APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 40
HCA/2019/281/XC

Lord Justice General
Lord Menzies
Lord Brodie

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL UNDER SECTION 107A(1)(a) AND 110(1)(e) OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

HER MAJESTY'S ADVOCATE

Appellant

against

SM (2)

Respondent

Appellant: A Prentice QC (sol adv) AD, KS Maguire AD; the Crown Agent
Respondent: McCall QC, Findlater; Lindsays, Dumfries

6 June 2019

Background

[1] This is a second appeal by the Crown following the court's previous decision ([2019] HCJAC 39) to allow an appeal against the trial judge's decision to sustain a no case to answer submission and to acquit the respondent on the basis of insufficient evidence to

prove lack of consent in respect of a charge of rape. The acquittal was quashed and the matter remitted to the judge to determine the second part of the submission. This was a contention that there was insufficient evidence of rape because, contrary to the Crown's contention, the complainer's testimony relative to the charge could not be corroborated by the evidence of the different complainer who featured in the events libelled in the docket.

[2] The trial judge sustained the submission once again. A narrative of the testimony of both complainers is set out in the previous opinion, to which reference should be made for a full understanding of the facts and circumstances. In addition to that narrative, and potentially relevant for present purposes, there was evidence from the complainer in the docket that, whilst she was being carried away by the respondent, she had managed to find her phone and dial 999. The respondent took hold of it and threw it away. The vaginal penetration had been from behind after the complainer was bent over a concrete box. The *locus* of this incident was a short distance from a residential street.

[3] The trial judge reasoned that there was a significant time gap between the incidents, for which there was no explanation. Because of the time gap, compelling similar features had to be shown. The similarities between the two incidents were of the type to be found in many rape cases. There were no compelling similarities and very significant differences. The circumstances of the two incidents did not disclose a unity of purpose from which it could be inferred that they were part of a course of criminal conduct undertaken by the same individual.

Note of Appeal and Submissions

[4] The ground of appeal was that the trial judge had erred in her assessment of the state of the evidence. It was accepted that there were differences in the circumstances of the two

incidents, but the similarities were sufficient for the jury to be able to decide whether an underlying course of conduct had been established (*Donegan* v *HM Advocate* 2019 SCCR 106 at paras [38] and [40]). The dissimilarities were not of such note as to disengage the principle set out in *Moorov* v *HM Advocate* 1930 JC 68. Both complainers were physically assaulted by being struck on the face with sufficient force to knock them to the ground. Both had been abducted and taken to a secluded spot. The respondent had expressed remorse during each incident. Intercourse had taken place in a similar manner. There was striking similarities which rendered the issue one for the jury to resolve.

Decision

[5] It is apparent from this appeal, and from the many others in recent years, that, despite what seem to be clear statements from the court, parties are experiencing continuing difficulties in the application of mutual corroboration in sexual offences cases. The principle to be applied is nevertheless clear.

[6] In any case in which mutual corroboration is relied upon, the court is looking for "the conventional similarities in time, place and circumstances in the behaviour proved in terms of the libel ... such as demonstrate that the individual incidents are component parts of one course of conduct persistently pursued by the accused" (*MR* v *HM Advocate* 2013 JC 212, LJC (Carloway), delivering the opinion of the Full Bench, at para [20]): "Whether these similarities exist will often be a question of fact and degree requiring, in a solemn case, assessment by the jury ... under proper direction of the trial judge" (*ibid*). In a case where there are similarities as well as dissimilarities, it has been said that a submission of insufficient evidence should be sustained only where "on no possible view could it be said that there was any connection between the two offences" (*Reynolds* v *HM Advocate* 1995 JC

142, LJG (Hope), delivering the opinion of the court, at 146). That is a shorthand expression which means simply that such a submission ought only to be sustained where, on no possible view of the similarities and dissimilarities in time, place and circumstances, could it be held that the individual incidents were component parts of one course of conduct persistently pursued by the accused (see also *Donegan* v *HM Advocate* 2019 SCCR 106, LJC (Dorrian), delivering the opinion of the court, at para [38]).

[7] The occurrence of the two episodes in this case, which occurred over 7 years and 350 miles apart, can be contrasted with the 21 incidents of indecent or common assault and attempted rape in *Moorov*; all committed over a similar period, but in the one draper's shop and involving complainers employed by the accused. In *B* v *HM Advocate* 2009 JC 88 it was explained (LJG (Hamilton) at para [3]) that the law had moved on since *Moorov* in the sense that what was critical was not the label attached to the crimes charged but, "apart from similarity of time, place and circumstance, 'similarity of the conduct described in the evidence'" (*ibid* at para [6], citing *McMahon* v *HM Advocate* 1996 SLT 1139, LJG (Hope), delivering the opinion of the court, at 1142). In *MR*, this development was said (LJC (Carloway) at para [17]) to have taken place

> "in an attempt to keep pace with modern societal understanding of sexual and other conduct and, in particular, what are perceived to be characteristic links between the perpetration of different types of sexual and physical abuse".

[8] It is not enough simply to catalogue some similarities between two crimes, and to dismiss others, for mutual corroboration to apply. There requires to be an overall similarity in the conduct described in the offences such as identifies it not just as constituting separate criminal episodes, but as "component parts of one course of conduct persistently pursued by the accused" (*MR* at para [20]). The conduct has to be capable of being seen in this way.

The circumstances of the two episodes in this case are far removed from those which might be put into that context. The charge involves a complainer who was a long-standing partner of the respondent. There was an initial assault on the complainer in Dumfries, which was unconnected to any intent to rape. It was followed by an abduction in a car, albeit one which eventually led to where the parties had intended to go (Dalbeattie). The circumstances immediately prior to the intercourse involved the complainer attempting to appease the accused, who was in a violent mood, by agreeing to have intercourse with him, albeit in circumstances which this court considered the jury could categorise as, in practical terms, one of captivity, notwithstanding that the complainer did not describe it as such. The episode ended with the couple going together to the complainer's mother's house as originally planned.

[9] The second episode occurred over 7 years later and 350 miles away. It involved persons who were strangers to each other. The initial assault, and physical abduction by carrying, was with intent to rape. There was no question of the complainer agreeing to sexual activity as a form of appeasement. After the attack, the respondent left the scene.

[10] In these circumstances, on no possible view could the two episodes be regarded as component parts of a single course of conduct persistently pursued by the respondent. The appeal is therefore refused.