APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 41
HCA/2017/00570/XC

Lady Paton
Lord Menzies
Lord Malcolm

OPINION OF THE COURT

delivered by LADY PATON

in

APPEAL AGAINST CONVICTION

by

RMY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: C Mitchell; Paterson Bell Solicitors, Edinburgh (for Beltrami & Co, Glasgow)
Respondent: Prentice QC, Sol Adv, AD; Crown Agent

11 July 2018

Introduction

[1] The appellant was born in June 1947. In August 2017 he faced trial in Hamilton Sheriff Court charged with *inter alia* the following offences:

> "1. On various occasions between 7 September 1967 and 6 September 1970 … at [an address in Wishaw], you … did use lewd, indecent and libidinous practices and behaviour towards [H], your niece … then aged 4 to 7 years … and did handle her vagina and breasts over her clothing.

> 2. On various occasions between 31 May 1975 and 30 May 1977 … within the common close at [an address in Glasgow] and within your motor vehicle … at a wooded area near to … Wishaw and elsewhere you did use lewd, indecent and libidinous practices and behaviour towards P … then aged 10 to 11 years … and did kiss her on the mouth, insert your tongue in her mouth, handle her buttocks, handle her breasts, expose your penis and force her to handle your penis".

The appellant was convicted of both charges under deletion of the last few words in charge 1. He was sentenced to imprisonment for 15 months in respect of charge 1, and for 30 months in respect of charge 2 (45 months in total). He now appeals against conviction in respect of those charges. He contends that the sheriff erred in refusing a "no case to answer" submission, and in particular that the *Moorov* doctrine was not applicable.

The sheriff's report

[2] The report by the sheriff notes:

> "**The Evidence**
>
> **Charge One**
> [4] The complainer [H] … was aged 53 at the time of giving evidence … She is the adopted daughter of the appellant's sister. In 1968 when she was five years of age the complainer was in the kitchen of her maternal grandmother's house. Her mother and grandmother were with her in the kitchen. The appellant, aged 20 at the time, was in the adjacent living room. He lived in the house with his mother, the complainer's grandmother. The complainer's mother and grandmother were cooking and were concerned for the child's safety. They told her to go into the living room. The door from the kitchen opens directly into the living room. The child went into the living room where the appellant was lying on the couch. He beckoned her over towards him and put his hand up her skirt and touched her on top of her pants on her vagina. The appellant was laughing as he touched her. As he touched her he put a finger to his mouth and said 'Shh'. He rubbed his hand back and forward on the child's vagina. The complainer had the impression the appellant did not take what he was doing seriously. Although she was only five years of age the complainer knew the appellant's behaviour was wrong. She had the impression the appellant was not worried or frightened about being caught despite knowing his sister and mother were in the adjacent kitchen. On a separate occasion when she was about six or seven she described the appellant lifting her onto a wall. He placed his hands under her arms and over her chest and touched her chest as he lifted her. The reference to the appellant touching her chest was deleted by the jury. The complainer said she was always uneasy around the appellant and tried never to be alone in his company. She

said she never liked him as an uncle. She described him as a bit 'touchy feely' and said she was wary of him. She said her maternal grandmother never left her alone with the appellant.

Charge Two

[5] The complainer [P] … was aged 52 when she gave her evidence … When she was a child she lived with her mother, her maternal grandparents, and her maternal uncle in Glasgow. The complainer's mother ... met the appellant in 1975 and they started dating. They eventually married. The appellant visited the complainer's mother before the marriage at the home of her maternal grandparents. The complainer first met the appellant when she was about 10 or 11. The family lived in a flat which had access to a landing which was entirely private and for the sole use of the occupants of the flat. It was not overlooked by any of the other flats in the close. The complainer said on every occasion when the appellant visited he beckoned her with his eyes to leave the house and go out onto the landing with him. When she went out the appellant kissed her. She described the appellant putting his tongue into her mouth and giving her a 'full blown kiss' on her lips. She described the kissing as 'passionate'. At the same time he felt her breasts and her back and her buttocks. Sometimes he felt her breasts and her back under her clothing but mostly it was on top of her clothing. She described being out on the landing with the appellant for between 5 to 15 minutes on each occasion. She described this behaviour happening most times when the appellant came to visit the house which was on a weekly basis until the marriage. The landing and close were in close proximity to the child's mother and grandparents who were sitting in the living room. The complainer said at the time she was not sure what was happening but when she looked back on his behaviour she said she felt disgusted, annoyed and angry that the appellant should behave in such a way towards a vulnerable person. The appellant and the complainer's mother married in August 1976 with the intention that the complainer would move to live with them in the Wishaw area. The complainer went to stay overnight at their marital home in Wishaw only once after their marriage. On that occasion she insisted she slept with her mother as she did not want to be alone with the appellant. The following morning she asked to go back and live with her grandparents and uncle. Her request was granted and she never lived with her mother and the appellant after their marriage. After the marriage the appellant took the complainer out alone for a drive in his car whenever she visited her mother. He drove to remote areas .... On two occasions when she was alone with the appellant in his car the appellant took out his erect penis and told her to put her hands around it. She also described him kissing her 'passionately' and putting his tongue in her mouth. After he behaved in this way he took the complainer to a chip shop or sweet shop and bought her something by way of a treat. Because of his behaviour the complainer tried to ensure she was never alone with the appellant. She made every effort to stay very close to her grandfather or uncle for safety. She explained that she never wanted to go with the appellant in his car but she did so because her mother encouraged her to go. She said she did everything she could to make her mother happy as she was very close to her mother. All the abuse towards the complainer took place when she was under the age of 12. …

