



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 40
HCA/2025/000450/XC

Lord Justice Clerk
Lord Armstrong
Lady Carmichael

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

APPEAL UNDER SECTION 107A OF THE
CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

HIS MAJESTY'S ADVOCATE

Appellant

against

CM

Respondent

Appellant: Edwards KC; Crown Agent
Respondent: Simpson; Paterson Bell Solicitors

20 August 2025

[1] The Crown appeals mid-trial under section 107A of the Criminal Procedure (Scotland) Act 1995 against the decision of the sheriff at Perth to sustain a submission of no case to answer on charge 2 of an indictment amended to retain 8 charges. The respondent argued that there was no corroboration for the evidence of the complainer on charge 2. In particular she proposed that the gap in time and differences in the nature and circumstances

of offending on charge 4 from charge 2 was such that there could be no mutual corroboration

[2] Charges 1 and 2 feature the respondent's daughter "AA". On charge 1, assault to injury, she was 5 years old and on charge 2, lewd, indecent and libidinous practices, she was between 7 and 11 years old.

[3] Charges 3 and 4 feature the respondent's son "BB." On charge 3, assault to danger of life, he was between 5 and 7 years old. On charge 4, indecent assault, he was aged 15.

The relevant charges and related evidence

[4] During the hearing the Advocate Depute satisfied us that all of the evidence she founded on was admissible, some under s 259 of the 1995 Act and some under schedule 8. Charge 1 narrates various occasions between October 1982 and January 1993 when the respondent is said to have assaulted AA by slapping or punching her on the head repeatedly, kicking her on the body and pulling her by the hair all to her injury.

[5] Charge 2 narrates various occasions between October 1984 and October 1988 when at an unknown address in Dunmore Street and another at a known address in Forres Crescent, both Dundee, the respondent is said to have penetrated AA's vagina with his fingers and her anus with clothes pegs or similar objects, to her injury, made sexual remarks, touched her on the body and vagina both over and under her clothing and masturbated in her presence.

[6] AA's evidence was that, when her mother was out at work, the respondent would enter the bedroom of the different homes where the family lived during this period. The conduct started with him touching her on the chest and vagina over her clothing. Her siblings, including BB who was about 3 years old, were often in the house. The conduct

escalated to touching her body when she was naked, rubbing her chest and vagina and inserting his fingers into her vagina. He would insert clothes pegs into her anus, thrusting and twisting them causing her pain. They could remain inserted for up to 15 minutes. When she complained about the pain he said she had to be brave. He told her that sex was about growing up and this was to be their secret. The respondent told her that every woman needed to have sex and he was teaching her. She suffered rectal bleeding and would soil herself and had to go to hospital on a number of occasions. She was removed to a residential school when she was 11 but would come home for holiday periods when the respondent would resume his activities.

[7] Evidence from social work records was adduced. AA was removed from home to a residential school just before she turned 11 with a documented history of faecal soiling for which there was no explanation such as disease or structural abnormality. It stopped when she was in the residential school. Medical records supported both physical and sexual abuse, but it was considered by relevant professionals at that time that there was no concrete evidence to support this.

[8] Whilst the Crown's response to the no case to answer submission before the sheriff rested on mutual corroboration, at a very late stage before the hearing, the Crown advised that it considered there was free-standing corroboration on charge 2 and presented submissions in that regard. In short, for proof of commission of a crime involving anal penetration, there was a body of evidence, independent from the complainer, of certain anal injuries that the complainer had sustained and a lack of any natural or pathological explanation for them. It was adduced as admissible hearsay that on 10 May 1988 the child was seen to have redness to her anogenital region but it could have been caused by her poor state of general hygiene. On 11 June 1998, her demeanour changed from bubbly to quiet

when the possibility of injury to her back passage was mentioned. There was redness of the rectal wall but no frank bruising. Social work records showed that she was placed in a residential school on 24 October 1988.

[9] In support of her identification of the respondent, the Crown relied on his interview by the police on 22 June 2023. We note that at page 10 the respondent said that AA would put pencils up her backside, assault herself and mess herself before denying that he had done anything indecent to her. At page 35, he said she was a very challenging child to bring up and would injure herself. At page 118, he said that she had put a pencil up her bum and he and his wife took her to Ninewells Hospital. He never took pegs into her bedroom. There was an odd peg on the floor from washing. He agreed that she would smear faeces on her bedroom wall and under her bed. At page 121, he agreed that he had pointed to the pegs and suggested to his wife that perhaps AA was using them to interfere with herself. We consider that that observation, to AA's mother, made at a time long before the complainer had reported what was occurring, was itself sufficient corroboration of both crime and identification. On page 122, he said he thought this because they had caught her doing it with a pencil. He also said that when they lived at Forres Crescent, and before his wife got agoraphobia, she worked on the buses.

