APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 52
HCA/2018/17/XC

Lord Justice General
Lord Drummond Young
Lady Clark of Calton

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION

by

MARTYN GLYNN DANIEL

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: McCall QC, Jones; Faculty Services Ltd
Respondent: Goddard AD; the Crown Agent

23 August 2018

Introduction

[1] On 24 November 2017, at the High Court in Edinburgh, the appellant was found guilty of a number of charges involving sexual and physical abuse. The appeal centres upon five of these, as follows:

"(1) on an occasion between 1 October ... and 30 November 2007 ... at ... Aberdeen, you ... did assault [AB], born ... 1992, and did lie on top of her, remove her lower clothing, restrain her and rape her by penetrating her vagina with your penis;

...

(5) on an occasion between 1 October 2009 and 30 April 2010 ... at ... Aberdeen you ... did assault [CD], then your partner ... and over a period of three days did lock her inside the said property, refuse to allow her to leave and thus detain her against her will, shout, place her in a state of fear and alarm and rape her by penetrating her vagina with your penis, and when she attempted to leave the said property you did seize hold of her neck, present a knife at her and hold it against her neck to her injury;

...

(11) on various occasions between 1 May 2014 and 14 July 2015 ... at ... Aberdeen, and elsewhere you ... did assault [EF], then your partner ... and did spit on her face, seize hold of her hair and pull her by the hair, push and pull her downstairs, restrain her, compress her neck with your hands, kick her on the head and body and punch her, all to her injury;

(14) on various occasions between 1 May 2014 and 14 July 2015 ... at ... Aberdeen you ... did assault [EF], then your partner, seize hold of her head, push her head towards your penis and repeatedly rape her by repeatedly penetrating her mouth with your penis and by repeatedly penetrating her vagina with your penis: CONTRARY to section 1 of the Sexual Offences (Scotland) Act 2009; and

(20) on an occasion between 1 ... and 18 February 2015 at ... Aberdeen you ... did assault [EF], then your partner ... and did repeatedly kick her on the head and cause her to lose consciousness, all to her severe injury".

Apart from these central charges, the appellant was convicted of charges 2 (malicious mischief), 3 (breach of the peace), 10 (assault), 12 (malicious mischief), 16 (a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) 2010 Act) and 18 (abduction of EF). The appellant received extended sentences in respect of charges 1, 5 and 14, which were to run concurrently. The longest of these was an 11 year term with an 8 year custodial period. Concurrent to that were sentences of 6 months and 1 year in respect of the assault charges 11 and 20. The trial judge imposed a total of 7 months on charges 2, 3, 10, 12, 16 and 18 to run consecutively to the earlier periods. The cumulative sentence was therefore an extended sentence with a custodial element of 9 years 7 months.

The rapes

Charge 1

[2] The complainer in charge 1, namely AB, was aged 15 at the material time and the appellant was 25. They worked together at the food court in the Bon Accord Shopping Centre. On an occasion in October or November 2007, they had met by arrangement at the amusement arcade on the Esplanade. They had then gone to the appellant's car, where, as the trial judge put it, the appellant began to force himself upon her. Despite her protestations, he continued in his attempts to have intercourse with her. She decided that resistance was futile and "let him have his way". After the intercourse, he had driven her home. This incident was not reported at the time and the complainer was only contacted by the police in 2016.

Charge 5

[3] The complainer in charge 5, namely CD, was a second year student at Aberdeen University, who met the appellant at a nightclub in September or October 2007. They began a relationship and moved in together. The incident, which occurred some time between October 2009 and April 2010, signalled the end of their relationship. The complainer had visited the appellant at his flat to tell him that she wished to end it. The appellant would not let her leave the flat, although they did go out together to get food. The appellant was extremely upset. He tried to persuade the complainer to remain with him. He had banged his head repeatedly off a wall during this episode. As the complainer was on a bed, he had put a pillow over her face. She had given no indication of any willingness to have intercourse, but he had proceeded to penetrate her. At the end of the incident, when the

complainer was trying to leave the flat, there was a struggle during which he had presented a knife at her, which had nicked her throat. She had then managed to escape.

Charge 14

[4] The third complainer, namely EF, had her own house and family in Aberdeen. She had met the appellant at the end of 2014 and had begun a relationship with him. This transpired to be a violent affair, with repeated episodes of rape found established in terms of the libel.

