APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 10
HCA/2018/269/XC

Lord Justice Clerk
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

PHILIP DONEGAN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: A Brown QC; Gildfedder & McInnes, Edinburgh for Callahan McKeown, Renfew
Respondent: S Fraser, AD; Crown Agent

26 February 2019

[1] At the High Court in Glasgow on 18 April 2017 the appellant was convicted of the rape of two complainers he met via a dating website and the stalking of one of them. The rape charges were in the following terms:

> "(003) on an occasion between 15 September 2016 and 15 October 2016, both dates inclusive, at … you …did assault [complainer A], … and did penetrate her vagina with your fingers, kiss her, touch her body, hold her down, bite her breast, seize hold of her, remove her lower clothing, seize hold of her hair, penetrate her mouth with

> your penis, repeatedly penetrate her vagina with your penis, repeatedly slap her face and buttocks, push her face into a pillow and restrict her breathing, penetrate her anus with your penis and you did thus rape her to her injury; CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009;
>
> …
>
> (005) on 28 July 2017 at … you … did assault [complainer B], … and having penetrated her anus with your penis with her consent, you did continue to penetrate her anus with your penis after her consent had been withdrawn and you did thus rape her; CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009."

The Crown had relied upon the application of the *Moorov* doctrine in respect of both charges of rape. The conviction on charge 3 was by majority verdict, while that on charge 5 was by unanimous verdict.

[2] The appellant was also convicted, by a unanimous verdict, of an offence of stalking in relation to complainer A between October 2016 and November 2016, by leaving a card and lip balm at her home, repeatedly sending her text, social media and other messages, repeatedly telephoning her and sending her a partially clothed photograph of herself, and threatening to send said photograph to her employer.

[3] The appellant was sentenced to an extended sentence of 12 years, with a custodial term of 8 years.

[4] His appeal against the convictions for rape contained three grounds, of which only two were in fact argued. These were, first that the *Moorov* doctrine was not applicable as the incidents were so different in nature and circumstances as to render the doctrine unavailable. Second, that Complainer A's evidence was so full of contradictions that no reasonable jury properly directed could have convicted.

Ground one

Evidence at trial

Complainer A's evidence relating to charge 3

[5] In September 2016, at the age of 32, she had subscribed to Match.com, creating a profile with restricted personal information. She exchanged messages with the appellant who gave his name as Phil Williamson. After several messages they exchanged phone numbers and arranged to meet. At her request, they met at her home, in breach of safety procedures recommended by the Match.com. In evidence she explained her reason for this was because she was anxious not to meet in a public place where she and the appellant would be in the "public gaze". The first meeting was not entirely successful but a further date was agreed. They continued to exchange messages in the interim. On that second date, again at her home, the appellant made sexual advances towards her. While flattered, the complainer pushed him away, but he followed her in to the kitchen and continued his inappropriate and unwanted advances. Despite this a third date took place, where further difficulties occurred but a fourth meeting was agreed.

[6] Prior to this fourth meeting, which was again at her home, the complainer had, in social messages, indicated that the appellant might be able to stay the night. In her evidence she said this was to allow him to drink and not worry about getting home. Her intention was that he would sleep on the sofa. They agreed to watch a DVD. The complainer went to the bathroom, and on her return found the appellant putting a DVD on in her bedroom rather than in the living room as she had expected. He was naked apart from wearing her dressing gown. At his request she lay on the bed with him and watched the DVD. The appellant started to touch her, placed his knee between her legs and fondled and kissed her.

She was uncomfortable with this and indicated that he should leave. He started to get rough, placed his hand into her underwear and inserted his fingers into her vagina. She told him it was painful and she didn't like it, but he did not stop. He pulled up her upper clothing, and exposed and then bit her breast. He grabbed her head and penetrated her mouth with his penis, then penetrated her vaginally, despite her continuing protests. He then turned her over and penetrated her anally, which she found very painful, as she made clear at the time. The appellant told her to "shut the fuck up", and pushed her face in to the pillow, causing her to have difficulty breathing. He withdrew his penis before ejaculating. While the appellant appeared calm and relaxed, she was crying. Going to the bathroom she discovered blood coming from her vagina. She felt excruciating pain when urinating. On returning to the bedroom she was surprised to find the appellant had not left. He said that what had happened "was not a big deal". She told him to leave, but he stayed the night. She lay on the bed beside him that night but cried and got very little sleep.

