APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 23
HCA/2020/000209/XC

Lord Justice General
Lord Justice Clerk
Lord Menzies
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the appeal against conviction by

MARK WILLIAM DUTHIE

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: I M Paterson (sol adv); Paterson Bell (for Bruce & Co, Arbroath)
Respondent: Farquharson QC AD; the Crown Agent

30 March 2021

Introduction

[1] This appeal concerns whether there was sufficient evidence to corroborate charges of rape which, in so far as they involved two different complainers, took place some eight years apart. The case was remitted to a Full Bench in order to consider, as part of the appeal, wider questions of whether: (1) evidence of a course of physical assaults and verbal abuse within coercive and controlling domestic relationships could corroborate the incidents of rape; (2) it is generally for a trial judge to determine the issue of sufficiency or whether that

is a matter which should be left to the jury; and (3) a special, compelling or extraordinary circumstance is required before mutual corroboration could be applied to rapes which occurred several years apart. The court was concerned that there may be a continuing tension between some of the appellate decisions of the High Court in these areas over the last decade.

Background

[2] On 19 February 2020, at the High Court in Edinburgh, the appellant was convicted of 29 charges. Most libelled conduct which occurred during his relationships with seven women over a 15 year period. Three were of rape as follows:

> "(002) on an occasion between 1 …and 31 May 2003, … at …Forfar, you … did assault [DC] …, your then partner, … and did push her onto a bed, straddle her, hold her body down and penetrate her vagina with your penis and did rape her.
>
> …
>
> (020) on an occasion between 23 September …and 31 December 2011, …at, Montrose, you did assault [NaD], your partner …and did, while she was sleeping and incapable of giving or withholding her consent and thereafter while she was awake, penetrate her vagina with your penis and you did thus rape her: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009;
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> (021) on an occasion between 23 September … and 31 December 2011, …at …Montrose, you … did assault [NaD], your then partner … and did repeatedly touch her vagina over her clothing, punch her on the head, and penetrate her vagina with your penis and you did thus rape her: CONTRARY to Sections 1 and 3 of the Sexual Offences (Scotland) Act 2009."

[3] The other charges consisted primarily of physical assaults, some to injury, against six complainers; all of whom had been partners of the appellant and including the two complainers in the rape charges. All of the offences occurred at addresses in Dundee, Forfar, Arbroath, Montrose, Brechin or nearby towns. Specifically, there were: a number of assaults

on DC in 2003 (charge 1); two assaults on JM in 2005 (3 and 4); a number of assaults on LD between 2007 and 2009 (8, 9 10, 12 and 13); a number of assaults on NaD between 2008 and 2009, and again in 2011 (14, 16, 18 and 22); a number of assaults on NiD between 2015 and 2017 (23 to 26); four assaults on KR between 2015 and 2017 (27, 28, 30 and 31); and three assaults on SB in 2018 (32 to 34). None of these assaults libelled a sexual element.

[4] In order to secure a conviction on the rape charges, the Crown required to rely on the application of mutual corroboration. When the appellant made a no case to answer submission, the Crown submitted that all of the charges, including those libelling assault only, formed part of a course of humiliating, degrading and controlling conduct within a domestic relationship. The evidence of the assaults could corroborate the rape complainers' testimony. In any event, the time gap was not too long, and the similarities were so strong, as not to require any special feature. If one were required, the nature of the relationship provided the significant feature or compelling circumstance.

[5] The trial judge determined that the rape charges had to be considered separately from the other charges, but that the jury were entitled to view the domestic setting as a special, compelling or extraordinary circumstance such as would allow for the application of mutual corroboration notwithstanding the time gap.

Charge

[6] The trial judge directed the jury, in terms of his decision on sufficiency, that the rape charges had to be considered separately from the non-sexual offending because they did not share the same characteristics. The assault charges could not be used to corroborate any of the rapes. Having told the jury that they required, first, to accept the two rape complainers as credible and reliable, the judge outlined the need for the jury to decide whether the rapes

were so closely linked by their character, circumstances and time as "to bind them together as parts of a course of criminal conduct systematically pursued by the accused". He pointed to the time gap as a factor which, in ordinary circumstances, would mean that mutual corroboration could not apply. The jury had to find "some special or compelling feature" which enabled them to conclude that, despite the time gap, the offences were closely linked in the manner which he had explained.

