APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 56
HCA/2018/525/XC

Lord Brodie
Lord Malcolm
Lord Glennie

OPINION OF LORD BRODIE

in

APPEAL AGAINST CONVICTION

by

RBA

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Lenehan; Faculty Appeals Service (for McAfee, Solicitors, Coatbridge)
Respondent: Borthwick, AD; the Crown Agent

27 August 2019

[1] On 29 August 2018 at Glasgow High Court, the appellant was convicted after trial on indictment of five charges of sexual offences committed against two complainers. On 10 October 2018 he was sentenced to a total of 8 years imprisonment.

[2] In seeking a conviction, the Crown relied on the principle of mutual corroboration associated with the decision in *Moorov* v *HM Advocate* 1930 JC 68. Following the closing of the Crown case at trial, defence counsel advanced a submission of no case to answer in terms of section 97 of the Criminal Procedure (Scotland) Act 1995 in relation to the five charges. It was argued for the appellant that the interval between the conduct giving rise to the charges relating to the first complainer and the conduct giving rise to the charges relating to the second complainer was such that the evidence could not justify the application of the *Moorov* principle.

[3] The trial judge repelled the submission, and the case went to the jury. The appellant now seeks to appeal against his conviction in respect of all five charges on the basis that the trial judge ought to have upheld the no case to answer submission. That is the sole focus of this appeal, with no issue taken by the appellant in relation to the trial judge's subsequent charge to the jury on the application of *Moorov*.

The Charges

[4] The charges of which the appellant was convicted may be stated as follows:

> "(001) on an occasion between [a date in July 1978 and a date in July 1980], both dates inclusive, at [an address in Bargeddie], you RBA did indecently assault [MR born in July 1966] … and did seize hold of her and penetrate her anus with your penis to her injury;
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> (002) on various occasions between [a date in July 1978 and a date in July 1980], both dates inclusive, at [addresses in Bargeddie] you RBA did use lewd, indecent and libidinous practices and behaviour towards [MR born in July 1966], a girl then above the age of 12 years and under the age of 16 years, place your hands inside her underwear and touch and penetrate her vagina with your finger: CONTRARY to the Sexual Offences (Scotland) Act 1976, Section 5;

(003) on various occasions between [a date in May 1993 and a date in May 1996], both dates inclusive, at the rear of a health centre, Easterhouse, and at addresses on Westerhouse Road, Glasgow, the exact locations which are meantime to the Prosecutor unknown, you RBA did use lewd, indecent and libidinous practices and behaviour towards [LW born in May 1984] … and did make lewd comments to her, touch her on the bottom, induce her to masturbate you, masturbate in her presence and touch her vagina;

(004) on various occasions between [a date in May 1996 and a date in May 1997], both dates inclusive, at the rear of a health centre, Easterhouse, and at addresses on Westerhouse Road, Glasgow, the exact locations which are meantime to the Prosecutor unknown, you RBA did use lewd, indecent and libidinous practices and behaviour towards [LW born in May 1984] a girl then of or over the age of 12 years and under the age of 16 years, and did make lewd comments, touch her on the bottom, induce her to masturbate you, masturbate in her presence and touch her vagina: CONTRARY to the Criminal Law (Consolidation) (Scotland) Act 1995, Section 6.

(005) on 1 January 1997 at an address on Westerhouse Road, Glasgow, the exact location which is meantime to the Prosecutor unknown, you RBA did indecently assault [LW born in May 1984] and did seize her by the arms, remove her clothing, hold her down, lick her vagina and penetrate her vagina with your penis and you did rape her all to her injury."

The Evidence

[5] The first complainer, MR, is one of eight siblings (five girls and three boys), among whom are her sisters, BR and KR. BR is the mother of the second complainer, LW, and accordingly the first complainer and KR are the second complainer's aunts. The appellant was married and had children. KR acted as babysitter to these children. The appellant entered into a relationship with KR who became his partner. They lived together but did not marry. At the material time, the first complainer was 12 to 13 years of age. At the time of the conduct alleged in charge (003), the second complainer was 9 to 11 years of age. At the time of the conduct complained of in charges (004), and (005), the second complainer was 12 years of age. The evidence of both complainers disclosed that the appellant was in a position of trust in

respect of these young children due to his long-term connection with different generations of their extended family (the parents of MR, their 8 children and their 14 grandchildren).

[6] Charge (001) referred to a single incident in which the appellant anally penetrated the first complainer with his penis in a toilet in her home in Bargeddie. She confirmed that he ejaculated and said to her "If you tell my wife, I'll tell her it was your fault", describing the act as painful. In respect of charge (002), the first complainer described the appellant touching her vagina with "his hand, inside", and stated that this happened nearly all the time that she went round to his home, also in Bargeddie, to ask for money for alcohol for her mother.

