APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 19
HCA/2019/000244/XC

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

RKS

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg, (sol adv); Faculty Services Ltd for Bridge Litigation, Glasgow
Respondent: A Edwards QC, AD; Crown Agent

22 May 2020

Introduction

[1] In March 2019 the appellant went to trial in the High Court at Glasgow on an indictment which contained two charges. The first was a charge of assaulting his partner MKS on various occasions between June 2013 and February 2017 at various addresses in Glasgow. The second was a charge of raping MKS on 21 February 2017 at the address in Glasgow where they lived.

[2] In addition, there was included in the indictment a docket containing two paragraphs. Ground of appeal number 1 related to the first of these, which set out that on various occasions between 20 March 2011 and 19 March 2013, at addresses in Glastonbury and elsewhere in England, the appellant engaged in sexual activity, including sexual intercourse with MKS born 20 March 1997 when she was aged 14 and 15 years old.

[3] At the conclusion of the Crown case the advocate depute withdrew charge 1. The appellant was convicted of the second charge in the following terms:

> "On 21 February 2017 at …. Fettes Street, Glasgow you did assault (MKS) your partner and did seize her on the body, force her over a sofa, restrain her, remove her lower clothing, place your hands around her neck, compress same and restrict her breathing, instruct her to perform oral sex on you, penetrate her vagina with your penis and you did thus rape her, all to her injury; Contrary to Section 1 of the Sexual Offences (Scotland) Act 2009."

The relationship between the parties

[4] The complainer gave an account of the history of her relationship with the appellant in her evidence. She explained that when she was around 14 years old she was living with her mother, who had separated from her father a few years earlier, in a block of flats in Weston-Super-Mare. The appellant, then aged about 27, lived in the same block. They met and within a few weeks began a sexual relationship. Two years later the appellant moved to Glasgow and asked the complainer to join him when she finished school. She did so on her 16th birthday. They then lived together between 2013 and 2017 at various addresses in Glasgow and married in 2015. Latterly they lived at Fettes Street. No objection was taken to the admission of any of this evidence.

[5] The complainer's evidence was that the couple had a volatile relationship involving many arguments and reconciliations. She became pregnant at age 17 and their son was born in June 2015. She gave evidence of assaults perpetrated on her by the appellant as alleged in

charge 1. In this context she explained that she left the appellant twice, once staying at a woman's refuge in Taunton and on the second occasion staying with her half-sister in Glastonbury.

[6] By early 2017 the couple's arguments became more frequent and the appellant threatened to leave her and to take their child with him. On 19 February 2017 the couple and their son flew to Glastonbury to attend the complainer's father's birthday party. They had quarrelled throughout and returned to Glasgow the next day. On arriving back in Glasgow the complainer had called her half-sister who counselled her to be patient but also advised her to leave the appellant. They exchanged texts about this. In the course of one of these messages the appellant had explained: "I can't do it […] I just want to kill myself." Later that day the complainer arranged for her family to drive from Somerset to Glasgow to collect her and her child.

Charge 2

[7] The complainer gave evidence that the appellant raped her in the living room of their home, forcing her to have intercourse with him despite her saying that she did not wish to. At one point he had both his hands on her neck and was strangling her. Later that day, when the appellant was sleeping, the complainer's father, brother and sister arrived. She and the child left with them and they drove her south to their home. She did not mention what had happened at that stage. When her half-sister asked her about bruises which were visible to her neck, the complainer told her they had been caused by the appellant strangling her but gave no further explanation.

[8] After she had arrived in Glastonbury the appellant kept up a barrage of texts, calls and Facebook messages to the complainer. In the afternoon of 23 February 2017 the

complainer telephoned a police officer to discuss the appellant's harassment of her. During this call she disclosed the rape.

[9] In his evidence the appellant gave a different account of the history of his relationship with the complainer. He denied having sexual intercourse with her before she moved to Glasgow. He denied that she moved to Glasgow at his instigation but accepted that they began a relationship and came to live together, later getting married. He admitted having sexual intercourse with the complainer on the night in question but said it was consensual and that it had been instigated at the complainer's request in an attempt by her to make up with him after an argument.