[10] By the time of the appeal hearing, counsel for the respondent accepted that there was, on the basis of the evidence set out in the foregoing paragraphs, a free-standing corroborated case on charge 2 without recourse to mutual corroboration.

[11] Charge 3 narrates a single charge of assault of BB to danger of life between November 1994 and November 1996 at an address in Tannadice Street, Dundee.

[12] Charge 4 narrates that on a single occasion, between September and early November 1997, the respondent indecently assaulted BB by inserting a hammer into his anus. It

happened when the respondent, who was drunk, learned that BB had been taking drugs. He pushed BB, who was wearing a housecoat, onto his bed in his bedroom and said “you think you are a man taking drugs?”, “you want to be a man eh?” and “I’ll be more of a man than you’ll ever be.” The respondent left the room, returned with a hammer and rammed the handle into BB’s anus. BB said it was not inserted too deeply, considered it was done “for shock value” but also that the respondent may have intended to insert it all the way into his anus. The complainer punched the respondent who retorted, “that’ll teach you,” before walking away.

[13] Charge 5 is a further charge of assault against BB, the allegation being that at another address in Dundee, the respondent struggled with him and pushed his head through a window to his severe injury and permanent disfigurement between November 1998 and November 1999 when BB was 17.

[14] Charge 6, between January and August 2022 alleges sexual assault under section 3 of the Sexual Offences (Scotland) Act 2009 of CC, then aged 14, by touching her on the buttocks and hips over her clothing on two occasions at an address in Johnshaven. The respondent is her grandfather and she was staying with her mother at his house for the weekend. When others left the room they were in, the respondent touched her on the bottom with his hand over her clothes making her feel uncomfortable. On another occasion when she had climbed onto a kitchen worktop, he held her by the hips, purporting to steady her but it lasted for such a period that it made her uncomfortable. AA is her aunt and BB is her uncle.

[15] Charge 7 alleged sexual assault of DD, a friend of CC, at addresses in Arbroath between January and August 2022 when she was 14 years old. On various occasions the respondent touched her on the thigh and buttocks over her clothing and threw pieces of paper at her chest. DD was visiting CC’s mother’s house. The respondent was there and

threw paper down her top, a tight vest top. It went inside her top and down her cleavage and the respondent immediately left to go to the toilet. There had been another occasion when, at the same house, the respondent had sat beside her and grabbed her thigh and, later that day, had grabbed her bottom twice, once while pretending to be playing a game. Charge 8, under s 34 of the 2009 Act, alleged that a few days later, he messaged her and asked her to send him pictures of herself naked.

Section 97 submission

[16] Counsel for the respondent submitted that on no possible view could mutual corroboration be found for charge 2 from either charge 4 or charges 6 and 7. Charge 2 involved prolonged, repeated and varied offending whilst, in relation to charge 4, which occurred once, there was no motive of sexual gratification and the child was post-pubescent and not pre-pubescent. The interval between charge 2 and charges 6 and 7 was simply too long and there was no evidence that the respondent had sexually abused EE, the younger sister of AA and mother of CC, excluding that this was repeated generational offending. There was no compelling similarity between charge 2 and charges 6 and 7. Counsel founded on: *HM Advocate v SM (No 2)* [2019] HCJAC 40, 2019 JC 183; *RB v HM Advocate* [2017] HCJAC 24, 2017 JC 278; *RBA v HM Advocate* [2019] HCJAC 56, 2020 JC 16 and *Adam v HM Advocate* [2020] HCJAC 5, 2020 JC 141.

[17] The prosecutor founded on certain similarities. The respondent was the father of both AA and BB, both were children at the time and the offences occurred in their bedrooms within the family home. The insertion of objects into their anal passages was peculiar conduct and it was open to the jury to consider this to be sexual conduct, whatever the complainer on charge 4 may have thought. Despite the interval between charge 2 and

charges 6 and 7, there was some similarity in the conduct and, on charge 6, a family connection. Sexual conduct against children is, itself, a compelling circumstance rendering mutual corroboration available.

The sheriff's decision

[18] In her report, the sheriff confirms the accuracy of the references to evidence in the Crown's written submission.

[19] There could be no mutual corroboration between charges 2 and 4 because the only similarity was the insertion of an object into the child's anal passage. In charge 4 it occurred once only and without sexual gratification. The complainer perceived it as punishment and did not suggest his father was acting in a "sexualised manner."

