APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 51
HCA/2018/536/XC

Lord Justice General
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION

by

GRAHAM THOMAS WATSON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: I Smith; Faculty Services Limited (for Muir Myles Laverty, Dundee)
Respondent: Edwards QC, AD; the Crown Agent;

9 July 2019

General

[1] On 23 August 2018 at the High Court in Edinburgh the appellant was found guilty of two charges as follows:

> "(1) On 15 January 2017 at …. Ann Street, Dundee you … did sexually assault [AB] … and while she was asleep and under the influence of alcohol, and after she had awoken, lower her pyjama trousers, place your hand inside her underwear,

handle her vagina, repeatedly attempt to handle her vagina, seize her by the body, turn her over, struggle with her, seize her hand and place it on your penis, remove her lower clothing, lie on top of her and penetrate her vagina with your penis and you did thus rape her: contrary to section 1 of the Sexual Offences (Scotland) Act 2009;

(3) On 14 … and 15 January 2017 at Rewind Nightclub … you … did sexually assault [CD] … and repeatedly touch her leg: contrary to section 3 of the Sexual Offences (Scotland) Act 2009".

[2] On 4 October 2018 he was sentenced to 5 years imprisonment.

Evidence

[3] The incident narrated in charge 3 preceded that in charge 1. Both offences occurred against a background of a family gathering for a birthday celebration attended by the appellant and, amongst others, the two complainers. The appellant was aged 46 at the material time. The complainer in charge 3 was aged 25. She was a cousin of the appellant's wife. She was sitting in a booth in the Rewind nightclub late on Saturday 14, or early in the morning of Sunday 15, January 2017. The appellant, who was sitting beside her, said to her "me and you later on". He rubbed the top of her thigh. She laughed this off and walked away from the table. When she returned, he continued to rub her leg.

[4] The complainer in charge 1 was aged 19. She was also a cousin of the appellant's wife. She ended up at the *locus*, which was the home of a third cousin, in the early hours of 15 January. She had had a lot to drink. She was helped into a bed by another female cousin. She was wearing the clothes which she had on at the nightclub. Her cousin had helped her put pyjama bottoms on. The cousin had also put a bucket next to the bed. She had regarded the complainer as "pretty drunk but not legless" when she had arrived and had drunk more thereafter, to the point of feeling sick. She fell asleep. She was wakened by the appellant who was beside her in the bed. Her pyjama bottoms were halfway down her legs and his

hand was inside her vagina. The complainer tried to move his hand away, but he succeeded in putting it back into her vagina. She said "no". The appellant, who was behind her, pushed her over onto her back, got on top of her and raped her, despite her efforts to push him away. The complainer was not sure how long it lasted. The appellant got up and left the bedroom. She went back to sleep. She did not tell anyone about what had happened until she told her cousin about two months later. About a month and a half after that, she reported the incident to the police.

[5] The appellant gave evidence. He accepted that, in the nightclub, he had squeezed the complainer's legs when she had got up to pass him. He had said "nice legs". This was a bit of banter. He had not rubbed her leg or made the remark which she attributed to him. He admitted having intercourse with the second complainer, but maintained that this had been with her consent. She had invited him into the bed and removed her own clothing.

Jury directions

[6] The trial judge considered that the jury would be entitled to find corroboration of the rape in charge 1 by the application of mutual corroboration with charge 3. This was the manner in which the trial advocate depute had presented the case. Both charges had involved sexual attacks on much younger women in the course, or aftermath, of a family celebration. The judge directed the jury accordingly to the effect that, if the jury were satisfied that the crimes charged were so linked in terms of character, circumstances, place and time "so as to bind them together as parts of a single course of criminal conduct systematically pursued by the accused", then the evidence of one witness about the commission of one crime could be corroborated by the evidence of another witness about the commission of another crime.

[7] On reflection, the trial judge reports that the evidence of the cousin about the physical condition of the complainer when she was put to bed would have been enough to corroborate lack of consent, although the jury were not directed to that effect.

