APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 71
HCA/2016/615/XC

Lord Justice General
Lord Drummond Young
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

CHARLES GRAHAM

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: A Ogg, Solicitor Advocate; McCusker, McElroy & Gallanagh, Paisley
Respondent: Niven Smith AD; the Crown Agent

23 August 2017

Introduction

[1] On 23 September 2016 at the High Court at Paisley, the appellant was found guilty of a charge which libelled that:

> "on 20 or 21 October 2013 at…Paisley, you … did assault [JB]… your then partner and did… penetrate her anus with your penis; and… you did ignore her pleas to stop and did continue to penetrate her anus with your penis to the emission of semen …

you did thus rape her to her injury: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009."

[2] On 1 November 2016 the appellant was sentenced to five years imprisonment, backdated to 23 September 2016.

[3] The point raised in this appeal is whether the judge misdirected the jury by advising them that they were entitled to use evidence of the complainer's distress on the morning after the incident to corroborate, not only her lack of consent, but also the absence of a reasonable belief by the appellant that she was consenting. This is therefore yet another appeal which arises from the phraseology used in section 1 of the 2009 Act which redefined rape as requiring a lack of reasonable belief that the complainer consented. This has caused, and continues to cause, significant problems for judges both in terms of assessing sufficiency and directing juries.

The evidence

[4] The complainer gave evidence that she had known the appellant for seven to eight years at the time of the incident, and had formed a relationship with him in the year prior to the incident in October 2013. She had moved in with him in April or May 2013. In August 2013, she had had a hysterectomy. She continued to live with the appellant until 23 July 2014. Only then did she report the incident to the police.

[5] The complainer said that the appellant had been having a drink in the living room of the flat. She had been sleeping in the bedroom. She awoke in the middle of the night to find the appellant "on the back of her". He had put his penis into her anus while she had been sleeping, lying face down. She had asked him to stop more than once, saying that it was

sore. He had placed his arms on her shoulders and pushed her down as she attempted to get up. He had said that he wanted to finish. He had carried on until ejaculation.

[6] After the incident the complainer had pain in her back passage and there was a small amount of bleeding. In the morning, at about 6 or 6.30, she had got up and made the appellant a cup of tea before he went to work. At about 8am, she phoned her friend (the appellant's cousin), AG. When AG visited her, the complainer was in quite a state. She couldn't stop crying. The complainer phoned a doctor, who attended. She went to hospital where she remained for four days.

[7] In the course of an argument on 23 July 2014, AG had accused the appellant of raping the complainer. He had denied this and said to the complainer "you loved it".

[8] AG was deceased by the time of the trial. In terms of section 259 of the Criminal Procedure (Scotland) Act 1995, the contents of her police statements were put before the jury. One, dated 23 July 2014, recorded that AG had witnessed the distress of the complainer "shortly after the incident". She had been told by the complainer that the appellant had forced himself upon her. AG had tried to convince the complainer to report it to the police but she would not do so. In relation to distress, the statement continued:

> "After [JB] told me this I remembered when I was at her house a short time after her operation last year when a doctor came to her home because she was in a lot of pain and couldn't move. The doctor decided to rush her to the hospital because there was something wrong with her recovery from her operation. [JB] told me that that was caused by Charlie when he forced himself on her…When [JB] told me this she was really upset and was crying."

AG gave a further statement, dated 29 August 2014. This read:

> "Last year in 2013 I got a phone call from [JB], she told me that she wasn't well and asked me to come round. She was quite upset. [JB] told me that Charlie had forced her to have sex up the back end… She was crying and upset when she told me this."

The statement narrated that a doctor had been called and the complainer had been taken to hospital. AG had been present on 23 July 2014, when the complainer and the appellant had been arguing. The complainer had been telling the appellant that he had caused her to go to hospital. AG heard the appellant say "that he had forced her to have sex in the backend, but she had loved it ...".

