APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 37
HCA/2025/000426/XC

Lord Justice Clerk
Lord Matthews
Lord Armstrong

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

JSH

Respondent

Appellant: Harper (sol adv) KC AD, McPherson AD; the Crown Agent
Respondent: McConnachie KC, Mullen (sol adv); the Glasgow Law Practice

6 August 2025

Introduction

[1] The Crown appeals mid-trial under section 107A of the Criminal Procedure (Scotland) Act 1995 against the decision of the trial judge to sustain a submission of no case to answer on charges 6, 7, 10, 11 and 12 of an indictment containing 20 charges. The

argument was that whilst charges 6 and 7 were well founded in the evidence of the complainer, no other charge could provide mutual corroboration, the only potential source of corroboration. On charges 10, 11 and 12 it appears the argument was that there was nothing sexual about the charges and so the respondent should be acquitted of them. How that might be so on charge 11 is a question to which we will return.

[2] The charges against the respondent relate to members of his immediate family. They mainly comprise various forms of domestic abuse including assaults.

The relevant charges and related evidence

[3] Charge 6, dating from 1 January 2005 to 30 November 2010, alleges rape at common law along with various forms of indecent assault. Charge 7, dating from 1 December 2010 to 30 April 2016, features various forms of sexual assault but particularly offences under sections 1, 2 and 3 of the Sexual Offences (Scotland) Act 2009. The complainer on both charges was the respondent's wife (UV).

[4] The evidence disclosed that in around 2004, the respondent and his wife, who were already devout practising Christians, following their watching of a TV documentary about an American family and his travelling to an American religious commune, became very strict in their adherence to biblical teachings. The respondent was the patriarch, determined that he and his wife should trust God with their fertility. The respondent believed that God made men to need sex. If UV said she did not wish to have sex he would say she was an ungodly, rebellious wife. When she awoke to find him penetrating her vagina with his fingers, he said that the marriage bed sanctified everything. When she said she was not consenting when asleep he replied that "You consented on the day we married. God gave

you to me. I can do what I want." She gave evidence constituting the offences in charges 6 and 7.

Charges 8, 10 and 11

[5] The complainer WX, one of many children in the family, explained that the respondent, for what he said were religious reasons, viewed it as his responsibility to check that the children and their mother were dressed modestly before they could leave the house. WX was not to leave her bedroom in the morning to go to school until the respondent checked her mode of dress. The respondent would come and ask her to bend down to see if he could see her breasts and he checked to see if he could see her underwear. Daughters were to comply with a modest mode of dress and their father would have significant influence on who they were to marry.

[6] Charge 8, on which there was no submission, alleges lewd, indecent and libidinous practices by inducing WX, between 2003 and 2007, when she was aged 3-6 years inclusive, to look at sexual images. Her evidence was that the respondent began showing her pornography when she was 5 years of age. At the time she did not know what it was or understand it. It went on for years. She would have flashbacks of the images as she slept and associated feelings of extreme pain in her vagina. She did not just walk in on the respondent doing so, as he later claimed. It came to light when her mother had found pornography on the family iPad. WX said she had seen it and, when her mother asked for an explanation, WX pointed at her father and said he had shown it to her. He turned pale and said "no you just walked in." Her father later spoke to WX privately during a car journey and said to her "you must have just walked in on me." UV confirmed this in her evidence, giving a more graphic description of the respondent's demeanour, and explained

that he said, "It might have been my fault. She must have walked in and seen things from behind. I'm so sorry, I brought this into our family."

[7] Charge 10 alleged sexual assault of WX on various occasions between 2014 and 2015 by compelling her to bend over and raise her skirt and repeatedly striking her on the body with a rod or similar implement and with a wooden spoon. At that time WX was aged 14 years. She was not allowed to wear makeup or high heels. The respondent said that daughters belonged to their fathers until they were married. Dating was not allowed. He said that if a woman wore a skirt above the knee, she was a stumbling block for a good Christian man.