Complainer B's evidence relating to charge 5

[7] At the time she made contact with the appellant she was around 29 years old and estranged from her husband. The appellant gave his name as Phil Lafferty. After an exchange of messages they agreed to meet on the evening of 28 July 2017. They had a meal in a restaurant, consumed further alcohol at a public house and then went back to the appellant's home. Once there, they ended up in the appellant's bedroom. They undressed and had consensual vaginal intercourse. She agreed to the insertion of butt plugs in to her anus by the appellant. However the vaginal intercourse became uncomfortable and she asked the appellant to stop, which he did. They agreed to have anal intercourse, but this too became painful for her. She asked him to stop serval times. He did not do so, but simply

said "please baby, please let me come." He then ejaculated. He tried to cuddle her but she was in tears. She got dressed, left his house and phoned for a taxi outside. While waiting for the taxi the appellant came out dressed in a dressing gown, spoke to her and offered to make her tea. He did this in prominent view of the taxi driver. He apologised for what had happened and acknowledged that he had breached her trust. She ignored him and went home.

The trial judge's decision on the submission

[8] The trial judge noted that the events were closely linked in time. He considered that whilst there were differences in the circumstances of each offence, there was a sense of there having been a course of conduct planned and perpetrated by the appellant. There was a unity of purpose in his *modus operandi*. The notable similarities between the two charges of rape included that:

i The appellant had used Match.com to arrange sexual encounters - a service regarded by its paying customers as being socially acceptable, respectable and a safe way of making contact with screened potential partners.

ii The complainers were much younger than the appellant

iii Each complainer exhibited some degree of vulnerability which had arisen from various difficulties in their lives at the time

iv There was evidence of calculation. The appellant had made exaggerated enquiries with the complainers regarding their compliance with the Match.com safety protocols. In the aftermath of each incident his response bore some similarity - acting with exaggerated courtesy and pretence that nothing untoward had happened. There had been a strong sense of purpose, that he was laying a trail of apparent innocence to "future proof" his actions.

v A shared feature was the appellant's desire to consummate the relationship at an early stage. He accelerated the development of a sexual relationship in each case. His actions were flexible and adapted according to the response of each woman – complainer A was less amenable to an early sexual encounter – but the shared feature was that he was going to have his way no matter what a complainer said or did. He put pressure upon complainer A and sought to dominate her. While complainer B had initially consented, the appellant ignored her withdrawal of consent and persisted in the face of it.

vi In each case alcohol consumption by the appellant was a factor.

[9] The similarities between the two offences might not seem entirely conventional when viewed against the routine application of *Moorov*, but the circumstances just reflected human conduct and sexual mores in the modern world. The trial judge had regard to the remarks of the Lord Justice Clerk (Dorrian) in *TN* v *HM Advocate* 2018 HCJAC 20, 2018 SCCR 109 at para [9] that the alleged conduct must be viewed as a whole, not compartmentalised, and that at heart the issue was a jury question. He considered that the evidence allowed the inference that the appellant was persisting in a course of criminal conduct and the test for an underlying unity of intent could be met. It was accordingly appropriate for a jury to assess that evidence and decide if it was prepared to draw the necessary conclusions.

Submissions for the appellant

[10] While both charges were of rape, and there were superficial similarities in the surrounding circumstances, such as an initial contact being made and dates being arranged via Match.com and the domestic setting of the alleged offences, the evidence did not disclose those conventional similarities in time, place and circumstances as to demonstrate a course of criminal conduct persistently pursued by the accused.

[11] Charge 3 was a violent and prolonged attack entirely different in character from charge 5 in which intercourse was initially consensual but then consent had been withdrawn. There was a need for an underlying similarity of conduct (*MR* v *HM Advocate* 2013 SCCR 190), the key question being (*RF* v *HM Advocate* 2016 SCCR 319) "whether the events alleged are so connected in time, place and circumstances as to show that they are examples of an underlying intent to pursue a particular course of conduct." The facts in the case did not support that proposition. The rule required to be applied with caution, especially when there were only two instances of behaviour referred to. The trial judge's reasoning for rejecting the no case to answer submission was speculative, or simple assertion, rather than being based on an objective consideration of the evidence.

Submissions for the respondent

[12] The advocate depute highlighted the points of similarity identified in the report of the trial judge. In addition, the appellant had in each case lied about his name, telling complainer A that his surname was "Williamson" and telling complainer B that it was "Lafferty". When the second complainer saw a reference to "Donegan" he told her he had changed his name as it sounded "too Irish". In the aftermath of each instance he remained calm, and tried to downplay the significance of his actions. In each case he apologised to the complainer – to complainer A for "getting carried away" and to complainer B for abusing her trust. The relatively short time gap between the offences strengthens the effect of the similarities. It is necessary to consider the conduct as a whole: the existence of differences does not prevent those similarities which exist from allowing the operation of the doctrine (*Reynolds* v *HMA* 1995 JC 142). It was not necessary for force to feature in each case before the doctrine could apply to two instances of rape (*Kearney* v *HMA* 2015 JC 259). The method

used by the appellant to achieve his objective merely reflected in each case the differing response of the complainers.