[9] In a further statement, dated 9 September 2014, AG confirmed that the appellant had used the word "forced" during the argument on 23 July 2014. She had heard the appellant say that "he had forced her to have sex in the back end" and that he had used the word "forced" and had said that "[JB] loved it."

[10] The appellant gave evidence that he and the complainer had regularly had vaginal and anal intercourse. Although he could not remember whether or not anal intercourse had occurred on the night in question, he thought that it had. On every occasion when they had sexual intercourse, it had been with the consent of the complainer. The complainer had been "feeling a wee bit sore" on the morning after the incident. AG was a regular visitor and she had come to the flat on the morning after the incident. The appellant had visited the complainer at hospital. She "was in pain, sore, agitated." On 23 July 2014, the complainer had said to him "You rammed me" and he had replied "No darling, you loved it." He denied that he had used the word "forced".

[11] The complainer's son, DB, gave evidence about the argument on 23 July 2014. He had heard the appellant say words to the effect of "you love it, darling." He did not hear the appellant say that he had forced the complainer to have sex. It was the complainer who had used the word "forced".

The charge

[12] The trial judge gave the jury the standard general directions on the requirement for corroboration, before applying the principles to the specific charge. Evidence of distress, referred to in the police statements of AG, was a piece of circumstantial evidence which the jury could accept or reject. If they did accept it, it could corroborate the complainer's evidence about her state of mind at the time of, and soon after, the incident. It could corroborate her evidence that she had not consented to what had happened. The jury had to be satisfied that there was corroborated evidence of the three essential elements of the charge: first, that the appellant had penetrated the complainer's anus with his penis; secondly, that the complainer did not consent to that; and, thirdly, that the appellant did not reasonably believe that the complainer had consented to what had taken place.

[13] The trial judge specifically addressed the requirement for corroboration of the complainer's lack of consent as follows:

> "... for corroboration of the account of [JB], you … need to accept the evidence noted in the police statements of [AG], either on the alleged distress which she said she witnessed, distress of [JB], or on the alleged statement by the accused that he forced [JB] to have anal sex.
>
> You would have to accept the evidence from the police statements of AG as both credible and reliable on at least one of these two matters: the distress or the alleged statement by the accused that he forced [JB] to have anal sex. If you don't accept at least one of those pieces of evidence, from the police statements of [AG], then again you must acquit."

[14] The trial judge summarised where the jury could find corroboration, if they accepted the complainer's evidence as credible and reliable, for each of the essential elements of the charge. In relation to consent and reasonable belief, he continued:

> "... the Crown say that [JB] didn't consent as proved by her evidence that she didn't give free agreement, and it's corroborated, the Crown says, by the circumstantial evidence ... that is to say, the two features I've mentioned in the evidence noted from

> [AG] in the police statements, that's the evidence of the distress and the evidence of what she said she heard the accused say about forcing [JB] to have intercourse. So that's how the Crown say they can corroborate the absence of consent.
>
> What about the absence of a reasonable belief? The Crown ... says that comes from the evidence of [JB], that she was asleep and then when she woke up she said, stop, or she indicated that she was withdrawing consent, or not consenting, and the Crown say that the corroboration of the absence of a reasonable belief comes from the same source as the corroboration of lack of consent, that is to say, the evidence from the police statements of [AG]. So that's how the Crown says it gets to a situation of proving the accused's guilt of the charge."

Submissions

Appellant

[15] The appellant submitted that he had given evidence that the complainer had consented. Accordingly there was a proper evidential basis upon which the jury could draw an inference that the appellant had reasonable grounds for believing that the complainer had consented (*Drummond* v *HM Advocate,* 2015 SCCR 180 at para [20]). The Crown had to prove the absence of belief. The trial judge had identified that the principal source of evidence of the lack of reasonable belief was the complainer. He had directed the jury that the distress spoken to in the statements of AG could corroborate the evidence of the complainer that it would have been clear to the appellant that the complainer was not consenting (*Drummond* v *HM Advocate* (*supra*); *H* v *HM Advocate*, 2016 SCL 288).