[8] It is an odd feature of this indictment that very similar conduct is set out in charges 9 and 10 covering different times but only charge 10 is libelled as sexual assault. On charge 9, libelled as simple assault, WX explained, when asked how her father would discipline her, that he would hit her with a rod he had brought back from America. He would tell her to go to her room, bend over and lift up her skirt. Sometimes he would move her pants out of the way. He would raise his hand and deliver 10 lashes on her thigh or bottom using a rod, a wooden spoon or his belt folded.

[9] The evidence relating specifically to charge 10 was that he was still doing it when she began menstruating, she protested about treatment that she found embarrassing and he stopped doing this to her at that time.

[10] Charge 11, brought under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, relates to a single occasion when WX was aged 19 years. Parties are agreed that the evidence shows she was 17 years and there will be a motion to amend the indictment. The respondent is alleged to have examined her body and made reference to her underwear.

[11] According to WX, she was doing some laundry and wearing only her shortest shorts. He told her to go up to her room, then followed her, entered the room behind her and shut the door. He stood in front of her and told her to turn around. He got on his knees and she could feel his breath on her thighs. He said she looked like Margaret (apparently a reference to the actress Margot Robbie playing the character Harley Quinn). He asked her why she was wearing those clothes. She explained she was doing her laundry and this was her last clean clothing. The respondent said, as noted, "I can [see] too much up your ass." She adopted that he had said "I can see your panties from here." She felt his breath on her thighs and bum. He asked her if she thought it appropriate clothing with her brothers being around the house at times. WX said she would not be going out like that. He told her it was not appropriate as he could see her thighs and her bum, she was looking like an actress and it was not appropriate. He told her that she couldn't dress like this with her brothers in the house because "it could cause sexual issues for them." She felt very afraid and struggled with the fact of her father saying she could be a "sexual stumbling block" for him and her brothers.

Charge 12

[12] Charge 12 alleges sexual assault of a young child, another daughter YZ, on various occasions between 2017 and 2020 when the child was aged 7-11 years. The charge avers that the respondent placed his hand on her thigh and stroked it. YZ also spoke to chastisement at the hands of the respondent and witnessing him administer it to her siblings.

[13] In a joint investigative interview dated 7 December 2022, forming part of her evidence, she had said her father did "creepy things" and, when asked what, she said she would wake up to find him standing in her room, staring at her. She would pretend to be

asleep. It was "creepy". At other times he would be leaning over her, his hand on her thigh, she would wake up and he was just there. She would sometimes pretend she was asleep and see him just staring and staring and it really "creeped her out". One time, when she woke up, he hit her on the thigh and it hurt. She again described him putting his hand on her thigh and it really "freaked her out". In the morning, she would wake and feel disgusted and "creeped out". The time he hit her on the thigh she woke up and was aware his hand was somewhere on her thigh and as he moved his hand it smacked her. Sometimes he would be leaning over her and sometimes he would be standing and bending over her.

[14] She was cross-examined on commission and in response to a leading question agreed that her father came in and she asked him to pray, that is what she expected him to do. She thought it would make him love her. It was suggested to her that if her father put his hand on her thigh, it was in passing and not sexual. She replied (as noted):

> "What I said in [my] statement is I knew nothing about anything [sic] sexual stuff, I didn't have any knowledge of anything, I remember saying I would often wake feeling grossed and freaked. The next part is going to be foggy what I remember back then was clear, everything was much more fresh and what I said in my statement [at] the time. It was weird, gross and freaked out."

[15] Another sister, AA, the complainer on charge 15, spoke to the respondent coming into their room at night and praying over YZ. This gave AA "the weirdest feeling", she felt unsafe. She took to sleeping in the bottom bunk with YZ to look out for her. The respondent came in every night. AA got annoyed with him as he put his hand on her bed and she punched his hand off. She told him she did not like people being in her room at night and it bothered her as YZ would be sleeping. AA said she never had the "right feeling" about the respondent and YZ and was "creeped out" by it. She wondered why her father had to come in at night to pray over YZ when she was asleep.

