APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 64
HCA/2017/75/XC

Lord Justice General
Lord Menzies
Lord Brodie

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION AND SENTENCE

by

IVAN KEITH DAVID MAXWELL

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Macintosh; John Pryde & Co
Respondent: K Harper, AD; the Crown Agent

17 August 2017

Introduction

[1] On 13 December 2016, at the Sheriff Court in Dumfries, the appellant, who was aged 44 at the time of the trial, was convicted of two charges which libelled that:

> "(1) on an occasion between 8 November 2012 and 7 November 2013, at ... Castle Douglas you… did sexually assault [AW], ... push her onto a bed and lie on top of

> her body, produce a condom, and ... intentionally direct a sexual verbal communication at her in that you did utter sexual remarks; CONTRARY to Sections 3 and 7(1) of the Sexual Offences (Scotland) Act 2009;
>
> …
>
> (4) on various occasions between 15 June 2013 and 14 June 2014, ... at various locations within the Dumfries and Galloway area you … having on at least one earlier occasion met or communicated with [KJ], aged 15 … did, ... travel with the intention of meeting said person and intend to engage, ... in unlawful sexual activity involving said person ...; CONTRARY to the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, Section 1;"

The appellant was acquitted of a further charge which libelled that:

> "(5) on various occasions between 15 June 2013 and 14 June 2014, ... at the Royal Bank of Scotland … Kirkcudbright, the Royal Bank of Scotland …Dalbeattie, and the Royal Bank of Scotland … Castle Douglas you … did penetrate sexually with your penis the vagina of [KJ], aged 15 …; CONTRARY to Section 28 of the Sexual Offences (Scotland) Act 2009."

The appellant was also acquitted of a further sexual assault on AW (charge (2)) occurring around the same time as charge (1) by pressing and rubbing her thigh.

[2] On 17 January 2017, the appellant was sentenced to 4 months imprisonment in respect of charge (1), and 12 months consecutive in respect of charge (4).

[3] The grounds in the Note of Appeal against conviction challenged: (1) the admission of evidence of internet contact between AW and the appellant around the time of the events libelled in charge (1); (2) the verdict to find the appellant guilty of charge (4) yet acquitting him of charge (5); and (3) the basis on which the jury could use charge (4) to corroborate charge (1). Ground (3) was not insisted upon at the appeal hearing.

The evidence

[4] The first complainer, AW, was 19 years old at the time of the trial. She had been a friend of the appellant's daughter and visited the appellant's home. The incident in

charge (1) occurred when she was 15. She was in the bedroom of the appellant's daughter. They were getting ready to go out for the evening. AW was sitting on the bed when the appellant came in and sat beside her. He took hold of her arms and pressed her down onto the bed. He had a condom in one hand, which he waved at her and said words to the effect that "You'll be needing this tonight". AW was angered and scared by this behaviour.

[5] AW spoke to the incident libelled in charge (2), when the appellant sat down beside AW in the living room of the house, placed his hand on her thigh and pressed it whilst inviting her to stay over after what had been an evening of babysitting. She had immediately left the house.

[6] The Crown attempted to lead evidence of Facebook messages received by AW from the appellant. The first message (undated) was sent one night after midnight. It read "U should be sleeping lol xx". The second message, which was dated 15 August (no year) and sent at about 9.00am, read "Is that u just getting home tut tut lol". The appellant objected to this evidence on the basis that the messages: (a) were not the subject of any charge; (b) were irrelevant to the proof of the sexual assaults on AW; and (c) amounted to an attack on the appellant's character, which was not permissible without an application under section 270 of the Criminal Procedure (Scotland) Act 1995.

[7] The Sheriff repelled the objection on the basis that the messages, whilst not *per se* of a sexual nature, were capable of demonstrating the appellant's interest in AW and shedding light on the appellant's interaction with her at the relevant time. The messages could be relevant to the determination of whether any assault by the appellant on AW had been sexual, and to whether the jury should draw the inference that the appellant's behaviour had been intentional or reckless.

