Justice Clerk (Gill)'s *dicta* in *Dodds* v *HM Advocate (supra)* was recently followed in *CS* v *HM Advocate* [2018] HCJAC 54 (Lady Paton, delivering the opinion of the court, at para [8]) in which *KH* v *HM Advocate* (*supra* Lord Brodie, delivering the opinion of the court, at para [28]) was also cited. *CS* was about *inter alia* whether assaults and rapes on one complainer in 2014 could be corroborated by assaults and rapes on two other complainers in the years 1993 to 2003. The appeal was allowed. *KH* had concerned the rapes of a 15 year old cohabitee in 2004 and a 22 year old, with whom the appellant was having a sexual relationship, in 2012. In the absence of a special feature, mutual corroboration could not apply since no course of conduct could be identified. A similar result was reached in *JM* v *HM Advocate* 2018 SCCR 149, which involved lewd practices against a 9 year old in 1997 and a 6 year old in 2014-15 (see LJC (Lady Dorrian), delivering the opinion of the court, at para [4]).

[33] The outcomes of the various recent cases illustrate that, although it will very often be necessary for the trial judge to leave the matter of whether the evidence is such as is capable of proving the existence of a course of conduct persistently pursued by the accused (*Donegan* v *HM Advocate* 2019 SCCR 106, LJC (Lady Dorrian), delivering the opinion of the court, at paras [39] and [40] and *RF* v *HM Advocate* 2016 JC 189, Lady Smith, delivering the opinion of the court, at para [23], citing *Reynolds* v *HM Advocate* 1995 JC 142, LJG (Hope), delivering the opinion of the court, at 146), the court at the appellate level will apply its own judgment on whether the evidence was sufficient for that purpose or whether it falls on the wrong side of the "open ground" referred to by Lord Sands in *Moorov* v *HM Advocate* (*supra* at 88) and

cited in *Reynolds* (at 146). In exercising this judgment, the court will take into account the nature of the course of conduct which is alleged.

[34] It is of considerable assistance to return to *Moorov* v *HM Advocate* (*supra*), not just to observe what was decided in relation first to the convictions on the physical assault charges which involved the employees in the appellant's drapers shop. These were quashed. It also helps, in comparison, secondly, to consider the findings of indecent assault which occurred over the same time period. These were sustained. For present purposes, it is the *obiter dicta* in *Moorov* concerning child abuse that deserves special mention in the context of the application of mutual corroboration. The Lord Justice General (Clyde), having noted the particular instances of subornation of perjury and adultery as suitable for that application, stated (at 74):

> "Another instance which has frequently occurred in recent years is provided by the case of lewdness practised on children by adults. It is now a settled point in the law of evidence ... that if, in cases of this sort, one child after another speaks to separate acts committed on him or her, material for the corroboration of each child's statement may be found in the statements of the others. Conduct of this sort differs from that normally produced by human lust or passion; and, if it is a necessary inference from the repeated acts spoken to individually by a number of children that the accused has, during the period covered by the separate acts spoken to, made a practice of getting himself into privacy with them for no purpose that can reasonably be suggested except a sinister one, it becomes possible to find circumstantial corroboration of each child's statement, in the same way as before – that is to say, in the same way as if there had been independent evidence to that effect. The peculiar and perverted character of the accused's conduct is an important element in this class of case; although no doubt the length of time elapsing between the separate acts spoken to may – especially if considerable – be of great importance against the corroborative effect of the separate statements. It is a class of case in which the utmost caution has to be used, and in this connexion the charge delivered by the presiding judge in the case of *HM Advocate* v *McDonald* [1928 JC 42] may be referred to as one which it might be difficult to improve on."

Lord Sands commented (at 87 and 88):

> "It was common ground in the argument that, however narrow be the limits, there are cases where evidence of the commission of a similar offence may be taken into account, eg offences near in time or circumstances against young children.

> ...
>
> In regard to the relevancy as corroboration of such evidence as is here in question, there is not, as in the case of previous convictions or of statements by a client to his agent, any clear-cut rule of law formulated in non-ambulatory terms. There are two extremes. On the one hand, it is not in dispute that, in the case of certain offences, such as indecent conduct towards young children, evidence of one offence is corroborative of the evidence of another alleged to have been committed as a near interval of time and under similar circumstances. On the other hand, it is not in dispute that, in the case of two thefts having no peculiar connexion the one with the other, evidence of the commission of the one is not corroboration of evidence of the commission of the other. Cases which fall clearly within the one class or the other present no difficulty.

Lord Blackburn made similar remarks (at 93).

[35] In essence, in cases involving the peculiar crime of the sexual abuse of children by adults, there already exists a special, compelling or extraordinary circumstance which will be sufficient for the jury to find the necessary course of conduct established, at least in cases which do not involve an exceptionally long gap in time. For these reasons there was sufficient evidence in this case and the appeals on this ground fail.