The Note of Appeal

[10] The appellant was granted leave to appeal on two grounds. First, that the trial judge erred in directing the jury that they could take into account the alleged start of the sexual relationship between the two, as specified in the docket, as one piece of the overall picture which they had to consider in relation to charge 2. It was contended that the jury ought to have been directed to disregard the docket evidence in determining their verdict on this sole remaining charge. The second ground of appeal concerns the directions which the trial judge gave on the definition of the crime of rape and which elements thereof required to be proved by corroborated evidence. It was contended that the trial judge was wrong in directing the jury that absence of reasonable belief did not require corroboration.

Submissions

Appellant ground 1

[11] In support of the first ground of appeal Ms Ogg drew attention to the terms of section 288BA of the Criminal Procedure (Scotland) Act 1995 which governs the

circumstances in which an indictment may include a docket in a case such as this.

Subsection (1) provides:

> "An indictment or a complaint may include a docket which specifies any act or omission that is connected with a sexual offence charged in the indictment or complaint."

Subsection 2 provides:

> "Here, an act or omission is connected with such an offence charged if it –
> (a) is specifiable by way of reference to a sexual offence, and
> (b) relates to –
> (i) the same event as the offence charged, or
> (ii) a series of events of which that offence is also part."

[12] The submission for the appellant was that by the time the jury were being directed regarding the rape charge it could not be said that sexual intercourse when the complainer was 14 and 15 years old was specifiable by reference to the rape, nor could it be said to be part of the same events as the rape or a series of events of which that offence was part.

[13] The submission was developed to contend that whilst the evidence as led in the trial about the early relationship between the parties was relevant, for example to explain how they came to know each other and to be involved as a couple, by the time the judge came to direct the jury the evidence was no longer relevant to the remaining charge. The trial judge ought to have considered whether or not section 288BA still applied. If he concluded that it did, he ought then to have considered whether the docket material was still relevant. Even if it was, he ought then to have considered whether the evidence led was so prejudicial that the jury should be directed to ignore it. In the present case the evidence about having sexual intercourse with the complainer when she 14 and 15 years old was of no relevance to the remaining charge, a contravention of section 1 of the 2009 Act perpetrated on a single day a number of years later. The conduct specified in the docket could not relate to the charge on the indictment. It therefore failed the test of relevance set out in section 288BA(2)(b). Whilst

subsection (5) provided a presumption as to relevance, that did not impact on the trial judge's duty to remove matters from the jury if he no longer considered them relevant to the issue before them. Even if the judge was satisfied that this evidence was of some relevance it was so prejudicial that the judge ought to have directed the jury to ignore it. His failure to do so resulted in the jury taking into account an irrelevant and highly prejudicial matter. A miscarriage of justice had therefore occurred.

Appellant ground 2

[14] In his charge the judge gave directions on the definition of the offence of rape contrary to section 1 of the 2009 Act. He brought these together by explaining:

> "... for the Crown to prove rape, it must therefore show that the accused acted intentionally or recklessly penetrated the complainer's vagina, anus or mouth with his penis; that she did not consent; and, that he had no reasonable belief that she consented. It is only the first two elements, that is intentional or reckless penetration and lack of consent, that require to be proved by corroborated evidence. Absence of reasonable belief does not require corroboration, it is an inference that you draw from proven facts, for example, if you accepted that he used force."

[15] In the present case the complainer gave evidence of a forcible rape. The appellant's position was of consent. Contrary to what had been said by the court in *Graham* v *HM Advocate* 2017 SCCR 497 at paragraph [24], the issue of reasonable belief was a live issue in every case where a contravention of section 1 of the 2009 Act was libelled. The issue of honest belief would be a live issue in every case of rape prosecuted at common law.

[16] The trial judge's direction to the effect that absence of reasonable belief did not require corroboration was wrong in law. A lack of reasonable belief was one of the three essential elements of the offence of rape as defined in section 1 of the Sexual Offences (Scotland) Act 2009. It therefore followed that all three essential components of the offence required to be proved by corroborated evidence. There was no defence of reasonable belief such as would raise an evidential burden. The absence of reasonable belief was an essential

part of the definition of the crime. The trial judge could have directed the jury that they were entitled to have regard to the elements of force which were established in the evidence in determining whether a lack of reasonable belief in consent on the appellant's part had been established by corroborated evidence.