[16] WX spoke to an occasion when she was sharing YZ's room. WX was woken by the bunk bed shaking. She saw the respondent on top of YZ. He was kneeling but most of his body was over YZ, directly on her. When asked if she saw anything like this happening again, WX said:

> "Yes, after that he would say to her before he'd leave, I'll come back and pray for you and she'd wait up, no matter how late, I'd be going to bed and he was there in that same position and I called out to him saying "What are you doing?" and he said "praying" and I believe me and him had a sort of fight about, I said this is so creepy and his response was I have the right to pray over her and I said you're literally on top of her."

Submissions

Crown

[17] The Advocate Depute summarised the evidence as we have set it out and senior counsel helpfully confirmed that he was content that it broadly represented the evidence adduced.

[18] All of the evidence should be considered together. The respondent's religious justification for his behaviour was an important consideration, as was the occurrence of his conduct against members of his family in the family home. The charges that were sexual or, in the case of charge 11, could be considered to have a significant sexual element, were committed against a mother and two of her daughters. There was some cross over in the time periods libelled. Charge 8 was available on its own to corroborate charges 6 and 7 in these circumstances but it also gave colour and context to charges 10, 11 and 12.

[19] The evidence of the three sisters describing events within the scope of charge 12 provided sufficient evidence on that charge, and senior counsel accepted that was so.

[20] It was not entirely straightforward to explain why charge 11 was not libelled explicitly as a sexual offence, or why charge 9 was an assault and charge 10 a sexual assault.

WX saw significance in the onset of puberty and this may have been the reasoning for the differences between charges 9 and 10. In any event, the evidence was all before the jury and all available for their consideration. It should all be considered together in determining if particular conduct was, as the Crown maintains, sexual. Whilst charge 11 is libelled under section 38 of the 2010 Act, the jury could readily infer that there was a significant sexual element and use it as a source of mutual corroboration for charges 6 and 7. As they could use the evidence on charges 8, 10 and 12.

[21] In short, on the evidence adduced it was open to the jury to find mutual corroboration for all of the charges of which the respondent was acquitted. The acquittals should be quashed.

Respondent

[22] Senior counsel responsibly accepted that given the terms of section 97, and the availability of alternative verdicts, the submission should not have been sustained on charges 10 and 12. There was sufficient evidence on charge 12 without mutual corroboration. On charge 10, if the jury were not satisfied of a sexual element, it would be open to convict of assault finding mutual corroboration from another charge of assault against a different complainer. Given the libel on charge 11, corroboration for the complainer's evidence could have been found on another section 38 or breach of the peace charge. The important issue is whether there is corroboration for charges 6 and 7 and there is not.

[23] Charges 8 and 11 could not possibly corroborate rape and nor could charges 10 and 12 where all concerned viewed the physical assaults on those charges as acts of discipline and none of the witnesses suggested they were sexual: *Watson* v *HM Advocate*

[2019] HCJAC 51 [16], 2019 JC 187 at para 16, *HM Advocate* v *SM (No 2)* [2019] HCJAC 40, 2019 JC 183. The repetition of offending on charges 6 and 7 was very different from those offences involving a single incident. There was no possible view on which the jury could find that the various offences were component parts of a single course of criminal conduct systematically pursued by the respondent.

Analysis

[24] We note below seven significant provisions and principles of which only the sixth appears to have been considered at first instance. Some now feature in the Crown's note of appeal, with particular reference to *MR* v *HM Advocate* [2013] HCJAC 8, 2013 SCCR 190 and *Duthie* v *HM Advocate* [2021] HCJAC 23, 2021 JC 207. Others are conceded by senior counsel for the respondent in his written submission and further concessions were made in the appeal hearing as noted above.

i) section 97 of the 1995 Act provides:

> "(1) Immediately after the close of the evidence for the prosecution, the accused may intimate to the court his desire to make a submission that he has no case to answer both—
> (a) on an offence charged in the indictment; and
> (b) on any other offence of which he could be convicted under the indictment."…

ii) the effect of s 50 and schedule 3 of the 2009 Act is that it is open on a sexual offence to convict of assault at common law.

iii) the 2009 Act provides a definition of sexual in section 60. Touching or any other activity is sexual if a reasonable person would, in all of the circumstances of the case, consider it to be sexual.