[20] There was a material difference between charge 2 and charges 6 and 7. The former related to a pre-pubescent child and the latter charges concerned teenagers. The former was a sustained course of conduct over several years and the latter were isolated, opportunistic and fleeting incidents. Given a gap of 34 years which could not be explained by a generational gap, there were no sufficiently compelling circumstances to permit the jury to view these as component parts of a single course of criminal conduct.

Submissions

Crown

[21] It was for the jury to determine what inferences to draw from the evidence on charge 4, not the sheriff. Whether there are sufficient similarities in time, character and circumstances is a question of fact and degree and a jury question unless it is impossible to

say that the individual components are part of a single course of criminal conduct systematically pursued by the accused: *GS v HM Advocate* [2023] HCJAC 35, 2024 JC 35.

[22] The sheriff erred in four respects:

- The respondent's motive or the complainer's impression on charge 4 was not decisive, *HM Advocate v JSH* [2025] HCJAC 37 [34], but an inference of sexual motivation was available given the nature of the conduct and the comments made;
- a motive of sexual gratification was not necessary for a sexual offence at common law, *JSH*;
- one complainer speaking to an isolated incident and another speaking to repeated instances of sexual conduct did not rule out mutual corroboration, *HM Advocate v BL* [2022] HCJAC 15, 2022 JC 176;
- all of the evidence of the complainers ought to have been considered including the inherent cruelty in the respondent's conduct to the two complainers on charges 1 to 4 and that, since the children were frequently in a residential school, the respondent's access to them was limited.

[23] There had been no submission that charge 4 could not constitute indecent assault and it was for the jury to determine if it was sexual. It could not reasonably be maintained that on no possible view could the jury find mutual corroboration between charges 2 and 4. The objective test for indecency at common law was essentially the same as that under the 2009 Act.

[24] Whilst the interval between charge 2 and charge 6 was very long, for the purposes of mutual corroboration there is no maximum. There was a family connection, the complainer on charge 2 being the aunt of the complainer on charge 6. The absence of conduct towards

other children was a matter for the jury to assess and had no impact on sufficiency; *Adam* at para [39] and it is not necessary to lead evidence to explain a gap; *DW v HM Advocate* [2023] HCJAC 28 [19], 2023 SCCR 248. The respondent lacked the opportunity to develop his conduct against CC further. He had not had access to her when she was younger and offended when he had access. She had only recently met her mother, and it was through her mother that CC met the respondent. The complainer on charges 7 and 8, DD, came into the orbit of the respondent through her friendship with the complainer's granddaughter CC, the complainer on charge 6. The offending in both charges 6 and 7 occurred at the respondent's home against two girls both aged 14. These charges, and charge 8, could all be seen as a continuation of a single course of conduct systematically pursued by the respondent. It was open to the jury to infer and recognise an underlying unity of intent.

Respondent

[25] The sheriff did not err and the appeal should be refused so far as mutual corroboration was concerned. Charge 4 should be seen as an isolated incident of punishment and the sheriff was correct to infer that what the appellant did was not carried out for sexual gratification. That inference could not be drawn. The gap from charge 2 to charges 6 and 7 was simply too long, especially when a younger daughter had continued to live in the family home after AA left. There was no evidence that the respondent abused her. The sheriff was right to find that there was no special, compelling or extraordinary similarity between charge 2 and charges 6 and 7. The most important and relevant cases are: *HM Advocate v SM* (No 2) notably at paras [6] and [8]; *RB v HM Advocate* and *RBA v HM Advocate*.

[26] It had to be accepted, on reflection, that there was sufficient evidence on charge 2 in the evidence adduced at trial, notably the respondent's police interview and certain medical findings and admissible entries in social work records. To that extent, everyone had erred at first instance for which counsel apologised.

Decision

[27] The question of whether it is open to the jury to find mutual corroboration between charge 2 and charge 6 was not a straightforward one. The sheriff considered the time gap between the two charges to be at least 34 years and, on the face of it, that presents a formidable obstacle that, until recently would have been considered insurmountable.

[28] The first point to note is that the sheriff should not have proceeded on the basis that there is a gap of 34 years during which there was no sexual offending. The jury may yet find that the respondent indecently assaulted his son BB, and AA's brother, in a family home, almost 9 years after offending against AA finished.

[29] We consider that this court's approach to mutual corroboration has evolved substantially in recent years and continues to evolve. The decision and reasoning in *Adam*, is an important stage in the journey. At para [29] the court confirmed:

"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."

