APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 35
HCA/2023/000027/XC

Lord Pentland
Lord Doherty
Lord Boyd

OPINION OF THE COURT

delivered by LORD PENTLAND

in

APPEAL AGAINST CONVICTION

by

GS

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: M. Davidson; Paterson Bell (for McKennas Law Practice, Glenrothes)
Respondent: Jessop, sol ad; Crown Agent

30 August 2023

Introduction

[1] After trial in the Sheriff Court in November 2022 the jury convicted the appellant of two charges on an indictment in the following terms:

> "(001) on various occasions between 11 January 2004 and 10 January 2010, both dates inclusive, at … you GS did use lewd, indecent and libidinous practices and

> behaviour towards your daughter, LS … and did place your mouth on her vagina and lick her vagina and did repeatedly touch her on the vagina under her clothing;
>
> (003) on an occasion between 18 May 2014 and 17 May 2015, both dates inclusive, at [***a different address than in charge 1***], you GS did sexually assault LH … in that you did try and touch her and repeatedly attempt to kiss her;
> CONTRARY to Section 3 of the Sexual Offences (Scotland) Act 2009."

[2] On 13 January 2023, having considered a criminal justice social work report, the sheriff sentenced the appellant to a cumulative term of 27 months' imprisonment.

[3] Charge 2 on the indictment libelled an offence of sexual assault of a third complainer, JG, on an occasion between February 2014 and February 2015 by attempting to remove her lower clothing and touching and rubbing her vagina over her clothing. The offence was alleged to have taken place at the same address as libelled in charge 3. The jury returned a verdict of not proven on charge 2.

[4] The appellant contends that there was no proper basis on which the jury could find that the evidence led in support of charges 1 and 3 was mutually corroborative. The sheriff should have directed the jury to that effect. Having failed to do so, there had been a material misdirection resulting in a miscarriage of justice such that the convictions should be quashed. There is no appeal against sentence.

Evidence of LS

[5] LS spoke of an occasion when she was 5 years old and woke up in her bedroom to find the appellant abusing her. He was performing oral sex on her; his mouth was on her vagina and his tongue was on her clitoris; his hands were at the sides of her legs. She was in shock and did not say anything to him nor did she tell anyone at the time. Oral sex happened only once.

[6] The next occasion when something similar occurred was when LS was about 6. The appellant entered her bedroom and molested her with his fingers underneath her clothes; he had his fingers on her vagina inside her pyjamas. She was frightened. She never said anything to the appellant about the incident nor did he say anything to her.

[7] The appellant touched the complainer's vagina again on many further occasions. It happened regularly – every couple of months – between the ages of 6 and 11. She would be in her room sleeping and would be awakened by the appellant coming into the room and taking her pants off. On each occasion he would be drunk.

[8] LS also testified that the appellant used to look at her when she was in the bath; it felt as if she did not have any privacy. This happened from when she was aged 8 or 9 until she was 12. On one occasion LS did say something to the appellant. She had been in the bath and heard footsteps. The door in the bathroom did not close properly. She knew that the appellant was there as she could hear his heavy breathing. She said "Hello, is anyone there?" but the appellant did not respond.

[9] LS explained that her parents separated when she was 15. Thereafter she sometimes stayed at the address libelled in charges 2 and 3. Amongst her close friends were JG and LH.

Evidence of LH

[10] LH was 16 years of age throughout the period libelled in charge 3. She confirmed that she had been friendly with LS at the time.

[11] LH described an event which happened on the first occasion when she went to the address in charge 3 where the appellant lived. LS was having a house party there with some of her friends. The appellant was also there. Everyone at the party, including the appellant,

consumed alcohol. The appellant was well aware that his daughter's friends were about the same age as her. Later on in the evening the party ended and LS was the last of the young people to leave. Before she left she went to the bathroom. There was no lock on the door. She was sitting on the toilet. The appellant came in and tried to kiss her. LH pushed him away and left the bathroom. She went to the living room where the appellant "tried to do things" to her. She ran out of the room. She got her coat and decided to leave. The appellant had tried to kiss her again. He tried to put his hands on her as she was leaving "as if he was trying to grab" her.