Ground two

Evidence relating to disclosure by complainer A, and prior statements made by her

[13] The evidence of complainer A was that after the incident the appellant continued to send her messages indicating a desire to carry on the relationship as if all was normal. Her responses were polite and uncommunicative, in the hope that he would leave her alone. She was extremely upset to discover a lip balm and a card from him at her front door. The messages continued in a more sinister tone. She replied that she did not want anything more to do with him. His response was to refer to intimate photos of her, and to hint at sending these to her employer. She was very upset at this implied threat. She decided to contact the police about the abusive messages and called "101" on 6 November. She told the operator that she wanted to stop the appellant contacting her, that she was worried about the photos, and her boss, but saying "I'm not sure I want to report it yet". She accepted that in the call she said something along the line (p92) "We'd met online, we'd messaged for a long time, we dated briefly. I didn't want to see him anymore because he was a bit abusive in the bedroom". She did not make a complaint of rape, but when pressed by the operator it seems that she made reference at least to being hit.

[14] PC Chambers and PC Campbell attended her home and spoke to her that day. The complainer stated that she did not tell the officers about the forced intercourse at that time, because she was ashamed and it was really difficult to talk about (p26). She told them that she had consensual sex with the appellant, during which he had hit her. She was ashamed and embarrassed to tell them otherwise (p95). It was not true when she said that the sex had

been consensual, even initially. PC Chambers spoke to his operational statement, which stated:

> "My colleague and I thereafter spoke with [complainer A] where she explained that she had been in a brief relationship with a male called 'Phil' whom she had met on a dating website. She stated that over the course of a number of dates they had partaken in sexual intercourse whereby the male 'Phil' began to hit her. At this time, [complainer A] stated she told 'Phil' to stop, both hitting her and to stop the intercourse, however 'Phil' did not stop."

He stated that it was his clear understanding that sexual intercourse had taken place on more than one occasion, but cross-examined by the Advocate Depute he conceded that it had been PC Campbell, who conducted the interview, would have heard more of her remarks and had been the only one to have noted what had been said. The complainer did not think she had made a statement about any earlier incidents of intercourse (p8 14c), and did not think that was the impression she was giving. She referred to having been on a few dates, but had not referred to it as a "relationship".

[15] PC Campbell did not recall, or note, any statements by the complainer referring to earlier sexual intercourse. From the terms of the interview, he was left with a strong suspicion that a sexual offence had been committed and in consequence produced the necessary follow-up referral to the CID. Two detective officers, including a female Sexual Offences Liaison Officer, called on the complainer the following day, 7 November, and again she did not report the incident, explaining in her evidence: "I couldn't do it; I wanted to, but I couldn't". She told these officers that she had consensual sex with the appellant, but that he was rougher than she had wanted him to be. She was pressed on this matter by the officers, who were concerned that an offence had occurred, but the complainer continued to maintain that sex had been consensual, saying in evidence that she was not comfortable with

the presence of a male officer at the time (p17). She did not tell the officers the truth. She said "I was ashamed, I blamed myself for allowing the man into my home."

[16] The officers returned on 8 November and took a signed statement from the complainer. In it she said that she would not cope well with a formal police investigation, that she was a private person, in a new relationship and wanted her life to remain private.

[17] After complainer B had made a report to the police, detective officers again contacted complainer A and took a statement on 31st July 2017. At that time she made a complaint of rape, giving the detail to which she spoke in her evidence.

[18] About the time of first contacting the police, complainer A also partly confided in her friend JY, but did not give details of what had happened.

[19] Complainer A was extremely anxious about the incident and attended her GP. She advised her doctor that she had been the victim of an assault which was being investigated by the police. She did not go in to any other detail.

JY

[20] JY's evidence was that he had grasped that complainer A was telling him that she had been raped even if the word rape had not been used or mentioned.

The trial judge's report

[21] The trial judge recognised that the evidence of complainer A was less impressive than that of complainer B, and that she required to explain certain inconsistencies in her prior statements and the fact that she did not make a complaint to the police until a much later stage. However, he observed that at trial the evidence she gave was that she was raped by the appellant, describing the distress and indecision about what she should do in response. Her instant priority was to end communication with the appellant. She had

subsequently met a new partner, wished to get on with her life and a full report was accordingly not made to the police. She had a fear and anxiety about commencing any court process. The decision to make a complaint solely in relation to the messages was made in a distressed frame of mind.

[22] Notwithstanding that she had not made a complaint of rape, the police harboured a clear suspicion that something had happened, and when they returned to speak to her after complainer B made her complaint, complainer A was emboldened to make a detailed report.

[23] There were inconsistencies between the evidence of PC Campbell and PC Chambers as noted above, and it was a matter for the jury to decide which account, if any, of the two officers was to be accepted. The complainer's evidence was that she had not had any prior intercourse with the appellant and had not given any impression that she had.