[7] The trial judge summarised the parties' submission on this matter. The Crown said that the extraordinary feature was the similarities in the circumstances of both complainers as young and vulnerable women and the wider campaign of domestic abuse against both women. The judge drew an analogy with the sexual abuse of children as a "peculiar crime", which, by itself, constituted a special feature that helped to bind the crimes together. There were some parallels with both types of offence being committed in a domestic setting and largely in private. Both involved an abuse of power or trust and could have prolonged psychological and emotional effects. The defence maintained that the time gap was too long. Domestic abuse was not a special feature. The rapes could not form part of a course of criminal conduct, given that the complainers in the intervening period had made no complaint of a sexual nature. In conclusion, the trial judge said:

> "… [I]f you get this far the question for you may be whether these are two isolated occurrences, perhaps showing a propensity to commit rape or do they demonstrate a course of conduct systematically or persistently pursued by the accused."

Submissions

Appellant

[8] The appellant contended that the time lapse between the rape charges meant that extraordinary or special features were required to make the similarities compelling (*KH* v

HM Advocate 2015 SCCR 242 at para [28], following A*K* v *HM Advocate* 2012 JC 74 at para [14]). The physical abuse of the other complainers could not bridge the gap. The appellant's intervening relationships with the other complainers undermined the existence of a continuous course of conduct persistently pursued. The existence of domestic relationships was not an extraordinary feature. Domestic abuse, which involved physical assaults and verbal abuse, had to be looked upon as of a different character to rape. The conduct lacked the overall similarity necessary to make the offences "component parts of one course of conduct persistently pursued by the accused" (*MR* v *HM Advocate* 2013 JC 212 at para [20], cited in *HM Advocate* v *SM (No 2)* 2019 JC 183 at para [6]). The conduct need not have the same *nomen juris*, but there had to be a "similarity of the conduct described in the evidence" (*MR* v *HM Advocate* at para [19] and *KH* v *HM Advocate* at para [34]). In order for mutual corroboration to apply, a rape would have to involve conduct of the same character as physical and/or verbal abuse in a domestic setting. This was not tenable given that rape involved penile penetration without consent.

[9] Sufficiency of evidence was a matter of law for the trial judge to determine. The judge erred in determining that it was for the jury to decide if there was a break in any link, as a consequence of the other relationships. Although it had been said that a no case to answer submission should only be granted if "on no possible view" could it be said that the individual instances were component parts of one course of conduct persistently pursued (*Donegan* v *HM Advocate* 2019 JC 81 at para [39], following *Reynolds* v *HM Advocate* 1995 JC 142 at 146; *HM Advocate* v *SM (No 2)* at para [6]), the judge had a duty to uphold a submission of no case to answer if there was insufficient evidence.

[10] Time was an essential part of mutual corroboration. Without a connection in time, there could be no course of criminal conduct systematically pursued. The words "special",

"compelling" or "extraordinary" related to evidence which would allow the course of conduct to be seen as continuing. Where there were long gaps, there needed to be good reasons to explain the break in the conduct.

Respondent

[11] In a wide ranging response, the advocate depute submitted that the trial judge had erred in compartmentalising the offences. The whole offending had to be looked at together. In the context of a domestically abusive relationship, the act of penetration could be a sexually violent one designed to achieve coercive control. That illustrated an underlying unity of purpose between the physical and sexual assaults. The trial judge erred in holding that the sexual offences were of a different character to the physical assaults and in directing the jury accordingly.

[12] A course of physical assaults in the context of a coercive relationship could corroborate rape. Whether it did so would depend on the circumstances. Part of the court's function was to react to developments in society's thinking. Lesser offending could corroborate the commission of more serious offending. Cases involving the "peculiar crime" of the sexual abuse of children possessed a special circumstance sufficient for the jury to find a course of criminal conduct established (*Adam v HM Advocate* 2020 JC 141; *TN* v *HM Advocate* 2018 SCCR 109).

[13] It was the underlying similarity of the conduct which had to be considered. It did not matter that the charges had different names or were more or less serious (*CW* v *HM Advocate* 2016 JC 148 at para [34]). The court's experience of the type of offending in question, and common sense, indicated that not every act of physical or sexual violence would necessarily be visited on each and every complainer. The actions/reactions of a

particular complainer may account for different outcomes in terms of an accused's conduct (JC v *HM Advocate* [2016] HCJAC 100 at para [16]. It may be appropriate to look at the particular vulnerability of a complainer (*JGC* v *HM Advocate* 2017 SCCR 605).