[30] The court noted the view, expressed in a number of cases, that where there was a long interval, there would need to be compelling or extraordinary circumstances before mutual corroboration could apply, before stating, at para [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.”

[31] A full bench, chaired by the Lord Justice General (Carloway), revisited this question in *Duthie v HM Advocate* [2021] HCJAC 23, 2021 JC 207 and determined that it was not the case that, as a matter of law, in a lengthy time-gap case there required to be special, compelling or extraordinary circumstances before the inference of a course of conduct persistently pursued could be drawn. In doing so, the court overruled *CS v HM Advocate* [2018] HCJAC 54, 2018 SCCR 329 where a court of three judges had stated that it was a requirement if mutual corroboration was to be found in such cases.

[32] One reason for generally leaving it to juries to determine questions of fact in most cases of mutual corroboration is that apparent differences in circumstances between different episodes may not be truly distinctive. A course of proposed grooming, starting with minor sexual touching intended to develop to serious sexual abuse, may be interrupted by circumstances beyond the control of the offender eg discovery, the offender losing access to the child because of a family or child moving home, or the child responding in such a way as to deter the offender from persisting. This may underlie decisions to the effect that a single incident can corroborate a long course of conduct: *HM Advocate v BL*, *HM Advocate v JSH*, and that there is no rule that the lesser cannot provide corroboration to the greater; *MR v HM Advocate* [2013] HCJAC 8, 2013 JC 212.

[33] Viewing matters in this way, the differences in conduct between charge 2 and charge 6 may not be as significant as the sheriff considered them to be. The difference in ages between the children is not so great if the end date of charge 2 is considered but even if there is deemed to be a material difference between a child of 10 or 11 and a child of 14, it is no more than a difference of degree. In other words, a matter for the jury’s evaluation.

[34] On the question of time intervals, post-*Duthie* decisions are a more reliable guide than those that preceded it. However, we note that in *AS v HM Advocate* [2014] HCJAC 135 [12], 2015 SCCR 62, the court proceeded on the basis that despite some differences, a third offence coming 18 years later against a granddaughter after offending against the appellant's son and daughter could still allow mutual corroboration. (It might be that this figure should have been 14 years given the last date in charge 2 but the court may have had a reason to state 18 years which was the interval from charge 1 to charge 3.) The court reasoned that this could be seen as a generational interval, the first two complainers no longer being children. In *JH v HM Advocate* [2022] HCJAC 39, 2023 SCR 26, a gap of 19 years did not preclude the jury finding mutual corroboration between certain charges and this was not challenged on appeal. Two of the three complainers were sisters but the third, the abuse of whom came 19 years later than the other two offences, is not said to have been related to them. The ground of appeal, that the sheriff should have said more about the long time-period and that similarities would require to be strong ones when compared to those needed where the incidents are closely linked in time, was misconceived. In *DW v HM Advocate*, in giving the opinion of the court Lord Matthews, having reviewed recent caselaw, concluded that the sheriff had not erred in allowing the jury to determine whether or not mutual corroboration could be found where there was a gap of 17 years between certain offences by an appellant who was not a relative of the complainers but there were features permitting the jury to find the requisite course of conduct.

[35] The sheriff does not explain why she considered "generational gap" to be irrelevant but she does report that defence counsel proposed that there was no evidence that the respondent abused another, younger, daughter and referred to CC's evidence to being in a car with the respondent on occasions when he did not abuse her

[36] These considerations are matters that are somewhat speculative and, in any event, at most they might form part of a jury's evaluation, they do not belong in a judicial decision on the sufficiency of evidence. As the Lord Justice General (Hamilton) explained in *Mitchell v HM Advocate* [2008] HCJAC 28 [106], 2008 SCCR 469:

“...when any question of sufficiency of evidence arises, in the course of a trial or on appeal, the evidence relied on by the Crown is to be taken 'at its highest', that is, for this purpose it is to be treated as credible and reliable and is to be interpreted in the way most favourable to the Crown.”

[37] As it has been repeatedly stated in the context of mutual corroboration, a submission of no case to answer should only be sustained if on no possible view could the jury find the requisite course of criminal conduct. It is a high test and one that will rarely be capable of being passed in cases of child sexual abuse; *HM Advocate v BL*. We consider that the sheriff fell into the same error as the trial judge in that case (see para [11] of the opinion of the court), by performing an evaluative exercise involving questions of fact and degree, nuance and impression that fell quintessentially within the province of the jury.

