APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 92
HCA/2019/181/XC

Lord Justice General
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

RONNIE HUME McCAFFERTY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: MF Guarino (sol adv); Guarino & Thomson, East Kilbride
Respondent: Edwards QC AD; the Crown Agent

5 December 2019

General

[1] On 12 March 2019, at the High Court in Glasgow, the appellant was convicted of four charges. The first two involved the complainer, namely KH, and libelled lewd, indecent and libidinous practices at common law, when she was aged between 6 and 11, and under section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995, when she was over 12

and under 16. The dates of the combined libels were between 27 November 2001 and 27 July 2010. The *loci* included an address in Uddingston. The third charge libelled the rape of KH, when she was aged between 11 and 13, on two occasions between November 2006 and November 2009 at the address in Uddingston and in a hotel in Benidorm. The fourth charge had an eventual libel spanning January 2000 and July 2010 and involved the repeated rape of AC, who was the appellant's partner, at the address in Uddingston "while she was asleep and under the influence of alcohol and prescribed medication".

[2] On 9 April 2019, the appellant was sentenced to concurrent periods of 7 years imprisonment on charges 1, 2 and 4 and 10 years on charge 3.

The evidence

[3] KH, and her sister EH, are the granddaughters of AC. The appellant was AC's partner and they lived at the address in Uddingston. Both grandchildren stayed with them at weekends. According to KH, on repeated occasions the appellant exposed himself to her, toucher her vagina and elsewhere on her body, induced her to touch and rub his penis and to perform oral sex upon him in various locations in the house, its garage and in a transit van. This included the bedroom, which KH shared with EH, and a loft. In relation to episodes of both touching and oral sex in the bedroom, KH pretended to be asleep. On one occasion, when KH was aged about 12, the appellant had sexual intercourse with her in the livingroom of the house. On another occasion, when the complainers, the appellant and the mother of KH and EH were all in Benidorm, the appellant had had intercourse with KH in his hotel room. This had occurred when the appellant had taken the complainer to that room to collect towels. The complainer was aged between 12 and 13 at that time.

[4] EH gave evidence of seeing the appellant giving KH what she described as a "sexual" kiss on an occasion, which she thought was odd at the time. She recalled being sent out of the loft at her grandmother's house; leaving the appellant and her sister alone there together. She remembered the appellant taking her sister to collect towels at the hotel in Benidorm and it being thought that the two had gone away for a long time. On their return, KH's mood had changed completely. She had declined to go into the swimming pool, despite having previously been enthusiastic about that prospect.

[5] AC was aged 67 at the date of the trial and had been disabled as a result of arthritis for over 20 years. She had suffered a stroke in October 2010. She had lived with the appellant at the address in Uddingston from at least 1996 until 2010, when the police had come to speak to her about the allegations against the appellant, which were being made by her granddaughter. She had difficulties getting to sleep and had a practice of taking sleeping pills, Tramadol and alcohol in order to assist. On one occasion she had woken up and realised that the appellant had had sexual intercourse with her while she had been asleep. She had been wearing pants, but had found them on the floor, inside out. Her vagina was both wet and sore. The complainer took to wearing pyjama bottoms. She would wake up to find these on the floor and her vagina wet and sore again. Semen was visible on her legs and on the bed. Further similar incidents occurred "quite a few times". The final occasion was when she had woken to find the appellant having sexual intercourse with her from behind.

[6] The complainer initially said that this last incident had happened a few weeks before the appellant had been "lifted" (2010). When she had gone to the police about the appellant's behaviour in April 2018, she had given a statement in which she described it as happening sometime between 2001 and 2002. The earlier incidents could have been years or

months before that. As a result of her stroke, her memory had been impaired. She could recall that these things had happened, but was not sure when. She had not had intercourse with the appellant after he had left in 2010, although contact with him had continued until 2017.

[7] In cross-examination, AC said that it had been in 2001 or 2002 that she had started to believe that something was going on. She repeated that she did not remember the dates and times because of her stroke. She got confused very easily. In re-examination, AC thought that KH had still been at primary school when the incidents had occurred. This would have put them as occurring some time before 2007.

[8] The appellant did not give evidence. He was interviewed by the police, but denied any inappropriate conduct towards the complainers.

The amendment

[9] The original date of the libel in charge 4 was between January 2000 and December 2002. That had accorded with the complainer's statement to the police, which she had initially adopted in her evidence. However, as already observed, she had later stated in her testimony that the sexual activity could have occurred at any time up to 2010, when she had separated from the appellant.

[10] At the conclusion of the evidence for the Crown, the advocate depute moved to amend the libel in order to bring the dates into line with the complainer's evidence. This was opposed on the basis of "prejudice"; that it would make it easier to apply the principle of mutual corroboration when the amended latitude was taken into account. The trial judge allowed the amendment in terms of section 96 of the Criminal Procedure (Scotland) Act

1995, on the basis that the character of the offence was not changed. There was no prejudice to the defence, since the appellant's position remained one of complete denial.

No case to answer submission

[11] It was contended that there was insufficient evidence on each of the charges on the basis that the principle of mutual corroboration could not apply. The complainer in charges 1 to 3 had spoken about activities when she was a child, primarily at her grandmother's house, but also at other locations. The offences had been committed clandestinely, persistently and frequently over a period of time. They displayed a pattern of physical conduct, including oral sex. In contrast, the incidents in charge 4 related to a specific form of sexual activity in relation to an adult, in the context of a long term cohabiting relationship.

