APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 20
HCA/2017/000488/XC

Lord Justice Clerk
Lady Paton
Lord Turnbull

OPINION OF THE COURT

delivered *ex tempore* by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

TN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: D Nicolson, Angus McLennan & Co
Respondent: McSporran QC, AD; Crown Agent

22 February 2018

[1] The appellant was indicted on charges of child neglect, charges of assault of his children, several charges of a sexual nature in relation to his daughter, KN, and one such charge in relation to the daughter of his brother's domestic partner, CS. He pled guilty to the neglect charges and was convicted after trial of various physical assaults. He was also convicted of two charges of a sexual nature in relation to KN, charges 8 and 10, a third charge (9) being found not proven. He was also convicted of the charge relating to CS (16).

[2] Charge 8 narrated that during a period when KN was between 4 and 6 years of age (October 2001-October 2003), the appellant, acting with other males, permitted and encouraged those males to engage in sexual intercourse with the child, handle her private parts, digitally penetrate her vagina, restrain her and tie her hands, and penetrate her vagina with their penises, thus raping her. The charge also extended to physical assaults.

[3] Charge 10 involved a single instance of rape of KN by the appellant when she was between 5 and 6 years of age (October 2002-October 2003), involving violence and compulsion.

[4] Charge 16 involved a single instance of lewd and libidinous behaviour towards CS, when she was 13-14 (May 2006 to May 2007), which included pulling her onto her back, restraining her, pulling down her trousers, handling her vagina, and digitally penetrating her vagina.

[5] The complainer in each charge gave evidence in accordance with the narrative in the respective charges.

[6] The complainer's brother WN gave evidence that he remembered that there were always a lot of strange men coming to their house. There were a lot of male figures between 20 and 40 years old who would go into a bedroom with KN, two, three or four at a time. The other children would not be allowed in. One man would linger outside to prevent this. They would have a pint or a joint and then go into the room with KN. On one occasion the appellant and another man went into the room. This evidence was not relied upon as corroboration, but as supportive of the credibility and reliability of KN. In submissions it was acknowledged that this evidence provided significant independent support for the evidence of KN. However, the question remained whether there was corroboration of her evidence relating to the specified conduct.

[7] A submission of no case to answer had been made in relation to charge 8. It was accepted that the evidence given by CS was capable of corroborating the evidence of KN in relation to charge 10; but it was argued that the circumstances of charge 8 were too dissimilar from those of charge 16 to permit of the operation of the doctrine of mutual corroboration.

[8] In repelling the submission of no case to answer, the trial judge stated:

> "I have not found this an easy point to decide. It seems to me, to use an expression from the field of photography, to depend upon the field of view of the conduct in question whether the necessary underlying similarity of conduct exists between the two charges. Both involve penetration of a child's vagina, but there are also striking differences. I would be entitled to sustain the submission of no case to answer only if I were satisfied that on no possible view of the evidence would it be open to the jury to apply the *Moorov* doctrine. I have concluded that I could not be so satisfied. On the other hand, there are, in my opinion, sufficient differences in the nature of the conduct in charges 8 and 16 to entitle a jury to hold that the *Moorov* doctrine should not be applied. The matter is one for the jury, not for me."

Grounds of appeal

[9] The basic propositions to be addressed when considering the application of the *Moorov* doctrine (*Moorov* v *HMA* 1930 JC 68) were not in dispute. What the court requires to look for are the conventional similarities in time, place and circumstances in the behaviour such as demonstrate that the individual incidents are component parts of one course of criminal conduct persistently pursued by the accused. The *nomen juris* of each criminal act is immaterial. The alleged course of conduct has to be viewed as a whole, rather than in individual compartments. The question is whether there is an underlying unity of conduct. Whether these similarities exist will often be a question of fact and degree requiring, in a solemn case, assessment by the jury. There is no rule that what might be perceived as less serious criminal conduct cannot provide corroboration of what is libelled as a more serious crime. The more similar the conduct is in terms of character, the less important a significant

time gap may be; whereas a course of conduct may be more readily inferred from ordinary similarities where the gap is time in short. Caution must be exercised, especially where there are few instances of behaviour under consideration.

