APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 1
HCA/2018/238/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

ALLAN FERGUSON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Renucci QC; Paterson Bell (for McGovern Court Lawyers, Wishaw)
Respondent: Prentice QC (sol adv) AD; the Crown Agent

12 December 2018

Introduction

[1] This case concerns corroboration of lack of consent in a rape case where the distress relied upon is observed after a significant interval.

General

[2] On 29 March 2018, at the High Court in Glasgow, the appellant was convicted of a charge which read that:

> "(1) ... on 13 November 2016 at ... Street, Wishaw you ... did assault [AB] ... lie on top of her, remove her lower clothing, penetrate her vagina with your penis, touch her vagina, bite her neck, penetrate her anus with your finger, and repeatedly penetrate her vagina with your fingers, all to her injury and you did rape her; CONTRARY to section 1 of the Sexual Offences (Scotland) Act 2009."

On 3 May 2018, he was sentenced to 4 years imprisonment.

The complainer's account

[3] On Saturday 12 November 2016, the complainer, who was a nurse aged 22, and a female friend had been out drinking. By the early hours of the Sunday morning, they were both "quite drunk". At about 2.00am they hailed a taxi, which they shared with a man whom they had met, for the first time, earlier. He had told them that he was going to a friend's house to watch UFC on the television. He suggested that they should join him. They did this. On arrival, there was a house warming party taking place. The appellant was the occupier. There were 10 to 11 men, drinking and watching television. The complainer and her friend were the only women. The drinking continued. Some of the party were vaping cannabis. The complainer was invited to, and did, try this. It made her feel sick. She went to the toilet and vomited. She decided to go home and went outside the front door to wait for a taxi, which she had called. The appellant joined her. He said to her that the driver would be unlikely to accept her as a fare, because she was too drunk. He suggested that instead she should rest a while in his bed. She agreed with him. She described herself as "Extremely paralytic". She was taken to the appellant's bedroom, where she fell asleep fully clothed.

[4] At about 3.00 or 4.00am, the complainer woke to find someone touching her bottom. He had gone away. She later heard the front door being locked and then a lot of clattering. The appellant had then jumped into bed with her. He was naked. He did not say anything, when she had asked "what are you doing? He lay on top on her. He began to touch her vagina and took off her tights. She was terrified and trying to get away. He penetrated her anus with his fingers. She kicked him and said "no". He penetrated her vagina with his penis. She said "Are you even wearing anything (referring to the absence of a condom)?" He had just laughed ("sniggered"). She had tried to push him off. She had felt pain and said "ow, ow" repeatedly. The complainer blacked out several times. She had eventually given up struggling; thinking that it would soon be over.

[5] The complainer awoke at about 7.00am, feeling pain in her vagina and pelvic areas. The appellant's fingers were in her vagina. Her bra was in place, but her dress was rolled up and her pants had been removed. She got up and asked the appellant to call her a taxi. He did this. The complainer said that she had not talked to the driver, except to say that, when a friend asks you to go out, it seems like a good idea at the time. She was "pretty much silent". She was "in shock". When she arrived home, she went upstairs to bed and cried. She saw her parents at about 3.00pm, when they had made her get up and eat. She had to pull herself together to go downstairs, "obviously". She said nothing to her parents as she did not want to accept that it had actually happened. She was (still) in shock. She would not cry in front of her parents. She did not want to tell them what had happened. The complainer saw her boyfriend at her house at about 7.00pm. She did not tell him either. She explained again that she was in shock and did not want to feel that it had just happened to her. She "just acted normal". She had sexual intercourse with her boyfriend. She gave him no indication of having been hurt.

[6] The complainer went to work on the following day, Monday. She described herself as "on autopilot", feeling the pain and, in response to cross-examination, "upset and disgusted". At about 12.00 noon or 2.30 or 3.00pm, she phoned a friend from her work to tell her what had happened. She was really upset and crying a lot. She then returned to her work before seeing this friend on the following night. Her friend had convinced her to tell the police. At the police station, certain photographs were taken. Although in due course it was said that these showed bruising, the complainer was not asked about what injuries the photographs showed or, if they did show any marks, what had caused them.

Corroboration

[7] There were several possible sources of corroboration. The taxi driver said that, when he arrived, the appellant had come out and signalled "two minutes". The complainer had come into the hallway and headed towards the taxi. The appellant had gone towards her, as if going to give her a cuddle or say cheerio, but she had "just brushed him tae the side" and walked on. When she was in the taxi "she seemed fine", although he had asked her if she had fallen out with her "boyfriend". She said that that is not what had happened, but that she should not have been at that house. Otherwise the complainer had ignored the driver's attempts at conversation.

[8] The friend, whom the complainer had 'phoned from her work on Monday, said that the complainer had been in hysterics and upset in a manner which clearly indicated that something was wrong. She was crying so hard that she was "struggling to get the words out". She told the friend that she had been raped.