Assault charges

[5] In relation to the assault charges against which the appeal is directed, these both involved EF. Charge 11 libelled various occasions on which the appellant had spat on her, seized her by the hair, punched her and committed other acts of physical aggression. Charge 20 was a single episode of repeatedly kicking the complainer to her head, to her severe injury.

Judge's charge

[6] The trial judge gave the jury the standard general directions on the need for corroboration; that is, as he put it, evidence from at least two separate credible and reliable sources which pointed to the guilt of the accused. He twice referred to the need for corroboration for both the commission of the offence and the identity of the perpetrator. He directed the jury on mutual corroboration; stating that all of the rape charges required to be corroborated in that way. Since the alleged rapes occurred, when only the appellant and one of the complainers had been present, and there was no other evidence available, corroboration for each had to come from evidence about the other alleged rapes.

[7] The trial judge said the Crown were entitled to ask the jury to consider similar incidents, for which it is said that the accused person was responsible. If the incidents were:

> "sufficiently alike as to reveal a pattern of behaviour that is distinctively that of the accused, then the jury is entitled to treat the evidence of one complainer as corroborating the evidence of the other.
>
> ...
>
> ... it is a matter for you whether you are satisfied that the cases are sufficiently alike. For the rule ... of mutual corroboration to apply, you must be satisfied about the following matters: first, that the crimes are alike in character; second, that the circumstances of their commission are alike; thirdly, that the place or places of the commission are alike; and fourthly, that they are close enough together in time to infer that they belong to a course of conduct, or a pattern of behaviour."

[8] On character, all the relevant incidents had involved rape. In relation to the circumstances, the trial judge mentioned that the Crown had founded on the incidents all having occurred within a relationship, albeit that that with AB was at its "outset", whereas the others were longer term. As to place, they were all in Aberdeen. As to time, the dates were set out in the indictment. The judge referred to the Crown having argued that the dates were sufficiently close together that it was possible to infer a "course of conduct pursued against a number of women with whom the accused had a relationship".

[9] The trial judge directed the jury that they also had to consider the differences involved in the charges. He gave examples of both similarities and dissimilarities. He directed the jury that they should decide whether the differences were important or whether the accused was acting "in pursuit of a course of sexual misbehaviour that is bound together by common threads of similarity". If the jury considered that each of the three complainers' accounts was acceptable, they had to ask whether they were corroborated by the account of at least one of the others. If not, an acquittal had to follow. He gave a specific direction in respect of the time gap between the first and third complainers in the event that the

testimony of the second complainer were rejected. In respect of each complainer, he repeated the need for corroboration from another complainer in the form of evidence of another rape which was "sufficiently alike in character, circumstance, place and time". He referred to the need for the incidents to be part of a course of sexual misconduct "from which you can infer has been pursued by the same man". He repeated that there could only be corroboration if:

> "by reason of the character, circumstance, place of commission and dates of each charge, the crimes are so closely linked that you can infer that the same accused was pursuing a course of conduct involving the various sexual assaults".

[10] The doctrine, the trial judge said, was also applicable to the non-sexual assaults. Again, the jury had to examine the circumstances and decide whether they were:

> "sufficiently bound together by character, circumstance, place and time as to demonstrate an underlying course of conduct that inferred that the conduct was linked to the accused".

He directed the jury that, in relation to the assault charges, the only source of evidence capable of corroborating charges 11 and 20 was the assault element of charge 5.

[11] The trial judge dealt with the appellant's testimony and directed the jury that, if they accepted his evidence, then they had to acquit him.

Judge's Report

[12] In his report, the trial judge responded to the criticism of his charge as follows:

> "... more often than not the jury is seeking to determine whether the individual strands of evidence have sufficient commonality to deserve the description of a 'course of action'. In this respect determining whether these strands of evidence are composed of similar facts is part of the task of determining whether the course has been 'systematically pursued'. I take it that this phrase is not intended to indicate that the crimes alleged were conducted according to a rigid system or method but that if similar facts or features are visible which imply the involvement of a single actor then the jury are entitled to find that there is mutual corroboration. This

> requirement is expressed in the need for a unity of character, circumstance, place and time. Where the features evident are merely typical incidents of the category of crime in question the jury could not then be satisfied that those features provide corroboration. ... my understanding is that if the evidence in connection with each separate offence showed that 'the accused had a general disposition to commit the kind of offence under consideration', then that evidence would be available as a source of mutual corroboration. The rule cannot operate when the evidence is of a generic nature. If the evidence is generic then the jury could not be satisfied that it was the accused who had committed the crimes in question. If therefore the evidence simply revealed that whoever committed it had a general disposition to commit a crime of that nature then one could not regard that evidence as corroborating the complainer's evidence that the accused committed the crime. This is because there was nothing in the way the crime was committed that would enable the jury to be satisfied that it was the accused who committed the crime. The point of the rule is to find corroboration of evidence that a crime was committed and that it was the accused who committed it."

