APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 37
HCA/2018/151/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL

by

ROBERT SPINKS

Appellant

against

PROCURATOR FISCAL, KIRKCALDY

Respondent

Appellant: B Sudjic (sol adv), A Ogg (sol adv); Black & Guild, Kirkcaldy
Respondent: A Prentice QC (sol adv) AD; the Crown Agent

13 June 2018

General

[1] On 17 August 2017, at the Sheriff Court in Kirkcaldy, the appellant was found guilty of two charges. The first was a contravention of the Criminal Justice and Licensing (Scotland) Act 2010, section 39(1) ("stalking") between 27 March and 10 April 2017 at Poundworld in the town centre. The libel was that he engaged in a course of conduct which

caused [MK] fear or alarm in that he did: repeatedly contact and attempt to contact her by telephone; repeatedly shout and swear; and step into the path of an oncoming vehicle. The appeal is not concerned with that charge.

[2] The second charge, of which the appellant was found guilty, was that:

> "on various occasions from 1 January 2013 to 27 March 2017 at ... Inchgarvie Road, Kirkcaldy ... [he] did assault [MK] and did punch her on the head, repeatedly seize her by the throat and compress the same, repeatedly pin her to the ground and against a wall, throw water at her, strike her on the head causing her to strike her head against a wall, repeatedly seize her by the hair, kick her on the body, and spit on her face, all to her injury."

[3] The sheriff imposed a Community Payback Order involving a supervision requirement of two years, a programme requirement for two years and unpaid work of 300 hours. He explains that 50 hours were attributable to charge 1 and 250 to charge 2.

Facts found and the evidence

[4] The sheriff found that in 2010 the appellant and the complainer had formed a relationship when the complainer was 15 years of age. A year later she moved in with the appellant at his home in Inchgarvie Road. On three separate occasions the appellant pinned her to a wall or floor and seized her by the throat. There is no specification of the date of these events at that part of the sheriff's findings. In January 2016 the appellant struck the complainer on the body, which caused her to strike her head against a wall, causing an injury which required hospital treatment. The appellant and the complainer separated in May or June 2016. On 27 March 2017 the complainer was taken by car to the appellant's house by a witness, namely MS. He shouted and swore at the complainer and spat on her face on a pathway outside the house. When interviewed by the police on 11 April 2017, the

appellant admitted having punched the complainer on one occasion two or three years earlier.

[5] At the conclusion of his findings-in-fact the sheriff set out the assaults which he found proved, in relation to charge 2, as follows:

> "(a) ... in about 2013 the appellant kicked her to the stomach when she was about 10/12 weeks pregnant;
>
> (b) ... in about 2014, when she was 19, the appellant pinned her to the wall and compressed her neck using one hand;
>
> (c) ... in about 2015 the appellant pinned her to the wall and compressed her neck using one hand;
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> (d) ... when [the complainer] was 20 or 21, ie in about 2015, the appellant punched her on the head;
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> (e) ... at the end of 2015 the appellant threw water on her, pinned her to the ground and compressed her neck with both hands with such force that she was injured in that there were marks on her neck;
>
> (f) in about January 2016 the appellant struck her on the body causing her to strike her head against a wall causing an injury to her head;
>
> (g) on various dates prior to April 2016 the appellant repeatedly seized her by the hair; and
>
> (h) on about 27 March 2017 the appellant spat on her face."

[6] The sheriff described the complainer as having a patchy recollection of exact dates of events which had occurred years ago. In relation to assault ("(a)") her recollection had been that this had occurred in about 2013, when she was about 18 and 10 to 12 weeks pregnant. The third incident ("(c)") had involved the appellant compressing her throat at some time before the incident in January 2016, when she had required to attend hospital. That incident had involved the complainer being punched on the side of the face causing her to strike the other side of her head against a bathroom wall. There is no other description of the various assaults for which findings-in-fact exist.

[7] In relation to corroboration, the sheriff referred to a neighbour of the appellant, namely MM, speaking about a volatile relationship, punctuated by incidents in which "both parties were robust in their interactions". Some parts of this witness's evidence could not be sufficiently related to the particular elements of charge 2 to amount to corroboration. MS gave evidence relating to the final incident in which she spoke to having seen the appellant spit at the complainer. There was the admission by the appellant that he had punched the complainer on one occasion two or three years before being interviewed.

The sheriff's reasoning

[8] The sheriff asked himself whether it was legitimate for the Crown to libel charge 2 as a "course of conduct" involving the abuse of a partner in the domestic context. He considered, on the authority of *Stephen* v *HM Advocate* 2007 JC 61 (at paras [6] to [9]), that it was. *Stephen* was an example of a case in which the details of the assault did not require to be corroborated. If there was corroboration of an assault, the complainer's evidence would be enough on its own to establish its details. It was legitimate to treat the series of assaults as a course of conduct, because they could be seen as very similar abusive conduct involving a domestic partner. There were repetitive elements in some of the incidents, such as the seizing of the complainer by the throat and the hair. It was legitimate to libel a single crime and, for the purposes of corroboration, to regard it as one constituted by repeated criminal acts of the same character.

