APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 49
HCA/2021/83/XC

Lord Justice General
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

NOTE OF APPEAL AGAINST CONVICTION

by

JSC

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Shand; Paterson Bell (for Murray Ormiston, Aberdeen)
Respondent: Prentice QC (sol adv) AD; the Crown Agent

25 November 2021

Introduction

[1] On 5 February 2021 the appellant was convicted by a majority of charges in the following terms:-

> "(1) On various occasions between 20 December 1997 and 31 December 2000, both dates inclusive at (an address) you JSC did use lewd, indecent and libidinous practices and behaviour towards H, born 3 January 1989… and did touch her on the chest and vagina over her clothing with your hand;

> (3) on various occasions between 12 April 2001 and 22 June 2004, both dates inclusive at (the same address) you JSC did use lewd, indecent and libidinous practices and behaviour towards L, born 23 July 1993 … and did press your penis against his buttocks, pull him towards you, place his hand on your penis, cause him to masturbate you, masturbate him, cause him to penetrate your mouth with his penis, penetrate his mouth with your penis and penetrate his anus with your penis, to his injury".

[2] The following charge was found not proven:-

> "(2) On various occasions between 20 December 1997 and 31 December 2000, both dates inclusive at (a different address and the same address and elsewhere) you JSC did assault H born 3 January 1989 and did pull down her lower clothing and did penetrate her vagina with your penis and you did rape her."

[3] The following docket was attached to the indictment:-

> "On various occasions between 5 January 1993 and 4 January 1997, both dates inclusive (at yet another address and the address in charge 1) JSC did touch H, born 3 January 1989, on the chest and vagina over her clothing with his hand and did rub his body on the body of said H over her clothing."

The docket narrates that the incidents were said to have occurred when the appellant was aged between 8 and 12 years old.

[4] Having adjourned the diet for the preparation of a report, the trial judge sentenced the appellant to 42 months imprisonment. There is no appeal against sentence.

[5] It is not necessary to go into detail about the evidence which was led. The complainers H and L are brother and sister and they are related to the appellant, as are all of the witnesses and potential witnesses referred to in this Opinion. They are all known to each other and lived at the material time in reasonably close proximity. The Crown case relied on mutual corroboration using the evidence of H and L. They gave evidence in support of the libel. During the course of the evidence of H she volunteered that a relative called C had been abused by the appellant and that C had been present while H herself had been raped. She had also claimed that C was a prostitute.

[6] The complainers' mother X also gave evidence. Amongst other things, she spoke of certain disclosures by the complainers. She said that she was a volunteer. That was explored in cross-examination and it transpired that she approached people who might have been abused and helped them to make financial claims, assisting them with the paperwork.

[7] The appellant gave evidence in which he denied committing the offences. There was also evidence from the appellant's cousin D, the brother of C. He denied that C was a prostitute and gave hearsay evidence that she denied having been raped by the appellant.

[8] During the course of her evidence H also volunteered that two other relatives of the appellant, CC and MC, had been abused by the appellant.

The grounds of appeal

[9] There are essentially four grounds of appeal which have passed the sift, grounds 2, 3, 4 and 5. Ground 2 alleges a failure by the Crown to disclose information which is said to be relevant. Ground 3 is that no reasonable jury could have found charges 1 and 3 established. Ground 4 alleges a misdirection by the trial judge in relation to the averment that the appellant penetrated the complainer's anus with his penis and ground 5 is that no reasonable jury could have found that aspect of charge 3 to have been corroborated. It is not suggested that there was insufficient evidence to convict.

Submissions for the appellant

[10] The Case and Argument and the oral submissions which followed thereon were wide-ranging and not always easy to follow. However, they can be fairly summarised as follows.

