APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 44
HCA/2023/359/XC

Lord Justice Clerk
Lord Pentland
Lord Armstrong

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

DM

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Reid; John Pryde & Co (for MSM Solicitors, Glasgow)
Respondent: Bain KC (Lord Advocate); the Crown Agent

_____

31 October 2023

Introduction

[1] The appellant was convicted after trial of 14 charges of assault and a contravention of s 38 of the Criminal Justice and Licensing (Scotland) Act 2010 involving a single complainer.

The Scottish Criminal Cases Review Commission has referred the case to the court in relation to certain charges which relied for conviction upon the doctrine of mutual corroboration for sufficiency. The appeal concerns charges 1-6, 8, 9, 14 & 19. The basis of referral is that the sheriff's directions failed to achieve a baseline standard of comprehensibility, and that, moreover, it is not possible for the appellant to determine with any confidence the reasons for his conviction in relation to the group of charges in question.

Background

[2] The Crown case was presented on the basis that on charges 10, 11, 15, 17 and 18 the complainer's evidence was corroborated by eye witnesses. In relation to charges 1– 6, 8, 9, 14 and 19 corroboration was available in the form of the doctrine of mutual corroboration (*Moorov* v *HMA* 1932 JC), as applied to charges involving a single complainer where other charges involving that complainer are otherwise established by corroborated evidence (*HM Advocate* v *Taylor (Ricky)* 2019 JC 71).

[3] At the close of the Crown case, the defence made a submission of no case to answer, arguing that the doctrine of mutual corroboration could not apply because of a lack of similarity in time, character, place and circumstance among the charges. During the debate on the submission, the sheriff made numerous references to the principle identified in *Howden* v *HMA* 1994 SCCR 19 and its possible application to the case.

[4] During the sheriff's charge to the jury he gave directions that corroboration could be found in the *Howden* principle. He did not give directions based on mutual corroboration. When the jury asked a question seeking clarification on how evidence relating to certain charges could corroborate evidence on other charges, he repeated the *Howden* direction.

After an overnight adjournment the sheriff recalled the jury to court and gave additional directions based upon *Moorov* and *Taylor*. He did not withdraw the *Howden* direction but directed the jury that he had been in error in saying that the application of that doctrine could result in conviction, since when it applied it could only apply to the issue of identification. Thus, in these additional directions the sheriff did not present *Howden* in itself as a route to conviction. The only basis upon which the offences could be found proved was under the doctrine of mutual corroboration. He summarised the position:

> "…. in order to convict of the charges with just the evidence of [the complainer], where there's no other corroborating evidence that the event occurred, you would have to believe [the complainer] and then have to decide if, by reason of the character, circumstance, place of commission and time of each charge, the crimes are so closely linked that you can infer that the accused was pursuing a single course of crime involving one of the crimes where the evidence was corroborated by [an eye witness]."

[5] The jury commenced consideration of their verdicts at 12.21 on 2 August. The sheriff responded to the question at 14.21. The jury resumed its deliberations until close of business at 16.06. The following morning the *Moorov* directions were given before the jury were asked to resume consideration of the case. The verdicts were returned at 12.37.

[6] The Crown concedes that *Howden* had no application in this case.

[7] The nub of the complaint is that the sheriff only gave accurate directions after the jury had twice been directed erroneously, and some time into the course of their deliberations, and that his error was compounded by the fact that he failed to withdraw those aspects of his earlier directions that were erroneous. It is contended that, moreover, in consequence of this, it is not possible for the appellant to determine with any confidence the reasons for his conviction in relation to the group of charges in question.

Submissions for the appellant

[8] The learned sheriff misdirected the jury on the issue of corroboration. The *Howden* directions were erroneous to this case and should neither have been provided nor repeated. This was a material misdirection which could not be cured. The sheriff's attempts to do so were inept. Although he gave adequate directions on *Moorov* eventually, he left the erroneous direction before the jury. Characterising the absence of a *Moorov* direction as an omission, as the sheriff did, conveyed the impression that it was a straightforward case of something having been missed out. Rather, erroneous directions had been provided and remained in place. The situation was not remedied and the additional directions were insufficient to avoid a miscarriage of justice, which has resulted.

[9] The sheriff should either have provided the correct directions, indicating clearly that *Howden* did not apply, or he should have deserted *pro loco et tempore.*

[10] The jury had spent several hours deliberating in the context of a flawed framework set by erroneous directions before the correct directions on *Moorov* were given. The erroneous directions were not withdrawn. This was not an incidental matter, but a core issue in respect of which the directions required to be tailored to a case where there was a single complainer. The directions provided must have confused the jury and impacted on their ability to reach the reasoned verdict to which the appellant is entitled in terms of Article 6 ECHR (*Taxquet* v *Belgium* (2012) 54 EHRR 26; *Rogers* v *United Kingdom* (2021) 72 EHRR SE7). It is not possible to discern how the jury arrived at the verdict they did concerning the charges relevant to this appeal given the differing directions which were before them at different stages.

