APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 15
HCA/2022/91/XC

Lord Justice General
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL

under section 107A and 110(1)(e) of the Criminal Procedure (Scotland) Act 1995

by

HER MAJESTY'S ADVOCATE

Appellant

against

BL

Respondent

Appellant: Prentice QC (sol adv) AD; the Crown Agent
Respondent: F Connor; John Pryde & Co (for Blackwater Law, Glasgow)

23 March 2022

Introduction

[1] This is an appeal against a decision of the temporary judge to sustain a no case to answer submission on the basis that the evidence in respect of two charges was not mutually

corroborative. The judge held that the case fell into the rare category in which it was the responsibility of the judge to uphold the submission rather than leave the issue for the jury.

The evidence

[2] The respondent was indicted on two charges of lewd, indecent and libidinous practices and behaviour. The complainers were brother and sister, aged some three years apart. The respondent lived next door to them. He was almost 8 years older than the sister and almost 11 years older than the brother. The first charge was said to have taken place between August 1979 and December 1981 and consisted of making a sexualised comment towards the complainer and touching her vagina. The episode took place in an upstairs bedroom of the respondent's home when the complainer was aged between 7 and 9 years old. According to a transcript of her testimony, the respondent was on his knees with his hand "towards" or "between her legs". He was holding out sweets or chewing gum, offering them to her if she let him touch her between her legs (p 13). She said that she could not remember him actually touching her, but she believed that he had (*ibid*). In cross-examination (p 37) she described the respondent on his hands and knees, with his hand "like that" saying "let me touch you there". She recalled thinking "this isn't what I should be doing but I want those sweets". Her "legs were like that and he had his hand there. So he didn't have his contact but he near as dammit had it". Although she could not remember actual contact, she had "a pretty strong belief that this is what happened next and that I have blanked it out" (p 38). It is a matter for the jury to make what they will of this testimony but, if it is accepted, it would constitute lewd, indecent and libidinous behaviour.

[3] The second charge libelled various occasions between June 1980 and December 1981, when the complainer was aged between 6 and 7 years of age. The *locus* was at the rear

garage of the respondent's house. The conduct, which was all spoken to by the complainer, involved occasions on which the respondent touched the complainer's penis, induced him to masturbate the respondent and penetrated the complainer's mouth with his penis.

The trial judge's reasoning

[4] The defence submission, to the effect that mutual corroboration could not apply, founded upon *HM Advocate* v *P* 2015 SCCR 403, whereas the Crown referred to the test in *Reynolds* v *HM Advocate* 1995 JC 142. The judge recognised that he had to take the Crown case at its highest and that evidence of lesser criminal conduct could corroborate testimony of more serious conduct (*MR* v *HM Advocate* 2013 JC 212). The bar was a "very high" one in that he had to be satisfied that on no possible view of the similarities, or 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 respondent. The judge agreed with the reasoning in *HM Advocate* v *P* (at para [7]) whereby conduct at the "top end of the spectrum" could not be corroborated by conduct "very much at the lower end". He did not accept that *Adam* v *HM Advocate* 2020 JC 141 was authority for the proposition that, in every case involving "the peculiar crime of the sexual abuse of children by adults", the matter was to be left to the jury.

[5] The judge took the view that it was not open to the jury to hold that the circumstances were mutually corroborative. There was no material to entitle the jury to hold that the episode involving the first complainer (charge 1) occurred within the dates in the libel. He was concerned that the first complainer was unable to recollect when the incident had happened. He regarded the evidence of the *loci* as having limited similarities.

He noted that the allegation in the first charge involved conduct between a girl and an older boy. The allegation in charge 2 involved a boy and an older boy.

[6] The judge considered there to be significant dissimilarities. Charge 1 was a single episode involving a comment made by a boy in his late teens to a much younger girl. This was an inducement to allow sexual touching and, if the touching had taken place, it was over clothing. The incident occurred indoors. There was no evidence on whether it was planned or opportunistic. This was to be contrasted with charge 2 where the evidence did not include any form of sexual remark. There was no evidence of an inducement to participate in the behaviour. The charge involved far more serious and intimate sexual contact. It was not contact over clothing, but involved exposure of intimate parts and touching, including masturbation and sexual oral penetration.

Decision

[7] In *HM Advocate* v *SM (No. 2)* 2019 JC 183 the court repeated the basic principles to be applied in a case of this nature. What had to be looked for were 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*).

[8] In a case where there are similarities as well as dissimilarities, a no case to answer submission should only be sustained where "on no possible view could it be said that there was any connection between the two offences" (*Reynolds* v *HM Advocate*, LJG (Hope), delivering the opinion of the court, at 146). That was a shorthand expression which meant

simply that such a submission should only be sustained where, on no possible view of the similarities and dissimilarities in time, place and circumstances, could it be said that the individual incidents were component parts of one course of conduct persistently pursued by the accused (*HM Advocate* v *SM (No. 2)* at para [6]).

[9] In this case the different episodes occurred within a similar timeframe in the years from 1979 to 1981. The first complainer gave evidence that the conduct occurred when she was 7, 8 or 9. The complainers were children, being brother and sister living in a neighbouring house to that of the respondent. The incidents were said to have taken place in or around the respondent's house. Both involved the sexual abuse of children. In these circumstances, the court has no difficulty in holding that it is a matter for the jury to consider whether the separate incidents involving each complainer are mutually corroborative of each other.

[10] It is no doubt correct, as the judge observed, that there were dissimilarities in the accounts of the abuse spoken to by the two complainers. The scale of the abuse of the second complainer was far greater than that said to have been perpetrated against the first complainer. Whether that is significant will be for the jury to gauge. It is not for the judge to conduct an intensive analysis of the respective accounts at the stage of a submission of no case to answer. In particular the judge should not be induced into a detailed consideration of whether a jury's determination that mutual corroboration applied would be reasonable (see Criminal Procedure (Scotland) Act 1995, s 97D).

[11] The type of evaluative exercise which was carried out by the judge, involving questions of fact and degree, nuance and impression, falls quintessentially within the province of the jury. The jury's role in that regard must be respected. The judge has to ask himself simply whether on no possible view of the evidence could it be said that the

respective accounts of abuse constituted component parts of a single course of criminal conduct systematically pursued. This is a very high test. It is one that in modern practice will rarely be capable of being passed in cases of child sexual abuse (see *Adam* v *HM Advocate* 2020 JC 141, LJG (Carloway), delivering the opinion of the court at para [35] citing *Moorov* v *HM Advocate* 1930 JC 68, LJG (Clyde) at 74 and Lord Sands at 87-88). In so far as *HM Advocate* v *AP* 2015 SCCR 03 suggests otherwise, it is disapproved.

[12] The court will allow the appeal, refuse the no case to answer submission and remit the case to the judge to proceed as accords.