Ground 2

[11] The appellant submits that the Crown failed to disclose information from C which had the potential to undermine the evidence of H. C was spoken to by the police and gave them certain information but not a written statement. According to an affidavit of C, dated 12 November 2021, police officers approached her in March or April 2020 and asked her if anything had happened with the appellant. She said that he had never sexually abused her. The officers did not mention H. They asked her if she would make a statement and she said she would but there was no point as nothing ever happened. She indicated that the complainers and her mother all had mental problems. According to the appellant's Case and Argument she said something like "you know my Auntie X she's deluded and she needs psychiatric help, they all need psychiatric help." This was all disclosable and would have undermined the complainer's evidence, since it contradicted what the complainer had said about C. Those now representing the appellant (who were not the same solicitors or counsel who represented him at trial) did not know exactly what information the original defence team had been given. It appeared that the advocate depute had been told that C had nothing to report and did not wish to provide a statement. It is assumed that this information was passed to the original defence team.

[12] If full disclosure had been made C could have been precognosced and could have revealed other information about H, namely that H makes up false stories; there were never family gatherings when H would have been alone in the company of the appellant for long enough for sexual abuse to have taken place; and that there was an occasion several years ago when H and X encouraged C to make a complaint that the appellant had sexually abused her. They told her that if she went ahead with such an accusation she could come into money.

[13] CC and MC were seen by the police, who asked them whether they wished to report any abuse by the appellant and they stated that they did not. According to MC's affidavit, dated 12 November 2021, she told the police that she had not been abused by the appellant. Again she gave no written statement. In the Case and Argument, it is speculated that H and/or X had asserted to the police that the appellant was guilty of abusing MC or CC but there is no basis for this speculation.

[14] As with C, MC also gave information about X having previously sought to persuade her to make false allegations of sexual abuse against the appellant.

[15] CC, in her affidavit dated 11 November 2021, said that she was approached by the police in the summer of 2018 and they asked her if the appellant had ever been inappropriate towards her. She confirmed that he had not. She was not asked to make a statement. According to her affidavit, the complainers and their mother had suggested that she had been abused by the appellant but this was only something she had heard. She said that X had told people in the past that if they said they had been sexually abused they could get money. She recalled being told a story involving X and H and her cousin C. She had also been told that X had tried to do this to another individual L. On one occasion in 2014 or 2015 X had sat her and her sister MC down in the house and kept suggesting that they had been abused.

[16] The appellant's uncle D had given a statement to the police on 29 January 2021. In the course of that he said that X had a history of accusing people wrongly of sexually abusing her and that she had been mentally unstable since childhood. She coerced other women to say they had been sexually abused when they had not, in pursuit of a cut of their compensation. He "believed" that she was doing the same with H. He had shared a room with the appellant for about a year when the appellant was 12 or 13 during the period of the libel of charges 1 and 2 and never saw him behave in a sexual manner.

[17] D also said that 7 or 8 years ago H had falsely accused him of sexually abusing her and he reported it to the police, who took a statement from him. He never heard anything more about it. The affidavit contained his opinion about H and her mother and mentioned things he had heard "through the grapevine".

[18] Had D's statement been disclosed it might well have revealed admissible evidence concerning concerted efforts by X to encourage others to make false complaints of sexual abuse for compensation. Along with the information given by C, MC and CC this could all have led to evidence of a pattern of behaviour by, presumably, H and X, which would corroborate the assertion by the appellant that the allegations against him were false. Just as the Crown can rely on *Moorov*, there is, or should be, scope for the defence to rely on a "defence *Moorov*". Unsurprisingly, no authority was cited in support of this proposition.

Ground 3

[19] No complaint was made about the evidence of L but no reasonable jury could have accepted the evidence of H. The inconsistency between the verdicts on charges 1 and 2 strongly supported this ground. The trial judge in his report was critical of H's evidence. She was said to be one of the most difficult witnesses he had encountered. It was very difficult to control her and to get her to answer questions. Answers became long rambles verging on diatribe. She would go off at tangents and on occasions he had to remind her to answer the question which she had been asked. Her evidence and behaviour at times bordered on "bizarre". She referred to the appellant when he was a young boy as "a little Hitler". On one occasion she started pulling up her skirt in the witness box. She volunteered that she had lied on many occasions in court in the past and that she had numerous convictions for shoplifting. We have already referred to her volunteering information about C, MC and CC.

