APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 88
HCA/2018/535/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

PIOTR VALDERMAR RYSMANOWSKI

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: J Scott QC AD (sol adv); Paterson Bell (for Lindsay, Dumfries)
Respondent: Borthwick AD; the Crown Agent

7 November 2019

Introduction

[1] This appeal against conviction raises a question of how a jury should be directed on what requires to be corroborated when the Crown libel an omnibus charge which refers to different, but similar, acts occurring on various occasions over a period of time.

General

[2] On 16 August 2018, at the Sheriff Court in Dumfries, the appellant was convicted of a charge which libelled that:

> "(1) on various occasions between 22 August ... and 9 September 2017 ... at ... Lockerbie you ... did sexually assault [RS] ... then aged 12 years then residing there with you, a child who had not attained the age of 13 years, in that you did (a) induce her to remove her clothing, handle and lick her genitals, touch her chest; (b) remove your trousers and induce her to put her hand on your penis and masturbate you; and (c) on one occasion handle her buttocks over her clothing; CONTRARY to section 20 of the Sexual Offences (Scotland) Act 2009."

The appellant was also convicted of a breach of a bail condition not to contact, or to communicate with, RS.

[3] On 3 October 2018, the appellant was sentenced to 2 years imprisonment on charge (1) and to 4 months in respect of the breach of bail; the periods to run consecutively.

Evidence

[4] RS described coming over to Lockerbie from Poland at the age of 13, when her mother was offered employment with an aunt and uncle. Her mother had arrived first, followed by the complainer, her younger brother and the appellant, who was her mother's partner. They all lived in a flat above the aunt and uncle's shop. The complainer spoke to being called into her bedroom and the appellant touching her "in different places". She was referring to her chest and her vaginal area above her clothes. The appellant sometimes told her to take her clothes off. He would touch her vaginal area with his finger and sometimes his tongue. It had happened more than once. Sometimes the appellant would take his trousers off and tell the complainer to touch him on his penis and to masturbate him.

[5] On one specific occasion, when her mother had returned to the flat unexpectedly, the appellant had been lying on a bed. As RS approached the bed, the appellant had seized her

bottom. Her mother was shocked and furious. Previously her mother had been away at work. She had told her mother everything and the police were called. This was on 9 September, some 18 days after her arrival in Lockerbie on 22 August.

[6] The potential corroboration came from the complainer's mother. She spoke to going back to the flat on 9 September and seeing the complainer standing clothed beside the appellant, who was reclining on a bed. The appellant was touching the complainer on her genital or stomach area and her buttocks, with one hand on the front and one on the back. This accorded with part (c) of the charge. Immediately after this, the complainer told the appellant to leave.

[7] No submission of no case to answer was made.

[8] The sheriff directed the jury on the general need for corroboration. He did so on the basis that the acts libelled constituted a single crime of sexual assault. He said that acts of intentionally or recklessly touching a person under 16 sexually were essential elements of the charge and had to be proved by corroborated evidence. He continued:

> "The other elements of the charge are descriptive only to give the accused fair notice of how the crime is alleged to have been committed and don't need to be corroborated."

[9] The sheriff said that the "case stands or falls on the evidence" of the complainer. He went on to say that, if the jury accepted that the complainer was credible and reliable, "there must be evidence supporting what she says." That support came from the evidence of her mother, who had given evidence "about some elements of the charge, although not all of them".

Submissions

Appellant

[10] The appellant's ground of appeal was that the complainer had described three separate episodes, with only the final one being corroborated. There had been insufficient evidence on heads (a) and (b) of the libel (*Spinks* v *Harrower* 2018 JC 177 at para [13], *Dalton* v *HM Advocate* 2015 SCCR 125). However, this argument was departed from in favour of a new ground, which had not passed the sift, that the sheriff had failed to provide the jury with an appropriate route to verdict when there was an omnibus charge and direct corroboration of only one of the elements. That route would have been open only if the jury applied the principle of mutual corroboration. It was accepted that there was a sufficiency of evidence, but there was no direction on the appropriate route where an omnibus charge was libelled. No directions on mutual corroboration had been given.

[11] The sheriff reported that he viewed the incidents as a single course of conduct. The jury were not given any directions to the effect that, if they had held that the incidents constituted such a course of conduct, then not all of the elements required corroboration. A specific direction to that effect would have had to have been given in order to provide sufficient evidence to convict of the whole charge. The jury would have had to have determined the matter in two stages (*Wilson* v *HM Advocate* [2019] HCJAC 36 at paras [38] and [41]).

Respondent

[12] The advocate depute submitted, first, that the appeal should be refused on the basis that the ground now advanced was not one which was contained in the Note of Appeal. It

had not passed the sift. That apart, there had been a sufficiency of evidence for three reasons.

