APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 84
HCA/2017/000208/XC

Lord Justice Clerk
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST CONVICTION

by

AD

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: F Connor; Paterson Bell, Edinburgh
Respondent: M Meehan, AD; Crown Agent

9 November 2017

Introduction

[1] The appellant is now 17 years old. He went to trial in the High Court at Edinburgh on an indictment containing five charges relating to two male and two female complainers, each of which libelled a contravention of the Sexual Offences (Scotland) Act 2009. The first charge was the subject of substantial amendment at the close of the Crown case. The appellant gave evidence on his own behalf and led the evidence of certain defence

witnesses. He was convicted by a majority on charges (001) and (003) in the following terms:

> "(001) on various occasions between 1 January 2014 and 30 September 2014 both dates inclusive at [an address in Fife] you … did assault [NA] … being a child who had not attained the age of 13 years, and did push him onto a bed, pull down his lower clothing, lie on top of him and rape him by penetrating his anus with your penis, to his injury: CONTRARY to Section 18 of the Sexual Offences (Scotland) Act 2009;
>
> (003) on an occasion between 1 June 2013 and 31 December 2013, both dates inclusive, at [an address in Fife] you … did sexually assault [KB] … a child who had not attained the age of 13 years, and did seize her by the body, pull her into your bedroom, push her onto a couch and the floor there, lie on top of her, restrain her on a chair there, attempt to remove her clothing, and kiss her on the face: CONTRARY to Section 20 of the Sexual Offences (Scotland) Act 2009;"

[2] The appellant was granted leave to appeal against conviction on four grounds. Grounds 1 and 2 argue that the doctrine of mutual corroboration could not apply as between charges (001) and (003), Grounds 3 and 4 criticise aspects of the directions which the trial judge gave in relation to how the jury might be able to find corroboration of the various charges before them.

The evidence

[3] The evidence at trial disclosed that the appellant lived with his mother in what was a small close community. He tended to spend much of his time in his bedroom playing computer games. His mother was content for other local children to come and go from the house on a regular basis and they would tend to join the appellant in his bedroom.

[4] The male complainer NA was one of the local children who regularly visited the appellant's home. He visited to play with the appellant's brothers or sisters and sometimes with the appellant himself. He was aged 9 or 10 at the time of the events described in charge (001) whilst the appellant was aged 14 (the libel commenced one month before his 14th

birthday). Sometimes when NA visited he would be alone with the appellant in his bedroom and on other occasions other children would also be present. Sometimes adults were in the house sometimes not. NA described a number of occasions when the appellant took him by the arm with both of his hands, put him into his bedroom and told him to sit on the bed. The appellant would make sure that no one else was looking, close the curtains, pull down NA's trousers and pants and penetrate his anus with his penis. He explained that when he asked to leave the appellant would not permit him to do so and told him that he had to wait until the game was finished: "or he would do it to him again but a bit more harder". There was never anyone else present in the bedroom at the time and the appellant blocked the door using items of furniture. He described this behaviour happening on around six, seven or eight occasions. The appellant was able to physically manhandle NA on account of the difference in age and size as between the two. There was evidence from another witness that he had seen the appellant dragging NA around in the house.

[5] The female complainer KB lived in the same street as the appellant and attended the same school as him. The appellant was a friend of her brother and she used to play with the appellant's younger sister. At the time of the incident specified in charge (003) she was aged 12 and the appellant was aged 13. She described an incident on an occasion not long after she had started High School in August 2013 when she went to the appellant's home, either to collect her brother or to play with his sister. She went with another female friend CA. Her brother and another boy were in the appellant's house, as was another young girl (C), but no adults were present.

[6] As KB was sitting on a couch in the living room, the appellant unexpectedly took hold of her hand and dragged her to his bedroom. She attempted to hold onto the couch and onto the door to prevent being dragged into the bedroom but this failed as the appellant

was too strong for her. Once in the bedroom he pushed her onto a couch or chair and got on top of her. He was trying to kiss her and she was trying to prevent him from doing so. He attempted to undo her buttons and take her jeans off but she grabbed onto his hands to prevent him doing so. She managed to get the appellant off her and to push him back. When she reached the middle of the bedroom he tried to drag her back again. She pushed him a further time and ran to the living room where she grabbed hold of her friend CA for protection. She was crying and shocked by what had happened. The appellant's bedroom door had been open throughout the whole episode.