[24] The focus on the fact that her statement of 8 November made no reference to a sexual offence, failed to recognise that in the same statement she explained that she would not cope well with a formal police investigation.

[25] The complainer did not deny being less than frank and truthful with the officers throughout her testimony. The whole thrust of her evidence was her fear and anxiety about commencing any court process. The jury were directed that there could be good reasons for a complainer to fail to disclose or make a report about a sexual offence. The jury had the evidence about complainer A's hesitation, and it was a matter for them to assess her evidence as a whole.

Submissions for the appellant

[26] It was submitted that the guilty verdicts returned by the jury in relation to charges 3

and 5 were ones that no reasonable jury, properly directed, could have returned. There were a number of reasons for this.

Contradictory nature of complainer A's evidence

[27] The contradictory nature of her evidence rendered her account of the alleged rape incredible and unreliable. These contradictions appeared in the "101" call; in the statements and discussions with various police offices; in the comments she had made to her friend JY; and in what she had reported to her GP. These are essentially the points referred to above relating to the repeated opportunities to make a complaint of rape, which were not taken by the complainer; her reference to the sexual contact being consensual; the evidence of PC Chalmers that the complainer had referred to a number of dates with the appellant and having consensual sexual intercourse with him on more than one of those occasions. There was also the discrepancy between what the complainer said she told her friend, JY, that she had disclosed some details about the incident, relating to extreme spanking, and his evidence, that complainer A said she had been seeing someone who had been at her home, that he had been rough, and that she had asked him to stop but he hadn't. He believed that she had been referring to sexual behaviour and that it sounded like rape, but the word rape was never used.

[28] In addition, she attended her GP on 9 November 2016 complaining of anxiety as result of an assault that was being dealt with by the police, but made no mention of rape or sexual assault.

Implausible nature of complainer's evidence

[29] Furthermore, the complainer's evidence regarding her relationship with the appellant, the events surrounding the alleged rape, and the explanations for her actions and

behaviour before, during and after it, were so inherently improbable and implausible as to render her an incredible and unreliable witness.

[30] She had sent flirtatious images of herself to the appellant, yet maintained that it was not her intention to have a sexual liaison with him – she said that she had 'given in' to pressure from the appellant to send the pictures; that she had only wanted him to like her and that no inference could be drawn that she had wished a sexual relationship. She had ignored the clear advice from the dating website that first meetings should take place in public, her explanation being that she had not wanted to be seen in public on a "nerve wracking first date".

[31] She had continued to see the appellant despite the fact that, on her evidence, he had allegedly struck her incredibly hard on the buttocks on their second date; kicked her and knocked her over in the supermarket on the third date; and made unwelcome sexual advances towards her on both of these dates. Her explanation was that the appellant was apologetic and had made her feel that she was over reacting: she felt now she had made a mistake seeing the appellant again.

[32] She had reluctantly agreed to the appellant staying with her on their fourth date, despite what had happened on the earlier dates, and despite arguing and bickering with him earlier in the evening. She claimed to be annoyed to find the appellant putting on a DVD in her bedroom rather than in the living room, yet joined him on the bed at his request, despite the fact that he had undressed. Nevertheless, she maintained that she had no intention of having sex with him and didn't expect to be forced to do so. Her explanation was that the appellant was very forceful and pushy, and wasn't listening when she asked him to leave. She hadn't been thinking logically.

[33] She not only failed to make a complaint to police, she continued normal contact with the appellant via text, social media and telephone calls after the alleged rape. Her credibility and reliability were central to the case; and in light of the factors highlighted, no reasonable jury could have accepted her evidence.

Jury uncertainty

[34] From a question asked by the jury it appears that they had concerns over the evidence of complainer A. A written note was sent by the jury after about an hour of deliberating, asking: "If we find the defendant guilty of one charge, can we find him not guilty of the other charges?" In court, the question became "Can we find him guilty on No 5 but not on No 3?" Further directions were given that "However, for charges 3 and 5 you have to accept both of the complainer's (*sic*) accounts to apply the special rule. It means that can either convict on both charges or must acquit of both charges; there is no halfway house." The following morning the jury made a request to see the complainer's police statements and to hear the 101 call. The former was refused on the basis that only extracts of the statements had been led in evidence. Thereafter they were allowed to hear the 101 call and given further directions about its use. The 101 call would not have been able to resolve any doubts which the jury had relating to the complainer's credibility.

Submissions for the respondent

[35] Where there is a sufficiency of evidence it will be only in the most exceptional circumstances that an appeal of this kind will succeed. The appropriate test is that no reasonable jury properly directed could have returned the verdict: *King* v *HMA* 1999 SCCR 330 at 333; *Williamson* v *HMA* 2016 HCJAC 115. The credibility and reliability of the complainer were a matter for the jury. It was open to the jury to accept the explanations

given by the complainer for acting as she did, and for not reporting the matter to the police when the opportunity arose.