[20] It was said by counsel that H was disconnected from reality. There were concrete examples in the case where her evidence could not have been right. She asserted that she had been abused when separated from others by a door but the evidence was clear that the door was made of glass. She gave evidence of being abused in the presence of pictures of MC and CC but according to her account the abuse happened before they were born. While the evidence of witnesses did not require to be looked at in a silo, complainers had to come up to some sort of reasonable baseline of acceptability. Her evidence on charge 1 was inextricably linked with her evidence on charge 2 and there was no reasonable explanation why the jury should have convicted of one and acquitted on the other.

Grounds 4 and 5

[21] While charge 3 did not in terms allege sodomy, there being no reference to "unnatural carnal connection", it was not necessary to specify a *nomen iuris*. While sodomy had been abolished by the Sexual Offences (Scotland) Act 2009 it remained a crime if committed before that Act came into force. The reality was that, although the charge was dressed up as one of lewd, indecent and libidinous practices and behaviour it contained an allegation of sodomy and corroboration of penetration was required. The trial judge had not directed the jury that that was the case.

[22] It was not known if the jury had relied on the evidence in the docket in support of charge 3. Corroboration of penetration had to be found in evidence of something approaching penetration, for example, a thwarted attempt at such. Reference was made to paragraph 22 of *Jamal* v *HM Advocate* 2019 JC 119. *Wright* v *HM Advocate* [2019] HCJAC 55 was a case involving oral penetration. Vaginal and anal penetration were in a different category. The docket could have provided corroboration but the judge should have told the jury that that was one of the available routes.

Submissions for the Crown

Ground 2

[23] This was a straightforward case involving two complainers who corroborated each other. It was correct to say that the police spoke with C to obtain a statement and she said she had nothing to report. She said that she had not been abused by the appellant but declined to provide a statement. The Crown had no statement from her. There had been a discussion between the trial advocate depute and defence counsel, who was aware that she did not support H. In fact, counsel put that to H in cross-examination. She was not a complainer and

was not a Crown witness. The distinction between her having nothing to report and her saying that the appellant did not abuse her was a fine one and of no moment. The defence had not been deprived of anything material. It was not clear whether or not defence counsel had been told any more than that she had nothing to report but that was of no significance. In any event the appellant was in a position to know that he had not abused C and could not ignore lines of inquiry which were of significance for his defence. *Cameron* v *HM Advocate* 2008 SCCR 748. Having been told that she had nothing to report, the defence could have made further enquiry or called her as a witness if they had thought it appropriate. It was put to H in cross that C did not support her allegations at all and evidence was led from the defence witness D that C had not been raped by the appellant, although this was hearsay. That showed that the defence were aware of C's position. Repeated reference was made by defence counsel in her speech to the fact that C had not given evidence for the Crown. As it happens, the charge potentially involving C, namely charge 2, was found not proven. Whether or not she had in fact been raped or abused was a collateral matter. The Crown was not aware of any evidence C might have been able to give in relation to the mental state of witnesses. It was opinion evidence in any event and was inadmissible. It was up to the defence what they did in relation to C. See *McDonald* v *HM Advocate* 2010 SC (PC) 1 at paragraph 60.

[24] MC and CC were not complainers and were not Crown witnesses. They had been referred to in a statement of a witness TN, which had been disclosed. The appellant had mentioned them to her. We assume that they are the persons referred to in that statement as his nieces. Against that background the police had approached MC and CC for a statement. They also advised they had nothing to report, had not been abused and refused to give a statement. This was irrelevant to the charges on the indictment and did not fall into any of the

categories of section 121(3) of the Criminal Justice and Licensing (Scotland) Act 2010. The defence were aware of their limited connection to the case and could have pursued that line if they had chosen so to do. Insofar as the appellant suggested that the information became disclosable as a result of H's volunteering that they had been abused, that still remained irrelevant to the matters before the court. It was a crime not charged in each case and it was up to the defence what they wished to do about it. Once again the appellant would have known that he had not abused these witnesses. He knew who they were and attempts could have been made to precognosce them and call them. Such information as they might have been able to give about attempts by X to claim that they had been abused was collateral and inadmissible.