Note of Appeal and submissions

Appellant

[8] The Note of Appeal (which was not drafted by counsel who appeared at the hearing) is in the form of a prose narrative of, amongst other things, the evidence at the trial and a statement of certain broad propositions concerning mutual corroboration. In relation to actual grounds of appeal, these have to be isolated from the narrative (cf Act of Adjournal (Criminal Procedure Rules) 1996 Form 15.2-B). They appear to be: (1) "the circumstances of the behaviour and character of the offences cannot provide corroboration ... the likeness between the offences is not similar" to permit the application of mutual corroboration. Penetration required to be corroborated; (2) "no reasonable jury ... could ... have applied [mutual corroboration] as between charges 1 and 3; and (3) the trial judge had erred when directing the jury that there was sufficient evidence to apply mutual corroboration. The trial judge had failed to direct the jury that they could not convict "in the absence of corroboration of penetration".

[9] In what were succinct and well presented submissions, the focus of the appellant at the hearing was initially on misdirection. It was accepted that, in appropriate cases, a lesser charge could corroborate the greater. The question was whether "the nature of the evidence ... is indicative of that underlying unity of purpose behind the accused's actings which make it appropriate to treat the several incidents as part of the one course of conduct" (*CW* v *HM Advocate* 2016 SCCR 285 at para 34; *MR* v *HM Advocate* 2013 JC 212 at para [20]). However,

the incidents had to be "of the same character" (*K* v *HM Advocate* 2015 SCCR 242 at para [34]; *AD* v *HM Advocate* [2017] HCJAC 84 at para [22]. It was accepted that, in terms of time, the offences were not so distant that mutual corroboration could not apply. The same considerations applied in relation to place. However, the circumstances of the behaviour and character of the offences could not provide corroboration. The conduct in charge 3 could not be considered sufficient for the jury to consider that the appellant was pursuing a single course of conduct as the similarities between the offences were not such as to permit mutual corroboration to apply (see *HM Advocate* v *P* 2015 SLT 485). Charge 3 involved an unwelcome pass and a sexual assault. It was not with intent to rape (cf *MR* v *HM Advocate* (*supra*), trial judge at para [5]). It may be that the conduct showed a propensity for sexual assault, but it was not sufficient to provide corroboration of rape. It was not enough to catalogue some similarities and to dismiss others for mutual corroboration to apply (*HM Advocate* v *SM (No 2)* [2009] HCJAC 40 at para 8). In view of the dissimilarities, on no view could the episodes in each charge be regarded as component parts of a single course of conduct persistently pursued (see *Jamal* v *HM Advocate* [2019] HCJAC 22 at para [21]).

Crown

[10] The advocate depute submitted that the only live issue was whether the incidents had taken place in the manner spoken to by the complainers; the foremost point of contention being consent. The appellant had not said that the complainer in charge 3 had consented. His account of this being banter was not a defence (*Lord Advocate's Reference (No. 2 of 1992)* 1992 SCCR 960). This charge could stand alone without mutual corroboration (*Campbell* v *Vannet* 1998 SCCR 207). Although the trial AD had not put the case in this way,

charge 1 could also have been held proved by the evidence from the cousin about the state of the complainer.

[11] There was no rule that what might be perceived as less serious criminal conduct could not provide corroboration of a more serious crime (*MR* v *HM Advocate* 2013 JC 212 at para [21]; *AD* v *HM Advocate* [2017] HCJAC 84; *HMcA* v *HM Advocate* 2015 JC 27 at para [11]; *JGC* v *HM Advocate* 2017 SCCR 605 at para [12]; *SM* v *HM Advocate* [2018] HCJAC 22 at para [11]; *Jamal* v *HM Advocate* [2019] HCJAC 22; *JC* v *HM Advocate* [2016] HCJAC 100; and *Donegan* v *HM Advocate* [2019] HCJAC 10 at paras [47]-[48]).

[12] The *nomen criminis* was immaterial. It was a matter of assessing whether the evidence as a whole was capable of demonstrating an underlying unity of conduct (*McMahon* v *HM Advocate* 1996 SLT 1139 at 1142; *B* v *HM Advocate* 2009 JC 88 at para [6]; *JGC* (*supra*) at para [12]; *HMcA* (*supra*) at para [11]; and *TN* v *HM Advocate* 2018 SCCR 109 at para [12]). A trial judge should only remove the case from the jury's consideration if there was no possible connection between the offences (*Reynolds* v *HM Advocate* 1995 SCCR 504 at 508). Whether there were sufficient similarities was a question of fact and degree, primarily for the assessment of the jury under directions of the judge (*AS* v *HM Advocate* 2015 SCCR 62 at para [9]).

