APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 33
HCA/2020/395/XC

Lord Justice General
Lord Menzies
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

JOHN DEENEY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Lenehan; Paterson Bell (for McQuillan, Glasser & Waughman, Hamilton)
Respondent: P Kearney (sol adv) AD; the Crown Agent

23 June 2021

The indictment and procedure

[1] The appellant was indicted on a single charge that:

> "on various occasions between 23 July 1981 and 21 August 1984 … at … Wishaw, you … did indecently assault [PT], born … 1972 … and did instruct him to remove his lower clothing and to kneel on his hand (*sic*) and knees, place your arm around his neck, seize hold of him and penetrate his anus with your penis to his injury."

The charge related to events which were libelled as having occurred when the appellant was aged between 13 and 17.

[2] Attached to the indictment was a docket, which stated that the Crown intended to lead evidence that:

> "on various occasions between 22 April 1977 and 13 July 1978 … at … Wishaw, you … did indecently assault [JK], born … 1970 and did lead him by the hand, induce him to get into your bed, rub his back, kiss him on the mouth, touch his penis, masturbate him and force him to masturbate you."

The docket related to events alleged to have occurred when the appellant was only aged between 9 and 10. He was of an age when he had criminal responsibility (Criminal Procedure (Scotland) Act 1975, s 170; cf Criminal Procedure (Scotland Act 1995, s 41 as amended by the Age of Criminal Responsibility (Scotland) Act 2019, s 1). However, it would not have been competent to prosecute the appellant for the docket offence at the time when the indictment was served (1995 Act, s 41A as introduced by the Criminal Justice and Licensing (Scotland) Act 2010, s 52(2)).

[3] The unusual nature of the docket, in so far as it related to the appellant's age, was raised at a preliminary hearing on 13 September 2019. Counsel for the appellant informed the court that:

> "discussions had been ongoing between parties regarding the docket, however she submitted that she did not intend to lodge any objection to the evidence".

[4] In due course, on 19 November 2020, the appellant was convicted of the charge. On 17 December 2020, he was sentenced to 4 years imprisonment. At that time he was aged 53.

The trial

[5] The trial proceeded on the basis that not only was the evidence relative to the docket admissible, but also that it was capable of providing corroboration. The background was that the conduct alleged in the charge and the docket all occurred in a house where the

appellant lived with his parents and siblings. His parents fostered children. A number of different foster children lived in the house from time to time. Both the complainer and the witness in the docket had been fostered in this way.

[6] The complainer said that he had moved into foster care with the Deeneys when he was aged about 7. He looked on the appellant as an older brother. He spoke to three incidents in which he was indecently assaulted by the appellant. The first occurred when he was aged about 9. He was invited by the appellant to go into the loft of the house to play a "game". The game involved the complainer removing his trousers and pants. The events libelled, including the act of sodomy, then occurred. The second occasion occurred two weeks later, in the same place, when the same "game" was played. The third occasion followed the same pattern. On one of the occasions the complainer had put his foot through the ceiling.

[7] The witness in the docket moved into foster care with the Deeneys when he was aged about 6. The appellant was "a bit older". The witness looked upon him as an older brother. He spoke to "quite regular" incidents occurring; this meaning about five occasions. On the first, the witness had been in his bed when the appellant came into the bedroom. The appellant had taken him by the hand and led him into his bed. He thought they were just "larking about". They ended up under the covers and were kissing and touching. The appellant committed the acts in the libel. The same thing happened a few nights after this. All of the incidents followed the same pattern of the witness being led from his bed by the appellant to the latter's room.

[8] The appellant's position was one of denial. The house did have a loft, but the appellant had not gone into it with the complainer. The home was a happy one. The appellant said that at the material time he did not know what sex was and he did not reach

puberty until he was 17. He did remember the complainer. It had been the appellant's foot which had gone through the ceiling when he was about 15.

[9] In his speech to the jury, the advocate depute relied upon mutual corroboration and founded upon several points of similarity between the charge and the docket events. Counsel for the appellant invited the jury to disbelieve the complainer's and the docket witness's evidence and to accept the appellant as credible and reliable. She founded upon inconsistencies in the testimony of the complainer and the witness and with their statements to the police in order to do this. She cast doubt upon a suggestion that a child of 9 or 10 would engage in sexual conduct. The appellant's counsel did not address the points of similarity, nor did she point to any dissimilar elements or comment on the lapse of time.

[10] The trial judge directed the jury, in standard terms, on mutual corroboration. In particular, he stressed to the jury that they had to decide, if they believed the complainer, whether they were satisfied that the crime alleged and the events described in the docket were so closely linked that they could infer that the appellant was systematically pursuing a single course of criminal conduct. He told the jury that mutual corroboration had to be applied with caution, particularly bearing in mind the age of the appellant at the material times.

[11] The trial judge reports that he did have a degree of disquiet about the events alleged to have occurred when the appellant had been aged only 9 or 10. He decided that, ultimately, this was a matter for the jury.

