APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 12
HCA/2021/262/XC

Lord Justice General
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

STEVEN JOSEPH JAMES STALLEY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Macintosh QC; Paterson Bell
Respondent: A Prentice QC (sol adv) AD; the Crown Agent

11 February 2022

Introduction

[1] On 15 March 2021, at the High Court in Glasgow, the appellant was convicted of 21 charges involving seven complainers. The offences ranged from breaches of the peace, through stalking, assault and sexual assault to three charges of rape. The appellant had previously pled guilty to seven further charges of stalking. Most, but not all, of the charges

involved the appellant's partners or ex-partners. The appellant was made the subject of an order for lifelong restriction with a 6 year custodial element. The appeal raises a question about the accuracy and adequacy of the trial judge's directions on the application of mutual corroboration in circumstances in which he directed the jury, *inter alia*, to take the contents of the Advocate depute's speech on that form of corroboration "into account". There is a discrete point about the sufficiency of evidence on two charges.

The charges

[2] The events leading to the first group of charges (cc 2, 4, 6, 7 and 8) occurred between May 2007 and January 2008. They concerned the complainer CL, with whom the appellant was in a relationship. The first incident (c 2) was a physical assault by presenting a knife to the complainer's face and threatening her. The second (c 4) was a breach of the peace in the house of a friend, where the appellant was searching for the complainer. About two months later (c 6), when the complainer was at a Christmas night out, the appellant sent various texts asking her to return home. On doing so, the appellant was not there. The complainer went to a neighbour's house. She found the appellant having sexual intercourse with a woman on the stairs. The appellant started shouting at the complainer and pushed her down the stairs. The next charge (c 7) was one of rape. This occurred following on from the events libelled in charge 6. After the appellant returned home, he pushed the complainer onto a bed and raped her. Finally (c 8), there was a further breach of the peace after the appellant and the complainer had separated. The appellant repeatedly sent the complainer text and voice messages, involving shouting, swearing and threatening the complainer and her family.

[3] The second group of charges (cc 10-15) involved the complainer, GR, who had also been in a relationship with the appellant. The first (c 10) libelled various occasions between August 2009 and October 2010, on which the complainer had been raped by the appellant. The next two charges (cc 11 and 12) were single incidents of rape, which occurred between April 2010 and February 2011. The next (c 13) was a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 (commonly known as a statutory breach of the peace), involving an episode at the complainer's home in 2013. The next (c 14) was a sexual assault, by repeatedly touching the complainer, contrary to section 3 of the Sexual Offences (Scotland) Act 2009, again occurring in 2013. The final charge involving GR (c 15) was a breach of section 39(1) of the 2010 Act (commonly known as stalking) in 2018. It was aggravated under section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 because it involved the abuse of an ex-partner. This happened after the appellant and the complainer had separated. The complainer had been on a bus when the appellant approached her and asked for her phone number. Thereafter, he had sent several pestering, and progressively abusive, messages.

[4] There was a single charge (c 16) of a sexual assault on RW in 2014 in Paisley. The complainer, RW, was not in a relationship with the appellant. She had been walking home from a trip to a garage sometime after midnight when the appellant staggered towards her, asked her for a cigarette and started to walk with her. The appellant put his hand down her top, fondled her breasts and put his other hand down her leggings and inside her underwear. The complainer ran away.

[5] The next charge (c 17) was the rape of JLB in August 2015. She was not in a relationship with the appellant. After a night out, they were both in the complainer's house along with others. The appellant and the others had been asked to leave as she was tired.

She had gone to bed in her night clothes, assuming that everyone had left. She was woken by the appellant having intercourse with her. He had removed her clothing. The same thing happened on two further occasions that night, after the complainer had again fallen asleep. When she got up, she found her Rottweiler dog tied to a radiator.

[6] A further group of charges (cc 18-21) involved the complainer KF and incidents between January 2016 and August 2018. The appellant had been in a relationship with KF. The first charge (c 18) libelled several statutory breaches of the peace in early 2016, involving the appellant threatening the complainer, damaging items in her house and setting fire to a toilet roll. The next (c 19) was a single event of abduction and assault in April 2016, by preventing the complainer from leaving his house, pushing her into a wall and gripping her tightly around the neck. A further assault (c 20) occurred in May 2016 when the appellant struck the complainer on the head. Finally (c 21), following the breakdown of the relationship, the appellant contravened section 39(1) of the 2010 Act (stalking) again by repeatedly calling the complainer and sending her text and voice messages, containing threats.