[25] The same was true of most of what D had to say. Much of that was hearsay in any event. There was nothing of relevance in it which was not otherwise disclosed or known to the defence. There was no information to suggest that any abuse had occurred in his presence so what he had to say about that would have had little import. Insofar as he denigrated the character of X and H, the defence knew all about that. The fact that X had made compensation claims for others was explored in her evidence. This was all collateral in any event. There was no such thing as a Crown *Moorov* or a defence *Moorov*. There was just evidence.

No reasonable jury

[26] This was a very high test. See *Geddes* v *HM Advocate* 2015 JC 299. It would only succeed in exceptional circumstances. *Naveed Iqbal* v *HM Advocate* [2018] HCJAC 65. The verdict had to be perverse or unreasonable. *Al Megrahi* v *HM Advocate* 2002 JC 99; *Webb* v *HM Advocate* 1927 JC 92. While the court should give considerable weight to the trial judge's

view (*Dreghorn* v *HM Advocate* 2015 SCCR 349), that did not mean that this ground should succeed. The issues with the evidence had to be of a high level of difficulty. See *AJE* v *HM Advocate* 2002 JC 215. It was accepted that there were a number of difficulties with the evidence of H but while one view of it could be that she was a complete liar, a manipulative individual, and one who had no respect for the jury or anyone in court, the other explanation could be that she had had a broken and unhappy family life. The abuse had left her damaged and she was now telling the jury as best she could what had happened to her. There were discrepancies in her evidence but she was trying to remember events from a long time ago. She was bitter and angry, which suggested hatred of the appellant. Where did that come from if she was not telling the truth? All this was before the jury, who had been presented with two possible views to take of her evidence. As it happened, the verdict was discerning and careful. The jury had acquitted on charge 2 and that might well have been related to the fact that no evidence had been given by C about it, despite what H had said. They must have accepted some of the evidence given by H and L and they were presumed to have followed the judge's directions. In *Dreghorn* there was a reason to distinguish between charges as there was here. The fact that L was a good witness might have had a bearing on what the jury made of H's evidence overall. See *PGT* v *HM Advocate* 2020 JC 205.

Grounds 4 and 5

[27] The judge had correctly directed the jury as to mutual corroboration. Whether there were sufficient similarities was a question of fact and degree for the jury. Both charges 1 and 3 as well as the docket involved sexual abuse of children by an older child continuing into his early adulthood and involving touching of their genitals. The abuse in charge 1 ended about the time the abuse in charge 3 began. The complainers were of similar ages when the

offending began and it took place generally in the appellant's home. He would take advantage of the opportunity afforded by their being forced to visit regularly or to stay in his house. His conduct was persistent and repeated and he acted in a domineering way with both complainers. The evidence of the appellant lying on top of H when she was smaller and grinding his penis up and down against her per the docket, was similar to some of the sexual acts spoken to by L as it involved a simulation of penetrative intercourse. In any event, the suggestion that anal penetration could not be corroborated by anything other than rape was not supported by the authorities. See for example *MR* v *HM Advocate* 2013 JC 212, *AD* v *HM Advocate* [2017] HCJAC 84, *JGC* v *HM Advocate* 2017 SCCR 605, *SM* v *HM Advocate* [2018] HCJAC 22, *Jamal* v *HM Advocate* 2019 JC 119 (especially paragraph 21) and *Wright* v *HM Advocate* [2019] HCJAC 55.