[10] It was accepted that the evidence on charge 16 could corroborate the evidence relating to charge 10, and that no issue relating to any gap in time could arise. The argument for the appellant was that the incident spoken to by CS was too dissimilar to the events spoken to by KN to allow a jury to conclude that they were part of the one course of conduct systematically pursued by the appellant. One charge involved the appellant art and part in conduct of the utmost depravity, permitted and encouraged by him, and involving both digital penetration and penile/vaginal rape. The other was a discrete offence, as actor involving inter alia, digital penetration of the complainer's vagina. There were some similarities but the conduct was fundamentally different. The appellant was only guilty art and part in charge 8, whereas he was actor in charge 16. The method of restraint in each case was different, a rope having been used on occasion in charge 8. There were only two complainers, the minimum possible that would allow the doctrine to operate. It could not be said that the individual incidents were component parts of one course of criminal conduct persistently or systematically pursued by the appellant.

Decision and analysis

[11] We are satisfied that the trial judge was correct in repelling the submission made to him. The submission fails to take into account the totality of the circumstances in which the offending behaviour took place. As has been noted above, the conduct must be looked at as a whole. This was emphasised by the court in *HMcA* v *HMA* 2015 JC 27, by the Lord Justice Clerk (Carloway) at para 11:

> "In these circumstances the trial judge was correct to report that it is inappropriate to approach matters in a compartmentalised way. The fundamental point remains that of whether the evidence is capable of indicating a course of conduct systematically pursued by an accused. The individual behaviour exhibited at different times may vary, but it is the course of conduct as a whole which must be examined. The fact that only some of the incidents in a course of conduct involved penetration, while others do not, does not lead to the conclusion that they cannot all be part of one course of conduct. The fact that only the first and final charges involved any form of penetration does not mean that only those two charges should be looked at when considering whether there is a sufficient temporal link, and links by way of other facts and circumstances, sufficient to provide the necessary mutual corroboration."

[12] The focus should be on the evidence given by each witness, and whether that evidence is indicative of a course of conduct. The charges are the mechanism by which that course of conduct is specified, and by which its criminality is asserted, but to focus too strongly on the individual charges is to risk compartmentalising the evidence rather than asking whether the evidence as a whole indicates a course of conduct. It will often be the case that behaviour is libelled in different charges for technical or presentational reasons. The conduct in charge 8, was libelled as part of a course of conduct which included not only the conduct of the appellant as actor in relation to CS referred to in charge 16, but his rape, as actor, of KN referred to in charge 10. The conduct in charge 8 was part of a wider course of conduct involving KN, in which the appellant was both actor and acting in concert with, and as facilitator of, others during an overlapping period of time. The fact that in charge 8 the appellant was not actor, but was guilty art and part of the rapes committed by the other men (at his instigation) is of no moment: the concept of art and part responsibility means that he is equally guilty as the actors. The conduct contained many similarities, all as identified by the advocate depute: the majority of the offending occurred in the complainers' respective homes within their respective bedrooms and in Edinburgh. Both complainers were female children within the appellant's family circle. In each case the offending involved penetrative vaginal abuse. In each case the offending was accompanied

by physical restraint. KN spoke to the men always being drunk, and the appellant generally so; CS spoke to the appellant being drunk.

[14] The submission for the appellant also fails to take into account a further similarity of the kind identified in *L(A)* v *HMA* 2017 SCL 166, namely that "the offences occurred in the environment of a controlling, dysfunctional, domestic relationship."

[15] There was considerable evidence in the present case as to the uncaring, dysfunctional, and neglectful homes of each complainer at the relevant times, the domestic environments of both being environments categorised by domestic violence, neglect, and drug and alcohol abuse. The advocate depute was in our view correct to submit that the complainers were vulnerable not just because they were children, but because they lived within that environment.

[16] In any case in which the application of *Moorov* arises it will generally be possible to point to both similarities and differences. If the features of time, place and circumstances would entitle a jury to draw the conclusion that the events were all part of one course of conduct, the matter should be remitted to them for their assessment. Delivering the opinion of the Court in *Reynolds* v *HMA* 1995 JC 142, the Lord Justice General (Hope) stated (p146 D):

> "We accept that there was a process of evaluation to be conducted, because there were dissimilarities as well as similarities. On the other hand, we do not accept that on no possible view could it be said that there was any connection between the two offences. Where the case lies in the middle ground, the important point is that a jury should be properly directed so that they are aware of the test which requires to be applied."

[17] The similarities in the context of all the evidence in this case were such that it would be open to the jury to apply the doctrine of mutual corroboration. Whether they should do so was a matter of evaluation of the evidence. In our view the trial judge was correct to repel the submission of no case to answer, and the appeal falls to be dismissed.