[7] The next group of charges (cc 22 and 23) consisted of another breach of section 39(1) of the 2010 Act (stalking) and a complainer, MW. The complainer had not been in a relationship with the appellant. She had been approached by the appellant in the centre of Glasgow, when she had been waiting for a bus. Having given the appellant her phone number, she had received numerous text messages asking her to contact him. She agreed to meet him at Central Station, when he tried to cuddle her and repeatedly attempted to kiss her in the street.

[8] The final charges (cc 24 and 25) involved yet another complainer, EMcC, and incidents between November 2017 and January 2018. The first was a sexual assault in

contravention of section 3 of the 2009 Act. The complainer had been waiting for a bus after finishing her work in Paisley. The appellant approached her and spoke to her. He got on the bus with her and sat beside her. He asked for her phone number. He then cuddled and kissed her. That was followed by several text messages containing inappropriate material. This was covered by the last charge, being a further episode of stalking.

Crown speech

[9] The Advocate depute sought verdicts on 21 of the 25 charges upon which he had gone to trial. At the outset of his speech, the AD drew the jury's attention to the principle of mutual corroboration. He said that this applied where an accused's conduct could be seen as part of a course of criminal conduct systematically pursued. The jury would require to look at similarities in time, place and circumstance. He submitted that the jury had heard from the complainers about individual instances of what was a single course of conduct towards women with whom he was in a relationship, or happened to meet and with whom he wanted to have a relationship. Although he said that he was not going to rehearse the evidence, the AD then engaged in a very detailed narrative of each of the complainers' testimony. The transcript runs to 43 pages.

[10] The AD returned to mutual corroboration. He said that the charges could be grouped in certain ways, although there were many overlaps. There were charges of breach of the peace (cc 4 and 8). The jury could find mutual corroboration in respect of these two charges from the similarities with the later conduct, including stalking, involving the complainers GR, MW and EMcC (cc 13, 14 and 25). There was, in addition, a general theme that ran through the evidence which enabled the jury to say that all of the charges constituted a single course of criminal conduct.

[11] The AD turned to the rape charges and maintained that there was mutual corroboration of each of the complainers who spoke to being raped (cc 7, 10 to 12 and 17). It was also possible to find mutual corroboration for the rape charges in the evidence of the sexual assault charges. This included the conduct spoken to by RW (c 16) and GR (c 14). The AD said that he was not suggesting that an unwanted kiss could provide corroboration for rape, but he did suggest that all of the sexual assaults (cc 14, 16, 23 and 24) could provide that corroboration.

[12] In relation to the physical assaults, charges 2 and 6 could be corroborated by an assault charge (c 5) involving another complainer and of which the appellant was acquitted. The other charges of violence (cc 19 and 20) were in the same bracket. Corroboration for the violent offences could be obtained from elements in the rape charges and the sexual assault charges. The type of conduct which involved violence towards women, and also involved rape, could corroborate a physical assault on a woman. The element of control applied to all of these offences.

[13] The AD repeated his reference to the jury being able to group the charges together in the way that he had described. He went on to repeat that there was a theme running through all of the charges in that it was the appellant exerting control over the women and forcing his will upon them. The jury could be satisfied that this was all part of a single course of conduct that the appellant had embarked upon towards all of the women.

Charge

[14] In his opening remarks to the jury at the start of the trial, the judge had explained that, in some cases, evidence of one complainer speaking about one charge could be

corroborated by the evidence of another complainer, speaking about another charge. He said that he would give detailed and full directions on this at the end of the trial.

[15] In his charge, the judge explained the principle of mutual corroboration as follows:

> "If you are satisfied that the crimes charged are so closely linked by their character, that's number one, their character, number two, the circumstances of their commission, and number three, in time … so if you are satisfied the crimes charged are so closely linked by their character, the circumstances of their commission and in time, so as to bind them together as parts of a single course of criminal conduct, systematically pursued by an accused, then the evidence of a single witness about the commission of one crime can be corroborated by the evidence of another single witness about the commission of another crime or other crimes."

