APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 28
HCA/2023/000010/XC

Lord Matthews
Lord Boyd of Duncansby
Lady Wise

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

Appeal

by

DW

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Paterson, (sol adv); Beltrami & Co, Glasgow
Respondent: Ewing (Sol. Adv), KC; Crown Agent

27 July 2023

[1] This is an appeal against conviction and sentence. Having heard the oral submissions we indicated that the appeal was refused and that we would give reasons in writing later. This we now do.

[2] The appellant was convicted of two charges of lewd, indecent and libidinous practices, one at common law and one under section 20 of the Sexual Offences (Scotland) Act 2009.

[3] Charge 1 libelled conduct on various occasions between 20 January 1991 and 31 December 1993 at a number of locations in Hawick. It involved a boy A, aged between 11 and 13.

[4] Charge 2 libelled conduct on various occasions between 1 June 2010 and 30 April 2011, also at a number of places in Hawick, involving a boy B aged 8 to 9.

[5] There was also a docket which alleged lewd practices on various occasions between 1 January 1993 and 31 December 1993, also at a number of places in Hawick, involving a boy C aged between 12 and 13.

[6] There was no issue as between charge 1 and the docket but it was submitted that the gap in time between charge 2, the docket and charge 1 was too great to allow the application of mutual corroboration. A submission of no case to answer was repelled, under reference to *Duthie* v *HM Advocate* [2021] HCJAC 23, and the conviction on charge 2 was challenged on the basis that the submission should have been upheld.

[7] The appellant was sentenced to imprisonment for 18 months. It was said that it was a *cumulo* sentence and that if charge 2 fell it would have to be revisited. The sheriff, on the other hand, told us in his report that the sentence on each charge was imprisonment for 18 months, to run concurrently and that is borne out by the minutes. In any event, submissions were made in support of an assertion that the sentence was excessive. However, they were predicated on the success of the appeal against conviction. If that failed it was accepted that there was nothing in the sentence appeal.

The evidence

Charge 1 (20 January 1991 to 31 December 1993)

[8] A said that the appellant would take him and some of his friends out in a car. A knew C and was best friends with C's brother D. D would be the front passenger and A would be in the back.

[9] Sometimes the appellant would let them drive, sitting on his knee. On one occasion they drove to Selkirk and the appellant bought a pornographic magazine and a packet of condoms. They drove to a layby and the appellant took out the condoms and magazine to "show them what grown men did". He took out a condom, masturbated and put it on. He told the boys to take out their penises so they could masturbate with him. The boys were too young to ejaculate but the appellant did so into his condom before taking it off to show them. He tidied himself up and took them home, giving them the remaining two condoms. They were flavoured.

Charge 2 (1 June 2010 to 30 April 2011)

[10] B said that the appellant had gone out with a relative of his. With his mother's permission, the appellant showed him how to play golf and he took him to see a Rangers game. They ended up at the appellant's house because of traffic problems and they slept in the same bed. B lay between the appellant's legs and the appellant touched his private parts over his clothing and rubbed his chest and belly under his clothes. He also grabbed and squeezed B's naked penis under his clothes. It felt weird and B kept making excuses to go to the toilet to get away. The appellant told him not to tell his mother. On the next day B went

for a bath before going to school and the appellant sat on the toilet and watched him. B went to the living room to get ready and the appellant told him to face him while he was drying himself. B said no, out of embarrassment. The appellant asked him if he knew what a "stiffy" was.

[11] On another occasion they were driving when the appellant asked if he wanted a shot at steering. B was excited and sat on the appellant's knees. The appellant had his hands on B's chest, belly and penis again.

The docket (1 January 1993 to 31 December 1993)

[12] C said that the appellant had been his rugby coach. They would often meet at school lunchtimes and the appellant would let him drive his car. This happened many times. He would sit on the appellant's knee at the latter's suggestion. There was pornographic material in the car and the appellant used to give him flavoured condoms and encourage him to masturbate along with him, although C did not do so.

