APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 53
HCA/2018/317/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

JAMES IRVINE McMEEKIN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Findlater; Faculty Appeals Unit (for James Irvine, Irvine)
Respondent: A Prentice QC AD (sol adv); the Crown Agent

25 July 2019

[1] On 18 May 2018, at the High Court in Glasgow, the appellant, who is now aged 54, was convicted of two charges, as follows:

> "(1) on an occasion between 1 ... and 23 July 2009 ... at ... Rutherglen you ... did assault [SK] ... and did, whilst she was asleep and incapable of giving or withholding consent, penetrate her vagina with your penis and did continue to penetrate her vagina with your penis after she awoke, and you did thus rape her;

> (4) on 11 July 2015 at ... Girvan you ... did assault [CB] ... and did penetrate her anus with your penis and you did thus rape her to her injury; CONTRARY to section 1 of the Sexual Offences (Scotland) Act 2009".

On 8 June 2018, a sentence of 8 years imprisonment was imposed.

[2] In relation to charge (1), the complainer had been in a relationship with the appellant. She was aged 25 and the appellant was 45. In July 2009, the complainer had stayed over at the appellant's flat in Rutherglen. They had had sexual intercourse. The complainer then fell asleep. She awoke to find the appellant lying on top of her. He had inserted his penis into her vagina. She tried to push him away, but was unsuccessful. She asked him what he thought he was doing, but he laughed and continued to have intercourse. He ejaculated. The complainer continued to push him and he eventually rolled off, said that he was sorry and fell asleep. The complainer got dressed and went home. The relationship ended. The complainer did not make any formal complaint until 2016, when approached by the police who were investigating other matters.

[3] In relation to charge (4), the complainer was aged about 39 and the appellant was 50. The complainer had begun a relationship with the appellant early in 2015. They had frequently visited each other's homes in Girvan. On 11 July 2015, the complainer stayed the night at the appellant's home. They had intercourse the following morning. During this, the appellant forcibly inserted his penis into her anus. The complainer had not agreed to that. She asked him to stop as it was hurting her. The appellant did not stop. He continued until he ejaculated. He then thanked her and went to sleep. This matter was only reported the following year.

[4] The appellant testified. He professed shock at the allegations and insisted that any sexual contact was with consent.

[5] There was no submission to the trial judge that the evidence was insufficient. The judge considered that the principle of mutual corroboration applied. The main similarity was that each crime was an incident of domestic sexual abuse. Each involved the appellant in an existing relationship with the complainer. They were not cohabiting, but spent time together in their respective homes. Each offence occurred in the house occupied by the appellant. The complainers were both younger than he was. The appellant was the dominant person in the relationship. He abused the trust of each complainer by having penetrative intercourse without consent. The trial judge described the appellant, as follows:

> "He did as he pleased, when he pleased and ignored their protests that they were not consenting".

Immediately after each incident, the appellant's attitude to each complainer was similar. He acted as if nothing untoward or wrong had happened. Although the crimes were separated by some 6 years, the whole circumstances revealed an underlying course of conduct (*TN* v *HM Advocate* [2018] SCCR 109 at paras [9] and [16]).

[6] The ground of appeal is that the two charges were not capable of being understood as part of a course of criminal conduct systematically pursued by the appellant. Mutual corroboration could not apply. It was not enough to identify certain similarities. The Crown required to demonstrate that each incident was a component part in the course of criminal conduct systematically pursued. It was not enough to show that the accused had a general disposition to commit offences of this nature. Reference was made to *Moorov* v *HM Advocate* 1930 JC 68 at 73; *HM Advocate* v *SM (No.2)* [2019] HCJAC 40 at para [6]; *MR* v *HM Advocate* 2013 JC 212 at paras [16]-[20]; *Dodds* v *HM Advocate* 2003 JC 8, LJC (Gill) at para [80] and Lord Osborne at para [38]; and *RB* v *HM Advocate* 2017 JC 278 at para [22]. The differences between the two charges were stark and the similarities were superficial. The application of

mutual corroboration had to be done with caution. Here, the first offence was one of vaginal rape whilst the complainer was sleeping and continuing after she had woken and protested. The second was one of anal rape, occurring in the middle of consensual sex. The first episode ended in an apology and the second with thanks. The first involved force in the form of pinning down, whereas the second involved a ramming motion, but no other violence. The offences were separated by a 6 year period. There was thus no evidence of an underlying unity whereby the offences could be regarded as subordinate parts in an overarching course of criminal conduct systematically pursued.

[7] The advocate depute founded upon the similarities referred to by the trial judge. Although there were points of dissimilarity, notably the nature of the penetration, there were points of similarity which justified the application of mutual corroboration. Both complainers were in a short term sexual relationship with the appellant. Both were relatively vulnerable as compared with the appellant. Neither complainer lived with the appellant. The offences took place in the appellant's bed. They involved penile penetrative conduct. Both had been preceded by consensual intercourse. Both offences were perpetrated despite the protestations of the complainers. Both involved elements of force. In these circumstances, the question of whether mutual corroboration could apply was a matter for the jury (*Donegan* v *HM Advocate* 2019 SCCR 106 at para [39]).

[8] In any case in which mutual corroboration is founded upon, it will often be possible to discern both similarities and differences in the conduct complained of. It was made clear in *MR* v *HM Advocate* 2013 JC 212, (LJC (Carloway), delivering the opinion of the Full Bench, at para [20]) that:

> "What the court is looking for are 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 criminal 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".

If the features of time, place and circumstances would entitle the jury to conclude that each incident was part of a course of criminal conduct persistently pursued by the accused, the matter should be remitted to them for assessment (*HM Advocate* v *SM (No.2)* [2019] HCJAC 40, LJG (Carloway), delivering the opinion of the court, at para [6]; *TN* v *HM Advocate* 2018 SCCR 109, LJC (Dorrian), delivering the opinion of the court, at para [15], citing *Reynolds* v *HM Advocate* 1995 JC 142, LJG (Hope) at 146; *Donegan* v *HM Advocate* 2019 SCCR 106, LJC (Dorrian), delivering the opinion of the court, at para [39]). In this case, the character of the offence is the same. Both are offences of rape. There is a coincidence of place; each occurring in the appellant's bed in his house. Both involved the complainer in an existing relationship with the appellant. Both involved force in response to protest. Looking at the conduct as a whole (*HMcA* v *HM Advocate* 2015 JC 27, LJC (Carloway), delivering the opinion of the court, at para [11]; *HM Advocate* v *SM (No.2)* (*supra*) at para [8]) the jury were entitled to draw the inference that the incident was part of the course of conduct described.

[9] In these circumstances, the appeal must be refused.