The Crown and defence positions at the trial

[12] In his speech to the jury the procurator fiscal depute relied upon mutual corroboration of each of charges 1, 2 and 3. Among the similarities he mentioned were, as regards charges 2 and 3, that the ages of the complainers at the time of the alleged offences were the same. In relation to all three charges the difference in age between the appellant and the complainer was similar. Each offence was alleged to have taken place in the appellant's home, and in each case the nature of the conduct was similar.

[13] Counsel for the appellant did not submit to the sheriff that he ought to direct the jury that LH's evidence in relation to charge 3 was incapable of corroborating LS's evidence in relation to charge 1. In his closing speech he contended that on the evidence the jury ought to find that none of the complainers' evidence was mutually corroborated by the evidence of another complainer. Among the differences upon which he relied were that whereas LS was a pre-pubescent child at the time of the conduct alleged in charge 1, LH and JG had been young women of 16 at the times of the alleged conduct towards them; whereas the appellant was LS's father, his only connection with LH and JG was that they were friends of LS; and

the nature of the conduct alleged differed greatly in each case, especially between that involving LS and LH. He did not submit to the jury that they could only convict on charge 1 if they also convicted on charge 2, or that they could not choose only to convict of charges 1 and 3.

The sheriff's charge

[14] The sheriff dealt with all necessary matters in his charge to the jury. He gave the standard directions on mutual corroboration. He summarised the points made by the Crown and the defence for and against the application of that principle. He stressed that it was a matter for them to decide if the necessary link in time, character and circumstances had been established and if the principle should be applied. In a departure from the standard directions on mutual corroboration which favoured the appellant, he directed the jury that they must be cautious about deciding to apply the principle (rather than that they should be cautious about applying it to corroborate mutually the evidence of only two complainers).

The sheriff's report

[15] In his report to this court the sheriff explains that it would only have been appropriate to give the direction which the appellant now suggests ought to have been given if the conduct in charges 1 and 3 could on no possible view be regarded as component parts of the same course of criminal conduct systematically pursued by the appellant (*Donegan* v *HM Advocate* 2019 SCCR 106; *HM Advocate* v *BL* 2022 JC 176). He did not hold that view. There were obvious similarities in the circumstances in which the offences were committed. They happened in the appellant's homes. They each involved conduct towards

a female complainer more than 25 years younger than him. The offences occurred when the appellant was drunk or had been drinking. The complainers were part of the same friendship circle. If the jury accepted the evidence of LH it painted a picture of the appellant being in his own home, in drink, and presented with a young female in a room where she would consider herself entitled to privacy – the door to which was unlocked – and the appellant then taking that opportunity to enter unannounced to assault her sexually. This was capable of supporting an inference of the appellant taking the opportunity to continue the course of criminal conduct which he had begun with LS whose evidence, if accepted, had been of sexual abuse by the appellant after he had entered her bedroom unannounced, and when he was drunk. At the very least it could not be said that no reasonable jury, properly directed, could have drawn such an inference. There was sufficient evidence to allow the jury to use the doctrine of mutual corroboration between charges 1 and 3 if they decided that it should be applied.

