APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 9
HCA/2023/000285/XC

Lord Justice Clerk
Lord Doherty
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

EM

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Gravelle, Sol Adv; Beltrami & Co
Respondent: Solicitor General; the Crown Agent

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22 February 2024

[1] The appellant was convicted of raping his partner on an occasion between 1 and 31 January 2018. They were both 15 at the time.

[2] According to the complainer, she had entered into a relationship with the appellant around May 2017 and, while they would have intercourse, she made it clear to him that she

would not have anal sex. In January 2018 she went to see the appellant at his father's house. She would normally bring a condom but on this occasion she had asked the appellant to do it and he said he would try but if he forgot they could try anal sex. She said "absolutely not". When they arrived at the house they went to his bedroom but the appellant did not have a condom. He kept asking for anal sex and, although she kept saying no, he raped her anally and forcibly, in circumstances described by the trial judge. The pain was "incredible".

[3] There was evidence of distress when the complainer saw school friends two days later, and reported to them what had happened.

[4] The complainer's relationship with the appellant continued until 2019. The appellant subsequently started seeing another girl, KP. The complainer communicated with KP on Instagram. KP's position was that she had received Instagram messages from the complainer between October and November 2019. KP was aware from the messages that the complainer was alleging that the appellant had raped her. The complainer was trying to warn her about the incident, which the complainer saw as rape but the appellant did not. The appellant had told KP that one thing had led to another and he had tried to put his penis into the complainer's anus but as soon as he heard her say "ow" he had stopped. What took place had been consensual. In the course of communications between them KP confirmed that she offered to go with the appellant to counselling, but KP's evidence was that this was to do with wider issues. The complainer wanted to go to the police about the incident. KP did message that what the appellant did "was really bad and terrible" but she had only done so to stop AT from messaging her. In one message KP said "he has owned up to the things he has done and has said about what happened 2 years ago". This was to do with the anal penetration which KP understood from the appellant to have been

consensual: her reference to the appellant having "owned up" was not about him admitting rape. Her evidence was that at no stage had the appellant said he had acted without the complainer's consent. That evidence was not challenged by the Advocate Depute.

[5] The appellant's evidence was to the effect that what happened was consensual. When the complainer said "Awe" he pulled away.

[6] At the conclusion of the evidence, at the judge's request, the Advocate Depute confirmed that the complainer's evidence was the principal source of evidence of the absence of consent, and that the distress evidence of her two friends corroborated the absence of consent. Anal penetration was corroborated by the appellant's own evidence and by the appellant's admission to KP, but the Advocate Depute confirmed that "the admission such as it is, is not admission of an absence of consent".

[7] At the heart of the appeal is the submission that the trial judge ought to have directed the jury specifically as to what use could be made of the communications between the complainer and KP; in particular, that they were not available as corroboration of lack of consent. Failure to do so had resulted in a miscarriage of justice.

[8] The Advocate Depute in his speech made it clear that the evidence upon which the Crown relied for corroboration of lack of consent was the evidence of distress. He said:

> "Her absence of consent is demonstrated by the distress and upset that was exhibited by [AT] when she spoke to her friends at school the Monday following. ….it is a reasonable inference that that upset, that distress is referable to the incident that she was describing. The fact that the anal sex took place is confirmed, of course form (*sic*) the complainer but also by what the accused told [KP] and also of course in his own evidence today.

[9] The defence speech confirmed that KP's evidence could corroborate penetration, which was in any event admitted; sought to undermine the evidence of the complainer and the evidence of distress, which was highlighted as the only potential source of corroboration;

and focused on the fact that KP's evidence would not otherwise assist in corroborative terms. In addressing the evidence of KP, the Advocate Depute said:

> "Now, she confirmed in her evidence that in a conversation with her the accused had admitted putting his penis in [the complainer's] anus although in the explanation he gave to her he had stopped when she had said, ow. She was aware that [the complainer had been encouraged (sic) him to go to the police and she also confirmed the messages that she had exchanged with [the complainer] and you may recollect the discussion in the course of these messages where I would submit to you, members of the jury, that [KP] appeared certainly in the messages to be indicating firstly that the accused had told her that *he had done these things*. Secondly, that he was going to get counselling about it and thirdly, that in certain ways KP was supportive towards [the complainer]."

[10] The highlighted words form the nub of this appeal, it being submitted that from this the jury might have been confused about the status of the messages as corroboration. In this passage, as elsewhere, the Advocate Depute could certainly have been clearer in explaining his purpose in addressing this evidence. However the reference to an admission of "these things" was read in context, clearly a reference to the appellant's admission of anal penetration. The jury would not have understood the Advocate Depute to have been suggesting that the texts could be construed as an admission to rape. That would have been entirely at odds with KP's unchallenged evidence about what the appellant had told her. The reference to counselling about "it" relates to the same admission of there having been anal penetration, again bearing in mind that there was evidence relating to the appellant seeking counselling for a variety of reasons, including the trauma of being accused of rape. As to the third element, there was evidence that KP seemed supportive of the complainer, although her evidence suggested she had an ulterior motive for doing so. Quite what purpose the Advocate Depute had in referring to these two pieces of evidence about counselling and KP seeming supportive is not clear. The speech as a whole suggests a lack of clear analysis of the issues in the case, and how the law might be applied to the facts. Be

that as it may, we are satisfied that the Advocate Depute did not suggest that the messages could be treated as an admission by the appellant of lack of consent, or that the jury might have been misled into thinking that they were such an admission. KP's evidence was that the appellant had at no stage admitted non-consensual penetration; that evidence was unchallenged. It is impossible to see that the jury might have taken a different inference from the messages, standing that evidence.

[11] The overall position was made clear to the jury: in order for them to convict they had to accept the distress evidence as corroborating lack of consent. It no doubt would have been preferable had the trial judge given a short and clear direction as to the effect of the messages and the use to which they could be put. However, the trial judge's charge is not to be scrutinised as if the jury did not hear the evidence and speeches (*Sim* v *HM Advocate* 2016 JC 174, para [32]). There was no error or ambiguity in the Advocate Depute's speech that the trial judge was obliged to correct or clarify. It follows that there was no misdirection, far less a material one amounting to a miscarriage of justice.