[9] The appellant, who was 29, did not give evidence. His interview with the police was played to the jury. The appellant's account was that the complainer had been drunk, but not

"so drunk that I thought it would be an issue". They had been flirting during the party "but nothing serious". He said that the complainer had been sitting at his door waiting for a taxi. He had brought her in and suggested that she should have a lie down in his bedroom. He then went back to the party for two or three hours. After everyone had gone, he had gone into the bedroom, having forgotten that the complainer was there. After doing some tidying up, he had unsuccessfully tried to wake her up. He had got into bed, wearing a T-shirt and pants, and fallen asleep. She had then woken up, pulled him towards her and kissed him. It had been the complainer who had initiated sex by touching his penis. His position was that the sexual conduct, which he admitted, had been consensual. They had just been "going for it really". He had been "quite drunk".

The judge's decision

[10] The trial judge repelled a submission of no case to answer. The complainer's evidence was to the effect that her lack of consent would have been obvious to the appellant. Although the distress on the phone had occurred some 30 hours after the incident, the judge took the view that the evidence of the taxi driver should also be taken into account. Although the complainer had not appeared to be distressed in the sense of being tearful, when in the taxi the driver's description of her was that she had at the very least been withdrawn. The judge had regard to the observations in *Wilson* v *HM Advocate* 2017 JC 135 (at para 30), to the effect that the interval between an offence and the point at which distress was observed was a factor, but the important question was whether the jury were satisfied that the distress had been caused by the offence. There was no fixed interval after which distress could not constitute corroboration (*RWP* v *HM Advocate* 2005 SCCR 764 at 771; *Patterson* v *HM Advocate* 1999 SCCR 750 at 759). The judge reported that he also took into

account the bruising which was shown in the photographs of the complainer which, it had been agreed, were taken on 18 November 2016.

Submissions

[11] The appellant submitted that the distress heard on the phone on the Monday could not provide corroboration of the complainer's lack of consent, having regard to the fact that she had not exhibited distress to anyone, including her parents and boyfriend, in the intervening period. The distress had been too remote. *Drummond* v *HM Advocate* 2015 SCCR 180 was distinguishable. Although the distress in *Drummond* had been exhibited two or three days after the alleged rape, it had been at the first opportunity. Distress was not available as corroboration of lack of consent in every case (*McCrann* v *HM Advocate* 2003 SCCR 722; *Moore* v *HM Advocate* 1990 JC 371). Each depended upon its own facts and circumstances (*Drummond* v *HM Advocate* (*supra*) at para 15, citing *Lennie* v *HM Advocate* [2014] HCJAC 103). Although, in *Wilson* v *HM Advocate* (*supra*), a delay of 30 hours was held to be capable of corroborating lack of consent, there were other factors in that case, including the mother's evidence that the complainer had acted in an unusual manner on her return home. In this case, the complainer had, in the period between the incident and the phone call to her friend, engaged in sexual intercourse with her boyfriend, who had observed nothing untoward. Although the trial judge had referred to the bruising in the photographs, the Forensic Medical Examiner had not been asked to speak to them or to express an opinion on whether they were consistent with the complainer's account.

[12] The advocate depute responded that the complainer's evidence of being forcibly raped could be corroborated by distress, which was independently spoken to, if the jury accepted that the distress had been attributable to the rape (*Graham* v *HM Advocate* (*supra*) at

paras 24-26; *Wilkinson* v *HM Advocate* [2018] HCJAC 39 at para [17]). Where the complainer had spoken to force, the search thereafter was to see if there was evidence in general supporting the broad position that force had been used (*Yates* v *HM Advocate* 1977 SLT (Notes) 42 at 43). There was no fixed interval after which distress could not constitute corroboration (*Wilson* v *HM Advocate* (*supra*) at para [30]; *RWP* v *HM Advocate* 2005 SCCR 764 at 771). Corroboration was simply evidence that supported or confirmed the complainer's position (*Fox* v *HM Advocate* 1998 JC 94 at 100-101). There were other adminicles of evidence. There was the bruising shown in the photographs. The taxi driver had described the complainer rebuffing the appellant. The complainer had ignored his attempts to speak to her during the journey. The appellant had been a stranger to the complainer, who had a steady relationship with a boyfriend.

Decision

[13] The sole issue is whether there was corroboration of the complainer's account of being forcibly raped at or about 3.00am on the Sunday morning. A starting point for a consideration of that issue is the proposition in *Yates* v *HM Advocate* 1977 SLT (Notes) 42 (LJG (Emslie) at 43) that, where a complainer has given credible evidence of force being used to achieve sexual intercourse:

> "the search thereafter is simply to see whether there is evidence in general which supports the broad proposition of force, details of which have been given by the girl".