[16] The judge referred to the well-known example of the corrupt goalkeeper and to *Moorov* v *HM Advocate* 1930 JC 68. It was essential, in respect of each charge, that the complainer was believed before the jury looked to see whether there was mutual corroboration. He continued:

> "If you do accept the essential parts of the complainer's evidence of any particular charge, then you may be able to find corroboration from another complainer who gave evidence which you accepted about a different charge, but alleging broadly similar types of conduct. If you accept that other complainer's evidence, you then have to go further to decide if by reason for (*sic*) the character, the circumstances, place and time of each charge the crimes are so closely linked that you can infer that an accused was systematically pursuing a single course of criminal conduct.
>
> It would not be enough if all that's shown is that the accused had a general disposition to commit this type of offence. You have to apply this rule with caution, particularly where there may be a substantial interval of time as there may be in respect of some of the charges in this case. In such cases, where there is a substantial gap in time between the alleged offences, you would require to consider any similarities, as well as the dissimilarities. And eventually find whether or not there were exceptional or extraordinary features and compelling similarities because of that gap of time."

[17] The judge said that the AD had spent some time setting out the similarities in time, character and circumstance. He did not consider that it was for him to repeat what the AD had said, but he did ask the jury to take what the AD had said into account. He continued:

> "If there are any significant differences in the circumstances of individual charges, it doesn't mean that you can't find that there is a mutual corroboration, but the differences would form part of … the total evaluation as to whether or not there is a single course of conduct."

Defence counsel had not suggested that the jury could not find corroboration for some of the charges, but it was for them to decide. The judge continued:

> "When examining charges or groups of charges to determine if you find mutual corroboration it is not the legal name for the crime which matters so much. What is important is the underlying similarity of the conduct described in the evidence, not the label which is being attached to it on the indictment which must be examined in order to see whether the rule can be applied."

[18] The judge went on to define the individual offences. When doing so, the judge made sporadic references to mutual corroboration. In relation to CL, if they found her reliable, the jury could look to "other charges alleging assault, and the general other charges (*sic*) … to provide mutual corroboration". On the assault on a complainer, LG (c 5), of which the appellant was acquitted, he said that a jury could look at the mutual corroboration "that's available … by considering other assaults". The judge noted that, in relation to the rapes, the Crown argued that mutual corroboration could be found from the other charges "particularly rape, but also those involving other matters spoken to by other complainers of a similar nature". If a complainer were accepted in relation to the rape charges, the jury "can look to other charges of a similar nature for mutual corroboration, so far as the Advocate depute is concerned". On the breach of the peace charge involving CL (c 8), the jury could look "to the other charges of a similar nature for mutual corroboration". On abduction the judge told the jury that there was corroboration available when "you look at all the other charges".

Submissions

Appellant

[19] The trial judge erred in refusing a submission of no case to answer in respect of assault charges 19 and 20. There was no corroboration of them. The only other assault charges which the jury could consider were charges 2 and 6 in respect of CL. There was a gap of 9 years between the two blocks of charges. That was an inadequate basis to demonstrate a course of criminal conduct systematically pursued. There had also been an intervening relationship in which no physical assaults had been committed. The Crown had argued that sexual assaults could be used to corroborate the physical assaults. That was incorrect (*Duthie* v *HM Advocate* 2021 JC 207).

[20] The judge had failed to direct the jury adequately on mutual corroboration. He had said in his opening remarks that he would give them detailed and full directions on this subject. He had not done so. He had not assisted the jury in relation to which charges might be used to corroborate which other charges. There was no attempt to provide the jury with a route to verdict having regard to the different nature of the charges. Whilst general directions may be sufficient in many cases, regard had to be had to the particular circumstances. The physical assaults in a non-domestic context could not corroborate the rapes (*Duthie* v *HM Advocate* at para [18]) or sexual assaults outwith the domestic context (*Reilly* v *HM Advocate* 2017 SCCR 142 at para [35]). In maintaining that the existence of a controlling element was present in each charge, the AD had misunderstood what was needed for corroboration. This was not a case in which all that was required was corroboration of a course of conduct (cf Domestic Abuse (Scotland) Act 2018, s 1).