Submissions

Appellant

[12] The ground of appeal is that the trial judge misdirected the jury on whether there

was sufficient evidence to entitle them to convict. If the fault lay not with the judge, it was with the appellant's counsel, who had failed to challenge the issue of sufficiency at the end of the Crown case.

[13] The appellant's contention was that the trial judge ought to have invited submissions on sufficiency and withdrawn the charge from the jury. Children under the age of 13 lacked capacity to consent to sexual activity. This was apparent from the differing approach to "younger" and "older" children in the Sexual Offences (Scotland) Act 2009. Thirteen represented an important watershed. Given the appellant's age at the time of the events in the docket, he would not have been able to comprehend the concept of consent. It was necessary for the application of mutual corroboration that the corroborative events amounted to a crime (*MR* v *HM Advocate* 2013 JC 212 at para 20). There was no offence of sexual conduct between younger children. The docket events could not constitute a crime because Parliament had excluded that possibility. Although the appellant was over the age of criminal responsibility at the material time, the court should have regard to the changes which Parliament had enacted not only in relation to that age but also in connection with the alterations introduced in the 2009 Act. The incapacity of a 9 or 10 year old child to consent applied equally to the dominant younger child as it would do to the subordinate. The requirement for the usual similarities in time, place and circumstances foundered on the dissimilarity of circumstances which pre and post-dated the 13 year old watershed.

Crown

[14] The appellant's primary submission was misconceived. The account of the docket witness described the crime of indecent assault against a child. If it were necessary to demonstrate that the appellant knew that what he was doing was wrong, the evidence

allowed that inference to be drawn. The issue of the appellant's consent was irrelevant (*C* v *HM Advocate* 1987 SCCR 104). The witness's testimony was relevant and admissible evidence of acts which formed part of a course of criminal conduct systematically pursued by the appellant. The appellant's counsel had not erred in failing to make a no case to answer submission, the matter was correctly left for the jury's consideration and no miscarriage of justice occurred.

[15] Any act connected with a sexual offence could be included in a docket under section 288BA of the 1995 Act. It had to relate to the same event or series of events charged. An act could be specified notwithstanding that, were it framed as a charge, it could not competently be dealt with by the court (*HM Advocate* v *Moynihan* 2019 SCCR 61 at paras [10] and [19]; *Fisher* v *HM Advocate*, HCJAC, unreported, 19 March 2021, at para [27]). It was the evidence of the complainer that was being corroborated rather than the charge. The search was not for corroboration of individual elements of the crime but of the underlying unity of conduct (*CW* v *HM Advocate* 2016 JC 148 at para [34]; *MR* v *HM Advocate* 2013 JC 212 at para [20]).

[16] The only potential relevance of the docket evidence was as mutual corroboration. That precluded any argument that it could never have been relevant, by reason of the witness's age at the time, to proof of the charges involving the complainer. There can be no appeal based on the admission of evidence referred to in a docket where that evidence was not objected to (*RKS* v *HM Advocate* 2020 JC 235 at paras [27] and [28], in which the court was considering section 118 (8) of the 1995 Act).

[17] The appellant's position was one of denial. That made it more difficult to argue that any subsequent changes in the law, which bore upon proof of lack of consent, could have any bearing upon whether a miscarriage of justice had occurred. The 2009 Act did not say

that children were unable to understand the concept of consent. It had not been argued that the evidence of the complainer and the docket witness could not be considered as part of a course of criminal conduct, systematically pursued. The trial judge could only have withdrawn the matter from the jury if, on no view possible view, could the conduct be so regarded.

Decision

[18] Section 118(8) of the Criminal Procedure (Scotland) Act 1995 provides that a conviction cannot be "set aside", in respect of any objection to the relevancy of the indictment (which would include any docket) or to the competency or admission of evidence, unless objections to the relevancy or that evidence have been timeously stated. In this case, if, as is now contended, the evidence in relation to the docket events was irrelevant, in the sense that it could not provide mutual corroboration, then objection to it ought to have been taken to it in the pre-trial procedure (ie prior to a preliminary hearing, 1995 Act, ss 72 and 79). Given the absence of such an objection, the appeal must fail on this basis.

[19] In any event, there is no requirement that the events libelled in a docket should, by themselves, constitute a crime of which the accused could be convicted. Section 288BA(1) of the Act provides that an indictment or complaint can include in a docket an act or omission that is connected with a sexual offence charged in the indictment or complaint. It is true to say that the events in the docket must have amounted to a crime in order to provide mutual corroboration of another crime (*MR* v *HM Advocate* 2013 JC 212, LJC (Carloway) at para [20]). That does not mean that the crime has to be one of which the appellant could competently be convicted. The acts, which the jury found the appellant committed in

relation to the docket witness, amounted to a crime against that witness in the form of an indecent assault. The appellant was above the age of criminal responsibility at the time and could have been convicted of that offence. There is nothing in the subsequent legislative amendments in 2009 or 2019 which affects this. That is sufficient for present purposes. The docket witness was not capable of consenting to the acts involved. The appellant's inability to consent or to understand the concept of consent is, in that context, irrelevant. The appeal is refused.