[7] In respect of charges (003), and (004), the second complainer visited the flat that the appellant lived in with her aunt KR in Westerhouse Road. From the age of 10, the appellant would talk inappropriately to her and touch her when no one else was around. He touched himself and pressurised her to touch him. He made comments such as "Let me touch your pussy" and "I can't wait to break you in". He touched the complainer's vagina, (touching the "inner part of my lips"), made her touch her own vagina and made her masturbate him. He instructed her to meet him behind a medical centre in Easterhouse where he would do these things. He would see her outside and say, if she did not meet him behind the doctor's surgery, "he would tell my aunt [KR] things about me." He sometimes gave her cigarettes at the age of 12 and she was scared of him and ashamed. She was concerned that he would tell her aunt that she was smoking.

[8] Charge (005) involved the indecent assault and rape of the second complainer on a single occasion when she had been asked to watch the appellant's dogs at the

flat while he and her aunt were at a New Year party elsewhere. He returned alone to the flat in the early hours of the morning and proceeded to put his mouth to her genitals. He then took her wrists and put his penis inside her vagina. She described the pain as unbearable and recalled passing out. She was next aware of lying naked on the sofa bed with blood all over her, on her thighs, between her thighs, down her legs and on her vagina.

[9] Evidence was also led by the Crown about a police interview with the appellant on 31 March 2016 at Motherwell police office which was mixed in nature. The appellant denied the critical allegations throughout but accepted that the first complainer came round to his house, and, further, that the second complainer came to his house and slept on the couch.

[10] A brief joint minute setting out the agreed position on family relationships and dates of birth was also before the jury.

The no case to answer submission

[11] At the close of the Crown case, defence counsel advanced a submission in terms of section 97 of the Criminal Procedure (Scotland) Act 1995. Having heard detailed arguments from both sides, and reflected overnight, the trial judge repelled the submission the following morning, providing his reasons for doing so. In his report to this court, the trial judge summarises these submissions and provides these reasons in the terms which he had stated in court when repelling the section 97.

[12] The trial judge records that he had been referred to what was said by the Lord Justice Clerk (Carloway) in *AS* v *HM Advocate* 2015 SCCR 62 at paras [9] and [10], by the Lord Justice Clerk (Dorrian) in *JL* v *HM Advocate* 2016 SCCR 365 at

para [30], by the Lord Justice Clerk (Gill) in *AK* v *HM Advocate* 2012 JC 74 at para [14] and by Lady Smith in *Livingstone* v *HM Advocate* 2014 SCCR 675 at para [14] endorsing the test set out by the Lord Justice General (Hope) in *Reynolds* v *HM Advocate* 1995 JC 142.

[13] The "essential question" was, in the eyes of the trial judge, "against a background of a time gap of nearly 13 years in what is essentially a two complainer case, of whether there is some extraordinary feature in the evidence that could be said to change the whole complexion of the Crown case and entitle the jury to conclude that, notwithstanding the said lengthy interval, the evidence indeed discloses, when considered as a whole, a course of conduct by the accused". From the judge's report, it is clear that this question was formulated by reference to what was said by the Lord Justice Clerk (Gill) in *AK supra*, and by Lady Smith in *RF* v *HM Advocate* 2016 JC 189 at para [22].

[14] In announcing his decision to repel the section 97 submission the trial judge said this:-

> "5. I have concluded that the Crown's submissions are in this case to be preferred, and I therefore repel the submission. My reasons for so doing can be stated relatively briefly, given that I have already set out the respective contentions of counsel in these remarks. In so doing I have concluded that it cannot be said that on no possible view could it be asserted that the individual instances in the libel can be seen or characterised as component parts of a single course of conduct. What then is the object of that course of conduct, and how can that be encompassed in a short description? It can in my view be said to be the sexual abuse of pubertal females within the R__ family group, the component parts of which are as set out in the libel in the indictment, covering periods of repeated acts of abuse spanning two years and four years approximately respectively for each complainer, taking place largely in family homes lived in by or frequented by the accused, involving alcohol, and including the anally penetrative attacks set out in charges 1 and 5, and during which the accused's manner of vaginal contact, involving full digital penetration of the first complainer, and touching of the 'inner part of my lips' as the second complainer, put matters, fell also to be considered. The

> key to understanding that the course of conduct is properly to be viewed as a singular one lies in the accused's unique relationship, which facilitated his contact with the complainers, with three generations of the [R] family: … and this relationship can be viewed as durable and geographically flexible, between Bargeddie and Easterhouse. This nexus, as the advocate depute put it, sheds light on and gives impact to the special or compelling feature in the evidence founded on by the Crown in this case, namely the threats made by the accused to each complainer to prevent them speaking out about his conduct: to the first complainer, 'If you tell my wife, I'll tell her it was your fault'; and to the second complainer, if she did not meet him as instructed, behind the surgery, 'he would tell [KR] things about me', which concerned the second complainer smoking cigarettes he gave her. The key features of these threats were these: (i) that they were made under reference to the accused's partner at the time, (ii) each of whom was very closely connected to or indeed a direct member of the R___ family, and (iii) (they) could only function with a deterrent effect, which was the accused's objective, because of the interwoven and prior nature of the accused's close relationships with the parties involved, in a family or *quasi* family sense. So, the threats can only be seen to contain content and function due to (i) the pre-existing relationship of the first complainer's family and the accused and his wife, and (ii) the pre-existing relationship of the accused and his partner, [KR], with the second complainer, her niece. In these whole circumstances, on the evidence led, I am satisfied that the Crown has here duly presented a compelling picture which is instructive of a single course of conduct.
>
> 6. These cases must always be considered in the light of the applicable general principles I have sought to set out, but they are always also essentially and inevitably fact-specific. On the facts of this case, as I view the Crown case at this stage, I am satisfied, for these reasons, that one course of conduct is potentially available for consideration by the jury, and I accordingly repel the submission ..."

