



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 43  
HCA/2024/000306/XC

Lord Justice Clerk  
Lord Matthews  
Lord Armstrong

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

APPEAL AGAINST CONVICTION

by

SCOTT McDONALD

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

**Appellant: G Brown, sol adv; Bridge Legal Ltd, Glasgow**  
**Respondent: Dickson AD; the Crown Agent**

11 September 2025

[1] Following a trial the appellant was convicted of 10 charges as follows:

- "1. Threatening L on an occasion between 1 January and 31 December 2004
2. Abducting L by locking her in a flat on various occasions between the same dates
3. Assaulting L on various occasions between the same dates
5. Behaving in a threatening or abusive manner towards S on various occasions between 1 December 2011 and 31 October 2012 and in various ways, including accusing her of being unfaithful, demanding that she remove her clothing and a sanitary product from her body and inspecting her clothing,

contrary to section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010

6. Abducting S by detaining her in a car and threatening her on two occasions between 1 December 2011 and 31 July 2012
7. Assaulting S on various occasions between 1 April and 31 July 2012
8. Taking an intimate photograph of S on one occasion between 1 December 2011 and 31 July 2012, contrary to section 9(1) and (4) of the Sexual Offences (Scotland) Act 2009
9. Raping S on various occasions between 1 May and 31 July 2012, contrary to section 1 of the Sexual Offences (Scotland) Act 2009
10. Behaving in a threatening or abusive manner towards C on various occasions between 1 April 2014 and 31 December 2019, and in various ways, including accusing her of being unfaithful, demanding that she remove her underwear and inspecting it, contrary to section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010; and
11. Assaulting C on various occasions between 1 April 2014 and 31 December 2019.”

Attached to the indictment was a docket containing six paragraphs. Paragraphs (i) and (ii) narrated the following:

- i. Acting in an aggressive, intimidating and controlling manner towards L on various occasions between 1 January and 31 December 2004 and in various ways, including controlling her use of contraception and accusing her of being unfaithful; and
- ii. Penetrating C’s vagina with a lollipop shaped like a penis and without her consent on one occasion in Blackpool between 1 and 30 September 2017.

[2] The jury acquitted the appellant on charge 4 (a sexual charge involving L) and charge 12 (raping C).

[3] On 13 June 2024 the appellant was made subject to an extended sentence of 8 years, the custodial term being 6 years. The sentence is not appealed.

[4] The only ground in respect of which leave to appeal was granted is to the effect that the judge did not properly direct the jury as to the requirements of mutual corroboration.

### **Circumstances**

[5] It is not necessary to narrate the evidence which was led, each of the three complainers speaking to the events libelled.

### **The judge's charge**

[6] This was in two parts. In the first, he gave standard directions including the usual ones concerning mutual corroboration. He explained that mutual corroboration can apply when an accused person is charged with a series of similar crimes, so closely linked by character, the circumstances of their commission and time so as to bind them together as parts of a single course of criminal conduct systematically pursued by the accused; transcript of judge's charge at pages 32 and 33. He continued, at page 33: "In looking at the charges it is the underlying similarity o[f] the conduct which is described by the witnesses which you have to consider in deciding whether this rule of law, this doctrine, applies." However, after the jury retired, the advocate depute and senior counsel addressed the judge. Their concern was that the directions on mutual corroboration had not made it clear that the evidence as to sexual offences could not be corroborated by that on non-sexual offences, in accordance with *Duthie v HM Advocate* [2021] HCJAC 23, 2021 JC 207. The discussion has been transcribed and is not easy to follow. That is of no moment however, our concern being with what was said to the jury thereafter.

### **The Note of Appeal**

[7] The additional directions were inadequate. The judge directed the jury that as far as charge 4 was concerned, as an example, corroboration could be found from the evidence on charges 5, 8 and 10, if they accepted that they contained a sexual element. He should have

reminded the jury that what was critical was the test of similarity. Charge 10, and in particular the sexual averment in it, was the only charge resulting in a conviction, where the evidence was capable of providing corroboration for the evidence on charges 8 and 9. There was a real possibility that the jury convicted the appellant of those charges on the simple basis that charge 10 contained a sexual averment rather than because the jury were satisfied that the evidence displayed the necessary similarities in time, character and circumstances. Accordingly the convictions on charges 8 and 9 were miscarriages of justice.