[12] The trial judge held, following *MR* v *HM Advocate* 2013 JC 212 (at para [20]), that there were similarities sufficient to permit the jury to infer that the appellant had systematically pursued an underlying course of criminal conduct. These were that: the incidents had taken place within a similar timeframe; they had taken place within the family relationship; each complainer was vulnerable, by virtue of age or physical difficulty; each lived in the same household as the appellant; the incidents had mostly taken place in the same house; they had commonly occurred at night; they occurred when the complainers were in bed and either sleeping or pretending to be asleep; and penetration had been involved in each case.

Submissions

Appellant

[13] The appellant submitted that the trial judge had erred in allowing the Crown's motion to amend the latitude of charge 4. It was accepted that amendment was primarily a matter for the discretion of the trial judge (*Cumming* v *Frame* (1906) 6 Adam 57 at 61). Nevertheless, the court ought to refuse an amendment if prejudice was thereby caused (*Walker* v *HM Advocate* 1999 SCCR 986 at 992). The change from 2 years to over 10 years had been based on evidence which amounted to no more than speculation or guess work on the complainer's part. This had caused prejudice in relation to the application of mutual corroboration. Because of the expansion of the timeframe, the amendment had cemented the notion of a unity of purpose.

[14] The trial judge had erred in repelling the submission of no case to answer. Notwithstanding the *dicta* in *Reynolds* v *HM Advocate* 1995 JC 142 (at 146), for the reasons advanced to the judge, there was insufficient to link the crimes libelled in charges 1 to 3 with that libelled in charge 4. There required to be an underlying similarity of conduct. The crimes in charges 1 to 3 were committed against a young child in a variety of domestic and external locations. They were significantly different in nature to that in charge 4, which was committed in the context of a longstanding cohabitation.

Respondent

[15] The Crown submitted that section 96 of the 1995 Act permitted amendment to cure any discrepancy or variance between the evidence and the indictment unless there was a change in the character of the offence. If there was prejudice, the court could grant a remedy by way of adjournment. The amendment had been based on the evidence which the

complainer had given. The appellant had had ample opportunity to attack the credibility and reliability of the complainer and had done so. The differences between the dates, which had been given in her police statement and those given in her evidence, provided additional material for cross-examination of the complainer. No objection had been taken to the testimony which had given rise to the motion to amend. The character of the offence had not changed.

[16] The principle in relation to the application of mutual corroboration was clear (*HM Advocate* v *SM (No. 2)* 2019 SCCR 262 at para [5]). Whether sufficient similarities existed was often a question of fact and degree requiring assessment by the jury (*MR* v *HM Advocate* 2013 JC 212 at para [20]). It was only if, on no possible view, could it be said that there was any connection between the offences that a submission of no case to answer could be sustained (*Reynolds* v *HM Advocate* (*supra*) at 146). There was sufficient similarity between the offences in charges 1 to 3 and that in charge 4 (*CAB* v *HM Advocate* 2009 SCCR 106 and *AL* v *HM Advocate* 2016 HCJAC 120). Both complainers were members of the same household and both were vulnerable and looked to the appellant for care.

Decision

[17] Whether to allow an amendment to an indictment in terms of section 96(1) of the Criminal Procedure (Scotland) Act 1995 is a matter primarily for the discretion of the court at first instance, provided that the amendment does not change the character of the offence. If any prejudice is caused to an accused, in the sense of being unable to deal with the evidential consequences of the amendment, the court can often provide a suitable remedy in the form of an adjournment (*Iqbal* v *HM Advocate* [2015] HCJAC 71, LJC (Carloway), delivering the opinion of the court, at para [21]). The amendment brought the charge into

line with the complainer's evidence, which had been led without objection. The complainer had said at first that she thought that the final episode of intercourse had occurred only a few weeks after the appellant's detention in 2010, but accepted that, in terms of her police statement, it could have been as early as 2001 or 2002. The amendment did not alter the character of the offence. It did not cause the appellant any difficulties in dealing with the complainer's testimony. He had been able to cross-examine the complainer and thereby challenge her credibility and reliability, based partly on the effects of her stroke and partly on her failure to report the incidents to the police for many years after the disclosure by her granddaughter. The appellant, who would have been the only other potential witness to the incidents, had been free to give evidence to contradict the complainer's testimony, if that had been his position. This ground of appeal fails. The effect is that the jury have held that, in relation to charge 4, the incidents occurred some time between 2001 and 2010.

[18] The principles governing the application of mutual corroboration have recently been outlined once again in *HM Advocate* v *SM (No. 2)* 2019 SCCR 262, as follows:

> "[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 (Lady Dorrian), delivering the opinion of the court, at para [38]).
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> ...

> [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])."

[19] It is true that there are differences in the nature and status of the complainers; one being an adult with whom the appellant was cohabiting and one a child. One set of circumstances involved clandestine sexual activity and the other paedophilic grooming followed by sexual abuse. There were, in contrast, striking similarities between the offences, the most obvious being that much of the sexual activity involving KH occurred in the same house as that involving AC. They occurred at approximately the same time, whatever dates for the commission of charge 4 are selected. Both included offences of rape. Both were in a domestic setting, with the appellant in a position of trust in relation to the complainers who were both vulnerable in one way or another. Both tended to occur when the complainers were in bed and either sleeping or pretending to be asleep.

[20] In these circumstances, following *Reynolds* v *HM Advocate* (*supra*, LJG (Hope) at p 146), it cannot be said that on no possible view was there any connection between the offences.

[21] The appeal against conviction is accordingly refused.