Submissions

Appellant

[13] The first ground of appeal was that there has been a miscarriage of justice in respect of charges 1, 5, 14 and separately charges 11 and 20 because of misdirections on mutual corroboration. The only available means of corroboration in respect of each of the rape charges was by application of the *Moorov* doctrine. The directions were such as to have confused the jury since, read as a whole, the jury would have been left with the impression that they should be looking for similarities in order to infer that the crimes were committed by the same man, rather than that they occurred at all. There had been no dispute about identification. Accordingly the directions were misleading.

[14] The trial judge failed to use the expression "single course of conduct systematically pursued", which was designed to convey that what was required was an underlying unity of purpose, rather than a general disposition to commit offences of a similar kind. He had focused on the doctrine as proving identification, rather than commission of the offence. He had not followed the directions in the Jury Manual (page 15.3/123). The terms of the judge's

report had reinforced the confusion under which he was labouring. It was accepted that it was not necessary in every case to give a direction about the fact that a general disposition was not enough, but this was desirable in order to assist the jury's understanding (*BM* v *HM Advocate* [2017] HCJAC 55 at para [35]). In terms of his report, the judge seemed to think that a general disposition was sufficient for mutual corroboration. His remarks betrayed a misunderstanding to the effect that the doctrine was about corroboration the identity of the perpetrator rather than the commission of the crimes. He had confused mutual corroboration with the rule in *Howden* v *HM Advocate* 1994 SCCR 19.

[15] The second ground of appeal was that there was insufficient evidence to corroborate charges 11 and 20, using the assault element in charge 5. This was so, notwithstanding the absence of a submission to that effect at the close of the Crown case; a matter which was adequately explained (*Farmer* v *Guild* 1991 SCCR 174). The use of the knife in charge 5 had occurred in the context of the complainer trying to leave the flat, where she had been raped. It was the only allegation of assault in respect of the complainer CD, and had occurred at the very end of their relationship. It was a one-off incident. By contrast, the evidence on charges 11 and 20 was of a violent relationship between the appellant and the complainer EF, in which no weapons had been involved. There was also a gap of about five years between the episodes involving the two complainers.

Crown

[16] The charge had to be seen in the context of the trial (*Sim* v *HM Advocate* 2016 JC 174 at para 32). The judge was not required to deliver an academic thesis, but to give concise definitions of the principle and general guidance on how it should be applied (*JH* v *HM Advocate* [2013] HCJAC 28 at para [10]). The Jury Manual was no more than a first port of

call, providing a checklist of points to bear in mind. The obligation on the judge was to provide a route to verdict which the jury could follow. The submission that the import of the charge suggested that the application of the doctrine related to identification, rather than the commission of the crime, took the terms of the charge out of context. The judge had directed the jury that they had to be satisfied that the crimes were so alike and linked closely enough in time to infer a course of conduct. He reminded the jury that the requirement was that there was a single course of sexual misconduct.

[17] There was a sufficiency of evidence to corroborate charges 11 and 20 with that in charge 5. The evidence of the complainers should not be compartmentalised. The assaults on both CD and EF had taken place in a situation in which the appellant had perceived himself as losing control of the situation. In respect of CD, he had become manipulative, aggressive and violent when she was socialising without him. The events in charge 5 occurred when she tried to end the relationship. He had become violent to EF in similar circumstances when she asked him to leave her flat. Both complainers gave evidence that they were detained against their will. Although the nature of the conduct was not identical, in the context of the evidence as a whole, the inference could be drawn of an underlying course of conduct (*CW* v *HM Advocate* 2016 JC 148).