[21] The judge had, when defining the various charges, said that the Crown were maintaining that there was mutual corroboration available "when you look at all the other

charges". That was a practical example of where the jury could have fallen into error. The general directions in relation to charges where there was a substantial gap in time were vague, apt to confuse and inaccurate. It was necessary in all cases to consider similarities and dissimilarities. In some of the charges the appellant was not in a relationship with the complainer. The jury's verdict was not understandable or discernible as the judge had not explained how mutual corroboration applied.

Respondent

[22] The judge had not erred in rejecting the no case to answer submission on the two charges of assault. *Duthie* v *HM Advocate* did not relate to such a situation. Charges 19 and 20 were both physical assaults. Corroboration was available from the evidence of other complainers who spoke to violent assaults upon them. This included the evidence on charges 12 and 16.

[23] It was accepted that the trial judge may have been overwhelmed by the multiplicity of charges. It might have been helpful if the indictment had been pared down. It was also accepted that it was the function of the judge to direct the jury on how mutual corroboration applied in the particular case. The trial AD's broad approach was not appropriate.

[24] It was the course of conduct as a whole which had to be examined (*McA* v *HM Advocate* 2015 JC 27 at para [11]). What mattered was the underlying similarity of conduct; not the name attached to the crime (*MR* v *HM Advocate* 2013 JC 212 at para [19]). Testimony about physical assaults could not corroborate rape (*Duthie* v *HM Advocate* at para [22]). A campaign of domestic abuse, including sexual offences, could be seen as a course of criminal conduct systematically pursued (*McAskill* v *HM Advocate* 2016 SCCR 402 at para [28]). A sexual offence of a relatively minor nature could corroborate more serious sexual conduct

(*Duthie* v *HM Advocate* at para [20]). The trial judge had admittedly erred in suggesting that compelling circumstances were required where there was a significant time gap (*Duthie* v *HM Advocate* at para [28]).

[25] To have gone through every possible combination for the application of mutual corroboration, when the Crown had already set out the basis upon which it could apply, would have led to a charge which was unwieldy and would have been apt to confuse rather than to clarify (*JC* v *HM Advocate* [2016] HCJAC 100). The fact that some charges were sexual offences did not prevent them from being part of a course of conduct of domestically abusive and controlling behaviour (*McAskill* v *HM Advocate* at para [28]). The judge had drawn the jury's attention to a situation in which there might be significant differences in the circumstances.

[26] In any event, no miscarriage of justice had occurred.

Decision

[27] It is difficult not to have some sympathy with the trial judge. He was left with an indictment containing 21 charges; some of which, in High Court terms, were relatively minor. Others were very serious. There were eight crimes to define: sexual assault, assault, abduction, breach of the peace (at common law and under statute), rape (at common law and under statute), and stalking. Most important, he required to deal with the Advocate depute's apparently conflicting approaches to mutual corroboration. It is not surprising that, ultimately, the charge ran to over 100 pages.

[28] There is often a risk of misdirection when a judge simply adopts a statement of the law, which has been expressed by counsel in a speech, as accurate or refers to it in a manner which suggests that it is accepted as being accurate. This danger is apparent here where the

Advocate depute was saying, at times in his somewhat meandering speech, that the jury should look for corroboration of a complainer's testimony in that of another complainer speaking to a similar charge and, at other times, that they could apply mutual corroboration to every charge by reason of a recurrent theme throughout all of the appellant's conduct. His ultimate approach was to lump all the charges together in one course of conduct on the basis that this theme involved the appellant "exerting control over … women, and forcing his will on them". The AD suggested that "the jury could be satisfied that this is all part of a single course of conduct that [the appellant] embarked on towards these women".

[29] When it came to his charge, the judge did give the jury clear and accurate directions on the general principle of mutual corroboration. These are not challenged. Not only did the judge instruct the jury that the corroborative conduct had to be "broadly similar", before they could go on to see if it was sufficiently linked in character, circumstance and time, he also directed them specifically that a general disposition to commit the type of offence was not enough. Had he stopped there, and given the jury practical examples of how that worked in relation to the charges on this indictment, his charge could not have been adversely criticised. In directing the jury to look for corroboration in the evidence relating to a similar charge or a charge of a similar nature, such as assault, the judge's charge is impeccable.

