APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 58
HCA/2017/667/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION

by

TG

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Hay; Faculty Appeals Unit (for Westcourts Litigation, Greenock)
Respondent: Goddard QC, AD; the Crown Agent

20 September 2018

Introduction

[1] On 26 October 2017, at the High Court in Glasgow, the appellant was convicted of a number of offences. Charges 1 and 2 were, respectively, lewd and libidinous practices towards, and physical assaults on, the son of the appellant's partner on various occasions between 1986 to 1988. The significance of the ultimate conviction was that, although the

original *locus* was an address in [M] Road, Port Glasgow, the jury added an address at [I] Avenue, Port Glasgow, upon conviction. Charge 5 was a libel of lewd and libidinous practices on one occasion between 1989 and 1991 at [I] Avenue against the daughter of the appellant's partner. Charge 6 involved various indecent assaults on the daughter in the period 1991 to 1997 at [I] Avenue and [A] Avenue, Port Glasgow. Charge 7 was one of indecent assault, attempted rape and rape of the daughter on various occasions at [A] Avenue between 1992 and 1997. Charge 8 was one of physical assaults on the daughter between 1989 and 1998, at [I] Avenue and [A] Avenue. Charge 9 was an offence of clandestine injury in respect of an adult complainer in 1996, also at [A] Avenue.

[2] The advocate depute withdrew the libel in respect of two other charges (3 and 4) involving lewd and libidinous practices and physical assaults on the daughter during the same time period and at the same *locus* ([M] Road) as charges 1 and 2.

[3] The appeal concerns the specification of the *loci* on the various charges. The jury had deleted that of [I] Avenue from charges 6 and 8. Prior to reaching their verdicts on charges 1 and 2, the jury had asked the trial judge the following question: "Can we also add ... [I] Avenue to charge 1/2? Are there any consequences of changing address?" The judge directed them as follows:

> "If, having assessed the evidence of a witness you … find that witness to be credible and reliable in the essential content of their evidence but consider that they may have made an error or are in some uncertainty as to the recollection of the place where the incident may have occurred, then you can so amend and it's my suggestion that you should do so, if it is an issue of uncertainty … by adding or, after Glasgow and [M] Road you should add 'or … [I] Place'(*sic*). You should do that only if you are satisfied that the issue of the evidence of the location or address does not affect the reliability of the witness on the central matter of what happened."

The jury returned a verdict inserting the words "or .... [I] Avenue" in respect of charges 1 and 2.

[4] The ground of appeal was that the judge erred in allowing the jury to amend the indictment by adding a *locus*. It was said that as a result the appellant has not had a fair trial in respect of charges 1 and 2 because the defence would have been in a position to lead evidence from the appellant's mother to confirm that the complainer on charges 1 and 2 had never been at the new *locus*, which was her address. In addition, it was maintained that, if the convictions on charges 1 and 2 were quashed, then, given the need for mutual corroboration, the convictions on charges 5 and 8 should also be quashed.

[5] In their written argument and submission, the nature of the submission changed to one of competence relative to the jury's amendment (Renton & Brown: *Criminal Procedure* (6th ed) para 8-72; *Brannan* v *Carmichael* 1991 SCCR 383; *Grant* v *Lockhart* 1991 SCCR 385 at 386; *Fletcher* v *HM Advocate* 2008 SCCR 231 at 235). The question of fairness became a subsidiary matter.

[6] The respondent conceded that the trial judge had erred in directing the jury that they could amend the libel as they did. Such an amendment was not competent in the absence of a motion from the prosecutor in terms of section 96 of the Criminal Procedure (Scotland) Act 1995. The respondent also accepted that charges 5 and 8 were reliant for proof upon the application of mutual corroboration. Nevertheless, it was said that the misdirection was neither material nor productive of a miscarriage of justice and that the convictions in respect of charges 1 and 2 should not be quashed. The exact address in Port Glasgow was not the focus of the trial.

[7] It is relatively clear from a consideration of the trial judge's report that the jury's concerns in relation to charges 1 and 2 were that the offences had been committed not at [M] Place, but at [I] Avenue. It is not competent for a jury to add a *locus* to a charge when returning their verdict. The jury ought to have been so directed and told that, if they were

not satisfied that the conduct had taken place at the address libelled, they required to acquit on charges 1 and 2. The court will accordingly quash the convictions on charges 1 and 2. That does not however mean that the convictions on charges 5 and 8 should also fall. The evidence to the effect that the appellant had committed the offences in charges 1 and 2, but at a different *locus*, remained for the jury's consideration. Since it is clear that they believed the complainer on these charges as credible and reliable, they were entitled to use that evidence as corroborative of the complainer's testimony on charges 5 and 8. The appeal to that extent fails.