Appellant's submissions

[16] The nature of the evidence of the complainers and the offending described by them were so different that it could not on any possible view be said that they were component parts of one course of conduct systematically pursued by the appellant. At its highest the evidence in the case was of isolated incidents of sexual offending. On charge 1 the appellant was convicted of licking and kissing the vagina of a child and thereafter touching the child's vagina under her clothing on a number of occasions when she was aged between 6 and 11. The complainer in charge 1 was the appellant's daughter. In contrast, the conduct in charge 3 involved the appellant attempting to kiss and touch a very young adult, one much younger than the appellant. The evidence showed no more than a general disposition to

commit a particular type of offence. There was a time gap of 4 years and 4 months at its shortest between charges 1 and 3. It was acknowledged that there was no time limit beyond which the rule in *Moorov* v *HM Advocate* 1930 JC 68 could not apply. While it was accepted that in comparison with other recent cases this time gap was not in itself significant, when combined with all of the other differences identified by the appellant this was indicative of there not being a single course of conduct systematically pursued by him. As to the places where the offences occurred, it was acknowledged that there was a similarity as the offending took place within the appellant's home, albeit at two different addresses.

[17] There were a number of significant differences between the charges. First, there was a significant difference between the ages of the two complainers. LS was aged between 5 and 11 – a pre-pubescent child. LH was a young adult aged 16. It was acknowledged that the age gap between the appellant and the two complainers was the same; however, it was submitted that the dissimilarity between the ages of the complainers, especially when combined with all of the other differences highlighted, was more indicative of the incidents not being component parts of a single course of conduct than of there being one. Secondly, LS was the appellant's daughter whereas LH was not related to him. Thirdly, the conduct described by the two complainers was significantly different. While it was accepted that evidence of lesser conduct could corroborate evidence of more serious conduct, here the conduct described by each of the complainers was so vastly different that the test for application of the *Moorov* doctrine could not be satisfied. There was no similarity between the sexual or physical contact. The appellant's conduct towards the two complainers had been entirely different from the outset of each incident. It was unrealistic to say that a young child asleep in her bedroom was in a situation of privacy *vis a vis* her parents. The

jury were not entitled to find that there were any similarities of conduct such as to allow them to apply the principle of mutual corroboration.

[18] It was further submitted that the libel of charge 1 did not include an allegation of watching LS while she was bathing. Accordingly, it was not appropriate for any reliance to be placed on that evidence.

Crown submissions

[19] There were a number of similarities which underpinned the conduct spoken to by the complainers:

(i) The complainers were both young females.

(ii) They were members of the same friendship circle.

(iii) There was a significant age gap between the ages of the complainers and the appellant. The appellant was more than 25 years older than each of the complainers.

(iv) All of the conduct in charges 1 and 3 occurred at the appellant's home.

(v) LS's evidence was that the appellant was drunk when the abuse in her bedroom occurred. LH's evidence was that the appellant had been drinking at the time he conducted himself as described in charge 3.

(vi) The appellant was in a position of trust *vis a vis* each complainer at the relevant times. The complainer in charge 1 was his daughter. He was also in a position of trust in respect of the complainer in charge 3; she was a friend of his daughter and was visiting his home.

(vii) The appellant intruded on the privacy of both complainers. The complainer in charge 1 said that the appellant *inter alia* watched her in the bath and she felt that she had no privacy; this was mirrored in the actions of the appellant walking into

the bathroom while the complainer in charge 3 was using the toilet, disregarding her privacy. In respect of each of charges 1 and 3 the appellant engineered situations so that he was alone with the individual complainer.

[20] The sheriff was therefore not entitled to conclude that on no possible view of the evidence could it be said that the complainers' accounts of the appellant's conduct constituted component parts of a single course of criminal conduct systematically pursued. This was a very high test.

[21] The issue here, as in *HMA* v *BL*, concerned the weight of the evidence rather than its sufficiency. If the sheriff had embarked on an extensive analysis of similarities and dissimilarities between the two accounts that would have taken him, quite improperly, into the province of the jury. The sheriff was correct, in all the circumstances, to leave that exercise to the jury. It was notable that there was no complaint made that the sheriff misdirected the jury as to the appropriate test to be applied. The doctrine of mutual corroboration was available to the jury even if they proposed to convict the appellant only of charges 1 and 3. The sheriff had been correct to leave that matter to the jury. There had accordingly been no misdirection and no miscarriage of justice.