[36] Evidence of late or staggered disclosure and prior inconsistent accounts is by no means unusual in the context of serious sexual offences: reference was made to section 288D of the Criminal Procedure (Scotland) Act 1995. The evidence relating to the stalking charge was evidence of controlling and manipulative behaviour on the part of the appellant which the jury were entitled to take into account in considering the evidence of the complainer as a whole.

[37] A jury must be presumed to follow the directions given to them.

Analysis and decision

Ground of appeal 1

[38] In any case in which the application of the *Moorov* doctrine is said to arise, the key question always is whether the circumstances of the individual offences, as spoken to by the complainers or other witnesses, are so interrelated by character, circumstances and time as to allow the inference to be drawn that they are part of the same course of conduct systematically pursued by the accused. It is important to bear in mind that for the doctrine to apply it is not sufficient that there are such conventional similarities – it is necessary that those similarities, viewed in the context of the evidence as a whole, give rise to the inference that the individual offences are part of such a course of criminal conduct persisted in by the accused. Although there is no time period beyond which the doctrine cannot operate, long gaps in time can clearly raise questions as to whether the incident may properly be said to form part of the one course of conduct. In such cases there is naturally a predominant focus on the temporal aspect of the case and a search for similarities in the accused's conduct

sufficient to connect the offences in this way notwithstanding the time which may have elapsed between the various incidents. But even in such cases, of which this is not one, the incidents here being separated by months rather than years, the correct approach is to look at the character and circumstances of the individual offences as a whole and not in a compartmentalised or individual way. The question is whether the necessary inference – i.e. the inference that the individual offences are part of a single course of criminal conduct systematically pursued by the accused – may be drawn from the whole circumstances and character of what is alleged to have taken place.

[39] In many case it will be possible to point to a number of similarities and differences in the facts and circumstances of each charge or incident. Those differences may be founded upon to refute the application of the doctrine. However, in such circumstances the court must bear in mind that, where there are indeed differences as well as similarities, the case may well fall within the middle ground discussed in *Reynolds* v *HM Advocate* 1995 JC 142. In such cases it will be for the jury to decide whether such similarities as there are, assessed in light of all the evidence about the individual offences and taking account of such differences as there may be, give rise to the inference that the individual offences form part of a single course of criminal conduct so persisted in.

[40] In *Reynolds* there were only two charges, some months apart, and the circumstances disclosed what on one view were similarities, but on another view were not (p145). In reaching its conclusion on whether the application of *Moorov* was permissible, the court stated (p146, D-F):

> "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 Sand's expression, the case falls into the open country which lies between the two extremes, as this case does, in our opinion. 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 … 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 the 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."

The point was repeated in *MR* v *HMA* 2013 JC 212, para 20:

> "[20] What the court is looking for are the conventional similarities in time, place and circumstances in the behaviour proved in terms of the libel (see *NKS* v *HM Advocate* , Lord MacLean, delivering the opinion of the court, para 10) such as demonstrate that the individual incidents are component parts of one course of criminal conduct persistently pursued by the accused (*Ogg* v *HM Advocate* , Lord Justice-Clerk (Aitchison), p 158; *AK* v *HM Advocate* , Lord Justice-Clerk (Gill), para 10). Whether these similarities exist will often be a question of fact and degree requiring, in a solemn case, assessment by the jury (*Reynolds* v *HM Advocate* , Lord Justice-General (Hope), delivering the opinion of the court, p 508) under proper direction of the trial judge."

It has to be recognised that, as was observed in *Pringle* v *Service* 2011 SCCR 97, at p107, in such fact-sensitive situations there can be "difficulty in identifying, let alone defining, the dividing line" between cases where the evidence is capable of bearing the necessary inference and those where it is not. Nevertheless, the process of evaluation should be left to the jury, unless it can be said that on no possible view could the inference of an underlying course of conduct be drawn. In considering that question, the court should be careful not to trespass on the jury's territory by dressing up as a question of law what is a matter of factual evaluation properly within the jury's functions.

[41] The same point was made, albeit in discussing the role of the appeal court, in *Cannell* v *HMA* 2009 SCCR 207, para 31:

> "It is the function of the jury, properly directed, to assess the evidence and to decide whether or not various incidents involving the appellant were so linked in time, character and circumstances as to demonstrate a course of criminal conduct and a unity of purpose such that it would be appropriate to apply the *Moorov* doctrine and

> find mutual corroboration established: *Sinclair* v *HM Advocate*. The appeal court is reluctant to interfere in such matters, but may do so where, for example there has been a misdirection; or where, following upon a discriminating verdict of the jury, convicting of some charges but not others, certain time lapses emerge between the various incidents which are so excessive in the circumstances that the law would not permit the application of the *Moorov* doctrine: cf Lord Justice Clerk Gill in *Dodds* v *HM Advocate* at para.7."