Section 97 submission
[The sheriff noted the submissions made on behalf of the appellant and continued:]

[17] The Crown accepted that charges 1 [and 2] had to be looked at together. So far as charges 1 and 2 were concerned, the time gap was seven years with the offences committed between September 1970 and May 1977. In both charges there was a family connection: in charge 1 the complainer was the adopted niece of the appellant and in charge 2 his step-daughter. It was unique that both complainers were non-blood relations. Further the appellant's conduct in both charges could be described as brazen. In charge one the behaviour occurred immediately outside the kitchen where the complainer's mother and grandmother were present. In charge two the behaviour took place on a landing where the complainer's family were nearby within the family home. In both cases the complainers were pre-pubescent. The behaviour consisted of touching over their clothing. The conduct in charge two was more serious than that in charge one but there was no bar to the lesser conduct corroborating the greater. ...

[19] I repelled the submissions made on behalf of the appellant in respect of charges 1 and 2 … So far as charges 1 and 2 are concerned the behaviour of the appellant was an example of sexual abuse occurring within an extended family unit. A distinctive feature, in my view, was the fact that the two complainers were not blood relatives of the appellant but an adopted child of the family unit and a stepdaughter. The gap in time between the two charges fell somewhere between five and 10 years but given the similarity in the appellant's behaviour against both complainers the gap in time could, in my view, be regarded as less important. The appellant's behaviour was similar and consisted of touching both girls on private areas of their bodies, one on her vagina and the other *inter alia* on her breasts and buttocks. There was a similarity in the place where the offences were carried out. The first was in the family home and the second immediately outside the family home on the veranda attached to the home. The circumstances in which the behaviour occurred were almost identical. In the first it took place in a room in close proximity to a room where the complainer's mother and grandmother were preparing a meal. The complainer was within earshot of her mother and grandmother. The danger that the appellant could have been disturbed by his sister and mother coming into the living room was a real one. The act of touching a child so near to her mother was blatant. It was suggestive of risk taking. In the case of the second complainer her mother, grandparents and uncle were also in close proximity, a matter of feet away from her. Any one of them could have looked out onto the veranda and witnessed the appellant's behaviour. The risk of him being discovered was a real one. The appellant's behaviour displayed the same kind of risk taking as in charge one. While the appellant's behaviour in charge two was more serious and more frequent that did not prevent the less serious conduct from providing corroboration to the more serious. …

[21] It seemed to me that the similarities in time, place and circumstances between the behaviour in charges 1 and 2 … were matters for the jury to assess and were capable of demonstrating that the individual incidents spoken to by the complainers were parts of one course of criminal conduct persistently pursued by the appellant …

> [24] The lack of any blood tie between the two complainers and the appellant was highlighted when the appellant's natural daughter gave evidence and said the appellant had never abused her in any way. The lack of a blood connection was a circumstance which the jury were entitled to take into account in finding a similarity between the two offences …"

Submissions for the appellant

[3] Counsel for the appellant submitted that there was a considerable time lapse of five to seven years between the offences libelled in charges 1 and 2. Moreover the character of the offences was very different. The behaviour described by H was opportunistic and limited to two occasions. The first occasion took place in the living-room of the appellant's home when the appellant touched her private parts. H was aged five at the time. Her mother and grandmother were nearby, in the kitchen. The second occasion involved a wall. By contrast the behaviour described by P took place on many occasions, often outside the home, and was planned. The appellant would take P out onto the private landing serving the flat and there kiss and touch her as described in the sheriff's report, but not touching her private parts. He also took P out in his car, again kissing and touching her as described by the sheriff. P was much older than H, being aged 10 and 11 during the relevant period. There were, in fact, more dissimilarities than similarities in the character and the circumstances of the offences. The sheriff had placed too much weight upon factors such as the lack of a blood relationship between complainers and appellant, and the blatant nature of the offences. The *Moorov* doctrine was not available for charges 1 and 2, which, as a result, stood uncorroborated. The section 97 submission should have been sustained. The convictions in respect of charges 1 and 2 should be quashed.

