APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 2
HCA/2018/00052/XC

Lord Menzies
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD GLENNIE

in

Crown Appeal under section 1942B of the Criminal Procedure (Scotland) Act 1995

by

HER MAJESTY'S ADVOCATE

Appellant

against

RICKY TAYLOR

Respondent

Appellant: Borthwick AD; Crown Agent
Respondent: A Ogg, sol adv; Paterson Bell, Edinburgh for Aberdeen Considine, Aberdeen

7 February 2019

Introduction

[1] This is an appeal by Her Majesty's Advocate against a decision of the Sheriff Appeal Court allowing (in part) the Respondent's appeal by stated case against his conviction in Aberdeen Sheriff Court of a contravention of section 5 of the Sexual Offences (Scotland) Act 2009. The appeal raises the question whether the doctrine of mutual corroboration (*Moorov* v *HM Advocate* 1930 JC 68) can apply where the individual offences said to constitute a

single course of criminal conduct persisted in by the offender were all committed against the same complainer; and where, necessarily in such circumstances, the only separate source of evidence relied on for corroboration is evidence not from another complainer (there being none) but simply from an independent witness to one of the offences. It also raises the question whether the *Moorov* doctrine can be used to corroborate evidence from the complainer about a number of incidents where those incidents are not charged separately but are included within one single "composite" charge.

Procedural history

[2] On 22 March 2018 at Aberdeen Sheriff Court the Respondent was found guilty after trial of a contravention of section 5 of the Sexual Offences (Scotland) Act 2009. The terms of the Complaint against him, in terms of which his guilt was established, were as follows:

> "(001) on various occasions occurring between 16 October and 16 November 2017, both dates inclusive at 14 Gaitside Drive, Aberdeen you RICKY TAYLOR did intentionally engage in a sexual activity in the presence of [SLD], Police Scotland Queen Street Aberdeen in that you did repeatedly expose your penis at windows of your home and masturbate;
> CONTRARY to Section 5 of the Sexual Offences (Scotland) Act 2009"

The words "on various occasions …", "both dates inclusive" and "repeatedly" reflected the allegation that there were four separate incidents of a similar nature committed within the period identified in the Complaint.

[3] Upon the Respondent being convicted, the court certified in terms of section 92(2) of the Sexual Offences Act 2003 that the offence was a sexual offence to which Part 2 of that Act applied. On 9 May 2018, after a period of deferral, the Respondent was placed on a Community Payback Order for 3 years with a Programme Requirement to attend and participate in the Moving Forward Making Changes Programme and a condition to carry

out 300 hours of unpaid work in the community. A Restriction of Liberty Order was made with a condition that the Respondent remain within his home address between the hours of 7.30pm and 5.30am daily for 9 months. The Respondent was advised that he would be subject to the Notification Requirements of the 2003 Act for 3 years.

[4] The Respondent appealed to the Sheriff Appeal Court against conviction. The appeal was by way of stated case. The questions of law in the stated case were directed (1) to whether the Sheriff was entitled to repel a no case to answer submission (a matter with which we are not presently concerned); and (2) as to whether she was entitled to convict the Respondent of all four incidents encompassed in the libel, rather than of one incident only.

[5] The appeal was heard before the Sheriff Appeal Court on 11 September 2018. The court allowed the appeal to the extent of setting aside the verdict of guilty and substituting therefor a verdict of guilty under deletion of the words "on various occasions occurring between 16 October and" and "both dates inclusive". In effect, the Sheriff Appeal Court restricted the conviction to one only of the four incidents encompassed within the libel, namely the incident which occurred on 16 November 2017.

[6] In light of that decision the Sheriff Appeal Court quashed the sentence imposed by the sheriff and in its place imposed a Restriction of Liberty Order limited to a period of 3 months from 9 May 2018 and a Community Payback Order with a Supervision Requirement for a period of 3 years from that same date with a requirement to participate in the Moving Forward Making Changes Programme (for a period of 3 years from that date) and a requirement to complete 150 hours of unpaid work. No change was made to the certification made by the sheriff in terms of Part 2 of the Sexual Offences Act 2003.

[7] This appeal against the decision of the Sheriff Appeal Court is brought in terms of section 194ZB of the Criminal Procedure (Scotland) Act 1995, permission to appeal having

been granted by this court on 15 October 2018. The questions raised in the Note of Appeal (retaining the original numbering) are:

3.1 whether the doctrine of mutual corroboration can apply where two or more offences have been libelled in an omnibus charge; and

3.2 whether the doctrine of mutual corroboration can apply where a single complainer speaks to two or more charges and that complainer's evidence in relation to one of those charges is corroborated.