Submissions to this court

Appellant

[15] A form 15.16 containing outline arguments for the appellant was lodged on 15 March 2019. A second form 15.16, repeating the outline arguments but with additional information, was lodged on 11 April 2019. On behalf of the appellant, Mr Lenehan adopted the outline arguments which he developed in submitting that the trial judge had erred in repelling the submission that there was no case to

answer. The period of time separating the charges relating to the respective complainers was some 12 years and 10 months. Although there is no maximum interval of time beyond which the *Moorov* doctrine cannot apply (*JL* v *HM Advocate supra* Lord Justice Clerk (Dorrian) at para [30]) there must be an underlying unity of intent such as to indicate a course of conduct on the part of the accused, systematically pursued. Care must be taken to guard against the real risk that evidence which points only to a general disposition to commit a particular type of offence will, wrongly, be allowed to be used as corroboration (*JL* v *HM Advocate* at para [22]). That, it was submitted, was exactly what had happened in the appellant's case.

[16] Mr Lenehan took no issue with the accuracy of the trial judge's summary of the evidence. He accepted that there were similarities as between what had been alleged by the first complainer and what had been alleged by the second complainer, as the trial judge had noted. However the similarities relied upon by the Crown, and the trial judge, were eloquent of what the Lord Justice Clerk (Dorrian) had described in *RB* v *HM Advocate* (2017 JC 278 at para [30]) as "the similarities one might expect to find in any two offences of this kind." However, where, as here, there were two complainers and the gap in time between the offending alleged by the first complainer and that alleged by the second complainer was nearly 13 years more was required; some reason or "extraordinary feature'" was needed to explain the lack of persistence during the 13-year period if what was alleged by the first offender and what was alleged by the second complainer were to provide mutual corroboration. There had to be something such as to allow the jury to conclude that the offending formed part of a single course of conduct systematically pursued by the appellant,

notwithstanding the lengthy interval during which there was no evidence of anything untoward (*AK* v *HM Advocate supra* at para [15]). There was no such feature in the present case. At its highest, the evidence suggested two separate courses of conduct, which were not unified and accordingly not amenable to the application of the *Moorov* doctrine.

[17] The fact that both chapters of offending occurred within one extended family was not an extraordinary feature. The appellant was embedded within that sizeable family over the whole period covered by the indictment, including the nearly 13 year interval. He appeared to have had continuous contact with all manner of other female children of about the ages of the first and second complainer at the time referred to in the libel, with no suggestion of attempted or successful sexual offending against these other children. There was nothing to suggest that a continuation of his offending had, in some way, been thwarted during the interval. The onus was on the Crown to demonstrate why *Moorov* could be relied on given the time gap. The jury should not be allowed to speculate on what might be an explanation.

[18] The threats made against the complainers were not a special feature. The threats to each complainer were of a different nature, thereby reducing any similarity to the bare fact that threats were used, which is a commonplace characteristic of such offending behaviour.

[19] Here there were only two complainers. There was a need for caution, particularly given that the evidence that had been led from these complainers might be expected to evoke an emotional response.

[20] The conclusion that the doctrine can only be excluded at the stage of a no case to answer submission where on no possible view could it be said that the circumstances founded upon by the Crown in the libel were component parts of a single course of conduct had to be tempered with the Court's comments in *RF* that it was not necessary for a case to be extreme, before on a submission such as the one made in the present case, should be given effect and the case taken away from a jury.

Crown

[21] The advocate depute adopted the written argument for the Crown. He reminded the court that at the stage of a no case to answer submission, the trial judge must take the available evidence at its highest for the Crown. Such a submission should not be sustained unless the court is persuaded that on no legitimate view of the evidence, taken at its highest, could it be open to a reasonable jury, properly directed to convict the accused (*Williamson* v *Wither* 1981 SCCR 214; *Du* v *HM Advocate* 2009 SCCR 779 at para [3], *Wang* v *HM Advocate* [2011] HCJAC 120 at para [10], *RMY* v *HM Advocate* 2018 SCCR 253 paras 5 to 7, *Donegan* v *HM Advocate* 2019 SCCR 106).

[22] What matters for the operation of mutual corroboration is the underlying similarity of the alleged conduct *(McMahon* v *HM Advocate* 1996 SLT 1139, Lord Justice General (Hope) at 1142). Any course of conduct must be viewed as a whole, not in individual compartments (*C(JG)* v *HM Advocate* 2017 SCL 1042 at para [12], *HMcA* v *HM Advocate* 2015 JC 27 Lord Justice General (Carloway) at para [11]).