[28] The then Lord Advocate in 2011 had directed that the term "unnatural carnal connection" should not be included in indictments. Such charges should be libelled as sexual assault, although in this case it was libelled as lewd, indecent and libidinous practices and behaviour. The anal penetration in this case was presented as part of a charge of lewd and libidinous conduct. No particular rules applied to that part of it being corroborated as opposed to the rest of the charge. The jury clearly accepted that it was corroborated as they left this element in the charge. It might have been of some advantage for the judge to have said a little more about penetration but the absence of such a direction did not give rise to a miscarriage of justice

Analysis and decision

Ground 2

[29] Sections 121 to 123 of the Criminal Justice and Licensing (Scotland) Act 2010 provide for a continuing duty of the Crown to disclose to the accused information of which they are aware which

(a) would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused,

(b) would materially strengthen the accused's case,

(c) would be likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused, and

(d) was not required to be disclosed under any of the preceding categories but which might be relevant to the case for or against the accused.

[30] The appellant's position relies principally on an alleged breach of section 122 of the Act, which relates to the last of the above categories. It is said that the information gathered which was not disclosed was relevant. We shall examine each of the pieces of information in turn.

[31] As far as C is concerned, at the very least it is clear that the appellant's representatives at trial were told that she did not support the evidence of H. That evidence was that C had herself been raped by the appellant and was present on a least one occasion when H was raped by him. The most that can be said for the appellant is that his representatives were not told in terms that she denied having been abused by him and that she had made disparaging remarks about the sanity of the complainer and her family. It is quite clear that the appellant's counsel at trial knew perfectly well that C did not support the complainer and there is no

material difference between what she must have been told in that regard and what the appellant now alleges she was not told. Had they been told in terms that she denied being abused by the appellant and that she denied ever seeing H being abused by him, while this could have been put to the complainer, as opposed to its merely being put that she did not support her, this of itself would not have been evidence. It could only have become evidence if C gave evidence to that effect and there was sufficient material disclosed to the defence to enable them to decide whether or not to precognosce C and thereafter call her as a witness. Inasmuch as she expressed an opinion about the mental faculties of the complainer and her family, that would not have been admissible evidence. The extent to which it might have led on to further enquiry is completely speculative. In any event, given that the appellant was acquitted of the charge in respect of which H volunteered that she was present, it is impossible to find that a miscarriage of justice has resulted.

[32] MC and CC were not witnesses and there was no suggestion in the indictment that they had been abused by the appellant. The information which had been blurted out by H was not admissible evidence and an exploration of it would have been collateral. Once the material was volunteered, it would have been open to the defence to take steps to precognosce the potential witnesses, presumably on the basis of instructions from the appellant that he did not in fact abuse them. Once again, even if there was a failure to disclose such material as the Crown had in this regard, but which, as it happens, did not include any statements from the witnesses, it cannot be said to have given rise to a miscarriage of justice. The defence cannot just sit back and wait for the Crown to do their work for them.

[33] Much of the material in D's affidavit is hearsay. None of it is relevant. Even if X has a history of accusing people of sexual abuse, falsely or otherwise, that cannot assist in

determining whether the appellant abused H or L. D's account of X being mentally unstable is of no relevance.

[34] D's claim that H accused wrongly accused him of sexually abusing her and the claims made by MC about X trying to persuade her that she had been abused by the appellant are irrelevant. CC's affidavit contains more irrelevant material, such as hearing a story about X and H trying to persuade C that she had been abused by the appellant.

[35] In short there is nothing in the information which C, D, MC or CC provided which was relevant other than the fact that C did not support H, who had said that she was present when she was raped.

[36] D's allegation that H falsely accused him of rape was, as was conceded by the appellant's counsel, not something which was instantly verifiable. As with the rest of the material which the appellant now relies on, it is plainly collateral, as any superficial perusal of all the recent authorities would show.

[37] This ground is without merit.

Ground 3 – no reasonable jury

[38] We recognise at once that H was a difficult witness. The trial judge has described her presentation. She was difficult to control and prone to going off at tangents. She would not answer questions. There were certain aspects of her evidence which seemed to fly in the face of the facts such as evidence about abuse happening on the other side of a glass door and the impossibility of pictures of as yet unborn children being on the wall when she was being abused.