In his submissions to this court the Advocate Depute accepted that the second question was not well framed and sought to re-formulate it in more precise terms, but we think it unnecessary to concern ourselves with that – the substantive effect of the question is sufficiently clear.

The stated case

[8] In paragraph 5 of the stated case, in sub-paragraphs 1-13, the sheriff found the following facts proved (substituting "the Respondent" for "the Appellant" to reflect his present position in these proceedings):

(1) The complainer, Ms SLD, resided at an address in Aberdeen with her partner, Mr R, and two young children.

(2) The Respondent, Ricky Taylor, was her neighbour. He lived at 14 Gaitside Drive with his parents.

(3) That is a semi-detached house on two floors. Ms SLD's back door is adjacent to the rear of the Respondent's house. When standing at the back door of her own house, Ms SLD had a clear view of the kitchen window of the Respondent's house. She could also see the Respondent's bedroom window

situated on the first floor directly above the kitchen. The distance from Ms SLD's backdoor to the Respondent's window was approximately twenty steps.

(4) Ms SLD was a smoker. On most evenings at around 9pm she would go outside, stand at her back step at the back door and smoke a cigarette.

(5) In October 2017 at around 9pm Ms SLD was at home with her children and partner. She was standing at her back door on the steps smoking a cigarette when she saw movement. She looked up at the Respondent's bedroom window. She could see the top half of his body from the thigh to his head. She saw him masturbating. He was right up at the window. He was completely naked and she saw his penis. She looked away instantly and went inside.

(6) A week later, in October 2017, at around 9pm Ms SLD opened her back door. She saw a light go on in the Respondent's bedroom. She saw the Respondent jumping up to his window. He started masturbating. He was close up to the window and was not wearing any bottoms. She saw his penis. The Respondent had tapped on his window to get her attention. He was making a whistling sound while he was doing this. The incident lasted 30 seconds.

(7) On 15 November 2017 at around 9pm Ms SLD had gone outside to have a cigarette. She was standing at a step at her back door. She could hear tapping and a whistling sound. She looked up at the Respondent's bedroom window. His window was ajar. He was wearing a T-shirt and was naked from the waist down. He had tapped his window and was whistling; and he

called her name to get her attention. She saw his penis and he was masturbating. The incident lasted for 30 seconds.

(8) Finally, on 16 November 2017, just after 9pm, Ms SLD was standing outside her back door at a step and smoking a cigarette. She saw the Respondent in his kitchen. He was facing her. He removed his boxer shorts, place one leg on the worktop, exposed his penis and masturbated. He was naked.

(9) On that same day Mr R went upstairs to his bedroom at the same time as Ms SLD went outside to have a cigarette. The bedroom is on the first floor and looks onto the Respondent's kitchen. He looked outside his bedroom window and after a few minutes he saw the Respondent in his kitchen. He saw him remove his boxer shorts, place his leg on the kitchen worktop, expose his penis and begin to masturbate.

(10) Mr R ran downstairs and told his partner what he had seen. They agreed to contact the police.

A police constable attended and they both gave statements. The findings in fact conclude with the finding that "the appellant engaged in sexual activity in the presence of [Ms SLD] and caused her distress and alarm."

The sheriff's reasoning in her decision

[9] It is clear from these findings in fact that the sheriff accepted the evidence of Ms SLD and Mr R. She says in paragraph 51 of the stated case that she found them to be "entirely credible and reliable witnesses". In paragraph 52 she says that she did not believe the Respondent in his explanations for his conduct. Given the evidence of Ms SLD and Mr R, the Crown had proved that the incident on 16 November 2017 had occurred. All the crucial

and significant aspects of the case had been corroborated. Her basis for convicting the Respondent of the remaining three incidents ("various occasions occurring between 16 October …") was that Ms SLD spoke to all such incidents which were of a similar nature to the one of 16 November 2017. She accepted that there was a "course of conduct" and, given that two witnesses spoke to the one incident, their evidence about that incident could support the evidence of the other three incidents given by Ms SLD alone. Put another way, Ms SLD's partner could be seen as a source of evidence for the incident on 16 November and Ms SLD for each of the other incidents, "all of which could be viewed as part of an underlying course of conduct towards Ms SLD systematically pursued by the [Respondent]." This was her finding on the evidence led at the trial.