[23] There is no maximum time limit for the application of the doctrine (*AK* Lord Justice Clerk (Gill) at para [14]). The more similar conduct is in character, the less important a significant time gap may be (*AS* v *HM Advocate* 2015 SCCR 62, Lord Justice General (Carloway) at para [10]). Even where there is a substantial interval, compelling similarities will merit consideration of the whole circumstances by the jury (*McAskill* v *HM Advocate* 2016 SCCR 402, Lord Justice General (Carloway) at para 26; *BM* v *HM Advocate* 2017 HCJAC 55, Lord Turnbull at para [27]).

[24] The fact-sensitive nature of cases can render the doctrine difficult to apply (*RB* v *HM Advocate supra*, Lord Justice Clerk (Dorrian) at para [27]). That an individual appears to be taking advantage of opportunities as they arise does not mean that there can be no course of conduct systematically pursued. A course of conduct does not necessarily require that the offence be committed or attempted every day or even every month (*Moorov*, *supra*, Lord Sands at p89).

[25] In relation to similarities and dissimilarities, reference was made to the dicta of the Lord Justice General (Hope) in *Reynolds* v *HM Advocate* 1995 JC 142 at 146D. The existence of dissimilarities does not preclude the operation of the doctrine (*Livingstone* v *HM Advocate supra* Lady Smith at para [17]). Reference was also made to *L (A)* v *HM Advocate* 2017 SCL 166. It is important to look at the totality of the circumstances in which the offending behaviour took place (*TN* v *HM Advocate* 2018 SCCR 109, Lord Justice Clerk (Dorrian) at paras 11 to 17; *Donegan supra*, at para [38]).

[26] The advocate depute acknowledged that the appropriate focus in the present case was on the substantial time-gap between the end of what was alleged by the first complainer and the beginning of what was alleged by the second complainer and the absence of any explanation for that. The Crown accepted the accuracy of the

additional information provided with the second form 15.16 for the appellant. There had been, as Mr Lenehan had put it, a "continued flow" of children in and out of the house that the appellant had lived in until at least 1996. MR had allowed her cousins, sisters and other young relatives to remain in unguarded contact with the appellant despite (if she spoke the truth) him being an abuser of children.

[27] The advocate depute nevertheless argued that the appellant's close connection with the complainers' extended family was important. That connection had endured over a period of time. Although part of it, the complainers were less involved with the family, and were therefore more isolated and vulnerable than others within the family matrix. After the abuse spoken to by the first complainer, the appellant had entered into a relationship with another family member who was around 16 years his junior (KR) before focussing his attention on the second complainer. The second complainer spoke to the appellant wanting to "break [her] in". The threats used by the appellant against the complainers were unusual and distinctive and therefore an extraordinary and compelling feature of the case. They were only effective because of the appellant's relationship with the wider family.

[28] There were other similarities, namely: (i) each of the complainers were around puberty at the time of the offending; (ii) the conduct involved repeated acts spanning two and four years respectively; (iii) the abuse largely took place in family homes lived in or frequented by the appellant; (iv) each complainer spoke to sudden acts of a serious nature involving penile penetration (charges 1 and 5); (v) the appellant engaged in conduct where he ran the risk of discovery; and (vi) both complainers gave evidence about digital and vaginal contact.

[29] The evidence, in its totality, disclosed similarities, both compelling and more conventional, redolent of an underlying course of sexual conduct by the appellant systematically pursued towards pubertal females in a particular family with whom the appellant had a close and enduring connection. The particular females were more vulnerable due to their isolation within that family. The conduct was underpinned by threats of disclosure designed to make them look bad to other members of the family. From the various adminicles of evidence, it was open to a jury, properly directed, to draw an inference that the offences spoken to by the complainers were part of a single course of conduct systematically pursued by the appellant.

Decision

[30] As the Lord Justice General has had recent occasion to observe, whatever may be the difficulties in applying mutual corroboration in sexual offences cases, the principle to be applied is clear (*HM Advocate* v *SM (2)* [2019] HCJAC 40 at para [5]). The Lord Justice General then (at para [6]) went on to state that principle, under reference to three authorities, as follows:

> "In any case in which mutual corroboration is relied upon, the court is looking for 'the conventional similarities in time, place and circumstances in the behaviour proved in terms of the libel ... such as demonstrate that the individual incidents are component parts of one course of conduct persistently pursued by the accused'(*MR* v *HM Advocate* 2013 JC 212, LJC (Carloway), delivering the opinion of the Full Bench, at para [20]): 'Whether these similarities exist will often be a question of fact and degree requiring, in a solemn case, assessment by the jury ... under proper direction of the trial judge' (*ibid*). In a case where there are similarities as well as dissimilarities, it has been said that a submission of insufficient evidence should be sustained only where 'on no possible view could it be said that there was any connection between the two offences' (*Reynolds* v *HM Advocate* 1995 JC 142, LJG (Hope), delivering the opinion of the court, at 146). That is a shorthand

> expression which means simply that such a submission ought only to be sustained where, on no possible view of the similarities and dissimilarities in time, place and circumstances, could it be held that the individual incidents were component parts of one course of conduct persistently pursued by the accused (see also *Donegan* v *HM Advocate* 2019 SCCR 106, LJC (Dorrian), delivering the opinion of the court, at para [38])."