[16] *Drummond* was not authority for the proposition that distress could corroborate a lack of reasonable belief in every case. In *Drummond,* the complainer had already been assaulted at the time of the rape. She was injured and distressed. *H* v *HM Advocate* (*supra*) could be distinguished. If the appellant had used force or the threat of force, he could not have had a reasonable belief that she was consenting (*H* v *HM Advocate* (*supra*) at para 9). In the present case, the complainer stated that she was in bed and sleeping (although the jury

deleted that part of the libel) when the incident had happened. It had occurred in the middle of the night. The telephone call to AG was not until 8am. Distress was not exhibited shortly after the incident. The complainer did not say that she had been distressed when making the tea.

[17] The distress was too far removed from the events libelled, particularly when the complainer had carried out normal daily tasks in the interim, to corroborate a lack of reasonable belief. The trial judge had erred in not directing the jury that the only possible corroboration was the purported admission that the appellant had forced the complainer to have sex. It was not known whether the jury had accepted the admission as corroboration or had relied solely on distress. Had the jury been directed that they could only rely on the admission as corroboration, they may have returned a different verdict.

Crown

[18] The Advocate Depute submitted that there was evidence of force. The complainer said that she had repeatedly told the appellant to stop, as it was painful. The appellant had his hands on her shoulders and was pushing her down as she tried to get up. Once the complainer was believed on the issue of force, the jury were entitled to use the evidence of distress to draw the almost inevitable inference that not only was she not consenting but also that the appellant was aware of that fact, hence his use of force in the first place (*Flynn* v *HM Advocate*, 2009 SCCR 651 at 654). Reasonable belief had not been a live issue, even if it remained an essential element of the crime (*Winton* v *HM Advocate* [2016] HCJAC 19 at para [8]).

[19] There was no fixed interval after which distress could not be used for corroboration. The behaviour of the complainer did not negate the use of distress. Where the hurdle of the

length of time was overcome, evidence of distress was available to corroborate both lack of consent and lack of reasonable belief in that consent.

Decision

[20] The common law defined rape as having sexual intercourse with a woman by overcoming her will by force; although the force did not require to involve physical violence (*HM Advocate* v *Sweenie* (1858) 3 Irv 109). The elements of a complainer's account which required to be corroborated, apart from identification, were intercourse and the use of force. In relation to the latter "the search… is simply to see whether there is evidence in general which supports the broad proposition of force, details of which have been given by the girl" (*Yates* v *HM Advocate* 1977 SLT (Notes) 42, LJG (Emslie), delivering the Opinion of the Court, at 43; *Smith* v *Lees* 1997 JC 73, LJG (Rodger) at 79). There was no requirement to prove any other matter, even though an essential element of the crime was the absence of an honest belief that the woman was consenting (*Meek* v *HM Advocate* 1982 SCCR 613, LJG (Emslie), delivering the Opinion of the Court, at 618). There was no need to direct a jury on that matter unless it had been put in issue (*Doris* v *HM Advocate* 1996 SCCR 854 LJG (Hope), delivering the Opinion of the Court, at 857).

[21] *Lord Advocate's Reference* (No 1 of 2001) 2002 SCCR 435 overruled *Sweenie* and determined that rape was constituted by the man having intercourse without the woman's consent; that is to say, force was no longer a requirement. The requisite intent was that the man knew that the woman was not consenting or was reckless as to that fact (LJG (Cullen) with whom the majority agreed, at 452). The notion that there required to be corroboration of the accused's state of knowledge appears to have arisen from an oblique *obiter dictum* in

this case (*ibid* at para [38]). Such a concept is not part of the proof in any other crime. Nevertheless, it was adopted in *McKearney* v *HM Advocate* 2004 JC 87.