[7] The appellant then returned to the living room and tried to pull KB away again but she held on to her friend and was able to prevent him from doing so. Eventually, he stopped and the three girls who had been in the house left.

[8] Some evidence was also available from KB's brother in relation to this event. He gave evidence that he had heard her shout: "get off me". He saw that the appellant's bedroom door was closed and when he opened it the appellant was on top of his sister and she was trying to free herself from underneath him.

Appellant's submissions

Grounds 1 & 2

[9] In the written case and argument advancing grounds 1 and 2 it was submitted that the evidence led in support of each of charges (001) and (003) disclosed that the character of the offences was materially different. It was pointed out that on charge (001) the complainer was a male child who was significantly younger than the appellant and that the conduct involved penetration of the complainer's anus with the appellant's penis. The child

complainer voluntarily attended at the appellant's home and bedroom to play and the assaults took place in private and on a number of occasions over a period of nine months.

[10] By contrast, the complainer in charge (003) was a female child approximately one year younger than the appellant. Her account was of being present with others in the living room of the appellant's home when she was dragged by him to his bedroom where she was forced down and he attempted to kiss her. The offence in relation to charge (003) did not involve any element of penetration and it was submitted that there was no evidence from which either penetration of attempted penetration could be inferred.

[11] The difference in gravity between the conduct described by each complainer and the dissimilarities in the circumstances of the offending behaviour were said to be so significant that the crimes were not capable of being viewed as part of a single course of criminal conduct. It was accordingly not possible for the charges to be corroborated through the application of the doctrine of mutual corroboration. Attention was drawn to the cases of *Moorov* v *HM Advocate* 1930 JC 68, *RB* v *HM Advocate* [2017] HCJAC 24, *KH* v *HM Advocate* 2015 SCCR 242 and *MR* v *HM Advocate* 2013 JC 212

Ground 3

[12] In support of ground 3 Ms Connor drew attention to the directions which the trial judge had given at page 35 of his charge to the jury. Having concluded his directions on the application of the doctrine of mutual corroboration, the trial judge directed the jury that in relation to charge (003) there was sufficient other independent evidence to permit the complainer's evidence to be corroborated without resort to the doctrine. It was accepted that these directions were correct.

[13] After the jury retired they asked for clarification on the application of the doctrine. Their question was:

> "If we have reasonable/any doubt on each charge how does mutual corroboration apply?"

In responding to this question the trial judge sought to summarise the concept and explained that the application of the rule meant that at least two charges must be involved in the event that they were to return a guilty verdict.

[14] It was contended on the appellant's behalf that this constituted a material misdirection. The direction, it was said, conveyed to the jury the understanding that they could not return a verdict of guilty in respect of charge (003) alone and would require to find the appellant guilty of another charge on the indictment if they were inclined to convict on that charge.

Ground 4

[15] Ground 4 comprised a more general criticism of the trial judge's directions in respect of the application of the doctrine. In support of this ground it was argued that the trial judge ought to have given the jury more detailed directions as to the application of the doctrine between the different charges in the event that they decided to acquit of certain charges. It was also submitted that he ought to have directed the jury on how to regard the evidence in respect of any charge upon which the jury decided to acquit the appellant during their deliberations on any remaining charges.

Crown Submissions

[16] On behalf of the Crown the advocate depute noted that it was accepted that the events founded upon were close in time and the issue in the appeal was what he called "identity in kind". In other words, whether the conduct described and the circumstances in which it took place demonstrated sufficient by way of similarity to permit a conclusion to be drawn that the appellant was engaged in a course of conduct persistently pursued.

[17] The advocate depute drew attention to the manner in which each complainer described being grabbed and manhandled by the appellant. He drew attention to the evidence of removing the male complainer's trousers and the conduct spoken to by the female complainer, who described an attempt by the appellant to remove her lower clothing. It was, he said, only her actions in physically resisting the appellant that prevented the matter from progressing.