[31] The three authorities referred to by the Lord Justice General were put before us, as were a significant number of other decisions, but as was the case in *HM Advocate* v *SM (2)*, parties took no issue with the principle which the decisions stated, re-stated and illustrated. The issue was with its application. In particular, the issue was with its application to the offences on the one hand spoken to by the first complainer (charges 001 and 002) and the offences on the other hand spoken to by the second complainer (charges 003 to 005) where the gap in time between the latest date in the libel for charges 001 and 002 and the earliest date in the libel for charge 003 was nearly 13 years.

[32] In the absence of any contrary evidence led under reference to a charge, or docket in terms of section 288BA of the Criminal Procedure (Scotland) Act 1995, it is to be presumed that an accused has not committed a sexual offence and is not guilty of any act or omission connected with a sexual offence charged in the indictment. There is no room for speculation as to what an accused might have done during any period in respect of which there is no allegation and no proof. Thus, when I refer to a gap in time I mean a period of time when the accused must be taken to have abstained completely from the sort of behaviour libelled in the charges.

[33] Where the Crown relies on mutual corroboration, the similarities which the court is looking for are similarities in time, place and circumstances in behaviour as between or as among what has been charged and spoken to by at least one witness.

In such a situation, the difficulty about asking a jury to accept that offences separated by a gap of some 13 years demonstrate similarity in time and that they are component parts of one course of conduct persistently pursued by the accused, is obvious. That much was noted by the Lord Justice-Clerk (Dorrian) in *RB* v *HM Advocate* at para [28]. She there quoted what had been said by Lord Sands in *Moorov* at 89:

> "[Time] is an important and, in some aspects, a vital consideration. This results from the quality of the acts as evidence of a 'course of conduct'. A 'course' involves some continuity. Acts isolated by a long period of time do not make a course of conduct."

[34] What then can be made of a period of time extending to nearly 13 years?

[35] It is now accepted that there is no maximum interval of time fixed by law beyond which the *Moorov* principle cannot apply. A long gap in time between instances of offending therefore does not necessarily exclude the possibility of the application of the principle. In *K* v *HM Advocate* the period was 13 years and 10 months; in *AS* v *HM Advocate* it was 18 years. Neither period was held to be too long. However, where the Crown relies on *Moorov* to provide corroboration, the onus is on the Crown to establish that the individual incidents are component parts of one course of conduct persistently pursued, notwithstanding a time-gap which would point in the other direction. That is of course true whether any time-gap is long or short but the longer the time-gap, for the reasons noted by Lord Sands, the more it will point away from a unitary course of conduct and the more difficult it will be for the Crown to discharge its onus.

[36] The Crown may seek to negative or at least attenuate the effect of a long time-gap by leading evidence as to why the accused may have left off a course of conduct

for a period of time. It may suggest that during the time-gap there was a lack of opportunity to offend. That was the Crown's position, for example, in *RB*. While there may be very obvious cases, such as where an accused has been in custody during the relevant period, what amounts to a lack of opportunity may depend on what can be demonstrated to be the course of conduct. If the course of conduct is the abuse of young children in a particular family, then a long time interval may be explained as a generational gap between the children of one generation reaching adulthood and the children of the next generation reaching an age which attracts the abuser (see *AS* v *HM Advocate* at paras [8] and [12], and *RB* v *HM Advocate* at para [30]).

[37] In addition to cases where a long time-gap is directly explained, for example by demonstrating lack of opportunity, the authorities contemplate the application of the *Moorov* principle notwithstanding a long time-gap where the other circumstances of the case include features of "unusual" or "striking" similarity or are otherwise "special" or "extraordinary" or "compelling" (see review of the cases and the expressions employed there by Lord Turnbull in *Reilly* v *HM Advocate* 2017 SCCR 142).

[38] In the present case the advocate depute did not rely on circumstances which explained the time-gap in the sense that lack of opportunity might explain a time-gap. Indeed, in a context where the course of conduct relied on by the Crown was the sexual abuse of young girls of the extended R family, he accepted that there had been unchallenged evidence that there had been a "continued flow" of children from that family in and out of the house that the appellant had lived in until at least 1996. What the advocate did rely on, as had the trial judge, as an extraordinary and

compelling feature, was that both complainers had given evidence of distinctive and unusual threats of disclosure by the appellant which were counterintuitive. MR gave evidence that the appellant had said: "If you tell my wife [KR], I'll tell her it was your fault". LW gave evidence that the appellant told her that if she did not meet him as he instructed, "he would tell my aunt [KR] things about me", which she took to mean that she was smoking.

[39] I accept, as Mr Lenehan accepted, that there are a number of similarities between the offences of which the first complainer gave evidence and the offences of which the second complainer gave evidence. These similarities include the accounts of the appellant making the threats to which the advocate depute drew attention. The evidence as to threats is relevant. The threats are features which weigh in the balance. However, I am quite unable to regard them as sufficiently special or extraordinary to impose on events so disparate in point of time the quality of a single course of conduct. Whether mutual corroboration applies is of course a jury question, to be answered on consideration of the whole evidence; a judge is only entitled to take that question away from the jury if, on no possible view of the similarities and dissimilarities in time, place and circumstances, could the jury hold that the individual incidents were component parts of one course of conduct persistently pursued by the accused. On the other hand, if that test is met then it is the duty of a judge in the face of a submission of no case to answer to withdraw the case from the jury's consideration. In my opinion that test is met in the present case.