[14] An accumulation of violent and sexual behaviour, which was directed against different partners, could reflect an underlying course of conduct of domestic abuse (*Reilly* v *HM Advocate* 2017 SCCR 142; *KH* v *HM Advocate* at para [34]; *McAskill* v *HM Advocate* 2016 SCCR 402 at para [28]). The appellant's actions demonstrated a course of coercive behaviour in his relationships with seven different women, across 15 years; starting when he was only 15. The complainers spoke of behaviour that was controlling, not just in terms of his physical and sexual violence, but also repeated. The appellant: would not allow his partners keys; would not allow them out of the house; monitored their movements; restricted their contact with others; and isolated, degraded, insulted, frightened and humiliated them.

[15] There were sufficient and particular similarities between the charges to allow mutual corroboration to be applied. In addition to both complainers being female, young, and in a relationship with the appellant, the rapes occurred after the relationships had endured for some time. Both complainers suffered physical, verbal as well as sexual abuse. The rapes in charges (2) and (20) were preceded by assaults. Sexual gratification was obtained by forced penile penetration, either when the complainers were asleep or actively not consenting. Both complainers told the appellant that they did not want to have sex. They were crying during the rapes and had continued to say "no" during the course of the rapes.

[16] While there were no reports of sexual offending in his intervening relationships, the appellant's background of forming comparable, controlling and dysfunctional relationships with other females should not be ignored. It demonstrated that he was involved in a wider campaign of domestic abuse. Changes in society's appreciation of the effects of domestic

abuse had been reflected in the Domestic Abuse (Scotland) Act 2018 which had been preceded by the Scottish Government paper: *A Criminal Offence of Domestic Abuse* (see paras 3.4, 3.6 and 3.10). Time was the most flexible component in *Moorov* v *HM Advocate* 1930 JC 68 (at 74 -75).

[17] Whether a course of physical assaults and verbal abuse could corroborate incidents of rape was a matter that should generally be left to the jury (*Reynolds* v *HM Advocate* 1995 JC 142 at para 146; *MR* v *HM Advocate* at para [20]; *Finlay* v *HM Advocate* 2020 SCCR 317; *JL* v *HM Advocate* 2016 SCCR 365 at para [33] and *Adam*). There would be exceptional cases in which the trial judge required to intervene (*Donegan* v *HM Advocate* at paras [38] – [45]; *RF* v *HM Advocate* 2016 JC 189 and *RB* v *HM Advocate* 2017 JC 278). The question was whether a jury could reasonably draw a particular inference from a body of evidence rather than whether inferences ought to be drawn (*Du* v *HM Advocate* 2009 SCCR 779).

Decision

Mutual Corroboration of Rape

[18] It is first necessary to decide what requires to be corroborated. The immediate answer is simple; the crucial facts of whether a crime has been committed and the identity of the perpetrator. At common law (charge 2) rape is defined as the act of having sexual intercourse against the complainer's will (*Lord Advocate's Reference No 1 of 2001* 2002 SCCR 435). There requires to be corroborated evidence of penetration and lack of consent. Under the Sexual Offences (Scotland) Act 2009 (s 1) (charges 20 and 21), the necessity of proving penetration by corroborated evidence remains the same. On each of the rape charges, the relevant complainer testified to being penetrated by the appellant. What then was needed

was evidence from another source that confirmed or supported that testimony (*Fox* v *HM Advocate* 1998 JC 94, LJG (Rodger) at 100 – 101). The only method by which any of the rapes could be proved was by application of the principle of mutual corroboration.

[19] In *Adam* v *HM Advocate* 2020 JC 141 the court (LJG (Carloway), LJC (Lady Dorrian) and Lord Turnbull) set out (at para [28]) the settled law on mutual corroboration as follows:

> "the testimony of one witness about one crime may be corroborated by a second witness's 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] citing *Ogg* v *HM Advocate* 1938 JC 152 LJC (Aitchison) at 157, describing the ratio of *Moorov* v *HM Advocate* 1930 JC 68)."

Expressions of how the law might be changed could not detract from what the law actually was, as vouched by several Full Bench decisions and the Institutional Writers.

