SHERIFF APPEAL COURT

[2019] SAC (Crim) 12
SAC/2019/000442/AP

Sheriff Principal D L Murray
Sheriff A G McCulloch
Sheriff N McFadyen

OPINION OF THE COURT

delivered by APPEAL SHERIFF N McFADYEN

in

STATED CASE

by

CG

Appellant

against

PROCURATOR FISCAL, DUNDEE

Respondent

Appellant: Duling; Faculty Appeals Service, for Muir Myles Laverty, Dundee
Respondent: A Edwards, QC; Crown Agent

2 October 2019

[1] The appellant was found guilty, after a lengthy summary trial, of two charges in the complaint against him: charge 2, a charge of contravention of sections 20 and 55 of The Sexual Offences (Scotland) Act 2009, between 12 and 19 October 2016 at a resort in Spain, in respect of a single incident of sexually assaulting a boy of 10 or 11 years by touching and

massaging him on the leg and groin area while applying sun cream to his body and charge 3, a charge of sexually assaulting a girl aged between 5 and 8 years on various occasions between 28 August 2014 and 16 May 2017, by touching and rubbing her vagina over her clothing with his hands. The children are siblings and the appellant is their uncle.

[2] The charges relate to the same statutory offence, the reference to section 55 being only relevant to establishing extra-territorial jurisdiction.

[3] The appeal is largely concerned with the question of mutual corroboration as between the two surviving charges, there being no corroboration when they are taken alone and also with the question whether the conduct in charge 2 was sexual within the meaning of the Act. There was a no case to answer submission in relation to charge 2. If the submission as regards the sexual character of the conduct in charge 2 is justified, because of the reliance on mutual corroboration, there is no basis for corroboration of charge 3.

[4] The male child in charge 2 appears to have had no recollection of any incident and the only witness to the incident and who could describe it was his mother. Finding in fact 7 includes the statement that while on holiday in Spain the appellant, whilst applying sun cream to the male child's body

> "intentionally touched and massaged him on the legs to the top of his thighs and at his groin area under his shorts. He continued until [the male child's] mother interrupted him to stop him. At the time [the male child] was wearing long shorts extending to a short distance above his knees".

[5] From the sheriff's note it is clear that, although no-one else was present, the sun cream incident took place in a public place, namely at the hotel pool side. The child's mother described the appellant as massaging him with sun cream from his ankles right up to his thighs, placing his hands underneath the child's shorts with one hand on each leg and

continuing to massage him up to the top of his thighs. She could not see exactly where his hands were touching the child,

> "but his hands were certainly inside [the child's] shorts at the top of his thighs at either side of his groin area. She thought it odd and felt uncomfortable and brought it to an end by saying something like "Oh [child's name], that must be a bit tickly, that's enough"".

[6] On the submission of no case to answer, and ultimately in relation to conviction, with regard to the touching being sexual, the summary sheriff founds on the nature of the activity, there being no reason for applying sun cream under the child's shorts (which were close to knee length), to the top of his thighs and to his groin area. While the circumstances are unusual, in that everything took place at the poolside and in full view of the child's mother, we consider that the evidence of the appellant's action, in applying sun tan lotion under the male child's long shorts and in the region of his groin area entitled the sheriff to be satisfied that the appellant's conduct was sexual; it was touching which a reasonable person would, in all the circumstances of the case, consider to be sexual. We are not convinced that the evidence of the child's mother comes up to demonstrating that there was touching of, as opposed to close to or at the groin area, although that was not necessary to dispose of the relevant no case submission.

[7] We turn to the question of mutual corroboration. The complainers are, as we have noted, siblings and were quite young and they were members of the wider family of which the appellant formed part; it was in that connection that the appellant enjoyed close contact with the children. Although counsel for the appellant sought to argue that the incidents were not particularly close in time, because they were within a family relationship, it seems obvious to us that the alleged offences did occur within a reasonably concise time period – between August 2014 and May 2017, although from the sheriff's findings in fact the actual

period was a shorter one, commencing around June 2016 - and, indeed, the alleged offence against the male child took place during the period of the alleged offending against the female child.

[8] There are obvious features of similarity. Both complainers were infant children and indeed siblings. The appellant was part of the same close family and accordingly enjoyed close access to the children. Counsel for the appellant maintained that the sheriff had applied what she described as triple accounting to the matter of family relationship, but we consider that all that the sheriff has done is to analyse that aspect of the case in the context of the various elements which the court requires to consider in determining whether to apply the doctrine of mutual corroboration.

[9] In both cases the appellant has allegedly touched the complainer, in the girl's case in the area of her vagina, over her clothing and in the boy's case at least at his groin area. Allowing for the biological differences, the parts of the body targeted are certainly in proximity.

[10] There are, of course, differences. One child is male, the other female. There is no similarity of place in the sense that charge 2 was at a poolside in Spain, in full view of the relevant child's mother. Counsel attempted to make something of the geographical distance, but we consider that of no moment: it was a family holiday within the same family group and it would not matter if the pool side was near to home as opposed to being in Spain. We consider that the family context is relevant – the family home in one case, the hotel where the family are on holiday in the other. A hotel poolside is, nonetheless, in some obvious ways a different sort of place from the privacy of home, being a public place and in this case the child's mother was present.

[11] The conduct alleged is different in the sense that the behaviour towards the boy was a single episode presented as massaging sun cream on the boy's legs, a public and at first sight innocent activity, as opposed to the more overt (but private) and repeated conduct towards the girl, involving direct touching and rubbing (over the clothing) of her vaginal area.

[12] As the High Court has very recently re-emphasised, in *HM Advocate* v *SM (2)* [2019] HCJAC 40, per Lord Justice General Carloway at para [6]):

> "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])".

[13] In probably the majority of mutual corroboration cases there will be some differences in the conduct which is complained of, but in this case what was alleged and accepted by the sheriff involved conduct of a broadly similar character. We are satisfied that the similarities in time, character and circumstances of the conduct, addressed as it was to two young children in the same broader family as the appellant, to whom he had close physical access as part of that family, committed over a relatively short period of time and involving touching of the children in one case over and in the other at the genital area, provide sufficient similarities properly to demonstrate one course of conduct persistently pursued by the appellant. The sheriff was entitled to apply the doctrine and to convict the appellant. The appeal must therefore be refused.

[14] We shall answer the first, second and third questions posed in the stated case in the negative and the fourth question in the affirmative and refuse the appeal.