Submissions for the Crown

[11] The Lord Advocate submitted that the jury were ultimately provided with clear and concise directions in relation to the doctrine of mutual corroboration. The *Howden* direction was not likely materially to have influenced the decision to convict.

[12] A misdirection does not always or automatically constitute a miscarriage of justice (*McAvoy* v *HM Advocate* 1983 SLT 16,). Whether it does so depends upon the circumstances of the case (*Greenhalghse* v *HM Advocate* 1992 SCCR 311 at 317B). The test to apply (*McInnes (Paul)* v *HM Advocate* [2010] UKSC 28) is whether, taking all the circumstances of the trial into account, there is a real possibility that, but for the violation the jury would have arrived at a different verdict. Here, on the evidence, there would have been no such possibility.

[13] The sheriff's charge must not be viewed in isolation but in the living context of the trial (*Goldie* v *HM Advocate* 2020 JC 164). The case was a straightforward one; the identity of the alleged assailant was never in any doubt. Both the crown and the defence addressed the jury on the basis that the *Moorov* principle applied. The appellant's defence and his approach to the relevant law was not in any way prejudiced or compromised by the sheriff's erroneous directions. There was no miscarriage of justice.

Analysis and decision

[14] The issues in the trial were straightforward. It was a matter of agreement that the appellant and the complainer had been in a relationship during the relevant period. There was eye witness corroboration for her evidence on charges 10, 11, and 15 (witness A) and charges 17 and 18 (witness B). The appellant gave evidence that he had at no time assaulted the complainer, and that she and the eye witnesses were lying. In some instances – charges 1, 6, 8, 9, 11, 18, 19, and to an extent 13, he offered a different version of events. For example,

in charge 6, that the complainer had punched her own hand though a car window, causing herself injury; and on charge 19 – involving striking her on the body with a knife- that she had sought to injure herself. As to charge 8, which alleged deliberately driving over her foot to her severe injury and permanent disfigurement, this had been an accident for which the complainer herself was largely to blame. He admitted being present at the time of the allegations made in charges 1, 2, 5, 6, 8, 9, 13, 18 and 19 but denied committing any criminal acts. There had been numerous arguments during the relationship but he denied that he had been controlling towards the complainer. The tracker app fitted to her phone was her own idea. In fact she had been the possessive and controlling party.

[15] It was apparent throughout the case that the doctrine of mutual corroboration arose. The sheriff seems to have recognised this at the outset in his preliminary remarks to the jury when he drew attention to this doctrine and advised that he would give directions on it in due course. By the end of the Crown case the position had been clarified to reveal that, in respect of corroboration, there were two groups of charges. One group depended on the acceptance of the evidence of eye witnesses; the other depended on the use of the evidence on these charges to enable the application of the *Moorov* doctrine to those remaining charges, in the way described in *Taylor.* The defence submission of no case to answer argued that in certain instances there was insufficient similarity of circumstances for mutual corroboration to apply. The Crown speech made it clear that mutual corroboration was being relied on for those charges where there was no eye witness, and the defence speech was presented on the same basis.

[16] It is abundantly clear that the sheriff should not have directed on *Howden*, should not have repeated that direction, and should have withdrawn it when he gave the appropriate directions on *Moorov*. There was thus clearly a misdirection. The question for the court is

what is the effect of that misdirection, in the context of the case as a whole, including the speeches and all the evidence.

[17] The fact that there has been a misdirection does not automatically mean that there has been a miscarriage of justice. The significance and potential effect of the misdirection must be assessed in light of the whole circumstances of the trial. The question is whether, but for the misdirection, taking all the circumstances of the trial into account, there is a real possibility that the jury would have arrived at a different verdict. In other words, was the defence denied, as a result of the misdirection, of the real possibility of securing a different outcome?

[18] We do not think such a conclusion can be reached in the circumstances of this case. The issues were very narrow; and whilst the *Howden* direction should not have been given, in the corrected directions the sheriff made it clear that *Howden* did not provide a basis upon which a verdict of guilt could be reached. He made it clear that *Howden* could apply only in cases where identification was an issue: this was not such a case and the jury could not have been confused on this matter. The sheriff gave appropriate and adequate directions on mutual corroboration in which he made it very clear that the only way upon which a verdict of guilt could be arrived at was the application of the doctrine of mutual corroboration.

[19] The jury's verdict shows that they did accept the application of the *Moorov* direction. There is a discernible, indeed obvious, and understandable, basis for the conviction. The prospect that had the erroneous direction not been made the jury might have returned ~~a~~ different verdicts is purely fanciful.