[39] However, we have considered the transcript of her evidence very carefully. Despite the obvious problems with her presentation when she gave her evidence, there appears in the

transcript a reasonably coherent picture of abuse which the jury were entitled to accept. This is particularly so given the clear evidence of L, who also provided a consistent picture of abuse with many similarities. As was noted in *PGT* v *HM Advocate*, the evidence of individual witnesses should not be looked at in a silo. Even were that not the case, we are not satisfied that the appellant has met the applicable high test.

[40] As was said in *Geddes* v *HM Advocate* 2015 JC 299 at paragraph 4: "It is only in the 'most exceptional circumstances that an appeal on this ground will succeed'". At paragraph 5 the following was said:

> "The argument will accordingly often boil down to one which seeks to persuade the court that the jury could not reasonably have accepted the testimony of a particular witness or witnesses, or part of it, as credible and reliable. Since that is traditionally and primarily the province of the jury to assess … it will only be in rare cases that the court will be persuaded that no reasonable jury, properly directed, could have accepted the testimony in question."

[41] There is no test of exceptionality as such but, as a matter of fact, occasions when a ground like this will succeed will be few and far between. This is not one of them. The jury plainly applied their minds to the evidence and returned discerning verdicts. There is nothing inconsistent between the conviction on charge 1 and the acquittal on charge 2 given the references by H to C having witnessed her having been raped. C not having given evidence in support of that, it is unsurprising that the jury acquitted on charge 2. Once again there is no merit in this ground.

Grounds 4 and 5

[42] We shall deal with these grounds together. Charge 3 was a charge of lewd, indecent and libidinous practices and behaviour which contained within it an averment of anal penetration. That averment could have been prosecuted as a charge with a different formulation. The fact remains that it was not. The trial judge directed the jury that the

complainer's evidence required to be corroborated. He did not break the libel down into different elements which each required corroboration. It was not necessary, at least in this case, that he did so. The jury were fully aware that the evidence had to be corroborated and it must be assumed that they followed the judge's directions in that regard. If the judge had told them that the anal penetration aspect of it required to be corroborated as opposed to telling them about any other part of it, it might have led to confusion. As it is, no miscarriage of justice has resulted.

[43] Lastly, it is said that no reasonable jury could have found the averment of anal penetration corroborated. It is not said that there was insufficient evidence. There was enough evidence, not only in the evidence of H but also in the evidence relating to the docket. While it is now said that the trial judge should have referred specifically to the docket, that criticism does not feature in the Note of Appeal. It proceeds on the basis that, having acquitted the appellant on charge 2, no reasonable jury could have found the circumstances in charge 1 sufficient to corroborate the anal penetration. That bald statement and the submissions in support of it fly in the face of the consistent line of authority which it would be otiose to outline yet again. For present purposes it is sufficient to refer to paragraph 21 of *Jamal* v *HM Advocate* where the Lord Justice General (Carloway) under reference to a number of well-known authorities said the following:

> "There is no principle whereby what might be perceived as less serious criminal conduct, such as a non-penetrative offence, cannot provide corroboration of what is libelled as an apparently more serious crime involving penetration."

and

> "The fundamental issue is whether the evidence demonstrates a course of conduct systematically pursued."

[44] In this case the trial judge gave full and accurate directions on the principle of mutual corroboration. There was sufficient evidence to support L in both the evidence about charge 1 and in the docket evidence. The jury were perfectly entitled to accept that evidence and to proceed as they did. Once again this ground has no merit.

[45] It is asserted that ground 2 also gives rise to a compatibility issue in that the Crown's alleged failure to disclose the desiderated material gives rise to a breach of article 6(1), 6(3)(b) and 6(3)(d) of the European Convention on Human Rights and Fundamental Freedoms. There was no separate argument in support of the assertion and it does not in any event give rise to any considerations which are not adequately dealt with by an application of domestic law.

[46] It follows from all the foregoing that the appeal is refused.