[20] Before looking to see whether there is proof of a course of conduct, there first has to be a search for similarities in the time, character and circumstances. When analysing the similarities in circumstances, the mutually corroborative testimony does not have to relate to incidents which carry the same *nomen criminis*. This area was explored in some depth by the Full Bench in *M*R v *HM Advocate* 2013 JC 212 in which it was recognised (LJC (Carloway), delivering the opinion of the court, at para [17]) that the law required to keep pace with modern societal understanding of sexual and other conduct. The focus in *MR* was on different kinds of sexual offending against female relatives, but the court acknowledged that "sexual and physical abuse of different kinds" within the same family unit was one model of that nature (see also *McAskill* v *HM Advocate* 2016 SCCR 402 at para [28]). A sexual offence of a relatively minor type might corroborate more serious sexual conduct (eg *Watson* v *HM Advocate* 2019 JC 187). In cases such as the present, where there is direct testimony

from two or more complainers, it is the underlying similarity of the conduct that is important and not the name which is attached to it (*MR* at para [17], quoting *McMahon* v *HM Advocate* 1996 SLT 1139 LP (Hope) delivering the opinion of the court at 1142).

[21] The proposition in this case is that an act which contains no sexual element at all can corroborate a sexual one when they occur in a domestic context of abusive, controlling or coercive conduct. However interesting it may be to analyse the place of rape as a crime of violence in the domestic context, the law has traditionally distinguished between two types of behaviour; sexual (including lewd practices, indecent and now sexual assault and rape) and non-sexual (assault, aggravated or simple). It may not be unreasonable to describe rape as an aggravated sexual assault at least in certain circumstances, but the sexual content remains, irrespective of the perpetrator's motives. Rape is a crime which is distinct from physical assault. It requires a particular act of a sexual nature, *viz*. penetration. It is not capable, at least in the circumstances of this case, of being corroborated by evidence which relates only to physical assault, however repeated and in whatever context. Although the Domestic Abuse (Scotland) Act 2018 reflects important advances in society's understanding of the nature and effects of sexual abuse, it does not alter the position that rape is different from a physical assault, given the need for penetration.

[22] Although a person, who is of a controlling disposition, may perpetrate a number of different types of crime against his partners, perhaps including not only physical or sexual assaults but also theft, malicious mischief and contraventions of the Communications Act 2003, that does not make these offences "similar" for the purposes of mutual corroboration. Dishonest persons may have a propensity to commit a variety of lucrative crimes, from theft to drug dealing and from extortion to embezzlement; that does not make them similar crimes for those purposes. It is not sufficient that the incidents relied upon demonstrate a

propensity to commit the crimes of the nature libelled; the test of similarity must first be met. That test is a necessary precursor to the search to see if the inference of a course of conduct persistently pursued is met. The Crown's central contention that testimony about physical assaults can afford corroboration of rapes is rejected.

[23] For a valid conviction to have followed, the jury required to consider whether the principle of mutual corroboration could be applied to the testimony of the complainer in charge (2) by using the testimony of the complainer in charges (20) and (21) and *vice versa*. In the circumstances of this case, in which there was no other sexual offending libelled, the act of rape in each charge was only capable of being corroborated in this manner by both complainers speaking to the rapes, and in particular the acts of penetration. The domestic context of the relationships could be an important factor in determining whether the three acts, some eight or more years apart could be classified as component parts of a course of conduct persistently pursued by the appellant. The existence of the time gap, and the absence of intervening complaints of sexual offending, could also be a significant feature, but the jury were entitled to take into account events which they were satisfied had occurred in the intermediate domestic relationships when deciding this issue. The question remains one of fact and circumstance in the particular case. Provided that the jury are properly directed on the legal principles to be applied, their verdicts will not normally be open to challenge.

No Case to Answer Submission

[24] Prior to the introduction of the no case to answer submission procedure by the Criminal Justice (Scotland) Act 1980 (s 19 amending the Criminal Procedure (Scotland) Act 1975 by introducing s 140A, now the 1995 Act, s 97)) the defence could make a submission

based on an insufficiency of evidence, but only after all the evidence had been led. If the judge agreed with the submission, he required in due course to direct the jury to return a verdict of not guilty (*Kent* v *HM Advocate* 1950 JC 38 LJG (Cooper) at 41). The new procedure provided an opportunity for the defence to make a submission prior to having to elect to give or lead evidence. If the judge sustains the submission, he or she "acquits" the accused. The test on whether to sustain such a submission is whether "the judge is satisfied that the evidence led by the prosecution is insufficient in law to justify the accused being convicted" (1995 Act, s 97(2)). That is the only test. Although no formal question of onus of proof arises, it is for the accused to satisfy the judge on the absence of a sufficiency.