[13] First, the offence libelled was a course of conduct involving repeated incidents of sexual assault towards a 12 year old girl, in the family home, over a period of 19 days. It was competent to libel this as a single crime, in a single omnibus charge. What was required was corroboration of the course of conduct as a whole. The complainer's testimony on that course of conduct could be corroborated by an independent source speaking to one or more of the sexual assaults (*Stephen* v *HM Advocate* 2007 JC 61 at paras [6] to [11]); Allison *Practice* 256, 552; Hume: *Commentaries* ii, 222-223, 384-386). As with the common law offence of lewd, indecent and libidinous practices, where a number of instances of the same crime were charged and formed part of the same criminal conduct, each separate act could be established by the evidence of one witness. The evidence of the complainer's mother on the final incident was sufficient to corroborate the complainer's evidence of the course of conduct involving the whole series of sexual assaults.

[14] Secondly, what amounted to a single episode of sexual assault was a matter of fact and degree (*Wilson* v *HM Advocate* [2019] HCJAC 36 at para [37]). The incidents had taken place over a short, 19 day period. This was a single episode during which the complainer was in the sole care of the appellant for significant periods. It was accepted that the jury were not directed in these terms, but no miscarriage of justice could have resulted from this.

[15] Thirdly, if the incidents were separate, since they shared the conventional similarities in time, place and character, a sufficiency could be supplied by the application of mutual corroboration (*Dalton* v *HM Advocate* 2015 SCCR 125; *Wilson* v *HM Advocate* 2017 JC 64 at paras [14]-[15]; *Spinks* v *Harrower* 2018 JC 177; *HM Advocate* v *Taylor* 2019 JC 71 at paras [13]-[19]).

Decision

[16] The court will allow the appellant to amend his Note of Appeal to introduce the new ground. This ground is essentially a development of the original ground. It does not require a supplementary report from the sheriff or to be returned to the sift. The legal principles in the old and new grounds are the same.

[17] It is apparent that this area of the law is continuing to cause difficulties in practice. It need not do so. First, although the Crown may be allowed considerable latitude when framing a criminal charge involving young children (Allison: *Practice* 256; Hume: *Crimes* ii, 222-223) that has no bearing on the need to corroborate each separate criminal act, whether these form part of a course of conduct or not and whether the crimes are sexual in nature or not. Secondly, the need for corroboration may be satisfied as a result of the application of mutual corroboration. In this case, the events libelled, which occurred on separate days over a period of time during which the complainer was otherwise living normally with her family, were separate criminal acts (*Spinks* v *Harrower* 2018 JC 177, LJG (Carloway), delivering the opinion of the court, at para [13]; cf *Stirling* v *McFadyen* 2000 SCCR 239). Corroboration could not be supplied in the same manner as in a single assault, involving different elements, occurring at or about the same time or as part of an uninterrupted *continuum.* However, thirdly, applying mutual corroboration, the mother's evidence about the final episode could corroborate the earlier episodes spoken to by the complainer, and *vice versa*. For a conviction of the whole charge, the jury would have to hold that each episode was a component part in a single course of conduct persistently pursued by the appellant. That in turn requires the jury to examine the similarities and dissimilarities in time, place and circumstances. It is important to recognise in all of this that the phrase

"course of conduct" has no significance in relation to sufficiency of evidence other than in the context of mutual corroboration.

[18] The fundamental problem in this case is that the jury were not directed to the possibility of applying the principle of mutual corroboration in order to find the whole charge proved. They were directed to approach the charge as if it constituted a single crime in which the separate episodes did not require to be corroborated at all. This was a material misdirection which must result in the quashing of heads (a) and (b) of the conviction.

[19] Part of the confusion may arise from the *dicta* in *Stephen* v *HM Advocate* 2006 SCCR 667. *Stephen* has been interpreted (Jury Manual at para 15.3) as meaning that:

> "Where a charge is divided into sub-heads, each libelling conduct occurring at a specific place, it falls to be regarded as a single charge libelling a course of indecent conduct, and each element does not require corroboration. It is the course of conduct that requires corroboration".

[20] The court in *Stephen* relied upon the passages from Hume and Allison, cited above, to hold that, where repeated crimes can be libelled as in a single charge (constituting a course of conduct), it is thereby legitimate for the purposes of corroboration to treat that charge as a single crime constituted by repeated similar acts. This approach was, the court held (at para [10]) consistent with the "well established principle" that, where an omnibus charge is libelled, corroboration may be found in evidence of particular instances of it. This may be correct in relation to the application of the principle of mutual corroboration, but there is no other such principle, far less a well-established one. It is noticeable that the court in *Stephen* proffered no authority for its view. The passages relied upon from Hume and Allison, relative to the scope of the libel, date from a time when the now obsolete practice of libelling major and minor premises was current.

[21] The principle of mutual corroboration is well understood. Corroboration of separate offences can, in defined circumstances, be provided by different complainers. The principle can apply to the evidence of a single complainer who speaks to separate offences, which are all committed against her, where there is a separate witness who speaks to one or more of these offences and the whole series constitutes the requisite course of conduct (*HM Advocate* v *Taylor* 2019 JC 71). In these circumstances, the route to verdict must include the conventional directions in a mutual corroboration case. There is no other route involving corroboration of a course of conduct.

Sentence

[22] Having regard to the deletion of significant portions of the libel, the court will quash the sentence of 2 years imprisonment and substitute one of 8 months.