[17] The decisions of the court in the cases of *Graham* v *HM Advocate* and *Maqsood* v *HM Advocate* 2019 JC 45 were both wrongly decided insofar as the court explained in each that the absence of reasonable belief did not require to be established by corroborated evidence, and that no direction on reasonable belief was required unless it was a live issue in the case. The court was invited to remit the present case to a larger bench to permit reconsideration of the cases of *Graham* and *Maqsood*.

[18] Support for the appellant's position was sought to be drawn from the cases of *Winton* v *HM Advocate* 2016 SLT 393 at paragraph [8], *Lord Advocate's reference* (No 1 of 2001) 2002 SCCR 435 at paragraph [38], *Spendiff* v *HM Advocate* 2005 1 JC 338 at paragraph [30] and *McKearney* v *HM Advocate* 2004 SCCR 251 paragraphs [12], [25], [30] and [34].

Crown ground 1

[19] On behalf of the Crown attention was drawn to the fact that no objection was taken to the competence of including the docket, or to the admission of the evidence referred to in it. The Crown contended that the evidence led in support of the docket was relevant. If the evidence was relevant it would have been wrong for the judge to direct the jury to disregard it. The withdrawal of the first charge had no bearing on the admissibility of the evidence led in terms of the docket.

Crown ground 2

[20] The Crown's case as spoken to by the complainer was of rape perpetrated without her consent and by the use of force. Both evidence of distress and evidence of injury

corroborated the complainer's account. The directions which the trial judge gave were in accordance with the law. Proof of *mens rea* will always be a matter of inference to be drawn from the proved facts. The appellant had identified no basis upon which it would be appropriate to remit the case to a larger bench.

Discussion

Ground 1

[21] Section 288BA of the 1995 Act sets out the circumstances in which a docket may be included in an indictment alleging a sexual offence and the effect of doing so. A docket may be included if it specifies an act or omission that is connected with a sexual offence charged in the indictment (subsection (1)).

[22] Two considerations arise in order to determine whether an act or omission is connected with a sexual offence charged in the indictment. First, the act or omission requires to be specifiable by way of reference to a sexual offence. Second, the act or omission must relate to the same event as the offence charged or to a series of events of which that offence is also part.

[23] The first consideration (specifiable) is satisfied if the act is one which can properly be described as a sexual offence (see *HM Advocate* v *Moynihan* 2109 SCCR 61 paragraph [19]). The question is not, as was advanced in the appellant's submissions, whether the act is specifiable by reference to the sexual offence charged in the indictment, in this case the charge of rape. The conduct specified in the first paragraph of the present docket can clearly be described as a sexual offence.

[24] The second consideration addresses the link between the specifiable sexual offence identified in the docket and the sexual offence charged in the indictment, with which it is

connected. Issues of relevance may arise in considering this link. However, it is to be noted that subsection (5) of section 288BA provides:

> "Where under subsection (1) a docket is included in an indictment or complaint, it is to be presumed that –
> (a) the accused person has been given fair notice of the prosecutor's intention to lead evidence of the act or omission specified in the docket, and
> (b) evidence of the act or omission is admissible as relevant"

No challenge was intimated to the inclusion of the docket or to the admissibility of the evidence specified. No objection was taken to the docket being read to the jury.

[25] The submissions for the appellant sought to suggest that the docket should be viewed in a different light by the time the jury were being directed. It was contended that by this time the only charge left on the indictment was removed in time and circumstances from what was contained in the docket. This cannot be correct. The terms of section 288BA(1) make it plain that an act specified in a docket requires to be connected with a sexual offence charged in the indictment. Whilst the appellant faced only one charge by the time the trial judge came to direct the jury, that charge was the only sexual offence which had ever featured on the indictment. The docket could only ever have specified an act which was connected with the events of charge 2. In the absence of an objection to the inclusion of the docket, subsection (5) created a presumption that the evidence of the act specified in the docket was relevant to the jury's determination of charge 2.

[26] Unsurprisingly, perhaps, Ms Ogg was unable to provide any authority in support of her proposition that a trial judge should direct the jury to ignore evidence which had been admitted without objection and which was, by concession, relevant at the time of its introduction.