[9] The sheriff accepted that, in relation to each part of charge 2, there was no corroboration specific to the assaults (a) to (c) or (e) to (g). If these required individual corroboration, the sheriff would have acquitted of these parts. The sheriff posed the following questions:

"(2) On the evidence was I entitled to convict the appellant of charge 2 ...;

(3) *Esto* I was not entitled to convict of charge 2 ..., what parts of the libel ought I to have deleted?"

The Sheriff Appeal Court

[10] The Sheriff Appeal Court's *ex tempore* opinion is in the following terms:

> "This is an appeal taken against charge 2 which contains a number of different *species facti* of an overall single charge and the question is whether it has been properly corroborated and can be sustained as a conviction. In our view it can and we refuse the appeal, that is because we agree with the proposition of the advocate depute that there's a similarity between domestic abuse cases and sexual abuse cases in that the matters are taken place (*sic*) in private. It is not challenged that the Crown has correctly libelled this as a course of conduct and we accept the proposition that the court is looking for clear evidence which it finds credible and reliable as it did in this case and supporting evidence for that. The supporting evidence need not cover all of the matters libelled. In this case there is clear corroboration in our view of two of the matters, one by admission and incidentally we do not accept it is a vague admission, it is quite a specific admission of two or three years before having hit the complainer in the face and also the corroborated evidence from third party (*sic*) of spitting. We do not see that there is any merit in the distinction which is attempted to be drawn between a case where there are two complainers and where there are a complainer and other sources of evidence and therefore we have no difficulty accepting that we must apply the *Stephen* case. For all of these reasons we refuse the appeal".

Neither the sheriff, nor the SAC, were referred to *Dalton* v *HM Advocate* 2015 SCCR 125.

Submissions

[11] The appellant appealed on the basis that the Sheriff Appeal Court and the sheriff erred in holding that, where a course of conduct had been established in the context of a single charge, individual elements of the charge did not require corroboration. The SAC had held that no corroboration was required for what were essentially separate offences, occurring over a period of almost seven years. The decision of the SAC would allow the Crown to present sufficient evidence for individual offences without the need for

corroboration, even if the incidents were of a significantly different character. The court should accordingly follow *Dalton* and not *Stephen*.

[12] The advocate depute maintained that, where it was established that offences committed over a prolonged period, albeit on separate occasions, were so linked in time, character and circumstances so as to demonstrate that they were parts of a single course of conduct, all that was required was corroboration of some of the episodes to amount to corroboration of the whole; that is to say that separate corroboration of each episode was not required. The course of conduct could be treated as a single crime which could be corroborated if only some, or perhaps only one, of the episodes were supported from a separate source. *Dalton* was a misdirection case and the court ought to follow the principle in *Stephen*.

Decision

[13] The court is unable to sustain the Crown's submission, which amounts to a substantial change in the law of evidence. A person cannot be convicted of a crime on the evidence of one witness alone. There requires to be corroboration. Where, as here, a complainer speaks to the occurrence of a crime, the crucial facts of her testimony require to be corroborated by testimony from at least one other source. In the case of a single episode of assault, there is no need for every element of the libel to be corroborated. All that is needed is evidence from another source that some form of assault took place and the appellant perpetrated that assault, at least where the assault involves the same type of conduct. The situation is quite different where there are separate incidents. In that situation the normal requirement of corroboration applies to each incident.

[14] *Stephen* v *HM Advocate* 2007 JC 61 involved charges of lewd, indecent and libidinous practices against two female complainers of the same age over the same date range. The court, founding upon Hume: *Commentaries* ii, 222 and Alison: *Practice* 256, observed (para [6]) that it had long been recognised that a single omnibus charge was legitimate, having regard to the difficulties which young witnesses may have in relating particular conduct to particular instances. On that basis, what could be looked for was corroboration of that single charge. That situation is readily distinguishable from the present, which involves different episodes of physical assault and an adult complainer. Although it is true to say that *Dalton* v *HM Advocate* 2015 SCCR 125 was a misdirection case, the court made it clear that, where separate episodes of rape with substantial periods of time between them were involved, each episode required to be proved by corroborated evidence, even if the same evidence may corroborate more than one offence. So it is with the present case.

[15] There was corroborative evidence from MS that the appellant spat at the complainer (finding h). The appellant admitted punching the complainer, so there was corroboration of that allegation on one occasion (finding d). There is no corroboration of any other of the other assaults libelled in charge 2. The fact that the Crown case proceeded, presumably without objection, upon an omnibus charge does not affect the law of evidence. Accordingly, the appeal must be allowed and the conviction restricted to that: on one occasion in 2015 the appellant punched the complainer on the head; and on another occasion on 27 March 2017 he spat on her face. On that basis, the court will answer the second question in the negative and the third question in accordance with this Opinion.

[16] The adjusted sentence will be a total of 100 hours unpaid work, in substitution for the 300 imposed. The programme and supervision requirements will be quashed.