Analysis and decision

[22] In recent times the court has stressed that it is always a question of fact and degree whether the conventional similarities in time, place and circumstances exist so as to allow the inference to be drawn that there was a single course of criminal conduct persistently pursued (*HM Advocate* v *SM (No 2)* 2019 JC 183, Lord Justice General (Carloway), delivering the opinion of the court, at [6], following *MR* v *HM Advocate* 2013 JC 212, Lord Justice Clerk (Carloway) delivering the opinion of the Full Bench, at [20]; *Adam* v *HM Advocate* 2020

JC 141, Lord Justice General (Carloway), delivering the opinion of the court, at [29]). Since the question is one of fact and degree it will in most cases fall to a properly directed jury to determine it.

[23] It is only where it is impossible to say on the evidence that the individual incidents were component parts of a single course of conduct persistently pursued that there will be an insufficiency of evidence as a matter of law (*ibid; Donegan* v *HM Advocate* 2019 JC 81, Lord Justice Clerk (Dorrian), delivering the opinion of the court, at [39], following *Reynolds* v *HM Advocate* 1995 JC 142). The test of impossibility is obviously a high one. If that test is not capable of being met, the issue becomes one of the weight to be given to the evidence. In our system questions of weight are for the jury, not the judge.

[24] In many cases it will be possible to identify both similarities and differences in the circumstances of the charges. It is for the jury to decide whether in the light of the similarities and the differences the necessary inference of the pursuit of a single course of criminality can justifiably be drawn.

[25] In the present case the sheriff asked himself the correct question and came to the correct answer when considering how to direct the jury. He understood that the issue for him was whether on no possible view of the evidence could it be said that the respective accounts of LS and LH constituted component parts of a single course of criminal conduct systematically pursued. The sheriff recognised that this was a high test.

[26] The effect of the sheriff's directions was that he instructed the jury that there was sufficient evidence to allow them to use the doctrine of mutual corroboration in respect of the evidence led on charges 1 and 3 and to return convictions on those two charges even if they were not satisfied beyond reasonable doubt of the accused's guilt on charge 2. The court is satisfied that the sheriff was correct.

[27] There were numerous similarities between the accounts given by LS and LH. They were both young females at the time when the appellant sexually abused them. He was more than 25 years older than them. All the abuse took place in his homes in circumstances where each of them could reasonably expect to be in a position of safety or privacy. The appellant had been drinking when he abused the two complainers. He occupied a position of trust in relation to LS and of responsibility in relation to LH. LH was a 16 year old who attended a party hosted at the appellant's house where alcohol was consumed by 16 year olds and the appellant. He was the only mature adult present. LS and LH were members of the same circle of friends. It is not difficult to discern from these common features an underlying pattern running through the appellant's offending. Essentially, when he was under the influence of alcohol he took advantage of young vulnerable females, who were in his home, in circumstances where he was able to gain access to them by invading their privacy or security. In relation to LS, such an invasion occurred on each occasion when the appellant intruded into her bedroom at night-time. The evidence of the appellant watching her as she bathed was evidence of additional invasion. That evidence, while not part of the libel of charge 1, was led without objection. It was open to the jury to have regard to it, for what it was worth.

[28] No doubt there were also dissimilarities between the circumstances in which the complainers were abused – this will often be so; the form that the abuse took was not identical; one complainer was a good deal younger than the other; some years had passed between the episodes (although not a particularly lengthy period). The significance of these features of the respective accounts in the context of the whole evidence (including the many similarities) was quintessentially a matter for the jury to weigh up when they came to

consider whether they were willing to apply the doctrine of mutual corroboration, as to the rules of which they had received proper directions.

[29] There was sufficient evidence for the jury to convict the appellant of charges 1 and 3 by applying the doctrine of mutual corroboration between the evidence led in support of those two charges. It follows that there was no misdirection.

[30] For these reasons the appeal is refused.