[42] In the present case there is no question that the character of the offence is the same. Each charge is one of rape. The *Moorov* doctrine is potentially capable of application. Although such differences may (or may not) be relevant to the jury's assessment of whether the facts spoken to by the complainers were sufficiently similar as to give rise to the inference that the incidents were part of a single course of conduct pursued by the accused, it is of no consequence to the potential application of the doctrine that one case involved force and the other did not (*Keaney* v *HMA* 2015 SCCR 81, para 15). As the court noted in that case (para 16):

> "...where mutual corroboration is relied on, the course of conduct that needs to be demonstrated is simply that the man has non-consensual sexual intercourse with women in circumstances where he either knows they are not consenting or is reckless about that. Force need not feature but if it does, it need not feature on every occasion for the relevant course of conduct to be established."

Caution must be taken when applying the doctrine, especially if there are only two incidents. However, where there are both similarities and dissimilarities in the relevant incidents, the applicability of the doctrine should be left to the jury unless it can be said that on no possible view could there be a connection between the charges, even where there are only two of them (Renton & Brown, Criminal Procedure, 6th edition, para 24-87.1; *Reynolds* v *HMA* 1995 JC 142 at p146).

[43] While there is some merit in the appellant's criticism of the characterisation and labelling of the "factors" mentioned by the trial judge in his report, the way in which he

qualified them, or the epithets which he attached to them, cannot detract from the factors themselves.

[44] Aside from the fact that both complainers were raped during the course of dates with the appellant, there are a number of factors which, when looked at in the context of the totality of the evidence, as they must be, might reasonably be taken by a jury as being indicative of a single course of conduct undertaken by the appellant. We emphasise the point made earlier, that it is not the role of the judge or the appeal court to form a view of whether such matters do or do not give rise to such an inference, except in a case where it can be said with confidence that no reasonable jury properly directed could properly have drawn the necessary inference from them. These factors include:

i *Method/mode of contact-* In each case the appellant used the website Match.com to meet the complainer, a dating service open only to members who must pay a subscription fee. He set up a profile and engaged in message and other forms of social media with each complainer before meeting each of them in person.

ii *"Safety" protocol compliance-* in respect of both complainers, the appellant brought up the topic of the Match.com's safety guidelines and checked on more than one occasion whether they had complied with it. Whilst the inference is not the only one the evidence might bear, the jury might reasonably have inferred that he was attempting to ingratiate himself with each of the complainers, lowering their guard by suggesting that their safety was paramount.

iii *False identity-* the appellant initially gave a false name to each of the complainers, introducing himself as Phil "Williamson" to complainer A and "Lafferty" to complainer B. In both instances, when his true name came to light, he sought to give an explanation to the complainers, suggesting to complainer A that the name was that of his brother-in-law and to

complainer B that he had changed his name as his birth name had sounded too Irish. There was no evidence about whether the use of false names on a dating website is unusual, but we do not see why a jury could not legitimately have formed a view that this was a similarity suggestive of a course of conduct pursued by the accused. This was not simply the use of a nickname, or even the choice of a single "nom de plume"; in each case a different name was deliberately selected.

iv *After the event behaviour* - following each incident he sought to down play any suggestion that anything untoward had occurred and appeared to try to give the impression to others that nothing untoward had happened and that he was an innocent party. In respect of complainer A he said that what had happened "was not a big deal" and subsequently, after the events giving rise to the stalking charge, he was the one to contact the police making allegations against her which he subsequently accepted to have been false. In respect of complainer B he attempted to cuddle her, offered a cup of tea, and waited outside partially clothed in full view of third parties with her until her taxi arrived.

v *Apologising* - Further, notwithstanding his attempts to down play what had occurred, he apologised to complainer A for "getting carried away"; and to complainer B he apologised and acknowledged that he had breached her trust. While on one view such after the event behaviour might be seen as neutral or anodyne, a jury could reasonably have viewed such behaviour as suggestive of an attempt by the appellant in each case to reduce the chances of the complainer making a complaint to the police.

[45] These factors have to be viewed as a whole. None of them individually is necessarily suggestive of a course of criminal conduct systematically being pursued by the appellant. Nor do they of themselves necessarily imply criminality. But that is not the question – for two reasons. First, because it is wrong to assess the relevance of each piece of evidence in a

compartmentalised way – the totality of the evidence has to be looked at in the round. Secondly, at the stage of considering a submission of no case to answer the question for the trial judge is not whether these various adminicles of evidence do give rise to the necessary inference that the offences spoken to by the complainers were part of a single course of criminal conduct; rather the question for the trial judge at that stage is whether it would be open to a reasonable jury, properly directed, to draw that inference.