[18] The advocate depute drew attention to the observations of the Lord Justice Clerk in *RB* at paragraph [28] about how opportunity and inclination can be intermittent. He drew attention to the comments made by Lord Brodie in giving the opinion of the Court in *KH* at paragraph [34] to the effect that underlying unity may be established by the evidence led in support of individual charges and once established what is libelled in individual charges can be regarded as merely incidents in a course of criminal conduct which is driven by that underlying unity.

[19] The advocate depute drew attention to eight points of similarity:

1. The incidents were closely connected in time;
2. The locus for each was the same, namely the bedroom of the accused;
3. Both complainers were young children;
4. Both complainers were in a similar relationship to the appellant, in that they were part of a friendship group;
5. Both complainers were in the appellant's home for the same reason – to socialise with other children;
6. Both complainers spoke to the use of force;
7. The appellant's behaviour towards both involved an element of risk taking, in that there were other persons present in the house;

8. There was removal of the first complainer's clothing prior to anal penetration and in charge (003) there were attempts to take off her lower clothing.

In light of these points of similarity, he submitted that the evidence as led did provide evidence of an underlying unity of intent and the evidence disclosed incidents of criminal conduct driven by that underlying unity.

Discussion

[20] In considering whether, in any given case, the evidence led is capable of affording corroboration by application of the doctrine of mutual corroboration, it does not of course matter that the crimes are not of the same *nomen juris* (*McMahon* v *HM Advocate* 1996 SLT 1139). There is no rule of law whereby what might be perceived as less serious sexual criminal conduct cannot provide corroboration of what is libelled as a more serious sexual crime (*MR* v *HM Advocate* paragraph [21]).

[21] In the present case it was accepted that the two charges were closely linked in time and in place. In our opinion, they were also closely linked in both character and circumstances.

[22] Each act was perpetrated against a younger friend of the appellant who was in his home. Each complainer was grabbed by the arms and forced into the appellant's bedroom. In relation to charge (003) the complainer's evidence was that the appellant was trying to kiss her and trying to take her clothes off. He attempted to undo her buttons and to take her jeans off. The jury would have been perfectly entitled to characterise this as a sexual assault in the course of which he was attempting to forcefully remove the complainer's clothing with the intention of further sexually assaulting her. The jury could therefore have

concluded that in relation to each complainer the appellant engaged in sexual activity, or attempted to do so, having forced them into his bedroom.

[23] In the case of the female complainer it was her conduct in fighting him off that prevented the appellant from persisting in a sexual assault. The outcomes in relation to each complainer were accordingly somewhat different but, as the advocate depute submitted, this was due to the different conduct of the respective complainers, not because of a difference in the way in which the appellant had behaved.

[24] The event in charge (003) pre-dated the events described in charge (001). The evidence of the appellant's subsequent conduct as given by the male complainer was not only evidence of a similar character to that described by the female complainer, it was also evidence of an escalation of that conduct in gravity. In our opinion, the jury would have been entitled to conclude that but for the female complainer's ability to resist the appellant the event which she described would have gone further. In the same vein they would have been entitled to conclude that the appellant's ability to conduct himself as he did towards the younger male child was because of his inability to protect to himself.

[25] As was explained by the Lord Justice Clerk (Carloway) in *MR* at paragraph [20], whether the evidence of different complainers can provide mutual corroboration depends upon whether as between the two or more incidents there are:

> "… 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 criminal conduct persistently pursued by the accused."

In our opinion the evidence which we have referred to above met that test. We are satisfied that the jury was entitled to find corroboration of each of charges (001) and (003) through the

application of the doctrine of mutual corroboration and the appeal on this ground must be refused.

[26] We are also satisfied that the directions which the trial judge gave were entirely adequate in the circumstances of this case. The jury sought clarification on the application of the doctrine and he gave them directions concerning that matter which were accurate. Those directions did not conflict with his earlier directions in relation to charge (003) and we do not accept that he conveyed the impression suggested by counsel for the appellant.

[27] Nor was it necessary for the trial judge to canvass the various possibilities which might arise should the jury acquit of one charge or the other. As was accepted, they were correctly directed on the application of the doctrine and are to be assumed to have applied those directions in relation to the charges which they found to be established.

Decision

[28] For these reasons we are satisfied that none of the grounds of appeal have been made out and the appeal is refused.