Decision

[18] In *JH* v *HM Advocate* [2013] HCJAC 28 it was made clear (Lord Clarke, delivering the Opinion of the Court, at para [10]) that:

> "It is well established that in giving directions on the doctrine of mutual corroboration the trial judge is not required to deliver on academic thesis: all that is required is ... a concise definition of the principle and some general guidance as to how it might be applied by the jury to the evidence in the case ... The charge has to be looked at as a whole, the critical questions being will the jury understand, from

> these directions, (i) that they cannot convict on the evidence only of the individual witness to each charge? and (ii) that they can only do so if they also accept the evidence of the other witness, and are satisfied as to the connection between the events?"

Seen in that context, the directions on corroboration in this case were adequate. The trial judge made it clear that corroboration was required in respect of both the commission of the offence and the identity of the perpetrator. He equally emphasised that each rape required the mutual corroboration of one or both of the other rapes and that the jury would have to be especially careful if the middle complainer, in terms of chronology, were to be rejected. He explained that what was required was a similarity in character, circumstances and place; that the individual offences belonged to a course of conduct carried out by the accused. Although the trial judge did put some emphasis on the conduct being that of the accused, the jury would have understood from the totality of the directions given that both the identity of the perpetrator and the offences themselves required the application of mutual corroboration. Ultimately, it is clear the jury accepted the testimony of the three complainers, rejected that of the appellant and regarded the circumstances as sufficiently similar to merit a verdict of guilty in respect of each charge.

[19] It is important not to conduct too strict a textual analysis of the judge's charge or to focus upon isolated passages rather than the charge as a whole, in the context of the evidence given and the speeches delivered. Nevertheless, the court accepts the force of the submission made by the appellant that the judge's report gives some concern in relation to his understanding of the concept of mutual corroboration. That is not, however, the focus of the appeal. *MR* v *HM Advocate* 2013 JC 212 (LJC (Carloway), delivering the Opinion of the Full Bench, at para [20]) sets out the modern law:

> "What the court is looking for are the conventional similarities in time, place and circumstances in the behaviour proved in terms of the libel ... such as to demonstrate

> that the individual incidents are component parts of one course of criminal conduct persistently pursued by the accused ...".

[20] In relation to a judge's directions, although a judge may feel compelled to depart from the guidance given in the Jury Manual, it remains important to have regard to the terms of the Jury Manual and to follow the language which is used in the Manual, unless circumstances dictate otherwise. As was said in *White* v *HM Advocate* 2012 SCCR 807 (LJC (Carloway), delivering the Opinion of the Court, at para [13]):

> "the contents of the Jury Manual, which have been devised by the judiciary for the judiciary, are intended to be an encapsulation of sound law and good practice".

Care requires to be taken before a judge departs from the standard phraseology developed over time and representing established wisdom. Consistency of language is important. In directing a jury on the concept of mutual corroboration, it is very important to provide a clear expression of the principle at the outset and, when dealing with the details of the concept, or indeed the evidence, to use the same language when describing the same concepts. In mutual corroboration cases, the following is the standard direction (Jury Manual page 15.3/123):

> "The rule is this: if you are satisfied that the crimes are so closely linked by: (1) their character; (2) the circumstances of their commission; (3) the place of commission; and(4) the time of commission, as to bind them together or parts of a single course of conduct systematically pursued by the accused, then the evidence of one witness about the commission of one crime is sufficiently corroborated by the evidence of one witness about the commission of each of the other crimes. In looking at the charges, it is the underlying similarity of the conduct which is described by the witnesses which you have to consider in deciding whether the doctrine applies.
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> For it to apply, you have to accept each of the witnesses who speak to the individual charges. If you don't, there can be no corroboration. So if you believe the complainer in any particular charge then you would have to find corroboration from a credible witness who speaks to any of the other charges. If you do believe that witness you then have to decide if by reason of the character, circumstance, place of commission and time of each charge, the crimes are so closely linked that you can infer that the accused was pursuing a single course of crime. It's not enough if all

> that's shown is that he had a general disposition to commit this kind of offence. You have to apply this rule with caution".

If a judge gives such a direction, it will be difficult to criticise him. If, on the other hand, he uses different phraseology such as, in this case, "pattern of behaviour", "common threads of similarity" or fails to mention part of the standard recommended direction, such as "course of conduct systematically pursued by the accused", he will risk opening his words up to criticism, even if a challenge to them may not ultimately succeed.

[21] In relation to the assaults, the court is satisfied, looking at the similarities of the use of violence in the domestic context, that there was sufficient evidence upon which the jury could find mutual corroboration between the charges involving violence to the two complainers.

[22] In all these circumstances, the appeal against conviction is refused.