Submissions for the Crown

[4] The advocate depute submitted that, at the stage of a "no case to answer" submission, the Crown case must be taken at its highest. The time-gap was not so extensive as to require special or exceptional similarities, and the similarities elicited in the evidence entitled the jury to apply the *Moorov* doctrine. In particular both complainers were female; both were pre-pubescent; H was the appellant's adopted niece and P was the appellant's step-daughter. Thus there was access to each in a family context, and in each case there was no blood relationship. In relation to both children, there had been an element of "risk-taking" on the part of the appellant, as the complainer's mother and grandparents were often nearby. The escalation of the behaviour in P's case had been possible because, unlike H, P was permitted and indeed encouraged to be alone with the appellant. The sheriff had been entitled to give a degree of weight to the lack of a blood relationship between the complainers and the appellant, particularly as the appellant's natural daughter gave evidence that he had never abused her. It could not be said that, on any view, there was no connection between the offences in charges 1 and 2 (*Reynolds* v *HM Advocate* 1995 JC 142 at page 146, cited in *TN* v *HM Advocate* [2018] HCJAC 20). The appeal should be refused.

Discussion

[5] When assessing any similarities at the stage of a "no case to answer" submission, the sheriff had to take the Crown's case at its highest. The time-lapse (namely, a maximum of seven years between the events described by H and those described by P) did not, in our opinion, require the sheriff to find any similarities to be exceptional or extraordinary. Furthermore, the sheriff had to bear mind the guidance given by Lord Hope in *Reynolds* v *HM Advocate* 1995 JC 142, at page 146, as follows:

> "As was pointed out in *Carpenter v Hamilton*, cases of this kind, while they must be

> approached with care, raise questions of fact and degree. That is especially so where, to use Lord Sands' expression, the case falls into the open country which lies between the two extremes … 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. In this case no criticism has been made of the directions which were given by the trial judge as to the application of the *Moorov* doctrine to the facts of this case … When the case is looked at in that light and regard is had to the fact that there are items in the evidence which may on one view be regarded as similarities and then balanced against dissimilarities, we consider that this case fell within the province of the jury rather than the judge. It was therefore one which the trial judge properly left to the jury to decide."

[6] Applying that guidance, we have concluded that this was not a case where the sheriff could have decided that "on no possible view could it be said that there was any connection between" the offences in charge 1 and those in charge 2. On the contrary, on the evidence available, a jury would be entitled to take the view that the behaviour described by H and P demonstrated the appellant's attraction to pre-pubescent female children resulting in wholly inappropriate conduct towards them for his own sexual gratification, often with the added risk-taking thrill of indulging in such behaviour in the vicinity of other adults related to the children. A jury would be entitled to conclude that each child became available to him because of the family context. A jury would be entitled to take account of evidence from which an inference could be drawn that the appellant chose not to subject his own blood-related female child to such behaviour, but had no inhibitions in relation to an adopted niece and a step-daughter. A jury would also be entitled to conclude that the reason for the greater escalation of behaviour in P's case (and the fact that the behaviour often took place outside the flat, on the landing or in a car, and therefore outside the home environment) was attributable to the greater availability of P, encouraged by P's mother in ignorance of what was happening. A jury would be entitled to give considerable weight to the similarities

referred to by the sheriff and the advocate depute, and to give lesser weight to any dissimilarities referred to by the appellant's counsel.

[7] Thus we consider that the evidence at the close of the Crown case, as noted in the sheriff's report and taken at its highest, disclosed sufficient similarities in time, character and circumstances to entitle a jury, if they so chose, to apply the *Moorov* doctrine. It could not be said that the evidence was insufficient to entitle a jury, properly directed, to conclude that there was a course of conduct systematically being pursued by the appellant towards the two complainers. No criticism is made of the directions given by the sheriff. It was therefore for the jury to balance the various similarities and dissimilarities, to evaluate questions of fact and degree, and to reach a view as to whether and to what extent the *Moorov* doctrine applied (cf *MR* v *HM Advocate* 2013 JC 212). We are not persuaded that the sheriff erred in refusing the "no case to answer" submission. For completeness, we add that the jury's deletion of the second incident referred to in charge 1 (the touching of the complainer's chest when she was being lifted onto a wall) still left the jury with adequate material for the application of the *Moorov* doctrine, if they so chose.

Decision

[8] For these reasons, the appeal is refused.