The Sheriff Appeal Court

[10] The reasoning of the Sheriff Appeal Court appears at paragraph [4] of its Opinion:

> "[4] In our view, the circumstances of the present case represent a series of incidents, only one of which was corroborated. That is a different matter from a single incident in which not all details are corroborated and the Crown originally sought to secure a conviction by treating the different episodes as a single charge because they were said to form part of a single course of conduct. However, while they may be different manifestations of a single course of conduct, each episode in our view was in fact a separate incident which required to be corroborated of itself. A similar type of situation was considered by the High Court of Justiciary in the case of *Spinks* v *Procurator Fiscal, Kirkcaldy* [2018] HCJAC 37 where the Crown argument was rejected. Today, the learned advocate depute submitted that the case of *Wilson* v *HMA* 2017 JC 64 provided support for the Crown's position. In particular, she referred us to para [15] of the decision of the court in the case of *Wilson*. It was argued that that aspect of the decision indicated that not all of the episodes required to be corroborated or to be spoken to by more than one witness, in effect under reference to the *Moorov* doctrine. We do not agree with the interpretation that has been placed by the Crown on para [15] in the case of *Wilson*, a case which dealt with two separate charges and not with a single charge covering two episodes. The final sentence of the para reads, "However, equally there is no need for the complainers in two or more charges to be different provided there are two sources of evidence to prove the crucial facts". In our view that must be construed as a reference to proving the crucial facts in relation to each of the charges. Following *Spinks*, in the present

> case it would mean that two sources would be required to prove each separate episode within the overarching charge."

Accordingly, as already indicated, the Sheriff Appeal Court allowed the appeal to the extent of restricting the conviction to a single incident, namely that on 16 November 2017, and, in light of that, imposing a lesser sentence.

Submissions

[11] For the Crown, it was submitted that the Sheriff Appeal Court had erred in determining that there was insufficient evidence to corroborate the libel in its entirety. The Sheriff Appeal Court was correct in determining that each of the four incidents encompassed in the libel required to be corroborated, and also in determining that the complainer's evidence about the fourth incident was corroborated by the evidence of Mr R; but it erred in deciding that the principle of mutual corroboration could not be applied to proof of the other three incidents witnessed by the same complainer. The complainer spoke to four incidents which were virtually identical and took place over a period of about one month. On the fourth occasion the complainer's partner witnessed the Respondent's conduct. The Sheriff Appeal Court erred in holding that the conduct spoken to by Ms SLD could not constitute a single course of conduct systematically pursued by the respondent such that the principle of mutual corroboration could apply; and erred in holding that the evidence of Mr R in relation to the fourth incident could not provide the necessary corroboration. On a proper analysis, each of the four incidents described in evidence demonstrated the "conventional" similarities in time, place and character of commission such that they could properly be said to form part of a single course of criminal conduct systematically pursued by the Respondent. Accordingly, the evidence of Ms SLD

concerning the first three incidents could be corroborated by the evidence of Mr R concerning the fourth incident. That analysis could be tested by considering the situation if Ms SLD had witnessed only the first three incidents and Mr R was an eyewitness to the fourth. In that situation it would be open to the Crown to lead evidence from Ms SLD in respect of the first three incidents and from Mr R in respect of the fourth incident and rely upon the principle of mutual corroboration. If the Complaint had libelled Mr R as a complainer in respect of the fourth incident, there could be no doubt that the principle of mutual corroboration could apply. It could make no difference that Mr R was not the complainer but only a witness to that incident. In the course of submissions for the Crown, we were referred to a number of authorities, viz: *Wilson* v *HM Advocate* 2017 JC 64, particularly at paragraphs [14] and [15], *Stephen* v *HM Advocate* 2007 JC 61 at paras [6]-[9], *Spinks* v *Harrower* 2018 JC 177, *Dalton* v *HM Advocate* 2015 SCCR 125, *Harris* v *Clark* 1958 JC 3 and *CW* v *HM Advocate* [2016] HCJAC 44 at paragraph [34]. It was submitted that the questions raised on the appeal should be answered: (1) yes, the doctrine of mutual corroboration can apply where a number of offences are libelled in an omnibus charge; and (2) yes, the doctrine of mutual corroboration can apply where a single complainer speaks to a number of charges and the complainer's evidence in relation to one of those charges is corroborated by evidence from another source.

