APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 74
HCA/2017/665/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION

by

MOHAMMED MAQSOOD

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: CM Mitchell; Faculty Appeals Unit (for Doonan McCaig, Glasgow)
Respondent: Edwards QC AD; the Crown Agent

28 November 2018

Introduction

[1] The redefinition of rape in section 1 of the Sexual Offences (Scotland) Act 2009 continues to pose problems for trial courts. They continue to wrestle with appropriate directions to a jury on the evidence required to demonstrate the absence of a reasonable belief that a complainer was consenting to the sexual acts libelled (s 1(1)(b)). Despite several

attempts, the appellate court has not been entirely successful in solving these problems. This case deals specifically with the evidential requirements where it is maintained that the complainer is incapable of consent because of the effect of alcohol (*ibid* s 13(1) and (2)(a)).

Background

[2] On 7 November 2017, at the High Court in Glasgow, the appellant was convicted of a charge which libelled that:

> "on 5 December 2016 in a motor vehicle ... at a parking area at ... Thornliebank ... you ... did assault [NG] ... and whilst she was intoxicated with alcohol and thus incapable of giving or withholding consent, did seize her by the hair and body, penetrate her vagina and her mouth with your penis and you did thus rape her: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009 ...".

On 1 December 2017, the trial judge imposed an extended sentence of 8 years with a custodial element of 6 years.

Evidence

[3] The complainer and her friend, namely SC, were 18 years old. Shortly after SC's 18th birthday, they went to a pub in Glasgow city centre for a celebratory lunch. They had food and two or three vodkas. After lunch they went to a pub in Shawlands. They arrived at about 7.00pm. They had many vodkas and shots of tequila. According to both women, they were very drunk. SC thought that they had had about 12 drinks each. This estimate was supported by the bar staff, although neither woman had been refused service. During the evening, SC had arranged for a person called Omar to deliver cannabis to her at the pub. The complainer had seen the transaction taking place at Omar's car outside the pub. They left the pub at about 11.30pm.

[4] According to the complainer, she was uncertain about how she was to get home; whether by taxi or a lift from her boyfriend's mother. CCTV cameras pictured the women being ushered out of the pub by the barman. There was a taxi rank nearby. The women tried to get back into the bar to use the toilet. They failed, so the complainer relieved herself in the doorway. The women then stayed on the pavement outside the pub. The complainer stumbled and fell. She stood up and then sat down on the pavement.

[5] The CCTV had captured the appellant parking his car opposite the pub, at a time when the women were on the pavement, performing a U-turn and stopping close to the pub. Both women went to the car and got in. The complainer maintained that she thought that it was Omar's car. SC thought it was a taxi, although it had no official markings. SC was dropped off near her home, which had only been a short distance away. She was in such a state that she could not get in. She was picked up by the police, sitting in the street, and taken to the police station where she stayed overnight.

[6] The complainer said that she had no memory of SC being dropped off. She did recall the car stopping and the appellant grabbing her hair, pulling her head towards his lap and forcing his penis into her mouth. She had shouted "no" and "stop". She said that she had been very upset. He had then thrown her onto the back seat. She said that she had been hysterical and scared. She had been aware that something else had happened, but could not remember what. It was agreed by Joint Minute that the appellant had had sexual intercourse with the complainer in the car. The car drove off. It stopped and she was told to get out; which she did. Her boyfriend and his mother were waiting for her. Although she had a jacket on, she had no bra or top. She had had these clothes on when she had got into the car. She had her trainers on but had lost her shoes.

[7] The complainer's boyfriend said that, when the complainer had failed to return home, he and his mother had gone to the pub, which was shut. They attempted to phone the complainer several times, but got no reply. She did eventually answer, at a point when she must have been in the car. She was hard to understand. A male person had taken the phone and said that she would be home in five minutes. The boyfriend and his mother went back out to look for her and found her in the street in tears. She could not get her words out. She was wearing her jacket, but had no clothes on her top. They took her home, where she was still very upset and drunk. The boyfriend's mother confirmed his account.

[8] On being medically examined, the complainer was found to have bruises on her arms and legs. She was still wearing a tampon, as she had been menstruating. Although a high vaginal swab had yielded semen from the appellant, the complainer, when interviewed by the police, could not remember having had intercourse and had been very upset because of this. She said that she had been too drunk to consent. The first police officer had spoken to her at about 2.30am and said that she remained distressed. A toxicologist gave evidence that, on a back count of her alcohol reading, she had "probably" had enough drink to be visibly affected by it. At the appeal hearing, neither the appellant nor the advocate depute were able to say what the alcohol reading had been or what the back count, which had been recalculated after cross-examination, had been.

