
**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**[2018] HCJAC 30**
**HCA/2017/614/XC**

Lord Justice Clerk
Lord Menzies
Lord Malcolm

STATEMENT OF REASONS

Issued by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

JM

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

**Appellant: D Forbes, Faculty Services Limited (for Dewar Spence, Leven)**
**Respondent: A Prentice, QC, AD; Crown Agent**

30 May 2018

[1] The issue in this appeal is whether there was sufficient evidence to justify the application of the *Moorov* doctrine in charges involving two complainers where the shortest gap in time between the alleged offending was a period of just under 17 years. It is maintained that there was insufficient evidence to indicate that the charges formed part of a course of conduct systematically pursued by the appellant. In respect of the first complainer the charge was one of lewd and libidinous practices when she was aged 9, on various

occasions between 1 September 1997 and 24 December 1997, in that the appellant gave her a bath during which he handled her naked body and on two occasions inserted his fingers into her vagina. There were two charges in respect of the second complainer. The first was that on various occasions between 1 December 2014 and 28 July 2015 he intentionally caused her, then aged between 6 and 7 years to participate in a sexual activity in that he induced her to masturbate his naked penis; contrary to section 21 of the Sexual Offences (Scotland) Act 2009. The second was of sexually assaulting the child, during that same period, by giving her a bath during which he handled her naked body, induced her to lie naked on a bed and rubbed her naked body with a towel and massaged her naked body with his hands and induced her to lie in bed with him whilst he was naked and she was naked and induced her to sit on his body whilst they were both naked; contrary to section 20 of the Sexual Offences (Scotland) Act 2009.

[2] The sheriff repelled a no case to answer submission, notwithstanding that the fiscal, in resisting the motion, had referred to the conduct as "opportunistic". The sheriff considered that whilst there was no upper limit to the time over which the *Moorov* doctrine could apply, for it to do so over a period as long as 17 years there had to be some extraordinary or compelling feature to entitle the jury to find the necessary underlying unity. The sheriff considered that there were such features. The appellant had ingratiated himself with the families of the girls. He gave the first complainer's mother cards which she could sell to make money. He did gardening for the parents of the second complainer and "helped" them by looking after her so that they could go to work. In both cases, the opportunity to be alone was suggested by him. He gave gifts to both girls. He gave both girls a bath, for no good reason. In the sheriff's view, it could not be said that there was no

possible view on which the jury would be entitled to characterise the similarities as extraordinarily compelling.

[3] The main point in the appeal was that although there was no maximum period beyond which the doctrine could not apply, the longer the gap the more difficult it was to draw the inference of an underlying unity, particularly in a limited number of charges, where great care must be taken to avoid using as corroboration evidence pointing only to a general disposition. There were no special or compelling points of similarity which might overcome the significance of the lengthy gap in time. Something more than repetition of a series of similar crimes was required. There was no evidence indicative of continuity, necessary to establish a course of conduct.

[4] For the Crown it was recognised that a gap of 17 years presented a considerable hurdle to the operation of the doctrine. It was acknowledged that where the interval was very long it was necessary to consider whether there were any special features which nonetheless made the similarities compelling, the question being whether it could be inferred that the behaviour all formed part of a course of action systematically pursued by the appellant. The matter should be left to the jury unless it could be said that on no possible view could there be a connection between the charges. The Crown referred to the individual factors which were said to be so compelling as would entitle the jury to draw the necessary inference of unity. These were largely those referred to by the sheriff. The advocate depute relied on para 17 of *DS* v *HMA* [2017] HCJAC 12 as supporting his argument that the features in this case, including what appears to be a certain degree of grooming, were capable of being treated as sufficiently compelling to elide the time gap. However, what may be sufficient to do so in a time gap of 7 years, as in *DS*, may not suffice when the gap is a much larger one. In our view the circumstances of this case present no

compelling circumstances capable of overcoming the very substantial time gap. The position is exactly as was described in *RB* v *HMA* 2017 JC 278 para 33:

> "There are, of course, similarities in the conduct, but they are the similarities which one might expect to find in any two offences of this kind. There are no similarities of such a striking or extraordinary nature which might suggest that the two offences were part of the same course of conduct, systematically pursued by the appellant. The evidence in the present case suggests two separate courses of conduct, albeit arising from a particular disposition."

[5] For these reasons the appeal will be allowed.