[30] However, the judge went on to refer to what the AD had said in relation to points of similarity. Having said that it was not for him to repeat what the AD had said, he asked the jury to take what the AD had said "into account". What that might be thought to mean is opaque. Either what the AD had said was correct as a matter of law or it was not. The judge had to direct the jury accordingly. The judge referred to the jury evaluating whether there

was a "single course of conduct". This suggests an acceptance that the AD's contention that mutual corroboration could be found in every charge, was correct. It is not.

[31] In *Duthie* v *HM Advocate* 2021 JC 207, which was decided after the trial in this case, it was explained (LJG (Carloway), delivering the opinion of the court, at paras [20] to [28], following *MR* v *HM Advocate* 2013 JC 212 at para [17] and *McAskill* v *HM Advocate* 2016 SCCR 402 at paras [26] to [28]) that a combination of sexual and physical abuse by an accused within one family unit could, if the underlying similarities were present, afford mutual corroboration of a combination of sexual and physical abuse by the same accused in another family unit. However, the court expressly did not endorse the proposition that an act which contained no sexual element could corroborate a sexual assault or rape; the latter requiring in addition a distinct penetrative element.

[32] The court in *Duthie* continued (at para [22]):

> "Although a person, who is of a controlling disposition, may perpetrate a number of different types of crime against his partners, perhaps including not only physical or sexual assaults but also theft, malicious mischief and contraventions of the Communications Act 2003, that does not make these offences 'similar' for the purposes of mutual corroboration."

So, in this case, a complainer's testimony in one of the three rape charges could each only be corroborated by testimony from one or both of the other rape complainers or possibly from those complainers who spoke to a similar sexual assault. Even then, given that one of the rapes (c 17) and some of the sexual assaults occurred outwith the domestic setting, the jury would have to have considered whether they were sufficiently linked, in terms of circumstances, to merit the application of mutual corroboration with the rapes and sexual assaults perpetrated by the appellant on his partners. One complainer's testimony of sexual or physical assaults in the charges involving the appellant's partners could be mutually corroborated by evidence of the same type of conduct coming from another partner.

However, several of the charges on this indictment did not involve a partner. Sexual assaults on a stranger in a bus, at a bus stop or in the street may often not amount to corroboration of a physical assault in a domestic setting.

[33] In short, the judge ought to have been far clearer in directing the jury, under reference to the particular charges, on which testimony was capable of mutually corroborating which other testimony on different charges. This would not require a charge by charge analysis and could be done by reference to groups of charges or the types of conduct in the libel. It was not appropriate for the judge simply to point the jury to what the AD had said. The judge had to put into his own words how mutual corroboration could operate in a case which included charges of physical and sexual assault in a domestic context, rapes in both a domestic and non-domestic context, sexual assaults in a non-domestic context, breaches of the peace and the stalking of both partners and non-partners.

[34] Subject to the lapse described in relation to the adoption of the AD's speech, this attempt at grouping seems to have been what the judge was initially trying to say when he referred to corroboration requiring to come from "broadly similar types of conduct", matters "of a similar nature", "the other similar charges", or "other similar incidents". He appears to have been beguiled by the AD's theory on controlling behaviour towards women. The problem of the relevance of the recurrent theme remains significant and must be regarded as a misdirection in so far as it affected the critical directions on corroboration.

[35] However, standing the fact that the jury must have believed, and found reliable, the many complainers in the charges of which the appellant was convicted, had they been properly directed, the jury would have been bound to find that corroboration of each offence was present. This would have included corroboration of the evidence on charges 19 and 20 which could be found in that relating to charges 2 and 6; the judge's directions on the need

for exceptional circumstances given the time gap being erroneous (*Duthie* v *HM Advocate* at para [28]). The jury's verdicts are readily explicable by their acceptance of the complainers' testimony in relation to the facts of each charge. It cannot be said that a miscarriage of justice has occurred.

[36] The appeal must be refused.