[9] The appellant gave evidence that he had been working as a delivery driver. He had been on his way home when he had stopped to make phonecalls. He had turned his car to go to a shop to buy milk. He had not noticed either the complainer or her friend until they got into his car. They had asked to be dropped off "up the road". The complainer did not get out with her friend and had asked to go to a party. He had driven to a retail park. They had sat and talked. After about half an hour, the complainer had suggested giving the

appellant oral sex. She did so. The appellant had then driven off. The complainer removed her top and began to give him oral sex again, whilst he drove the car. When he stopped at a set of traffic lights, she had sat astride him and had intercourse. At some point, the complainer had spoken to her boyfriend on the phone. He had taken the phone and said that she would be home in five minutes. The complainer had left clothing in the appellant's car. The appellant had gone to a 24 hour gym, where he had washed and put the clothes in a charity skip.

The judge's charge

[10] The trial judge gave the jury the standard general directions on the onus and standard of proof and corroboration. She directed the jury that if they believed the appellant, then they would be bound to acquit. The same result would follow if his evidence provided a reasonable doubt. The judge defined rape as consisting of penetration, without the other person's consent and without the accused having any reasonable belief that the person consented. She directed the jury that all three elements had to be proved by corroborated evidence. In relation to consent, she reminded the jury that the Crown's position had been that the appellant had forced his penis into the complainer's mouth. The vaginal intercourse had occurred at a time and in a way that the complainer could not describe, because of the state that she had been in. If that was proved, said the judge, that showed that there had been no consent and no reasonable belief that there had been consent. She directed the jury that if they did not accept the complainer's evidence, then that was an end of the matter. Otherwise, they had to consider, if they accepted what she had said, whether there was corroboration.

[11] The trial judge directed the jury that there had to be no reasonable belief that the complainer was consenting, "but all of the evidence is relevant to more than one thing". Whereas the Crown had said that the complainer was so drunk that the appellant must have known that she was incapable of consent, the appellant had said that she was capable of walking and talking. He had thought that there was consent because of what she had said. The judge continued:

> "So he says that he did have a reasonable belief that, for a start, she was capable of consenting and, for a second, that she did."

[12] Specifically, in relation to the absence of consent because of the drink that had been taken, she said:

> "So what evidence is there ... for you to corroborate it? That's where you have to look at the whole story as it unfolded before you. Both of the young women speak about having perhaps 12 drinks, including some shots. ... So there is evidence from them about what they say they had to drink but there's also evidence from people who are independent about how much drink they were served in the pub.
>
> And then you've got the toxicologist ... she came back with a ... figure which ... would give the likelihood of there being some noticeable effect of drink, some obvious intoxication.
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> ... [T]here is other medical evidence about some bruises on [the complainer's] body which ... were consistent with a number of things, for instance being held firmly, as well as ... pressing hard against some part of a wall or a car ... and of course ... on the CCTV, you saw [the complainer] falling over in the street.
>
> ... [Y]ou have evidence that you have to consider also, when thinking about corroboration, of distress and that is [the complainer's] evidence about getting out of the car ... and being upset, and you saw her on the CCTV apparently limping. She was half clad. She did have her outdoor jacket but she did not have anything on underneath it and you've evidence from [the complainer's boyfriend] and from his mother about when they found her, having been looking for her, she was distressed.
>
> Now you can use evidence of distress when it's seen by somebody other than the distressed person as evidence which can corroborate what the distressed person says. So, if you accept the evidence from [the complainer's boyfriend] and from his mother, then you can hold that she was distressed and that can be for a variety of reasons but one of the reasons could be that something that she hadn't consented to had happened to her. ...
>
> You also need to think about corroboration of whether there was no reasonable belief that she consented to sex ...

> A person shouldn't just assume there's consent; either there needs to be actual spoken consent or actions from which consent can readily be inferred. And, given that we are talking about human relations, in most cases, there's probably a mixture of both, both talking and acting.
>
> ... [T]he Crown argues that it must have been very obvious to [the appellant] that [the complainer] was very drunk and that he took advantage of her because of that. That's what the advocate depute submitted to you this morning. [Defence counsel] on the other hand, asks you to accept [the appellant's] account that [the complainer] did know what she was doing and that she was an active participant in it all."