[22] In *McKearney* it was said that the principle in *Doris* v *HM Advocate (supra)* had been superseded in cases where force was not an element in the Crown case (LJC (Gill) at [12]). Henceforth a direction on belief would be required in such cases. Proof of "*mens rea*" would be required in cases where force was not alleged (*ibid* paras [14] and [15]; Lord McCluskey at para [34]). With the exception of Lord McCluskey, "*mens rea*" was regarded as an inferential fact. Where there was evidence of distress, that would, along with the complainer's testimony "have instructed the jury's primary conclusion on the lack of consent". The same elements are, on the analysis in *Yates*, then available to establish force and, necessarily by inference, to prove that the accused had the requisite "*mens rea"* for rape (*Spendiff* v *HM Advocate* 2005 JC 338, Lord Penrose, delivering the Opinion of the Court (which included LJC (Gill), at para [30]).

[23] Despite what had been said in *Spendiff* on the subject of *mens rea*, section 1 of the Sexual Offences (Scotland) Act 2009 expressly defined rape as requiring not only an absence of consent but also an absence of reasonable belief that the complainer consented. It is correct to say that it is an essential element of the crime (*Winton* v *HM Advocate* [2016] HCJAC 19, Lady Dorrian at para [8]) but, as already noted, the absence of a belief, of some description, has always been a requirement, at least in the sense that the accused has to have the requisite criminal intent (*Meek* v *HM Advocate*, (*supra*)). That is an essential part of many crimes, but it does not, as such, require separate formal proof. It is an inference drawn from facts (such as the use of force) themselves proved by corroborated evidence. The purpose of this part of section 1 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.

[24] In a case in which force is alleged and proved, there is no need for a distinct direction on corroborating the accused's lack of belief unless that is a live issue at the trial. It does not become live simply because the complainer maintains that she was forced to have intercourse and the accused says that she consented. In the vast majority of cases, and this is one of them, this "middle ground" does not arise. The complainer said that she was telling the appellant to stop but he forced her down and persisted in having anal intercourse against her will. The appellant claimed that this is not what happened. Rather, it had been a normal episode of consensual intercourse of a type which had occurred many times in the past. There is no room, in that state of the evidence, for holding that, although the complainer had not consented, the appellant reasonably believed that she had. The appellant either had forceful intercourse against the complainer's will or she consented to intercourse of the type libelled. In such circumstances it is sufficient that a trial judge, whilst properly defining rape in terms of the statute and thus including a reference to an absence of belief, directs the jury that the complainer's account of being forcibly raped is adequately corroborated by, in this case, either distress observed by another person after the incident or an admission made by the appellant and spoken to by another witness.

[25] It follows that, although the trial judge's directions were erroneous, they favoured the appellant. The appeal must fail on that basis. In that regard the fact that some hours had passed since the incident and the complainer had made the appellant a cup of tea did not stop the distress from being capable of providing corroboration (*Wilson* v *HM Advocate* [2017] HCJAC 3, LJC (Carloway) at para [30]).

[26] The directions given by the trial judge largely followed the guidance in the Jury Manual, which may thus be seen as over complicated. In this case, the jury would have been adequately directed along the following lines:

> "The crime charged is rape, contrary to section 1 of the Sexual Offences Act 2009. That section defines the crime as including the intentional penetration, to any extent, of the complainer's anus by the accused's penis without her consent, and without any reasonable belief that she did consent. Consent means free agreement.
>
> Intentional penetration and lack of consent must be established or proved by corroborated evidence. Where penetration is admitted or otherwise proved (as here) the issue is one of consent. Rape cannot be committed if the woman consented. Consent is thus a complete defence.
>
> The evidence of the complainer was that she did not consent; that the accused held her down and penetrated her despite her telling him not to and to stop. Her evidence that she did not consent can be corroborated by the evidence of her distressed condition given by [AG]. Evidence, that a woman was observed to be in a distressed condition shortly after the act of intercourse, is capable of providing corroboration of her evidence that the intercourse occurred without her consent and by means of the use of force. If intercourse is achieved by the use of force, you are entitled to hold that her lack of consent would have been obvious to the man; that is to say that he had no reasonably held belief that the complainer was consenting.
>
> Before distress can be used as corroboration of the complainer's account etc…."