[12] For the Respondent, it was submitted that the Sheriff Appeal Court had reached the right decision for the right reasons. In particular, the Court had correctly applied the case of *Spinks*. The Complaint in this case libelled a number of separate incidents, each of which required to be corroborated. It was wrong to characterise it as a single course of conduct to which the *Moorov* principle could apply. This was so for two separate but overlapping reasons. First, there was in this case only one complainer in respect of the four individual

incidents. The application of the *Moorov* principle required there to have been a course of conduct perpetrated against more than one person. In so far as statements in the case of *Wilson* suggested otherwise (in particular in the last sentence of paragraph [15] of the Opinion of the court), those statements were *obiter* and, in any event, were incorrect. The second reason why *Moorov* could not apply was that the Complaint libelled all the incidents in one charge. In such circumstances there was no scope for the principle of mutual corroboration to apply. It was submitted that the answer to the questions raised on the appeal were: (1) no, the doctrine of mutual corroboration cannot apply if the incidents libelled in the omnibus charge all relate to the same complainer; and (2) no, the doctrine of mutual corroboration cannot apply where there is a single complainer speaking to the various charges, even where the evidence of that complainer in relation to one of the charges is corroborated by evidence from another source.

Decision

[13] It is competent to libel in one "composite" charge a number of instances of criminal behaviour, particularly where a course of conduct is alleged. This is frequently done in practice. Where, albeit within a single composite charge, the incidents of criminal behaviour are separate and distinct, possibly separated by substantial periods of time between them, each such incident requires to be proved by corroborated evidence: *Dalton* v *HM Advocate* at para [42], *Spinks* v *HM Advocate* at paragraph [14]. However, there is no reason to doubt, even in such a case, that if the separate incidents of criminal behaviour libelled in the composite charge show similarities in time, place and character of commission such that they can properly be said to form part of a single course of criminal conduct persisted in by the accused, corroboration may be provided by the principle of mutual corroboration: cf

Moorov v *HM Advocate*. In so far as the Sheriff Appeal Court took the view that simply because the separate incidents of criminal behaviour in this case were libelled in one single composite charge, therefore there was no room for the application of the *Moorov* principle, we disagree. In the passage quoted from the Opinion of the Court (see para [10] above), the Sheriff Appeal Court appears to have taken the view that *Spinks* was authority for the proposition that whenever separate incidents were libelled in a single composite charge each incident had to be separately corroborated by two sources of evidence directed to the particular incident. This is not correct. *Spinks* is not authority for any such proposition. The incidents in that case which were held on appeal not to have been proved by corroborated evidence – summarised at paragraph [5] of the Opinion in that case – were clearly separate and distinct from those which were proved. The *Moorov* point did not arise. *Spinks* was not about *Moorov*. The principle of mutual corroboration does not depend to any extent upon whether the separate incidents on which reliance is placed are charged in separate charges or in one single composite charge. The principle remains the same, namely that if such incidents share the conventional similarities in time, place and character of commission such that they can properly be said to form part of a single course of criminal conduct persisted in by the accused, evidence given in relation to one such incident can be used to corroborate evidence given in relation to others; and that is so regardless of whether the incidents are charged in one charge or in several.

[14] It was submitted on behalf of the Respondent that the principle of mutual corroboration could only apply to a situation where the single course of criminal conduct persisted in by the accused involved offences against more than one person; and that the corroboration had to be in the form of evidence from more than one complainer. There are in fact two propositions contained within this submission. The first is that the accused must

have committed the offences against more than one person. The second is that the case against the accused must be supported by evidence from more than one complainer. We see no basis for either proposition.

[15] As to the first, true it is that the "classic" *Moorov* case tends to involve two or more complainers each speaking to actions of the accused perpetrated against them; and, indeed, the doctrine of mutual corroboration arose out of the perceived difficulty in finding corroboration in a case where the accused perpetrated separate criminal acts against individuals in circumstances where there were no other witnesses or likely sources of corroborating evidence. But there can in fact be no justification for limiting the application of the principle to cases where there is more than one complainer. After all, a succession of criminal acts directed against the same complainer is as redolent (perhaps more so) of a single course of criminal conduct persisted in by the accused as those same acts would be if directed against a number of different individuals. The point is that evidence concerning one incident may corroborate evidence concerning another incident, even against the same complainer, provided that there is relevant evidence from more than one source.

[16] As to the second proposition, it cannot matter whether the corroborating evidence is given by another complainer or by some other individual who observed and is able to speak to the relevant events. Take a case where there are two complainers speaking to separate incidents, but one of them has moved away and is no longer traceable. By chance the incident involving that complainer was observed by a friend or partner. Is the case to fail on the basis that evidence of that second incident was given not by the second complainer but by someone who merely observed what has happened? That would make no sense, and no authority was cited which requires us to reach such a conclusion.

[17] There have in fact been cases where the *Moorov* principle of mutual corroboration has been applied in circumstances where the corroborating evidence came from witnesses who could not properly be described as "complainers". In *Harris* v *Clark*, for example, the accused was convicted of reset of a number of articles stolen from a warehouse at various times over a period of about 10 months. The only evidence came from three youths in the warehouse who had, at his request, stolen the goods and passed them on to him. The court applied the doctrine of mutual corroboration and upheld the conviction. It is true that in that case the point was not taken that the *Moorov* doctrine could only apply where there was more than one complainer; but the argument was available had it been a good one and the court was fully aware of the circumstances of the case before it.