iv) in *HM Advocate* v *BL* [2022] HCJAC 15, 2022 JC 176, another section 107A appeal where the question of whether mutual corroboration can be found between two very different sexual offences arose. This court explained that the question a judge must ask is whether on no possible view of the evidence could it be said that the respective accounts of abuse constituted component parts of a single course of criminal conduct

systematically pursued by the accused. It is a high test and it will rarely be capable of being passed in cases of child sexual abuse.

v) In *McMahon* v *HM Advocate* 1996 SLT 1139, the Lord Justice-General (Hope), explained:

> "The fact that each crime is described as an instance of lewd, indecent and libidinous conduct, or as an indecent assault, is not a conclusive pointer in favour of the application of the rule. Nor does the fact that the crimes each have a different nomen juris necessarily point against its application. It is the underlying similarity of the conduct described in the evidence, not the label which has been attached to it in the indictment, which must be examined in order to see whether the rule can be applied".

vi) In *MR*, the Lord Justice Clerk (Carloway) in delivering the opinion of a full bench endorsed what was said in *McMahon* and then confirmed, at para 21, that there is no rule that what might be perceived as less serious criminal conduct cannot provide corroboration of what is libelled as a more serious crime.

vii) It is not necessary for an accused person to act for the purpose of sexual gratification. It is no part of the definition of sexual offences under the 2009 Act and nor was it a necessary constituent of a common law offence such as lewd, indecent and libidinous practices: *Somerville* v *HM Advocate* [2010] HCJAC 14, 2010 SCCR 299.

[25] We note that in *SM (No 2)*, there were two unconnected rapes separated by 7 years. The alleged rape of the accused's partner in 2007 was in Scotland and the other relating to a woman unknown to the appellant in 2014 in England. The court referred to the 350 miles separating the locations. The gap in time, the absence of family connection between the complainers and the commission of offences so far apart are highly material points of distinction.

[26] Regarding *Watson*, the quote presented in the respondent's written submission could be no more than *obiter*. Reading on from the passage quoted, in the next sentence the Lord Justice General said that the issue was a question of fact and degree before determining that, despite the stark difference in the extent of the sexual conduct described, the proximity in time, place and circumstances rendered mutual corroboration available where the two complainers were related. We accept that it may have been of some significance that when

the appellant touched the second complainer on the thigh he said that he wanted to have sex with her later. What is important to appreciate is that questions of fact and degree are for the jury to determine, not for the judge to determine as a matter of law.

Decision

[27] As is now acknowledged, the trial judge erred in sustaining the submission on charges 10 and 12 as it was open to the jury to convict of assault if not satisfied that the sexual offence charged was committed. The complainer YZ's evidence on charge 12 can be corroborated by the evidence of her sisters. There are other offences on the indictment from which mutual corroboration could be found for both charges.

[28] The judge also erred in sustaining the submission on charge 11. If the jury do not consider that there was anything sexual about this conduct, they could convict by finding mutual corroboration from other charges of non-sexual domestic abuse. If they do consider charge 11 to have a significant sexual element, and now that we know what the evidence was on it we are satisfied that it is open to the jury to reach that conclusion, the evidence on charges 6 and 7 would be a potential source of corroboration. The evidence on charges 10 and 12 is a potential source of corroboration if the jury find that there was a sexual assault.

[29] We turn to the submission that there was no potential source of mutual corroboration for charges 6 and 7 and the related argument that the conduct in charges 10, and 12 was not sexual. It satisfied the trial judge who referred to WX's evidence presenting what happened on charge 10 as chastisement based on biblical teaching to which the respondent referred when administering it. He noted that the modesty checks did not just apply to WX but to all of the females in the household. He also noted that YZ did not

suggest there was a sexual dimension to charge 12 and confirmed that she had asked her father to pray for her.

[30] We note that YZ did say it "creeped her out" and the evidence of her sisters adds considerable further colour, not least the shaking bed as the respondent lay on top of the child.

[31] The judge considered that taking the evidence at its highest, charges 6 and 7 were so far removed in circumstances from charges 10, 11 and 12 that "they did not meet the legal test required for mutual corroboration."