[25] In the specific context of mutual corroboration, it has frequently been said that a no case to answer submission should only be sustained when "on no possible view" could it be said that the individual incidents were components parts of a course of conduct persistently pursued by the accused (*Adam* v *HM Advocate* at para [29], citing *Donegan* v *HM Advocate* 2019 JC 81 LJC (Lady Dorrian) at para [39]). These words are derived from *Reynolds* v *HM Advocate* 1995 JC 142 (LJG (Hope), delivering the opinion of the court, at 146). *Reynolds* was not a sexual offences case. The context of the dictum is as follows:

> "[C]ases of this kind… raise questions of fact and degree. That is especially so where, to use Lord Sands' expression [in *Moorov* v *HM Advocate* at 88], the case falls into the open country which lies between two extremes… We accept that there was a process of evaluation to be conducted, because there were dissimilarities as well as similarities. On the other hand, we do not accept that on no possible view could it be said that there was any connection between the two offences. Where the case lies in the middle ground, the important point is that the jury should be properly directed so that they are aware of the test which requires to be applied".

[26] In its identification of a test to be applied at the stage of the no case to answer submission, this does not introduce any new or different element beyond the test which is set out in the words of the statute. The court is not considering the acceptability of the

relevant testimony. It is simply asking "whether there is no evidence which if accepted will entitle the court to proceed to conviction" (*Williamson* v *Wither* 1981 SCCR 214, Lord Cameron, delivering the opinion of the court, at 217). As it is often put, the Crown case must be taken at its highest. The court must decide whether there is testimony relative to two or more incidents which, if accepted, contains the requisite similarities such as may demonstrate a course of conduct persistently pursued. If these similarities exist and one inference is that there was such a course of conduct, the no case to answer submission must be repelled. It becomes a matter for the jury to decide whether the appropriate inference of course of conduct can be drawn from the similarities.

Special, compelling or extraordinary circumstances

[27] The court in *Adam* v *HM Advocate* (at para [31] and [32]) examined the various dicta in which there had been reference to the necessity, in lengthy time gap cases, of having special, compelling or extraordinary circumstances before a course of conduct persistently pursued could be inferred. The source of these references is the opinion of the Lord Justice Clerk (Gill) in *AK* v *HM Advocate* 2012 JC 74 (at para [14]) which followed *Dodds* v *HM Advocate* 2003 JC 8 and *Stewart* v *HM Advocate* 2007 JC 198. There have been subsequent cases which have adopted similar language (eg *CS* v *HM Advocate* 2018 SCCR 329 at para [11]; *RB* v *HM Advocate* 2017 JC 278 at para [30]); *JM* v *HM Advocate* 2018 SCCR 149 at para [4]; *RF* v *HM Advocate* 2016 JC 189 at para [24] and *KH* v *HM Advocate* 2015 SCCR 242 at paras [28] –[29]) .

[28] It is important that what began as a cautious remark by a trial judge, which was intended to assist the jury in their assessment of the mutual corroboration issue (in *AK* at para [7]), is not elevated into a principle of the law of evidence which is applicable in all

cases in which there is a lengthy interval between the relevant incidents. It is not the case that, as a matter of law, in a lengthy time gap case, there require to be special, compelling or extraordinary circumstances before the appropriate inference can be drawn. What is essential, in terms of the settled law, which was described in *Adam* v *HM Advocate* (at para [28]), are similarities in time, character and circumstances such as to demonstrate that the individual incidents are component parts of one course of conduct persistently pursued by the accused. The jury will have to be directed to that effect but, normally, that is all that is required. A judge or sheriff may elect to explain to the jury in a particular case that there is a long time gap and that, because of that factor, the similarities would require to be strong ones when compared to those needed where the incidents are already closely linked in time. The giving of such a direction is not essential and in some cases it may be undesirable. In so far as *CS* v *HM Advocate* is seen as being to the contrary effect, it is over-ruled.

Conclusion

[29] Although there was a significant time gap between the rapes involving the two complainers, there were sufficient similarities in the appellant's actings, not least the domestic context of the rapes, to enable the jury to draw the appropriate inference of a course of conduct persistently pursued by the appellant. It follows that the trial judge was correct to repel the no case to answer submission. In so far as the judge directed the jury that a special or compelling factor was required, this favoured the appellant. The appeal is accordingly refused.