[18] It is, however, unnecessary to seek to extract any point of principle from these cases. Nothing in *Moorov* itself suggests that the doctrine is limited to a case where the acts are committed against different complainers or where the evidence is from different complainers. And the case of *Wilson* v *HM Advocate* supports the proposition that, for the application of the *Moorov* principle, there is no need for the complainers on the separate charges to be different: ibid at paragraph [15]. That follows from the "modern expression" of the principle set out in paragraph [14] of the Opinion in that case. The crucial facts, viz the commission of the crime and the identity of the perpetrator, must be proved by evidence "from at least two separate sources". The principle of mutual corroboration is not an exception to this, but an example of it where, in the case of charges involving a course of criminal conduct, "the testimony of one witness concerning one charge may corroborate, and be corroborated by, testimony of another witness speaking to another charge linked with it in time, character and circumstance." There is no suggestion in that passage that the application of the principle is limited to cases where there is more than one complainer.

What is required is that there be more than one source of evidence capable of providing the requisite corroboration. It is against that background that it is stated in paragraph [15]:

> "… there is no need for the complainers on two or more charges to be different, provided that there are two sources of evidence to prove the crucial facts."

As stated above, that is clear authority for the proposition that in a *Moorov* case there is no need for the complainers to be different; all that is required is that there be evidence from two sources to prove the crucial facts. It was submitted on behalf of the Respondent that these last words in that passage, viz "… to prove the crucial facts", show that the court was contemplating that, in a case where there was only one complainer on the various charges, each incident or charge required to be proved individually by evidence from more than one source – in other words that the charges could not be corroborated by mutual corroboration. But this ignores the fact that this statement follows an analysis of the *Moorov* principle, an analysis which culminates in the court saying that the *Moorov* principle can apply in the appropriate case even where the complainers on each charge are the same, provided that there are at least two sources of evidence to prove the crucial facts. If there were a requirement in such a case for evidence from two sources on each separate incident or charge, that would mean, contrary to the point being made in this passage, that the case could not be proved by the application of *Moorov.*

[19] It was submitted on behalf of the Respondent that, if that was a proper understanding of this passage in the Opinion of the court in *Wilson*, then that passage was wrong and, in any event, was *obiter*. We do not accept that submission. Properly understood, *Wilson* involved the application of the *Moorov* principle, albeit in unusual circumstances where the issue was one of identification; and the reasoning in

paragraphs [14] and [15] forms an essential part of the reasoning leading to the resulting decision. We note that the rubric summarises the decision as establishing that:

> "(1) for the principal (sic) of mutual corroboration to apply, it was not required that the complainers on two or more charges be different, provided that there were two sources of evidence to prove the crucial facts, being the commission of the crime and the identity of the perpetrator (para 15) …"

This is an accurate summary of that part of the decision.

[20] In the present case all four incidents were spoken to by Ms SLD. The last incident was also spoken to by Mr R. His evidence serves two separate purposes. First, it provides direct corroboration of the fourth incident, which took place on 16 November 2017. Accordingly, if the four incidents had not been so closely connected as to attract the application of the *Moorov* principle, Mr R's evidence, combined with that of Ms SLD, would have been enough to have secured a conviction on that fourth incident. But secondly, Mr R's evidence was separate and independent evidence concerning the events of 16 November 2017. Leave aside for the moment the fact that Ms SLD also spoke to this fourth incident; Mr R's evidence about what happened on 16 November 2017 was sufficient, applying the principle of mutual corroboration, to corroborate Ms SLD's evidence concerning the first three incidents. It was evidence from a separate source which, taken together with the evidence of Ms SLD, enabled all four incidents to be corroborated on a *Moorov* basis. If Mr R had been named in the Complaint as a complainer to the fourth incident, clearly his evidence would have provided classic *Moorov* corroboration of the first three incidents. It can make no difference that he was not a complainer but simply a witness.

Disposal

[21] Accordingly, we shall answer the second question raised in the stated case ("Was I entitled to convict the [Respondent] of all four incidents rather than the one incident of 16 November 2017?") in the affirmative. As to the questions raised in the Note of Appeal, summarised at paragraph [7] above, we shall answer both questions in the affirmative.

[22] In the result, therefore, we shall allow the appeal against the decision of the Sheriff Appeal Court and restore the decision of the Sheriff in Aberdeen. We shall continue the case to hear submissions about sentence.