[14] The time lapse between the alleged rape and observable distress was examined at some length in *Wilson* v *HM Advocate* 2017 JC 135 (LJG (Carloway), delivering the opinion of

the court, at para [24] *et seq*). In *Moore* v *HM Advocate* 1990 JC 371 it had been explained (LJG (Hope) at 377) that:

> "What matters is not the time interval as such but whether the shocked condition or the distress of the complainer was caused by the rape".

This is undoubtedly correct. If a jury accepted the evidence of distress and that it was the rape which had caused it, that evidence of the complainer's physical state, independently observed, corroborates the complainer's account of lack of consent. The link is pre-eminently a question of fact for a jury to resolve. Yet in *Moore* the court went on to hold that a direction, that distress exhibited to a close relative, namely an aunt, some 12 or 13 hours later could constitute corroboration, was erroneous because the complainer had, in the interim period, visited her boyfriend, and another house and two pubs looking for her handbag. There had been no evidence from a third party that she had been distressed before visiting the aunt. The decision proceeded on a view that "no reasonable jury ... could have held that the distress" seen by the aunt could have satisfied the corroboration requirement.

[15] A very similar statement of principle to that quoted from *Moore* v *HM Advocate* (*supra*) is to be found in *McCrann* v *HM Advocate* 2003 SCCR 722 (LJC (Gill) at 725). There was no fixed interval beyond which distress ceased to be corroborative. All the circumstances were for the jury to consider. Yet in *McCrann*, as in *Moore*, the court held that the complainer's failure to exhibit distress to her children and to her work colleagues, and the lack of any complaint to relatives, friends or the public during the interim period, made it unreasonable to hold that distress exhibited some 12 hours after the incident could afford the necessary corroboration.

[16] In both *Moore* and *McCrann*, the court appeared to be reaching a view on what might, or might not, be expected to occur by way of complaint or distress after a woman had been

raped. It is legitimate, in an appeal where the contention is that no reasonable jury could have returned a verdict of guilty on the evidence presented to them, for the appellate judges to apply their collective knowledge and experience to the issue of reasonableness (*Geddes* v *HM Advocate* 2015 JC 229, LJC (Carloway) at para [89] following *AJE* v *HM Advocate* 2002 JC 215). However, great care ought to be taken in a case such as this before expressing a view of the same nature as that expressed in *Moore* and *McCrann,* if such a view is intended to define what is to be regarded as reasonably explicable relative to the timing of visible distress following upon a rape. Even greater care too must be taken before excluding the occurrence of distress after an interval of time as constituting corroboration.

[17] In *Wilson* v *HM Advocate* (*supra*) it was said that:

> "[30] The question ... is ... whether the distress described by [the witness] could support or confirm the complainer's account of lack of consent during an incident which had occurred more than 24 hours previously. Of course the jury had to be satisfied that the distress was caused by the event, and not by some extraneous element, but the sheriff gave clear directions on that matter. The interval between the alleged offence and the point at which distress is observed is a factor which a jury will wish to consider, but the important point is whether the jury are satisfied that the distress was caused by the offence. The occurrence of intervening occasions on which a complainer might have exhibited signs of distress, but did not, may be of some significance, but there is no fixed interval after which distress cannot constitute corroboration (*RWP* v *HM Advocate* 2005 SCCR 764, Lord Hamilton at 771; *Paterson* v *HM Advocate* 2000 SLT 833, LJC (Cullen) at 759".

[18] In *Wilson*, the complainer had explained why she had not told either her friend, her boyfriend or her mother about what had occurred, or exhibited any signs of distress to them. It was a matter for the jury to determine whether to accept that explanation. There were other factors in that case, including a significant age gap, the absence of prior sexual intimacy and some description about the complainer's abnormal behaviour on returning home. A similar position exists in this case. The complainer explained why she had not exhibited signs of distress to those whom she met in the taxi, at home and at work. If the

jury accepted that explanation, which they clearly did, it was open to them to hold that the distress heard on the phone, when she called a friend from her place of work, was attributable to the incident involving the alleged rape and thus available as corroboration of her account that she did not consent to the intercourse which had been forced upon her.

[19] It is of some note also that, although the distress was required as part of the available corroborative evidence, it was not the only evidence which the jury could take into account in determining whether there was corroboration of lack of consent. The appellant accepted that there had been no sexual intimacy between him and the complainer prior to the appellant getting into bed with her in a naked state, when she was still clothed and sleeping off the effects of alcohol rather than anticipating a sudden, unexpected sexual encounter. There was the testimony of the taxi driver on her conduct on the way home. This had involved rebuffing the appellant at the door and a state of some withdrawal thereafter. Neither element would have sufficed on its own, but when combined with the later distress, a strong corroborative case emerged. For completeness, the bruises were not available as corroboration in the absence of evidence linking them to the incident. Rectification of this deficiency may not have required medical evidence, but in that event the complainer would have had to link them to what had happened and she was not asked to do so.

[20] The appeal is refused.