[40] I would move your Lordships to allow the appeal.

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27 August 2019

[41] I am in agreement with the opinion of your Lordship in the chair, and would therefore allow the appeal. Lord Glennie asks, why should it matter whether incidents are seen as isolated events or as part of one course of conduct? He suggests that a jury could reasonably regard separate incidents as being mutually corroborative if the facts are sufficiently similar. He criticises the irrationality said to

be inherent in past decisions which involved a single course of conduct being identified on the basis of two events separated by a long period of time.

[42] I have discussed some of this, and related topics, in *CW* v *HMA* [2016] HCJAC 44, 2016 SCCR 285 at paragraphs 49 – 53, and in *HMA* v *ER* [2016] HCJ 98, 2016 SCCR 490 at paragraphs 13 – 14, the latter being a long time gap case (24 years). (For ease of reference these passages are set out in an appendix to this opinion.) The *Moorov* doctrine exists in the context of (a) a need for corroborative evidence before a guilty verdict can be returned, and (b) a general concern about permitting evidence that someone committed crime X in support of an accusation that he committed crime Y, which in turn is linked to notions of relevancy and fairness. If two uncorroborated witnesses are speaking to different events which can be seen as constituent elements in a single course of criminal conduct, a conviction for both is reconcilable with our law on corroboration (see Lord Emslie in *AK* v *HMA* 2012 JC 74 at paragraph 23), and more easily meets the demands of relevance and of fairness to the accused.

[43] Lord Glennie may well be correct in observing that on occasion judges have stretched the doctrine of mutual corroboration as presently framed beyond its breaking point, and no doubt respectable arguments could be mounted in favour of a broader approach based on a "similar facts" rule along the lines of that deployed south of the border: see for example Professor Peter Duff's article "Towards a Unified Theory of 'Similar Facts' Evidence in Scots Law", 2002 JR 143. However, the need for demonstration that the individual incidents "are component parts of one course of criminal conduct persistently pursued by the accused" was recently reaffirmed in a five judge decision, see *MR* v *HMA* 2013 JC 212 at paragraph 20.

While much more could be said on the subject, perhaps that should await any appeal which involves a review of *MR*.

APPENDIX

***CW* v *HMA* [2016] HCJAC 44, 2016 SCCR 285**

[49] The Crown contends that there were sufficient similarities, notwithstanding the lack of evidence that the appellant took advantage of an unwilling DA. It may be important to remember that the touchstone for the application of the *Moorov* doctrine is not confined to a search for and assessment of similarities. Despite all the twists and turns over the years, the fundamental test has remained much the same as laid down in *Moorov*. In the recent five judge decision in *MR* v *HMA* 2013 JC 212, it was described as follows (at paragraph 20):

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

[50] Though this is a unitary test, it can be seen as having two parts: firstly, are there the similarities mentioned, and secondly, are they component parts of one course of criminal conduct systematically pursued by the accused? Usually, the focus has been on the first part of the test, no doubt on the thinking that the second part is covered if and when the necessary similarities are identified. However, sometimes a subtle shift occurs in that the question posed and answered is, can the charges be described as examples of the same crime in a reasonable sense of the term? If an affirmative answer to that question is treated as sufficient for application of the rule of mutual corroboration, an important part of the legal test is

side-stepped. A possible explanation for the difference of opinion in *B* v *HMA* 2009 JC 88, is that the majority equiparated the "underlying unity" mentioned by Lord Justice General Clyde in *Moorov* with similarities in time, place and circumstances, plus similarities in the conduct described in the evidence; whereas Lord Eassie looked beyond these to a search for "a single unified course of criminal conduct." His Lordship described the classic case of separate attempts to suborn witnesses in a forthcoming trial. This was to be distinguished from cases where, notwithstanding the conventional similarities, there are differences, for example as to purpose, which prevent the application of the doctrine- see paragraph 31. (It can be noted that at paragraph 18 in *MR*, the court referred to the need for an "underlying unity of purpose.") Lord Eassie required "similarity in the essence of the particular criminality of the conduct in issue."

[51] That said, all such phrases still leave room for debate as to the correct judgment to be made in a particular case. These are not hard-edged rules. One could agree with the outcome of the case in *B*, while applying the same process of reasoning as that adopted by Lord Eassie, perhaps by reference to the developments in modern thinking mentioned by the then Lord Justice Clerk (Carloway) in *MR* at paragraph 17, and the example of "sexual and physical abuse of different kinds perpetrated by one person but occurring within the same family unit, extended or otherwise…". Whatever else, it is clear that the law has moved away from outdated rigid rules, such as identity of *nomen* juris and that a lesser crime cannot corroborate a greater one. Such restrictions excluded the application of the doctrine before one even approached the first hurdle. Nonetheless, the fact remains that in *MR* the court reaffirmed the need for the identified similarities to demonstrate a systematic course

of criminal conduct; or, as it was put by Lord Justice General Clyde in *Moorov* at page 73, that they are:

> "subordinates in some particular and ascertained unity of intent, project, campaign or adventure, which lies beyond or behind - but is related to the separate acts."