[13] Both complainers were young women in their twenties. Both were cousins of the appellant's wife. There was a twenty year age gap. The incidents occurred at and in the aftermath of a party at which all had been present. Both complainers had been drinking. The incidents were only a few hours apart. The assaults were of a sexual nature. The appellant had expressed an intention to have sex with one complainer and had achieved that with the other. The comment to one complainer linked the earlier incident with the later one (see *AK* v *HM Advocate* 2012 JC 74).

[14] There was nothing unreasonable in the jury's verdicts. In assessing reasonableness, erroneous directions fell to be ignored (*Geddes* v *HM Advocate* 2015 JC 229 at para [89]). The test was a high one (*ibid* para 118). There was no material misdirection by the trial judge. To the extent that there might have been, it operated in the appellant's favour.

Decision

[15] As was said in *MR* v *HM Advocate* 2013 JC 212 (LJC (Carloway), delivering the opinion of the Full Bench) in a case, which is dependent about the application of mutual corroboration, the court is:

> "[20] ... looking for ... conventional similarities in time, place and circumstances in the behaviour proved in terms of the libel ... such as to demonstrate that the individual incidents are component parts of one course of conduct persistently pursued by the accused ... 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.
>
> [21] There is then no rule that what might be perceived as less serious criminal conduct cannot provide corroboration of what is libelled as a more serious crime."

[16] In a case in which rape, including the use of force, is libelled, it will be seldom that mutual corroboration is afforded by proof of an assault by rubbing another woman's leg on a different occasion at a different time. It may be regarded as unlikely that the two incidents could be regarded as a single course of conduct. It is, however, a question of fact and degree. In this case, it is significant that the two incidents occurred within hours of each other. They were both connected to the same celebration which was attended by both complainers and the appellant. They both involved the appellant, who was 46, assaulting young women. Both were cousins of the appellant's wife. Of particular significance was the appellant's comment to the complainer in charge 3 that he wanted to have sex with her

"later on". This coincided with him having sex with the other, by that time intoxicated, cousin later that night. These particular features of the case entitled the jury to hold that the incidents were component parts of a single course of conduct persistently pursued by the appellant, thus to apply mutual corroboration and to find both charges proved.

[17] In any event, both charges were capable of being established without the need for mutual corroboration. The occurrence of charge 3 was effectively admitted by the appellant. He accepted that he had deliberately touched the complainer's legs and made a comment about them. Although the charge may be regarded as relatively minor, there was no defence to it.

[18] The issue in charge 1 was whether the complainer had consented to the appellant's sexual conduct. The complainer's account was that she awoke in bed, with the appellant in bed with her and with his hand in her vagina. Forcible intercourse followed. This account, in so far as it related to her lack of consent, was corroborated by her cousin's account of having to put the complainer to bed, put her pyjama bottoms on her and leaving a bucket into which she could, and did, vomit. The complainer was in a state of extreme intoxication when put to bed. This was sufficient support for the complainer's account of waking to find the appellant already engaged in a significant sexual assault. There was, of course, no question of any deficiency in the proof of penetration. The appellant admitted having intercourse with the complainer.

[19] There was nothing unreasonable in the jury's verdict. Once they had accepted each complainer's testimony, in circumstances in which a sufficiency was established, and rejected that of the appellant, they were entitled to find the appellant guilty. Any direction by the trial judge, to the effect that the charges could only be proved by the application of mutual corroboration, was in favour of the appellant. The appeal is accordingly refused.

Postscript

[20] The court has referred (*supra*) to the content of the Note of Appeal. Such a Note ought to set out in clear, and preferably numbered, propositions, the grounds of appeal which are to be advanced. These should not be obscured by excessive narrative of the evidence, quotation from authority or discussion of the law. These are matters which may be contained in due course the written Case and Argument, albeit in a succinct and articulate manner (Act of Adjournal (Criminal Procedure Rules) 1996 rule 15.15A(5)). In this case, for example, it would have been sufficient (on the sufficiency point) to state that "the facts and circumstances in charge 3 were insufficient to provide mutual corroboration of those in charge 1". It is important too that, if more than one ground is being advanced, each should be stated in a clear proposition. Thus, in this case, what could ultimately be found to be separate grounds of appeal, in the form of unreasonable verdict and misdirection, ought to have been evident from the Note of Appeal at a glance. The numbering of the grounds in separate paragraphs will enable both the judges at first and second sift and those at the substantive hearing to understand, consider and determine each ground in a comprehensible manner.