[46] Counsel for the appellant's submission was that the ultimate form of the crime in addition to the location and the stage of their association at which each alleged incident took place, as spoken to by the two complainers, varied to such a degree that both incidents could not conceivably form a single course of criminal conduct. In respect of complainer A, the rape occurred on a fourth meeting at her home with the appellant, prior sexual advances by him having been rebuffed. The rape had been with force, included both vaginal and anal penetration and had been without consent throughout. In respect of complainer B, the rape had occurred on the first occasion of meeting, after they had returned to the appellant's home. Consent had initially been given to both vaginal and anal sexual intercourse. When consent in respect of the anal intercourse was withdrawn the appellant nonetheless continued.

[47] However, whilst there are these differences, the outcome in both complaints was the same- the appellant disregarding the ultimate wishes and level of consent of the complainer for his sexual gratification. The jury would have been entitled to conclude that the time at which the outcome occurred - a first meeting versus a fourth one - was determined not so much by the appellant as by the complainers' attitudes and behaviour and their approach to meeting a potential other partner and developing sexual relations with him.

Complainer A's approach to dating generally and contact with the appellant was to take

matters slowly, meeting him on 4 occasions and rebuffing any suggestion or action by the appellant that their contact should progress to a sexual encounter. Complainer B, in contrast, was more confident in what she wanted. She was willing to move interactions with the appellant to those of a sexual nature at their first meeting. The jury would have been entitled to conclude that the locations of the incidents and the circumstances in which the rapes occurred were the result of the complainers' differing response to the appellant; and that their responses dictated how quickly consent was disregarded.

[48] This point was noted in *JGC* v *HMA* [2017] HCJAC 83, para 15, where the court observed that "the jury would be entitled to take the view that the different outcome in L's case was attributable to her greater maturity and awareness of the sexual connotations of the behaviour, and her ability to rebuff it". The same point was made in *JC* v *HMA* [2016] HCJAC 100, para 16, where the court noted that "The outcomes were accordingly somewhat different (and accordingly the ways in which the charges were formulated) but as the advocate depute submitted, this was due to the different conduct of the respective complainers, not because of a difference in the way in which the appellant had behaved." While the assessment of such matters is for the jury, these observations apply with equal force in our view to the form in which the complainers' consent was disregarded, particularly when taken with the similarities of the conduct undertaken.

[49] Accordingly in light of the aforementioned circumstances, we consider that the evidence at the close of the Crown case, taken at its highest (*Mitchell* v HM Advocate; *TN* v *HM Advocate* 2018 SCCR 109), disclosed sufficient similarities in time, character and circumstances for the matter to be remitted to a jury and for the jury to be entitled, if they so chose, to apply the *Moorov* doctrine and conclude that in each instance the appellant's

behaviour was part of the same course of action. The trial judge was accordingly correct to refuse the appellant's motion and this ground of the appeal should be refused.

Ground of appeal 2

[50] Counsel for the appellant accepted that appeals of this kind faced a high test, and would only succeed in exceptional circumstances. The principal basis for this were arguments relating to complainer A's reliability and credibility, the various (untaken) opportunities to report the rape, and inconsistent prior statements made by her.

[51] In her testimony the complainer accepted that she had been less than truthful to police officers in particular, but there had been reasons for doing so, she wished to forget the events, she feared the implications of a court case on her and her job, and there had been positive developments in her personal life which she did not want interrupted. She repeatedly explained that she had found this incident humiliating, and that she blamed herself for letting the appellant into her home, and indeed for continuing to see him after the earlier dates when he made unwelcome advances. As to those earlier incidents, the appellant had a way of making her feel she had been over-reacting, and she gave him the benefit of the doubt. With hindsight she considered she was wrong to do so. She kept saying that she was ashamed of what had happened, and this played a part in her reluctance to report it. Typical examples of her evidence are: "I was ashamed. I blamed myself for allowing the man into my home"; "I didn't want to have to discuss it. It was humiliating." It is not uncommon for victims of sexual assaults to delay making reports, to stagger reporting or make inconsistent statements in doing so. This is recognised to such a degree that measures are in place, namely section 288DA of the Criminal Procedure (Scotland) Act 1995, to demystify myths and misunderstandings that a jury may otherwise have as to these

matters. Directions in terms of that section were given in this case. The credibility and reliability of the witnesses was and is a matter solely for the jury. They would have to assess the credibility and reliability of the complainer, in the same way as that of the other witnesses, including the first two police officers who attended the complainer following the "101" call who themselves had differing recollections of what the complainer had said. It was clearly a matter for the jury as to whether they accepted in whole or in part all or any aspects of the complainer's evidence and prior statements, some of which were inconsistent, as it would have to do in respect of the aforementioned police officers and other witnesses.

[52] It cannot accordingly be said in our view that no reasonable jury properly directed could have returned the verdict that it did (*King* v *HMA* 1999 SCCR 330, at 333; *Williamson* v *HMA* 2016 HCJAC 115). The appeal on this ground also falls to be refused.