The Lord Justice Clerk (Alness) talked of "a *nexus* which binds the alleged crimes together", having earlier referred to Dickson's "unity of character" (pages 79/80). In short, it is not enough simply to identify the alleged crimes as being the same in any reasonable sense of the term; something more is required. Were it otherwise, the second part of the test as described in *MR* would be redundant, and one would be close to a "similar fact" evidential rule.

[52] A recent example of the court refusing to apply the *Moorov* doctrine notwithstanding "striking similarities" in the appellant's conduct towards each of the complainers is to be found in *Pringle* v *Services* 2011 SCCR 97. Having begun its consideration by a reference to *Ogg* v *HMA* 1938 JC 152, the court said:

> "… the much more difficult question is whether the high test laid down by Lord Justice Clerk Aitchison - that the court be satisfied as 'a reasonable and practical certainty' that the offences are instances of one course of conduct pursued by the same person - can be met in this case." (paragraph 19)

The court reminded itself that the *Moorov* doctrine should be applied:

> "with caution, to guard against the danger of evidence demonstrating the general disposition to commit a particular kind of offence being treated as corroboration."

The decisive factors in that case were the time gaps between the various incidents. Thus, even though the crimes were the same in any reasonable sense of the term, and their particular circumstances were all very similar (pupils aged 14/15 assaulted on outward bound courses by their teacher), the court was not persuaded that the

evidence concerned events which "formed part of a course of conduct which was systematically pursued by (the appellant)".

[53] Reverting to the circumstances of the present case, many will need little persuasion that if someone is prepared to groom a 15 year old, give him alcohol, and then take advantage of him in the way spoken to by DA, there is every likelihood that he will be prepared to do the same in respect of an intoxicated JW. The appellant pled guilty to charge 5, so the view might be taken that clearly he is someone who is prepared to commit sexual offences of this general type. However, this is exactly the kind of thinking which judges have been anxious to warn against. In *Moorov* it was stated that the rule requiring corroboration guards against the "twin dangers" of (a) that the crime may not have been committed, and (b) that if it was, it was not committed by the accused (the former being the more pertinent here). The problem is that, as yet our law has not developed a sufficiently clear and certain test for distinguishing between a case of "a general disposition to commit a particular kind of offence" and the "underlying unity of purpose" mentioned earlier.

***HMA* v *ER* [2016] HCJ 98, 2016 SCCR 490**

[13] It is clear that since its inception the *Moorov* doctrine, at least in its application, and certainly in respect of the time characteristic, has become somewhat attenuated. Nonetheless my impression is that the Crown approach in the present case involves something of a step change, even in the context of the more liberal approach adopted in recent years. Of course there are cases where long time gaps have been accommodated, and there are many when they have not. It is not easy to identify any concrete guidance beyond the occasionally expressed need, if the gap is

to be bridged, for something "compelling", "extraordinary", "special", or some equivalent epithet.

[14] In these circumstances it may be helpful to return to basic principles. I do not understand the *Moorov* doctrine to be designed to encroach in any fundamental way on the rule that there must be corroborative evidence as to both the fact that a crime was committed and that it was committed by the accused. Our law still adheres to this as a safeguard against errors being made on one or both of these matters. On the face of it the *Moorov* doctrine might seem to violate these requirements, in that there can be only one source of evidence pointing to event A, and another separate single source of evidence pointing to event B. However, so long as event A and event B can be identified as constituent elements of a single course of criminal conduct, then, if the evidence is accepted, each can corroborate the other and provide a sufficiency of evidence.

> The point was put in simple terms by Lord Emslie in *AK:*
> "Subject to its established limitations the *Moorov* principle is essentially straightforward: corroborative proof of a single course of criminal conduct may be achieved through the testimony of two or more individual victims of constituent offences".

The classic example is the subornation of intended witnesses in respect of a particular criminal trial, though it now seems to have been supplanted by attempted match-fixing. While the doctrine is not restricted to such confined circumstances, it is nonetheless subject to limits; and we have the benefit of a recent five judge decision in *MR* v *HM Advocate* 2013 JC 212, where the court said at paragraph 20:

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

APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 56
HCA/2018/525/XC

Lord Brodie
Lord Malcolm
Lord Glennie

OPINION OF LORD GLENNIE

in

APPEAL AGAINST CONVICTION

by

RBA

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Lenehan; Faculty Appeals Service (for McAfee, Solicitors, Glasgow)
Respondent: Borthwick AD; the Crown Agent

27 August 2019

[44] I agree that this appeal must be allowed for the reasons given by Lord Brodie in his Opinion. I do, however, have considerable misgivings about having to reach this conclusion, and that for reasons which I shall try to explain.