[13] On one occasion, at Hawick Leisure Centre, they had been swimming and the appellant asked C into his cubicle. He had an erection and asked C to help him with it but C ran away.

Submissions for the appellant

[14] The relevant gap in time was about 17 years. There was no evidence which could explain it, although there was evidence in the case which suggested that there were opportunities to offend during that period. It could not be said that the individual instances were component parts of one course of conduct persistently pursued by the appellant,

despite the fact that there were some similarities in the conduct. What was essential in terms of the settled law were similarities in time, character and circumstances such as to demonstrate that the individual incidents were component parts of one course of conduct persistently pursued by the appellant. Time was still an important factor and it would not do if all that was shown was that there was a general disposition to commit offences of this nature. *Duthie* did not say that time was no longer a part of the equation and in order to bridge the time gap there had to be something more than the similarities which were demonstrated by the evidence in this case. There was no evidence of offending in the intervening period, albeit there was opportunity for it.

Submissions for the respondent

[15] The test was whether it could be said that on no possible view could the jury find that there was a single course of conduct systematically pursued; *Adam* v *HM Advocate* 2020 JC 141 at paragraph 29. That was a very high test and one which in modern practice would rarely be capable of being passed in cases of child sexual abuse; *HM Advocate* v *BL* 2022 JC 176 at paragraph 11. There was no maximum time period after which the principle could not be utilised. The significance of a long interval would depend on all the circumstances of the case and the weight to be attached to it would depend on those circumstances; *JH* v *HM Advocate* [2022] HCJAC 39, *AS* v *HM Advocate* 2015 SCCR 62 and *AK* v *HM Advocate* 2012 JC 74. While there had been cases where the gap was too long, such as *Reilly* v *HM Advocate* 2017 SCCR 142, *RB* v *HM Advocate* 2017 JC 278 and *RBA* v *HM Advocate* 2020 JC 16, it was clear that the more compelling the similarities were the less significant would

be a substantial interval of time. There were compelling and striking similarities in the conduct alleged in this case.

[16] While there was no additional evidence to explain the time gaps such as the appellant being abroad or generational abuse, that was not a prerequisite for the application of the principle; *Adam* v *HM Advocate* at paragraph 39, where the court said:

> "There was sufficient evidence upon which the jury could hold the course of conduct proved. The significance of the absence of similar conduct in relation to other children was a matter for the jury to assess. It had no effect on sufficiency."

Analysis and decision

[17] There is no dispute as to the relevant law and the test which falls to be applied in cases of this nature. It has been well ventilated and we see no need to repeat it. What the court is looking for are the conventional similarities of time, character and circumstances in order to demonstrate that the individual instances are part of a course of criminal conduct systematically pursued. Only if on no possible view of the evidence could a jury come to that view a submission of no case to answer will be upheld; *Adam* paragraph 29. We are not satisfied that that can be said in this case. There were strong similarities in the evidence of the three complainers. They were all boys of a similar age, all from the town of Hawick. They were known to the appellant in some way before the abuse commenced and the conduct all took place in or around Hawick. The appellant was the rugby coach of C and knew B's mother. This permitted access to the child which he exploited so that he had an opportunity to be alone with child when the child was undressed as at the public baths or at bath time.

[18] Perhaps the most compelling piece of evidence was that the abuse, or a component of it, involved inviting the boys to "drive" the appellant's car and have them sit on his knee

and thereafter engage in abusive conduct. Further elements of the abuse involved the appellant either touching the child's penis or attempting to induce the child to expose his penis in his presence and the making of sexual remarks referencing masturbation or erections.

[19] While there was no additional evidence which might explain the time gap, that was not necessary, as is clearly set out in *Adam*, albeit in appropriate cases the Crown may seek to lead evidence of that type.

[20] The sheriff was correct to repel the submission of no case to answer. The appeal against conviction is refused.

[21] Since the sentence appeal depended upon the success of the conviction appeal, it follows that it too must be refused.