[27] Section 118(8) of the 1995 Act provides:

> "No conviction, sentence, judgment, order of court or other proceeding whatsoever in or for the purposes of solemn proceedings under this Act—
> (a) shall be quashed for want of form; or
> (b) where the accused had legal assistance in his defence, shall be suspended or set aside in respect of any objections to—
> (ii) the competency or admission or rejection of evidence at the trial in the inferior court,
> unless such objections were timeously stated."

[28] There can therefore be no appeal against the admission at trial of the evidence specified in the docket, which was in any event presumed relevant. Since the only charge to which the evidence had relevance was the charge which remained it would have been quite wrong for the trial judge to have directed the jury to disregard the evidence led in respect of the events specified in the docket. There was no misdirection and the appeal is refused on this ground.

Ground 2

[29] The appellant's defence in the present case was that the complainer initiated a sexual encounter between the two which was consensual throughout. His evidence was that there was no crime. The jury must have rejected the appellant's account. As the trial judge directed them to do in this situation, they must then have put his evidence to one side and considered the evidence of the complainer. As they must have understood from the clear directions given, the jury could only convict the appellant if they were then satisfied beyond reasonable doubt of the accused's guilt on the basis of the evidence given by the complainer, as corroborated by the evidence of distress and injury. The evidence relied upon by the Crown was plainly adequate to establish all the necessary elements of the crime of rape contrary to section 1 of the 2009 Act. The appellant does not suggest otherwise. The offence of which he was convicted on the basis of this evidence was a forcible and violent rape perpetrated in the face of requests to desist.

[30] In these circumstances there was simply no room for a separate and hypothetical consideration of whether, despite the fact that the complainer did not consent, for some reason, about which there was no evidence, the appellant nevertheless may have thought that she was consenting. It would have been wrong and confusing for the trial judge to have introduced directions based on a concept which did not feature in the evidence led at the trial. We do not accept the contention that reasonable belief is a live issue in every prosecution under section 1 of the 2009 Act, regardless of the nature of the evidence led. The appellant's contention would require a direction of the sort contended for to be given in a case where the accused denied that intercourse took place and led a defence of alibi.

[31] Directions on the absence of reasonable belief and the need to provide corroborated evidence of that absence will only be appropriate if such an issue is focussed in the evidence. This is not to suggest a new approach. In the case of *Doris* v *HM Advocate* 1996 SCCR 854 the complainer gave evidence of a violent attack on her by the appellant with whom she had struggled. The appellant gave evidence that what happened took place with the complainer's consent. In giving the opinion of the court at page 857 the Lord Justice General (Hope) stated:

> "... a direction about honest belief in rape cases should only be given when the issue about honest belief has been raised in the evidence. A jury should not be invited to speculate on these matters if there is no basis for this in the evidence which has been led at the trial."

[32] The same point arose in similar factual circumstances in *Blyth* v *HM Advocate* 2005 SCCR 710 where the Lord Justice General (Cullen) in giving the opinion of the court referred to what had been said in *Doris* v *HM Advocate* and stated at para [10]:

> "While it is no doubt correct as a proposition of law that the crime of rape is not committed if the man believes that the woman is consenting, a direction to that effect where the Crown case is that sexual intercourse was obtained by force is unnecessary."

[33] In *McKearney* v *HM Advocate* the Lord Justice Clerk (Gill) explained that, in his opinion, the principle set out in *Doris* v *HM Advocate* had been superseded by the decision in *Lord Advocate's Reference (No 1 of 2001) in cases where the use of force is not an element in the Crown case* (emphasis added). The use of force was a core element in the present offence.

[34] In *Graham* v *HM Advocate* the Lord Justice General (Carloway) in giving the opinion of the court explained at paragraph [23] that:

> "The purpose of this part of s.1 (of the 2009 Act) was not to add a new requirement which would need to be proved by corroborated testimony, but simply to change that part of the mental element from an absence of an honest belief to an absence of a reasonable one."

This analysis led the court in the cases of both *Graham* v *HM Advocate* (at paragraph [24]) and *Maqsood* v *HM Advocate* (at paragraph [16]) to state that a distinct direction on corroborating the accused's lack of reasonable belief is not necessary unless that is a live issue at the trial.

[35] Nothing which has been advanced on the appellant's behalf causes us to think that what the court said in either of the cases of *Graham* or *Maqsood* ought to be reconsidered. The directions which the trial judge gave in the present case were appropriate, sufficient and in accordance with law. The appeal is refused on this ground also.