Submissions

Appellant

[13] The ground of appeal is that the trial judge misdirected the jury on distress. She had said that it could corroborate what the distressed person said, including that she had not consented to what had happened. The judge erred in failing to direct the jury that distress could only be used to corroborate the "*mens rea*" of the appellant or, if corroboration of that was not required, to inform the jury of that *mens rea*, only if the jury were satisfied that the complainer was distressed at the time of the incident. It was necessary for the jury to understand the significant limitation on the evidential value of post-incident distress. The jury had to find corroboration of the appellant's lack of reasonable belief. If this was a case where reasonable belief did not arise (*Graham* v *HM Advocate* 2017 SCCR 497 and *Wilkinson* v *HM Advocate* 2018 SCCR 248), clearly the direction on distress and the lack of corroboration thereof could not found a successful ground of appeal. However, there was a tension between the proposition that in some cases the requirement for corroboration of lack of reasonable belief was unnecessary and the *dicta* in *Winton* v *HM Advocate* 2017 SCCR 320. This tension was reflected in the trial courts. The proper course ought to be to convene to a full bench to consider the matter further.

Crown

[14] The advocate depute argued that the trial judge's charge had to be read as a whole. It had covered all the necessary elements. The case was ultimately straightforward, even although it could be made to seem complicated. The Crown case was that the complainer was incapable of giving consent because of her intoxication. The charge libelled a single continuing offence, in breach of section 1 of the 2009 Act. No direction on corroborating the absence of reasonable belief had been required. This was not a "middle ground" case. The evidence of the complainer's intoxication led to an inference that there was a lack of reasonable belief.

Decision

[15] The issue before the jury was whether, as the complainer maintained, the appellant had had intercourse with her whilst she was incapable of consent as a result of the effect of alcohol. The court has not ignored the complainer's account of the use of force in relation to the oral intercourse or the evidence of bruising or several other adminicles of evidence already described. For the purposes of this opinion, however, it assumes that this was primarily a case in which the Crown maintained that the complainer was so intoxicated that she could not consent. The appellant's version of events, on the contrary, was that the sexual conduct had not only been entirely consensual, it had also been initiated by the complainer.

[16] In *Graham* v *HM Advocate* 2017 SCCR 497 the court (LJG (Carloway) at para [23]) explained that, although an absence of belief was an essential element of the crime of rape, it did not require "formal proof". This latter expression was intended to mean that it did not

require to be established by corroborated evidence. Whether an accused had, or did not have, a reasonable belief was an inference to be drawn from proven fact (eg the use of force or, in this case, signs of obvious intoxication). The accused's mental element did not require to be supported by corroborated testimony. Thus far, the matter ought to have been clear. That clarity ought to have been heightened by the model directions (at para [26]) that it was only intentional penetration and lack of consent that required corroborated evidence. However, the court recognises that the phraseology of the opinion in *Graham* (at para [24]) may have been interpreted as meaning that in some cases, in which reasonable belief was a live issue, there did require to be corroborated evidence of a lack of reasonable belief and thus a direction on that matter. That is not what was intended. Rather, the court was simply attempting to say that no direction on reasonable belief was required unless that issue was live. It so happened that the specific direction in *Graham*, with which the court was dealing, was one relating to corroboration.

[17] Putting matters in reverse order, first, although a judge ought to continue to direct a jury that the definition of rape includes an absence of reasonable belief, no further direction on reasonable belief is required unless that is a live issue at trial. That issue will be live only in a limited number of situations in which, on the evidence, although the jury might find that the complainer did not consent, the circumstances were such that a reasonable person could nevertheless think that she was consenting. That does not normally arise, for example, where an accused describes a situation in which the complainer is clearly consenting and there is no room for a misunderstanding.

[18] Secondly, it is only intentional penetration and lack of consent that require to be proved by corroborated evidence.

[19] In a case, as here, where intercourse is admitted or otherwise proved, and the Crown contended that the complainer was incapable of consent as a result of the effects of alcohol, that incapacity does require formal proof. It will be proved where the complainer speaks to such a state (as the complainer did here) and there is supporting evidence of that state. The corroboration in this case came from the evidence of the complainer's friend, the bar staff, the CCTV recording and the complainer's boyfriend and his mother. In this situation it is the complainer's state of intoxication, rather than any distress, that is important. If it is held that the complainer could not consent because of the effects of alcohol, that is all that is required as a matter of sufficiency. The jury would still have to consider an accused's evidence that the complainer was not so incapacitated through drink that she could and did consent, but that is another matter.

[20] The trial judge's directions were accordingly erroneous in a number of respects, notably on both absence of reasonable belief and the need to provide corroborated evidence of that absence. These directions were entirely in favour of the appellant. They did not cause any miscarriage of justice. The jury's verdict, based on the complainer's intoxication, would have been almost inevitable standing the state of the proof. The appeal is accordingly refused.