[53] In support of the appeal counsel argued that the jury had returned an inconsistent verdict in respect of the rape charges - being unanimous in respect of complainer B, but giving a majority verdict in respect of complainer A. There was uncertainty as to whether they had followed the judge's directions. The Crown appeared to concede that the inconsistencies in the verdict indicated that at least some of the jury had failed to comply with the trial judge's directions in relation to mutual corroboration when reaching its verdict. It is not immediately apparent that this was so: it is correct to say that the jury would not have been entitled to convict on one charge and not on the other; but there is no apparent reason why they could not reflect what might have been the differing extent to which they found each complainer to be credible and reliable. In any event, notwithstanding the concession it was submitted that no miscarriage of justice had occurred. We agree. A jury must be presumed to follow the directions given to them. They were told they could not convict of one charge and acquit on another, and they did not do so. There is

an obvious explanation for the course which was taken. The trial judge had noted himself that complainer B had been an exemplary witness. Irrespective of any foundation for such an argument, we see no basis upon which it can be said that there has been a miscarriage of justice. In conclusion therefore, the appeal must be refused on both grounds argued.

Further observations

[54] It was clear from the transcripts of the evidence at trial that the complainer A, who was in the witness box for three days, was subjected to a lengthy, unjustified and sometimes insulting cross-examination on issues which included her delay in reporting the offence, the reasons for that, her varying accounts as to what occurred and her failure to shout out or seek help from others during the attack. At one juncture the question put to the complainer was in these terms: "so, … within a few weeks of what was on the face of it a horrendous experience that you had suffered at the hands of a man, *you'd taken up with* another man*?"*(transcript, 11 April, p55). The emphasis is ours, to highlight the derogatory and insulting nature of the question. Somewhat surprisingly there was no objection from crown counsel. Moreover, rather than being tempered by the bench, the experience for the witness was merely prolonged further by the inquisitorial nature of the trial judge judge's own questioning, which in some instances took the form of cross examination in itself. When counsel put to her that she should be capable of telling someone to get out of her bedroom, the trial judge raised the possibility that she might have contacted a neighbour, in this exchange:

> "Trial Judge: Well, there are ways to go about that. You could phone the police. You could walk out your own property and get help, go to a neighbour, contact a friend, contact the police.

Witness: Yeah. I made a mistake.

Trial Judge: Did you consider any of these things?

Witness: They did go through my head, yeah.

Trial Judge: did you do any of them?

Witness: No, I didn't do them. As I say, I made a mistake."

This led to questions in which counsel repeatedly asked the complainer "did you try screaming at the top of your voice?". Other examples of judicial intervention, verging on cross-examination, may be seen throughout the transcripts, in particular that of 11 April on pp 5-7 and 17-19.

[55] Furthermore, as disclosed in the terms of a joint minute, in the course of a discussion relating to the use of prior inconsistent statements, a comment was made by the trial judge, prior to the material being put to the complainer, that the impact of the material was that "It blows her evidence out of the water". We have had the recording checked, and this was indeed said by the trial judge at about 1021 hrs on 11 April. While the comments were made outwith the jury's presence, they were made in open court and in the presence of the accused. They were made before the material had been put to the complainer, and before her detailed explanations had been heard. In our view it is quite clear that these should not have been made at all, and were wholly inappropriate.

[56] In recent years, in line with the approach in other jurisdictions, notable steps have been taken in Scotland seeking to address and demystify for court users various supposed "myths" associated with the reporting of and the reliability of rape allegations; and to improve the experiences of those involved and those giving evidence. Procedures have been adopted to address the perceptions of the jury and the requirement of their role, most notably section 288DA. The conduct of the sort that occurred during the trial has the

potential to erode such progress. We accept that, to an extent, the matters in question constitute legitimate grounds for inquiry, but the nature, degree and content of the questioning should be kept within reasonable bounds. This issue was referred to in *Dreghorn* v *HMA* 2015 SCCR 349, by the Lord Justice Clerk (Carloway), para 39:

> "Due regard must be had to the right or privilege under domestic law to test a witness's evidence by properly directed and focused cross-examination. That right, however, does not extend to insulting or intimidating a witness (*Falconer* v *Brown* (1893) 21 R (J) 1, LJC (Macdonald) at 4). It also requires to be balanced against the right of a witness to be afforded some respect for her dignity and privacy (see Criminal Procedure (Scotland) Act 1995, s 275(2)(b)(i)). The court must be prepared, where appropriate, to interfere when cross-examination strays beyond proper bounds, both in terms of the nature of the questioning and the length of time for which a complainer can be expected to withstand sustained attack."

It appears that these observations bear repeating. We therefore wish to remind all involved of their respective roles in keeping examination of a witness within proper and reasonable bounds.