[36] In relation to the form of any necessary or appropriate direction to the jury, there has been a tendency in recent years for the court to sanction the need for judges to direct the jury on how they should approach matters of fact which are within their exclusive province to determine. It is at least of passing interest to observe that, in his charge to the jury in *Moorov* v *HM Advocate* (*supra*), which is available in the Justiciary Papers, Lord Pitman made no mention even of a need for the jury to find corroboration in the manner desiderated or, *quantum valeat*, to find the crimes proved beyond reasonable doubt. No doubt because of the content of the speeches these obvious requirements were taken as given. Lord Pitman mentioned "corroboration" on one occasion in the following passage:

> "... you have the various kinds of charges that you have to consider them all as a whole. ... [A] charge of assault does not help you in considering another charge of indecent assault. One charge of assault, even as spoken to by one witness, is relevant corroboration of another charge of assault spoken to by another witness of the same

> kind and in the same connection. You must take the charges of assault together, you must take the charges of indecent assault together, and it does not do for the Defence to take each individual charge and say, 'This charge is "not proved" because each and all may in your judgment support each other'. ... [C]harges of indecent assault do not help you in a charge of attempt to ravish. ... [T]he three must be considered separately and independently, charges of assault, charges of indecent assault and the charge of attempt to ravish, the last of course being the more serious of the lot."

He reiterated this in summary as follows:

> "I can only repeat what I have said before, that you have to consider the cases as a whole. You do not take each one and say, 'This particular case is proved necessarily'; that is to say, the one case may help the other, but I have tried to distinguish them and divide them up into cases which I think are cases of simple assault, cases of indecent assault and cases of attempt to ravish. I have told you what the law is with regard to attempt to ravish, namely, that is has not been proved; that there is not sufficient legal evidence to prove it."

[37] In *HM Advocate* v *McDonald* (*supra*), to which the Lord Justice General made reference in *Moorov* v *HM Advocate* (*supra*), Lord Blackburn put the matter simply, when dealing with the defence contention that there could be no sufficiency in a case in which the accused was charged with what were described as "a series of disgusting and unpleasant offences with his two daughters", when only the one child spoke to her experiences:

> "I cannot hold that a jury is not entitled in a case of this sort to take into consideration the evidence of one child as to her experience as sufficient corroboration of the evidence of another child as to her similar experience, and to record a verdict of guilty against the panel on either or both of the charges. Accordingly, my charge to you is that in this case there is sufficient corroboration of each child's story in the story of the other – if on consideration of the evidence you believe their stories – to entitle you to find the panel guilty of one or all of the charges made against him.
>
> The question whether the children are telling true stories is one of fact, and that is a question for you and not for me. But I must warn you that you must consider their evidence very carefully, and check what each child has said with regard to other incidents outside what has actually passed between her and her father with the evidence given by other witnesses as to those outside incidents."

A direction that any application of mutual corroboration must be made with caution is a familiar one, which is ingrained in our jurisprudence. This is so, even if it might be regarded

as somewhat condescending to assume that a jury would do anything else. A striking feature of the charges in both *Moorov* and *McDonald* is that they presume a degree of collective intelligence on the part of the jury and proceed on the basis that the central issues of fact for their consideration have been focused adequately in the speeches.

[38] The parties have pointed to certain *dicta* on the need for a specific direction on the necessity for a special or compelling feature; the high point being *CS* v *HM Advocate* (*supra*, Lady Paton, delivering the opinion of the court, at para [11]). Whether such a direction is required will depend on the circumstances of the case. *CS* was concerned with an 11 year gap in relation to assaults and rapes against different adult complainers. Mr Adam's case is quite different in nature, having regard to the ages of the complainers. The time gap is much shorter than that in *CS* (cf *RMY* v *HM Advocate* 2018 SCCR 253, Lady Paton, delivering the opinion of the court, at para [5]). The critical direction in the modern era is the one which the judge gave on the requirement for the crimes to be so closely linked by their character, the circumstances of their commission and time as to bind them together as parts of a course of criminal conduct systematically (or persistently) pursued by the accused. As was said in *JL* v *HM Advocate* 2016 SCCR 365 (LJC (Lady Dorrian) at para [33]):

> "It is the function of the judge to assess whether there is a sufficiency of evidence. It is for the jury to say whether, looking at the evidence as a whole, they find it sufficiently compelling to entitle them to conclude that the incidents are all component parts in a course of conduct".

Mr Adam's appeal on this ground must fail.

[39] In both cases there was sufficient evidence upon which the jury could hold the course of conduct proved. The significance of the absence of similar conduct in relation to other children was a matter for the jury to assess. It had no effect on sufficiency. Similar considerations apply to the differences in gender of the complainers in Mr Daisley's case.

[40] The appeals are therefore refused.