### **Submissions for the appellant**

[8] In the written submissions, it was said that at no time during the course of the initial directions did the judge direct the jury in terms of *Duthie* that it would not be open to them to use non-sexual allegations by one complainer to corroborate sexual allegations from another complainer. It was a misdirection to tell the jury in due course that where non-sexual charges contained averments of a sexual nature or sexual character then the evidence on those could be used as corroboration. *Duthie* did not hold that all sexual charges are capable of corroborating all other sexual charges. The jury had to consider whether the test of similarity was met and then consider whether the appellant was persistently or systematically pursuing a single course of criminal conduct in relation to the sexual offending.

[9] This had given rise to a miscarriage of justice. The only evidence which the jury could have used to corroborate that on charges 8 and 9 was that on charge 10 and paragraph (ii) of the docket. These related to the complainer C. The averment in charge 10 that the appellant demanded that C remove her underwear and inspect it was not on its own sufficient to meet the test of similarity and provide corroboration for charges 8 or 9. Neither

did the conduct in paragraph (ii) of the docket. The taking of a photograph of a naked person, while obviously sexual conduct, was of a very different nature to sexual penetration with an object. As far as charge 9 was concerned, it was accepted that a jury could find corroboration for that in paragraph (ii) but it was extremely unlikely that the jury accepted the evidence of the complainer C as to that, having acquitted the appellant in relation to charge 5, namely the repeated rape of C. The most likely source of corroboration accepted by the jury for charge 9 was the evidence supporting the sexual averment in charge 10 but it did not meet the test of similarity.

[10] Even if there was sufficient similarity, there was a real possibility that had the jury been properly directed they would have concluded that the sexual averment in charge 10 did not meet the similarity test being considered along with charges 8 and 9.

[11] In oral argument before us, however, counsel accepted that it would have been open to the jury to use the evidence as to the sexual averment in charge 10 to corroborate the evidence on charges 8 and 9. That assumed that they were properly directed to that effect.

### **Submissions for the Crown**

[12] The appeal should be refused. In his charge the trial judge properly referred to mutual corroboration. He grouped the charges by the conduct narrated, namely threatening behaviour, assaults, abduction, voyeurism and then rape. The problem was that he did not give an adequate direction based on *Duthie*. There was a significant sexual element in charge 10 and in paragraph (ii) of the docket. The fact that the jury acquitted on charge 4 meant that they had followed the directions as a whole and returned a discriminating verdict.

### **Analysis and decision**

[13] As counsel for the appellant conceded in his submissions, a charge to a jury has to be looked at as a whole. It will not do simply to take individual sentences or phrases out of context. As we have indicated, it was conceded before us, properly, that there was sufficient evidence before the jury in relation to the sexual activity set out in charge 10 and also paragraph (ii) of the docket to entitle the jury to find that it corroborated the evidence on charges 8 and 9. There is no rule that less serious conduct cannot corroborate more serious conduct.

[14] The further directions to the jury were not given in a vacuum. They had already been fully directed as to the requirements of mutual corroboration, the only thing missing being a direction to the effect that evidence on non-sexual matters could not corroborate that on sexual matters in accordance with *Duthie*.

[15] At the beginning of the further directions the trial judge told the jury that he had explained to them in some detail the doctrine of mutual corroboration. At the end of the further directions, in the presence of the jury, the advocate depute declared that the Crown were not suggesting that there could be corroboration of an entirely non-sexual charge with a sexual charge because they were too different in character. Having heard that, the trial judge said “yes” and said to the jury that a basic assault, for example, could not corroborate a charge of rape but a “sexual aspect (*sic*)” might, depending on the view that the jury collectively took.

[16] As it happens, the jury asked a question about an aspect of charge 2 and whether corroboration of that element could be drawn from the evidence on another charge on the indictment. In answer to that question, which related to the retention of keys in the context of abduction, the trial judge directed the jury that the mere mention of keys did not in itself

corroborate anything and reminded them of the necessity for a link in character, circumstances and time. If there was evidence before them in relation to another charge that was similar in time, character and circumstance to the charge they were dealing with, then they could have regard to that evidence in considering whether or not there was corroboration.

[17] While that question related to a particular aspect of charge 2, the jury having been directed as to mutual corroboration in the first part of the charge, having been reminded of it at the beginning of the further directions, and having been told again how it should work in answer to a specific matter, the suggestion that they might have proceeded on a different basis is entirely baseless.

[18] There was sufficient evidence to enable the jury to convict on charges 8 and 9. They were, when the whole of the judge's charge is taken into account, properly directed about mutual corroboration.

[19] There is no merit in the appeal, which is, therefore, refused.