APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 80
HCA/2018/132/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

DARREN PATRICK JEFFREY EDWARDS

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Crowe; Faculty Services Limited
Respondent: Meehan QC AD; the Crown Agent

8 November 2019

The charges

[1] The appellant faced an indictment containing 33 charges, including five of rape (Sexual Offences (Scotland) Act 2009, s 1), four of having sexual intercourse, or otherwise engaging in penetrative or other sexual activity, with a child between the ages of 13 and 16 (2009 Act, s 28 to 30) and the balance relating to indecent communications with a child either

under 13 (2009 Act, ss 23 and 24) or between the ages of 13 and 16 (2009 Act, ss 33 and 34). The communication offences generally involved either sending indecent photographs of himself to the girls, asking them to send sexual images of themselves to him or inviting them to meet him for the purposes of engaging in sexual activity. The appellant also faced two charges, under section 127(1)(a) of the Communications Act 2003, of sending grossly offensive, indecent, obscene or menacing messages to girls under 16.

[2] The appellant, who was born on 3 February 1998, went to trial at the High Court in Edinburgh. The trial lasted some 18 days after which, on 30 January 2019, he was convicted of 17 charges. Leaving aside the communication offences, these consisted of: charge 3, involving two occasions in January or February 2016 when he had sexual intercourse at his house with BBS, then aged 14, this having originally been one of the rape charges; charge 12, being an occasion in January 2018 at Caird Park, Dundee, on which he engaged in sexual activity, including intercourse, with KM, then aged 15 years; charge 14, an occasion in April 2016 at his house when he engaged in sexual activity, including sexual intercourse, with LGC, then aged 14; charge 22, involving various occasions between July and October 2017 in a wooded area of Dundee when he engaged in sexual activity, including both vaginal and anal intercourse, with SM, then aged 14 or 15; and charge 23 which, libelling the same dates and *loci* as charge 22, read as follows:

> "on an occasion between 1 July … and 30 October 2017 … at the wooded area at Longhaugh Road, Dundee, near to Iceland Supermarket, Pitkerro Road, Dundee you … did in the course of consensual penile/vaginal sexual intercourse with her, assault [SM] … then aged 14 or 15 years, and penetrate her anus with your penis, and you did thus rape her: CONTRARY to section 1 of the Sexual Offences (Scotland) Act 2009".

[3] On 28 February 2019, the trial judge sentenced the appellant to 10 years in total on the charges which involved either penetrative sexual conduct with girls between the ages of

13 and 16 or communications with girls under 13 (charges 1, 3, 12, 14, 22 and 24). Had he been sentencing the appellant separately on each charge, the trial judge would have selected periods of, respectively, 3, 18, 30, 30, 30 and 12 months. He imposed a 5 year sentence of imprisonment specifically in relation to charge 23, which was the offence of rape. On the remaining communication offences involving girls under 16 (charges 8, 10, 11, 13, 15, 21, 25 and 27), he imposed 5 years imprisonment. Six months was selected for the breaches of the 2003 Act. All the sentences were to run concurrently and backdated to 15 February 2019, when the appellant had been remanded in custody.

Evidence

[4] The trial judge reports on the general position as follows:

> "The evidence disclosed a clear pattern and course of conduct, by which, over a period of some four years, the appellant made contact with young girls, via the Snapchat messaging app. After a short period of messaging of a general conversational type, he would send messages which had an increasingly sexual content. In most cases, that would be followed, in due course, by him sending sexually explicit images of himself, and inviting the girls to reciprocate in like fashion. Thereafter, his messages would suggest meeting for the purposes of sexual activity. In each case, though a teenager himself, he was some years older than the girl concerned. Most of the girls were vulnerable in one way or another. Several of them had been the subject of social work intervention. When a meeting did take place, he would take advantage of the younger person's naivety in a manner which, in some cases, resulted in underage penetrative sexual intercourse or rape".

[5] The issue which is raised is whether the offences of under-age sexual intercourse (charges 3, 12 and 14) were capable of providing the mutual corroboration of the rape in charge 23. The trial judge reports in relation to mutual corroboration of these charges that:

> "All four of these offences were committed within a single 22 month period, between April 2016 and January 2018. In each case, the complainer was a girl aged either 14 or 15 years. In each case the appellant was older (charge 23 – aged 19 ...; charge 3 – aged 17/18; charge 12 – aged 19 ...; charge 14 – aged 18 ...). In each case the sexual

> conduct involved penile penetration – in relation to charge 3, of the vagina; in relation to charge 12, of the mouth and vagina; in relation to charge 14 of the vagina; and in relation to charge 23, of the anus and vagina. In the cases of charges 12, 14 and 23, the sexual conduct was preceded by the sending of sexual communications …".

[6] Specifically in relation to charge 23, the complainer had previously engaged in unlawful consensual anal intercourse with the appellant, which was consistent with his conviction on charge 22. The complainer's evidence on charge 23 was that she and the appellant had met several times previously in order to have sexual intercourse. On the particular occasion, in the course of consensual vaginal intercourse, the appellant had suggested anal intercourse. She had said "No" but that, as the complainer described it in her testimony, "he turned me over and forced it in" before ejaculating. The trial judge determined that the similarities present between the evidence relating to charge 23 on the one hand, and that relating to charges 3, 12 and 14 on the other, were such as to fulfil the criteria set out in *McMahon* v *HM Advocate* 1996 SLT 1139 and *MR* v *HM Advocate* 2013 JC 212.

