



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 10
HCA/2023/314/XC

Lord Justice General
Lord Boyd of Duncansby
Lord Beckett

OPINION OF THE COURT
delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

JH

against

Appellant

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Neilson; John Pryde & Co SSC (for Messrs Livingstone Brown, Glasgow)

Respondent: A Prentice KC (sol adv) AD; the Crown Agent

7 March 2024

Introduction

[1] This appeal concerns an alleged misdirection by the trial judge on corroboration in relation to one of a series of charges of physical assaults by the appellant on members of his extended family. The appeal is taken on the basis that the judge did not provide the jury

with an appropriate route to verdict, including the application of mutual or standalone corroboration.

The charges and evidence

[2] The appellant was convicted of, *inter alia*, charge (1) which libelled that:

“on various occasions between ... 1999 and ... 2001 ... within a flat in ... Glasgow ... and ... Place, Stirling you ... did assault [S], ... and did strike him on the head, push him on the body and cause him to fall, seize hold of him, restrain him, punch and kick him on the body, head butt him, strike him on the hands with a remote control, extinguish cigarettes on his body and hold his head under water, all to his injury”.

[3] The direct evidence on this charge came first from S himself. He was the appellant's partner's son. He spoke to being subjected to a number of physical beatings when he was aged between 3 and 5. This involved him being subjected to the assaults libelled. These consisted of different episodes and various types of attack. Secondly, direct corroboration came first from B, who is S's brother, who spoke to an incident when the appellant wet his bed and was slapped on the face and head by the appellant. The appellant's partner's mother, Ag, who was blind, gave evidence of an assault when S had wet himself, at the age of 4, in a supermarket and the appellant had thrown him to the pavement. She spoke to other occasions when she heard the appellant smack S.

[4] There was also mutual corroboration. The appellant was convicted on three other charges of physical assault and two of sexual offending, with which the appeal is not concerned. Charge (3) was an assault on B, which involved the appellant choking the complainer. B also spoke to charge (5), which was an assault on another of the appellant's partner's daughters, K. B spoke to the appellant hitting K with a belt, when K was aged 2 or 3, and slapping her on the head. Charge (6) was an assault on another daughter, A, when she was aged between 2 and 5. A spoke to being burnt by the appellant on the face with a

cigarette. She said that the appellant had tried to batter her and had kicked her on the shin, thigh and arms.

Directions

[5] Both in his opening remarks and in his ultimate directions, the trial judge stressed the need for there to be corroboration for a conviction to follow on a particular charge. At the start of the trial, he mentioned that, in certain circumstances, mutual corroboration could apply whereby the evidence of a complainant in one charge could corroborate the evidence of another complainant about another charge. In his final directions, he said:

“On charge (1), the charge of assault on [S], the evidence comes from [S] himself, [B] and [Ag]. What you make of their evidence is a matter entirely for you, but there is corroboration of the charge if you accept it.

Be aware of this, ... so long as a part of the charge is corroborated then the remainder of the charge can be proved by the evidence of a single witness, so long as there's been another source of evidence, another witness in respect of part of the charge.

So, for example, if you accept the evidence of [B] regarding the hitting by the accused of [S] after the bed wetting incident, that could corroborate [S's] evidence on the parts of the charge which he described ... and, similarly, in respect of the evidence of the grandmother regarding the incident outside the supermarket – the, ... throwing of the boy onto the pavement. ... that could corroborate the rest of [S's] evidence on the other aspects of that charge.”

[6] When it came to the directions on one of the sexual offences, the trial judge referred again to the principle of mutual corroboration. He then directed the jury that, in relation to the physical assault charges ((3), (5) and (6)), these could only be proved by the application of that principle. Where a crime was committed and there was only one eyewitness, the commission of each crime could be corroborated by the evidence on the other charges if the crimes were so closely linked by their character, circumstances and time as to bind them together as parts of a single course of conduct systematically pursued by the accused. For

this to apply, each of the witnesses speaking to the separate charges had to be accepted as credible and reliable; otherwise an acquittal had to follow. The judge made it clear that the physical assaults could only be corroborated by evidence of another physical assault and not by reference to the sexual offending.

[7] The trial judge continued:

“... in this case the Crown does invite you to make use of this principle and to do so in the following ways. Firstly (*sic*), on charges (3), (5) and (6), the assault charges, where there is only evidence on each of those from one witnesses, namely [B] on charge (3), the assault on herself by seizing her by the throat, charge (5); the assault on [K] where the only evidence came from [B]; and charge (6), the assault on [A] where the only witness who spoke about this charge was [A] herself.”

The Crown says that the principle ... can be applied ... [I]t relies on these points of similarity, also making use of the evidence of [S] regarding charge (1), the assault upon him. The similarities are these according to the Crown. This was violence used by an adult, that is a parent or step-parent, and always being used on young children. They all happened in a domestic setting. They all happened when the accused was alone with the child. Some of the criminal conduct was similar with the use of a weapon ... and similar conduct in the form of the alleged burning of the complainer with a cigarette ...”.

[8] The trial judge went on to explain how various permutations might apply in respect of the assault charges. He continued by stating that if they accepted the evidence of [S] on charge (1) then the principle of mutual corroboration could apply to supply corroboration for the remaining assault charges (3), (5) and (6). He did not, at least specifically, tell the jury how the evidence on these latter charges might supply corroboration of charge (1) or how the direct corroboration might operate to establish the various assaults within that charge.