[45] As your Lordship makes clear, the argument in this appeal has focused on the question whether on the evidence adduced at trial the doctrine of mutual corroboration (*Moorov* v *HM Advocate* 1930 JC 68) can apply to this case. That doctrine, as authoritatively laid down in recent cases, allows evidence directed to one

incident to corroborate evidence directed to another incident where the conventional similarities in time, place and circumstances in the behaviour proved to have occurred are such as to

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

See eg *HM Advocate* v *SM (2)* [2019] HCJAC 40 at paragraph [5], quoted by your Lordship at paragraph [30]. Your Lordship has explained why that doctrine so defined cannot apply here – the length of time between the different incidents spoken to by the two complainers, coupled with the absence of any sufficiently special or extraordinary similarities in the conduct of the appellant, makes it impossible to give to those different incidents the character of a single course of conduct persistently pursued by the appellant. As I have said, I agree with that analysis and therefore agree with the conclusion that the doctrine of mutual corroboration as presently delineated cannot assist the Crown in the present case. The Crown did not seek to support the conviction on some wider basis allowing corroboration by similar fact evidence unfettered by the need to prove a single course of criminal conduct persisted in by the accused.

[46] Yet it is difficult as a matter of principle to see why the availability of the evidence about one incident as potential corroboration of the evidence concerning the other should depend on whether the circumstances of the two incidents can be squeezed into a *Moorov* straightjacket. Putting the matter another way, either the evidence about the one incident is potentially relevant and supportive (corroborative) of the evidence about the other or it is not. Why should the

resolution of that issue depend on the question whether the incidents should be seen as two separate incidents or as part of the one course of conduct?

[47] *Moorov* itself was a case where the repeated transgressions of the accused each spoken to by a different witness lent itself to the characterisation of what had occurred as a single or unitary course of criminal conduct persisted in by the accused. It was therefore not surprising that the court should express itself in those terms. What is perhaps more surprising is that, in its adoption and repetition in subsequent cases, the principle derived from cases such as *Moorov* has usually been expressed as being confined to such circumstances – ie to circumstances where the different incidents can be seen as part of a single course of criminal conduct persisted in by the accused – whereas it might legitimately have been treated as but one example of a broader principle allowing similar fact evidence to be admissible where its relevance is established. Why should it be an essential part of the doctrine of mutual corroboration that the several incidents must all be part of a single course of conduct persisted in by the accused? Surely the doctrine can work just as well without being tied to such a requirement – why is it not enough that the conduct of the accused in relation to each separate incident, as spoken to by the different witnesses, can reasonably be regarded by a jury as supporting (or corroborating) the evidence of other witnesses to other incidents of a similar kind, without the need to wonder whether the various incidents can or cannot be regarded as all part of the one course of conduct persisted in by the accused? If that test were applied in the present case I can see no basis for thinking that this court would have interfered with the verdict of guilty returned by the jury.

[48] As the Scottish Law Commission has pointed out in its 2012 Report on Similar Fact Evidence and the Moorov Doctrine (Scot Law Com No 229), the principle that the *Moorov* doctrine only applies where the incidents in question form part of a single course of conduct has been stretched to and even beyond its natural breaking point in the decided cases (see section 6 of the Report, and in particular paragraph 6.14). To date their Report has not been acted on. Recent cases decided since their Report simply confirm the problem. For example, as your Lordship has pointed out, it has been held that there is no maximum interval of time between the relevant incidents beyond which the *Moorov* principle cannot apply. Nor is there any minimum number of incidents required before the inference can be drawn that those incidents are part of a single course of conduct persistently pursued by the accused. Two incidents occurring many years apart can potentially be sufficient to justify the application of the doctrine. I find that difficult to justify. It is, to my mind, difficult to find any proper basis in reason or common sense for treating two incidents occurring, say, 10 years apart as illustrative of a single course of conduct persisted in by the accused, however great the similarities between the conduct spoken to by the witnesses. The long gap between the incidents points away from any legitimate inference of a single course of conduct; and evidence of circumstances preventing such offending for a large part of that period, a matter which the courts have on occasion found to be relevant (as your Lordship points out in paragraph [36]), does not alter that fact – it simply confirms that the accused has not persisted in any such conduct during that time and provides an explanation for that fact. Similarly, the search for striking similarities in the accused's conduct on, say, two occasions separated by a long period of time, another matter which the courts have sometimes

found to be relevant (as your Lordship points out in paragraph [37]), does not on any rational basis touch upon the question whether the incidents were part of a single course of conduct or were two isolated incidents of the same kind; though it is, of course, directly germane to the issue of whether such evidence could be potentially relevant and corroborative if similar fact evidence were to be allowed without the constraints of the presently understood scope of the *Moorov* doctrine. There have been decisions of this court in which such factors as these have been held to justify the application of the *Moorov* principle in cases where the incidents were few and far apart; but to my mind these cases simply illustrate the difficulties which the court has faced in trying to shoehorn the facts of the particular case into an unnecessarily rigid and narrowly defined principle. There would be no such difficulties if the principle were re-defined as suggested above, omitting the requirement for the facts to show a single course of conduct persistently pursued by the accused.