Submissions

[7] The appellant submitted that the evidence in support of the rape allegation was materially different from that in support of the other three charges. The difference in gravity and circumstances was so significant that it was not capable of being viewed as part of what was otherwise a course of criminal conduct. For mutual corroboration to operate, the crimes had to have an underlying unity and be "the same in a reasonable sense" (*McMahon* v *HM Advocate* (*supra*)). The crime of rape was a radical departure from any course of conduct upon which the appellant had embarked. It was accepted that a charge of rape could be

corroborated by conduct falling short of penetration (*MR* v *HM Advocate* (*supra*)) and that mutual corroboration could apply even when the requirements of consent were different, provided that the evidence was capable of indicating a course of conduct systematically pursued by the accused. Evidence that the appellant had consensual, albeit unlawful, sexual intercourse with other complainers was materially different from the single instance of anal rape narrated in charge 23.

[8] Charge 23 alleged an assault and rape; that was a deliberate attack on the complainer with evil intent and the intentional or reckless penetration of her anus without her consent. Charges 3, 12 and 14 were radically different in that they did not require an absence of consent. Charge 23 was the only one on which sexual intercourse was forced on a complainer. The appellant clearly had a project or campaign to communicate with, meet and have sex with girls. Rape was a separate act that was unconnected, and could not be regarded as related, to the other charges. There had to be supporting evidence of physical sexual abuse on another complainer.

[9] The respondent argued that the central question mirrored that in *CW* v *HM Advocate* 2016 JC 148. The court had held that a charge, where consent, or its absence, was not relevant, could properly be used to corroborate evidence in respect of a charge where it was critical. It was the underlying similarity of the conduct described in the evidence, and not the label to which it was attached, that had to be examined. The matter was ultimately one of fact and degree (*McMahon* v *HM Advocate* (*supra*) at 1142); *MR* v *HM Advocate* 2013 JC 212 at para [20]). The course of conduct had to be viewed as a whole, and not in individual compartments (*TN* v *HM Advocate* 2018 SCCR 109 at para [9]). Rape could be corroborated by a less serious non-penetrative offence (*AD* v *HM Advocate* [2017] HCJAC 84 and *Jamal* v *HM Advocate* 2019 JC 119).

Decision

[10] In *CW* v *HM Advocate* 2016 JC 148 the Lord Justice Clerk (Lady Dorrian) explained (at paras [34]-[36]) how mutual corroboration operates in practice. It is not the particular charge that requires corroboration, but the evidence of the witness to the crime or crimes libelled in that charge. The question is whether the testimony of the witnesses to the two or more crimes is "indicative of that underlying unity of purpose behind the accused's actings which makes it appropriate to treat the several incidents as part of the one course of conduct". It does not matter that the particular crimes have different names or are more or less serious. The testimony of the corroborating witness (usually, but not always, a second complainer) does not need to cover all of the essential elements of the crime in order to be mutually corroborative. The question is whether the testimony is sufficiently similar to allow mutual corroboration to apply. This is a question of fact and degree. The rape in charge 23 may be capable of being corroborated by the similarity in time, place and circumstances of the evidence relating to one or more of the other three charges.

[11] In this case, although the anal rape of the complainer in charge 23 represented an additional act, involving a lack of consent on the complainer's part, from those described by the other complainers in so far as accepted by the jury, the conduct in charges 3, 12, 14, 22 and 23 can all be seen as parts of a course of conduct persistently pursued by the appellant. They have all the conventional similarities in time, place and circumstances, notably the predatory conduct in relation to underage girls involving sexual messaging, followed by sexual activity at a pre-arranged meeting. In these circumstances, the jury were entitled to hold that mutual corroboration was applicable between charges 3, 12 and 14 on the one

hand and both charges 22 and 23 on the other. The appeal against conviction must be refused.

Sentence

[12] The appellant was aged almost 21 at the date of trial. He had no previous convictions. He lived with his parents in Dundee. His parents had separated but continued to support him. He had attended mainstream education until the age of 15, when he was moved to "off-site" education because of his problematic behaviour. He had attended college and completed certain courses, including painting and decorating.

[13] According to the Criminal Justice Social Work Report, based on the RM2000 risk assessment tool, the appellant is at high risk of being convicted of a further sexual offence. The risk factors were his age, the presence of stranger victims, a lack of intimate relationship experience and the existence of non-contact offences. Using the Stable and Acute 2007 risk assessment tool, he was at moderate risk. The risk areas related to his lack of "pro-social peers, lack of intimate peers, poor cognitive problem solving, deviant sexual interest, presence of negative emotions/hostility, feelings of rejection, loneliness and sexual preoccupation". The CJSWR concluded that the appellant took no responsibility for his offending behaviour; denying all but five of the offences. He stated to the social worker that his victims must have confused him with someone else or were being untruthful. There was no indication that he recognised that his behaviour was problematic or harmful. He was unable to demonstrate any genuine empathy for his victims.

[14] The appellant's pattern of offending reveals a course of predatory sexual conduct involving thirteen girls under the age of sixteen and two under thirteen. Four of the charges involved unlawful sexual intercourse and there was one of rape. The offences were serious

and required to be dealt with by the imposition of a significant period in custody. The question is whether the cumulative total of 10 years in custody is excessive, having regard in particular to the appellant's youth at the time of the offences. He was aged between 17 and 19 years. The court is persuaded that the sentence is excessive.

[15] Having regard to the nature of the offending and the risk assessments in the CJSWR, the period for which the appellant would ordinarily be subject to license on his release from custody would not be adequate for the purpose of protecting the public from serious harm. The court will accordingly quash the sentence of 10 years imprisonment and substitute therefor an extended sentence, in terms of section 210A of the Criminal Procedure (Scotland) Act 1995, of 9 years, of which the custodial element will be 6 years.