APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 46
HCA/2020/23/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION

by

ALEXANDER JOHN GARLAND

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: IM Paterson (sol adv); Paterson Bell
Respondent: A Cameron AD; the Crown Agent

30 October 2020

Introduction

[1] On 6 December 2019, the appellant, who was aged 32, was convicted of a charge which libelled a sexual assault on an 11 year old girl, namely KC, on an occasion in May 2019 at the address of her mother. The appellant was living with the complainer's mother at the time. The detail of the libel was that the appellant:

> "did lie beside her, place your hands inside her lower clothing, touch and rub her buttocks and repeatedly take her hand and compel her to touch your penis: CONTRARY to section 20 of the Sexual Offences (Scotland) Act 2009; …".

This had been the second charge on the indictment. The first had libelled the rape of a 19 year old. The appellant was acquitted of that charge. On 16 December the appellant was sentenced to 18 months imprisonment, three of which were attributable to a bail aggravation.

[2] Although the ground of appeal was phrased in terms of a misdirection by the trial judge about the content of certain letters which had been written by the appellant to his former girlfriend pre-trial, the issue ultimately came to be one of whether the evidence against the appellant was sufficient. In particular, the question was whether the content of appellant's testimony, during which he denied that the events libelled had occurred, and one of the letters was capable of providing corroboration of the complainer's account.

The Crown case

[3] The complainer's evidence consisted primarily of a joint investigative interview which was held on 7 June 2019. The complainer said that she was at the interview "because my mum's ex-boyfriend was making me touch him down there". She had come in from school and had been really tired. Her mother was at work. She went into her mother's bedroom and lay down. Two seconds later the appellant came in and lay down beside her. He was "like rubbing into my back bum" and "making me touch him on his private parts". She moved away and went to the bathroom. She had gone into her own bedroom and started crying. She asked the appellant to phone her grandmother and he had done this. Her grandmother came to collect her.

[4] The Crown witnesses who spoke to the circumstances surrounding this incident consisted first of the deputy head teacher at the complainer's school. On 28 May 2019, about two weeks after the event, the complainer had told her that the appellant had made her touch him on his "private parts". He had also made her lie on top of him and had rubbed himself against her "bum". Secondly, there was the complainer's grandmother who did not notice anything untoward when she picked the complainer up and took her to her home, which was quite normal although she did seem a bit quieter than her usual very chatty self. The complainer lived with the grandmother.

[5] Thirdly, the complainer's mother explained that she had begun a relationship with the appellant in January 2019. He had moved in with her during the following month. The appellant had bought the complainer expensive items, such as air pods, trainers and "things" from the Nike shop. The complainer's mother also referred to the disclosure at the school at the end of May 2019. There was evidence about what the complainer had said on the way to the JII, which was consistent with what she had told the deputy head teacher.

[6] The complainer's mother spoke to a number of letters which had been received from the appellant. These essentially denied that he had done anything wrong. One was dated 20 June 2019 and had been sent by the appellant while he was on remand. This said, *inter alia,* that:

> "[K] touched me on couch and I told her it was wrong then she acted daft as if she didn't know but clearly did I then explained to her why it was wrong then she hit me in my privates I then screamed and shouted at her she then went to her room and I sat and watched Ireland's got talent then I went into her room and tried to speak to her but she was screaming get out
>
> … for weeks before that she was climbing on top of me for cuddles."

[7] At the close of the case, there was no submission of no case to answer. It appears to have been accepted by the appellant that there was a sufficiency of evidence at least on the basis of mutual corroboration between the two charges.

The appellant's testimony

[8] The appellant had made no comment when interviewed by the police. He did testify at the trial. His response to the first question about the charge was: "It's absolute bulls..t". He explained that the complainer did not live with her mother but with her grandmother. He often picked the complainer up from school and took her to her mother's home, where he too was living. This is what had occurred on the particular day. They had arrived at the house at about 4.00pm. He decided to go to bed. He was under the covers, wearing a top and shorts.