[38] We note further that, whilst there was no submission on any of the charges except charge 2, when the jury comes to consider charges 6, 7 and 8, the effect of our decision on mutual corroboration is that for charge 6 mutual corroboration can be found from charges 2, 4, 7 and/or charge 8. For charge 7, mutual corroboration can be found from charges 2, 4 and 6. Counsel accepted before us that on charge 7 there is free-standing corroboration in recently exhibited distress and communications implicating the respondent. Charge 8 could come within the scope of mutual corroboration from charges 2, 4, and 6. There is also free-standing corroboration on charge 8. The complainer's account can be corroborated by the respondent's admissions to the police about asking her to send him pictures of her in her birthday suit. Charge 8 being corroborated in this way could permit corroboration of charge

7 on the principle set out in *Taylor v HM Advocate* [2019] HCJAC 2, 2019 JC 71 and *Rysamanowski v HM Advocate* [2019] HCJAC 88, 2020 JC 84.

[39] So far as charges 2 and 4 are concerned, it is quite clear that the sheriff erred. Any question of an absence of motivation of sexual gratification, even if based on the evidence of the complainer, was not decisive: *JSH* at para [24] (vii) citing *Somerville v HM Advocate* [2010] HCJAC 14, 2010 SCCR 299. It is a question of fact for the jury to decide whether charge 4 constituted an indecent assault, because on any view it was an assault. It is difficult to imagine them coming to any conclusion other than that this was an indecent assault, when the respondent inserted the handle of a hammer into the anus of his son. Whilst the charge is brought at common law, the test for whether this was indecent assault is an objective one for the jury to resolve and it does not depend on the perpetrator's intention or motive: *Grainger v HM Advocate* [2005] HCJAC 11, 2006 JC 141 [17]. We consider that there is no material difference between the common law's objective assessment of indecency in an indecent assault and the test under s 60 of the 2009 Act that conduct is sexual, "if a reasonable person would, in all the circumstances of the case, consider it to be sexual."

[40] Where the two children concerned were siblings and the respondent their father, the offences occurred in the family home, and his offending against AA was limited by her removal to a children's home for several years, and there is a link in the highly idiosyncratic conduct of inserting household objects into the anus of his children, the interval approaching 9 years between charge 2 and charge 4 is far from an insuperable obstacle in law.

[41] We confirm that there is also a free-standing sufficiency of evidence on charge 2 in the body of evidence we have set out at paras [7], [8] and [9] above. It was capable of confirming, or supporting, the evidence of AA as set out in para [6] above.

[42] For all of these reasons, the court will allow the appeal, refuse the no case to answer submission and remit the case to the sheriff to proceed as accords on charge 2 and all other charges on the indictment.

Postscript

[43] This is the second appeal under s 107A this court has heard this month. It is regrettable that in each case a jury has been kept waiting for several days for the issue to be resolved. In recent years, members of the Jury Manual Committee have introduced clear and simple guidance on recent case-law on sufficiency of evidence under ss 97 and 97A of the 1995 Act. In the law section on mutual corroboration the most important cases are signalled and up to date appellate thinking is explained. In a concise chapter on indecent assault the sheriff could have quickly found that the question of whether conduct is indecent is to be objectively assessed. We recognise that judges and sheriffs may have difficult issues of sufficiency presented with no warning. It was precisely to assist the judiciary to make sound decisions and avoid mid-trial appeals that the Jury Manual evolved as it did. Judges and sheriffs will not always find an answer to every problem there, but they have a very high chance of finding a succinct, sound and current explanation of the law and reference to the relevant and recent caselaw on which it is based. We would encourage judges and sheriffs to use it. Doing so may avoid a requirement to prepare an appeal report whilst a jury is kept waiting.

[44] The Jury Manual is publicly accessible and available to both prosecutors and defence lawyers on the Judiciary of Scotland Website. The terms of s 97 of the 1995 Act are set out in a short chapter on no case to answer submissions. The unfortunate developments in this case, whereby nobody recognised at first instance that there was free-standing corroboration

on charge 2 and the trial was interrupted by an appeal before both Crown and defence came to appreciate that the Crown had led sufficient evidence regardless of mutual corroboration, were avoidable. The responsibility for what happened rests primarily on parties, but it should be noted that the terms of s 97(2) also impose, by necessary implication, a statutory obligation on the presiding judge, before sustaining such a submission and acquitting an accused, namely:

“...the judge is satisfied that the evidence led by the prosecution is insufficient in law to justify the accused being convicted of the offence charged in respect of which the submission has been made or of such other offence as is mentioned, in relation to that offence, in paragraph (b) of subsection (1) above [on any other offence of which he could be convicted under the indictment]...”

[Emphasis added.]