Submissions

Appellant

[9] The trial judge erred in law by omitting to explain either of the two different ways in which charge (1) could be proved by corroborated evidence; within the confines of the

charge itself (*HM Advocate v Taylor* 2019 JC 71) or by the application of mutual corroboration from the evidence on the other assault charges. Charge (1) could not be described as a series of repeated assaults over such a short period that they might be considered to be part of one episode of offending (*Dalton v HM Advocate* 2015 SCCR 125 at 127). It described separate incidents, with substantial periods of time in between. Therefore the normal requirement for corroboration applied to each incident (*Spinks v Harrower* 2018 JC 177 at 181; cf *Stephen v HM Advocate* 2007 JC 61 at 65 and *Rysmanowski v HM Advocate* 2020 JC 84 at 88).

[10] The jury would have had to have been told that, for corroboration to operate, the conduct had to be part of a single course persistently pursued. For charge (1) to have been proved without reference to the other charges, there had to be a direction on the operation of mutual corroboration within the confines of that charge. The second route to verdict was by the operation of mutual corroboration between charge (1) and the physical assaults in the other charges. There was insufficient by way of direction on how that could operate. Although, from part of the directions, it could be inferred that charge (1) could be proved by the application of mutual corroboration, that was precluded by the direction that the only ones which could be proved in this manner were charges (3), (5) and (6).

Crown

[11] The Advocate depute accepted that charge (1) was an omnibus one which libelled separate incidents of assault, each of which had to be corroborated (*Dalton v HM Advocate* and *Spinks v Harrower*). Mutual corroboration could be used to prove such a charge, but only if a course of conduct systematically pursued were established (*HM Advocate v Taylor*; *Rysmanowski v HM Advocate*). In order to convict the appellant on charge (1) the jury required to apply mutual corroboration either in the traditional sense, by using the evidence in

respect of the other assault charges (3), (5) and (6), or by applying *Taylor*. It was accepted that the judge had not directed the jury clearly on either of these routes to verdict. The jury could not have used a *Taylor* approach because that had not been explained to them.

[12] There were, however, sufficient general directions on mutual corroboration for the jury to apply it to charges (1), (3), (5) and (6). The evidence of B, A and Ag could corroborate that of S on charge (1). This was sufficient to provide a route to verdict in the context of the trial Advocate depute having invited the jury to find that charge (1) involved a course of conduct which could be corroborated by the evidence of the other assaults.

[13] Had the jury been properly directed, they would have arrived at the same verdict (*Stalley v HM Advocate* 2022 JC 121). The jury believed, and found reliable, the testimony of each of the complainers. They were satisfied that the appellant's behaviour constituted a course of criminal conduct similar in time, character and circumstance. The judge's omission was favourable to the appellant, as it reduced the routes to verdict from two to one. The jury convicted on charge (1) unanimously. There was no real possibility of a different outcome (*DM v HM Advocate* [2023] HCJAC 22 at para [17]). No miscarriage of justice had occurred.

Decision

[14] The trial judge's direction, at least in relation to charge (1), that "so long as a part of a charge is corroborated then the remainder of the charge can be proved by the evidence of a single witness", was wrong. Whether corroboration of part of a charge is sufficient depends upon the nature of the charge. If it libels a single assault, corroboration of part of the assault may be sufficient, but where what is libelled is an omnibus charge which includes different assaults, separated in time, each assault requires to be corroborated (*Dalton v HM Advocate*

2015 SCCR 125, LJC (Carloway), delivering the opinion of the court, at para [42]; *Spinks v Harrower* 2019 JC 71, LJG (Carloway), delivering the opinion of the court, at para [14], followed in *HM Advocate v Taylor* 2019 JC 71, Lord Glennie, delivering the opinion of the court, at para [13]). Where the assaults on a single complainer are linked in time, circumstances and character such that they can be said to form part of a single course of criminal conduct systematically pursued by the accused, evidence from a separate source which directly corroborates one or more of the assaults may be sufficient to corroborate each assault as part of that course of conduct.

[15] There would have been little difficulty in the jury holding that the assaults on S were part of the requisite course of conduct and thus adequately corroborated by the testimony of B and Ag about seeing and hearing different assaults on S. The problem is that the jury ought to have been directed accordingly on the need for that course of conduct to be established. The second route to a guilty verdict would have been by the application to S's testimony of mutual corroboration derived from the evidence of B on the assaults on her and on K and from that of A on the cigarette and other attacks on her. This would also have required a direction to that effect, including the need for the jury to accept that the assaults on the various different complainers also constituted the requisite course of conduct. The peculiarity about the trial judge's directions is that, although he did give such a direction to the effect that charges (3), (5) and (6) required to be corroborated in this way, and that S's testimony could form part of that type of proof, he did not expressly state that the converse was also true. The evidence on charges (3), (5) and (6) could provide the necessary corroboration of S's testimony on the assaults in charge (1), provided that the course of conduct requirement was met.

[16] That misdirection and omission having been established, the issue for the court is whether a miscarriage of justice has occurred. The court is satisfied that no miscarriage arises. First, the jury were given general written and oral directions on mutual corroboration. The trial judge had identified charges (1), (3) (5) and (6) as a group of assault charges. Secondly, the jury must have accepted the testimony of each of the complainers, including S. They accepted, from their verdicts on charges (3), (5) and (6), that the requisite course of conduct had been made out. They must inevitably have considered that the assaults on charge (1) formed part of that course. They had been directed properly on how to apply mutual corroboration to the evidence on different charges, albeit not expressly in relation to charge (1). That being so, the jury had sufficient directions by way of a route to a guilty verdict on all charges.

[17] The appeal is refused.