[9] The complainer had come into the bedroom. She sat on top of the appellant, initially above the covers. She had wanted a cuddle. This was a regular occurrence. There had been a phonecall from the complainer's mother. At the end of this, the complainer had tried to climb back on top of the appellant. This time she had gone under the covers. She had cuddled into him. He had stopped her from climbing on top of him by raising a leg. The back of the complainer's hand was next to his penis. This meant that it was touching his penis, over his shorts. The appellant moved it away, but shortly afterwards the complainer deliberately put it back to where it had been.

[10] The appellant jumped out of bed and went into the living room, where he started to watch Ireland's Got Talent. He remonstrated with the complainer and told her that he did not feel comfortable with her climbing on him. She had then kicked him "in the privates",

causing him to scream, shout and swear. The appellant had telephoned the complainer's grandmother, who came to collect her 15 minutes later.

Speeches

[11] The advocate depute's speech focused on the more serious charge, which was found "not proven". The AD emphasised how mutual corroboration could operate and that the appellant must have been unfortunate to have two females complaining of what was said to be similar sexual offending. However, the AD did contend that there was a sufficiency on each charge without the need for mutual corroboration. Specifically on the charge with which this appeal is concerned, apart from the evidence of the complainer, the AD founded upon the letter of 20 June (*supra*) in which the appellant had explained that the complainer had touched him on the couch and that she had "hit him on his privates". The lack of detail in the letter was contrasted with the evidence which the appellant had given. The AD commented that the appellant "had six months to reveal all of this detail, but there is no such detail in the letter".

[12] The speech then concerns itself with the timing and terms of the complainer's disclosure to her teacher and her mother and on the lack of any motive on the part of the complainer to lie about what she was saying that the appellant had done. The speech returned to corroboration. The AD said that the appellant had admitted that there was "sexual touching" in the letter to the complainer's mother (*supra*). She continued:

> "Of course, he turned it around and claimed that it was the child who sexually touched him. But it would be open to you to accept the accused's admission that there was sexual contact and to reject his explanation that it was at [K's] instigation."

[13] The defence speech concerned itself mostly with issues of credibility and reliability and the application of mutual corroboration. Counsel recognised that the AD was seeking a conviction based not only on the application of mutual corroboration but also on standalone corroboration on each charge. He did not submit that the AD was not entitled to do this. He did not ask for a direction that if the jury rejected the evidence of the complainer on the rape charge, they would require to acquit the appellant of the other charge.

Charge

[14] In what might be described as a comprehensive charge, at least on some matters, the trial judge said that the appellant had denied any wrongdoing. The appellant had given accounts that were consistent with his innocence and that if the jury believed his testimony, or had any reasonable doubt about the Crown case, they would be bound to acquit him. If the jury did not believe the complainer, that too had to result in an acquittal. The judge continued that, if they did believe the complainer, then:

> "the crown say it's a standalone charge in the sense the advocate depute suggests that there were things said by the accused in the letters which you have heard about which support the account given by [KC], but you have to bear in mind everything said by the accused himself in relation to these matters, namely that there was no wrongdoing whatsoever in relation to [KC]".

[15] At a later point in his charge, the trial judge added:

> "In relation to charge 2, the advocate depute suggests that too is a standalone charge based on the evidence of the complainer, [KC] and the advocate depute says from things said by the accused and she points to the letters that you heard in evidence".

Finally, he said:

> "In relation to charge 2, the advocate depute invited you to accept the second complainer as well as the first in relation to those matters, and she invited you to find corroboration for that in the admission of sexual touching the advocate depute suggested existed. Whether there was any admission is a matter for you…".

Submissions

[16] The ground of appeal is that the trial judge erred in directing the jury that the content of the letters could be interpreted as an admission. The jury ought to have been directed that the charge involving KC could only be proved by the application of mutual corroboration. The letters did not contain an admission of inappropriate behaviour or wrongdoing.

[17] The appellant submitted that the trial judge had erred by failing to direct the jury that there was no corroboration available either in the appellant's letters or his testimony. There had been no admission of inappropriate touching. The letters and the testimony were entirely exculpatory.