[32] We apply the principles set out at para [24] at (iii) to (vii) above. We also note what was said by the Lord Justice General (Carloway) in *BL*:

> [10] It is no doubt correct, as the judge observed, to say that there were dissimilarities in the accounts of the abuse spoken to by the two complainers. The scale of the abuse of the second complainer was far greater than that said to have been perpetrated against the first complainer. Whether that is significant will be for the jury to gauge. It is not for the judge to conduct an intensive analysis of the respective accounts at the stage of a submission of no case to answer. In particular the judge should not be induced into carrying out a detailed examination of whether a jury's determination, that mutual corroboration applied, would be reasonable (see Criminal Procedure (Scotland) Act 1995 (cap 46), sec 97D).
>
> [11] The type of evaluative exercise which was carried out by the judge, involving questions of fact and degree, nuance and impression, falls quintessentially within the province of the jury. The jury's role in that regard must be respected. The judge has to ask himself simply whether on no possible view of the evidence could it be said that the respective accounts of abuse constituted component parts of a single course of criminal conduct systematically pursued. This is a very high test. It is one that in modern practice will rarely be capable of being passed in cases of child sexual abuse (see *Adam v HM Advocate* , Lord Justice General (Carloway), delivering the opinion of the court, para 35, citing *Moorov v HM Advocate* , Lord Justice General (Clyde), p 74, and Lord Sands, pp 87, 88). In so far as *HM Advocate v P* suggests otherwise, it is disapproved.

[33] In that case the trial judge had upheld a submission of no case to answer, deciding that the jury could not find mutual corroboration for sexual offences which varied in nature, frequency and gravity between two child complainers who were brother and sister. On one

charge the respondent touched his younger sister's vagina over her clothing and made a sexualised remark and on the other charge touched his younger brother's penis, penetrated his mouth and induced the child to masturbate the respondent on various occasions. The court allowed the Crown's appeal and refused the no case to answer submission.

[34] On charges 10 and 12, we are unable to say that it is not open to the jury to determine from the evidence that these charges involved sexual touching and therefore sexual assault. Section 60 of the 2009 Act provides for an objective assessment to be made in all of the circumstances. Whilst the jury is entitled to take them into account, neither the respondent's motivation nor the child's impression is decisive. It follows that we are unable to say that they cannot provide mutual corroboration for charges 6 and 7.

[35] Whilst we can understand why defence counsel wished to suggest that charge 8 was not a potential source of mutual corroboration, we do not understand why the trial Depute and judge did not identify it as such. This was plainly a sexual offence. The conduct may be less serious, and it is far from identical to charges 6 and 7, but neither consideration precludes the availability of mutual corroboration. There is a temporal overlap with charge 8 and charges 6 and 7 were plainly a course of conduct involving continuing crimes of rape and sexual assault split into two charges because of the introduction of the 2009 Act. The jury may or may not find mutual corroboration for charges 6 and 7 from charge 8 but it is their evaluation to make where the complainer on charge 8 was the daughter of the complainer on charges 6 and 7 and all of the offending on the charges subject to the submission is said to have occurred in the various family homes.

[36] It is open to the jury to find corroboration for charges 6 and 7 from charges 8, 10 and 12 and it will be open to them to find it from charge 11 if they find there was a significant sexual element in its commission. There is nothing in the full bench decision in

Duthie to suggest otherwise. In the critical paragraph on this issue, 21, the court rejected the proposition:

> " that an act *which contains no sexual element at all* can corroborate a sexual one when they occur in a domestic context of abusive, controlling or coercive conduct." [emphasis added.]

[37] We also consider that, depending on what they make of the evidence, it is open to the jury to find a link between charges 6 and 7 on the one hand and charges 10, 11 and 12 on the basis of the respondent's purported religious justification in carrying out these offences. That is another consideration supportive of the availability of mutual corroboration between these charges.

[38] The court will allow the appeal, refuse the no case to answer submissions and remit the case to the judge to proceed as accords on these and all other charges on the indictment.