



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 39  
HCA/22-122/XC

Lord Matthews  
Lord Tyre  
Lord Boyd

STATEMENT OF REASONS

delivered by LORD MATTHEWS

in

APPEAL AGAINST CONVICTION

by

JH

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

**Appellant: Gravelle (Sol Adv); Beltrami & Co Ltd**  
**Respondent: Goddard KC AD; Crown Agent**

26 October 2022

**Introduction**

[1] We refused this appeal on 26 October 2022 and indicated that we would give our reasons in writing. This we now do. On 24 February 2022 the appellant was convicted of three charges before a jury in the Sheriff Court. These were as follows:

“Charge 4 - lewd, indecent and libidinous practices and behaviour towards SD on an occasion between 1 January 1972 and 5 April 1980;

Charge 5 – lewd, indecent and libidinous practices and behaviour towards GD on two occasions between 1 January 1972 and 11 July 1981 and;

Charge 6 – lewd, indecent and libidinous practices and behaviour towards SH on various occasions between 1 January 2000 and 9 March 2003.”

[2] In due course the sheriff sentenced the appellant to 12 months’ imprisonment *in cumulo* in respect of charges 4 and 5 and to 18 months’ imprisonment consecutively in respect of charge 6.

[3] The complainers in charges 4 and 5 were sisters aged, respectively, 7 and between 8 and 12 when the offences took place. The complainer in charge 6 was 5 or 6 years old when the offence occurred.

[4] All three complainers described the appellant lying on top of them, pressing his private parts against theirs and moving up and down. All parties were clothed during the commission of the offences. It is not necessary to go into the full details since it is accepted that there was sufficient evidence to allow the jury to convict of all three charges on the basis of mutual corroboration.

[5] It is contended, however, that, given the time gap (approximately 19 years) between the events of charges 4 and 5 and those of charge 6,, the sheriff ought to have directed the jury that there required to be special, compelling or extraordinary features present before they could convict of charge 6. It is accepted that the sheriff gave appropriate standard directions on mutual corroboration but the lack of a direction on special features was a material misdirection by omission.

### ***Submissions for the appellant***

[6] A number of authorities had observed that a special feature ought to be identified in cases involving a significant gap in time. *Duthie v HM Advocate* 2021 JC 207, while

over-ruling these cases, left open the possibility that a direction about special features might be required in particular cases.

[7] At paragraph [28] in *Duthie* the court said the following:

“It is important that what began as a cautious remark by a trial judge, which was intended to assist the jury in their assessment of the mutual corroboration issue (in *K* at [7]), is not elevated into a principle of the law of evidence which is applicable in all cases in which there is a lengthy interval between the relevant incidents. It is not the case that, as a matter of law, in a lengthy time gap case, there require to be special, compelling or extraordinary circumstances before the appropriate inference can be drawn. What is essential, in terms of the settled law, which was described in *Adam v HM Advocate* (at [28]), are similarities in time, character and circumstances such as to demonstrate that the individual incidents are component parts of one course of conduct persistently pursued by the accused. The jury will have to be directed to that effect but, normally, that is all that is required. The judge or sheriff may elect to explain to the jury in a particular case that there is a long time gap and that, because of that factor, the similarities would require to be strong ones when compared to those needed where the incidents are closely linked in time. The giving of such a direction is not essential and in some cases it may be undesirable. In so far as *S v HM Advocate* is seen as being to the contrary effect, it is over-ruled.”

[8] The use of the word “normally” showed that the appeal court had in contemplation that there might well be cases where such a direction was required. This was such a case.

### **Submissions for the Crown**

[9] *Duthie* made it perfectly plain that no such direction was required. In this case the conduct had been particularly idiosyncratic, and there had been evidence of a lack of opportunity. The issue of the gap in time was explored in the speeches and there was no miscarriage of justice.

### ***Analysis and decision***

[10] The appeal raises a short point. It is not a good one. The comments of the court in paragraph 28 of *Duthie* have to be read in the context of paragraph 27 which runs as follows:

“[27] The court in *Adam v HM Advocate* (at [31] and [32]) examined the various *dicta* in which there had been reference to the necessity, in lengthy time gap-cases, of having special, compelling or extraordinary circumstances before a course of conduct persistently pursued could be inferred. The source of these references is the opinion of the Lord Justice Clerk (Gill) in *K v HM Advocate*, 2012 JC 74 (at [14] ) which followed *Dodds v HM Advocate* 2003 JC 8 and *Stewart v HM Advocate* 2007 JC 198. There have been subsequent cases which have adopted similar language (eg. *S v HM Advocate*, 2018 SCCR 329 at [11]; *B(R) v HM Advocate*, 2017 JC 278 at [30a]; *M v HM Advocate*, 2018 SCCR 149 at [4]; *F v HM Advocate*, 2016 JC 189 at [24] and *H* at [28]-[29]).

[11] The use of the word, “normally” in para [28] must be seen in its context. All that is being said is that the conventional directions are usually all that is needed. It recognises that there may be occasions where something more might appropriately be said, for example where there are a large number of charges with different categories of offences or the evidence is complex, although whether to go further than the standard directions in any case will be a matter for the discretion of the presiding judge. It does not mean, and was not intended to mean, that there will still be some cases with a lengthy time gap where a direction on special features has to be given on account of that factor. It is made explicit in *Duthie* that judges or sheriffs may elect to give such a direction but the words “it is not essential” could not themselves be clearer.

[12] The appellant’s submissions rely on a proposition of law which is the polar opposite to that which was decided in *Duthie*, where the intention was to put to bed once and for all the suggestion that a direction on special features had to be given.

[13] The appeal is without substance and is refused.