[18] The advocate depute maintained that there was a sufficiency of evidence based upon the appellant's admissions (*Gilmour* v *HM Advocate* 1994 SCCR 133 at 135; *Branney* v *HM Advocate* 2014 SCCR 620 at para 18). The statements made by the appellant, both in the letters and in his testimony, were capable of being taken as containing admissions that the complainer had repeatedly touched the appellant's penis. The jury could accept that and reject the qualifications advanced by the appellant (cf *Dunn* v *McGovern* [2013] HCJAC 120; see also *Gray* v *Procurator Fiscal, Elgin,* Sheriff Appeal Court, 29 July 2020, unreported).

Decision

[19] It is understandable that the focus at the trial may have been on the rape charge, but it is unfortunate that the Crown did not spell out in much clearer terms exactly what they were founding upon as standalone corroboration on the charge under consideration. It would appear, from what the AD said to the jury, that she may have been founding solely

upon the content of the letter of 20 June and asking the jury to reject the appellant's testimony in its entirety. The problem with that approach is that, although, with its reference to *Ireland's Got Talent*, the letter is referring to the same incident as the appellant later spoke about in his testimony, what the letter refers to in an incident on the couch in the living room and the complainer touching the appellant and then hitting him on his "privates". It is not immediately clear how that could corroborate the complainer's account of what she said happened in the bedroom. The latter involved positive actions by the appellant.

[20] It is unfortunate too that the trial judge did not give the jury clear directions on exactly where they might find standalone corroboration of the complainer's evidence. The directions merely stated what the trial judge understood the Crown's position to be and were therefore not very helpful. The judge's understanding of the AD's speech reflected the focus on the letters, or rather a letter, rather than the appellant's testimony. He left it to the jury to decide whether the letter contained "any admission". He ought to have given the jury clear directions on where corroboration might be found by identifying with reasonable precision any passages in the letter, or elements of the appellant's testimony, which might constitute corroboration.

[21] What is clear is that the jury accepted the testimony of the complainer as credible and reliable. The only real question is whether corroboration could be found in either the testimony of the appellant or in the earlier letter. That involves a consideration of whether what the appellant said or wrote "confirms or supports" the complainer's account. As was made clear in *Fox* v *HM Advocate* 1998 JC 73 (LJG (Rodger) at 100-101; LJC (Cullen) at 109), when disapproving of the approach in *Mackie* v *HM Advocate* 1994 JC 132, where the question is whether proof of certain facts and circumstances affords sufficient corroboration

of direct testimony, it is not necessary for those facts and circumstances to be more consistent with the direct evidence than an explanation or account given by an accused. It is sufficient that they are capable of confirming or supporting the complainer's testimony. It is a matter for the jury to determine whether to accept the facts and circumstances as corroborative or to interpret their meaning in a different manner.

[22] The following facts and circumstances, when taken together, provided sufficient corroboration of the complainer's direct testimony. First, the relationship between the appellant and the complainer was not a familial one, or at least not strongly so. The appellant's relationship with the complainer's mother had only commenced about three months before the incident. The complainer was not living in her mother's home, but with her grandmother. Secondly, notwithstanding the relatively remote nature of the relationship, the appellant was buying the complainer presents of significant value. The jury would have been entitled to consider that he was deliberately ingratiating himself to her. Thirdly, the incident occurred when the complainer's mother was away at work and would therefore not be returning home at the material time. Fourthly, the appellant accepted that he was in bed with the complainer, that is to say an 11 year old girl, at about 4.00pm. The jury would have been entitled to regard this as unusual in a situation in which he was only supposed to be looking after the complainer in the period between her return from school and going to her grandmother's house. Fifthly, the appellant also accepted that he was in close physical contact with the complainer, involving at least cuddling, under the bedcovers. That, in itself, would have been a strong corroborative circumstance had it been spoken to by an independent eye witness, and it is no less so when it is described by the appellant. Sixthly, the appellant accepted that the complainer's hand was touching his penis, albeit

over his shorts, on two separate occasions. The same consideration applies here in relation to testimony from an eye witness who might have observed this happening.

[23] It was then a matter for the jury to decide whether they regarded these facts and circumstances as confirming or supporting the complainer's testimony or whether they interpreted them in a different manner. The appeal is therefore refused.