[8] The second complainer, KJ, who was 18 years old at the time of the trial, was also a friend of the appellant's daughter and went to school with her. The appellant had contacted her by text after she had attended the christening of his youngest daughter. At that time she was aged 14. He had complimented her on her dress. The appellant and KJ began to exchange texts and Facebook communications. The appellant created a Facebook account using a false name and date of birth (that of the complainer) to do this. According to KJ, the appellant began a sexual relationship with her within a few weeks of the initial message. The first occasion on which they had sexual intercourse was at the appellant's home. This did not form part of the libel, but no objection was taken to this. Thereafter, the appellant asked her to accompany him to the bank branches which he cleaned. He drove her to branches in Dalbeattie and surrounding towns, where they would have sexual intercourse. The relationship lasted for about two years. It ended when KJ began a relationship with someone else in early 2015. She was then about 16½.

[9] During cross-examination of KJ, it was suggested that the sexual relationship between the appellant and KJ had not begun until KJ was 16. Despite her earlier testimony, KJ accepted that this might be so. She was not sure of the exact dates.

[10] The Crown relied upon messages to KJ from the appellant's Facebook account. Many were intimate, and contained terms such as "babes" and "sexy". A limited number were specific as to date (May 2014), at which time KJ was 15. KJ could not say if the remainder of the messages were sent before or after she had attained the age of 16. One message from the appellant, which was dated 26 July (no year), depicted an image of a snake followed by the word "missing" and an image of pebbles. This appeared to have been sent after the break-up of the relationship. According to one witness, Mrs S, this message

was a reference to the appellant's penis and the complainer's vagina. It might be taken as an admission that sexual intercourse had taken place between them.

[11] The complainer's mother, DJ, had been a friend of the appellant and his wife. In 2015, she had become aware that her daughter had been in a sexual relationship with the appellant, who was in his forties at that time. She had noticed that, when her daughter was 15, she often accepted lifts from the appellant in his car. She had a suspicion that something was going on, but she had dismissed the idea, as she was close friends with the appellant's wife. The appellant's wife, PM, gave evidence that the christening of her youngest daughter took place on 23 June 2013.

[12] The appellant did not give evidence.

Speeches

[13] In her speech to the jury, the Procurator Fiscal Depute made a general reference to the need for corroboration. Specifically in relation to charge (5), she said:

> "... what we're looking for here is corroboration that the accused had a sexual relationship with [KJ], which started when she was 15 years old ...
>
> ... we can also look for corroboration in ... the various Facebook messages both dated and undated.
>
> ... you may come to the view that these dated messages ... when she was 15 were intimate messages and indicative of a sexual relationship.
>
> ... some ... were sent in 2015 after [KJ] was 16 ... Mrs [S] gave evidence that [the image of the snake etc] was known to her to be a reference to his private parts missing her private parts and of a sexual nature ...
>
> So what you have to decide ... is whether the evidence and surrounding facts and circumstances corroborate the allegation that the accused had a sexual relationship with [KJ] which started when she was 15 years of age".

[14] The appellant's address acknowledged that there was "clear evidence" that the appellant engaged in sexual activity with KJ. It too referred to the need for corroboration,

although not specifically with reference to charge (5). It tackled the significance of the image messages which had been sent after KJ was 16. In relation to the messages before she was 16, the contention was that they did not establish a sexual relationship at that time; ie that the Facebook images did not corroborate underage intercourse.

The charge

[15] The sheriff gave the jury standard general directions on corroboration and mutual corroboration. He gave them specific directions on each of the charges. In relation to charge (4), the jury were directed that the offence was "to do with sexual grooming" of someone under the age of 16. It was an offence of, having met or communicated with the child at least once before, intentionally meeting or communicating with a child under the age of 16, with the intention of engaging in unlawful sexual activity. Prior communication may have been by any method, but, on the subsequent occasions involving the travelling, the sheriff stressed that the accused must have intended to engage in unlawful sexual activity involving the child.

[16] The sheriff continued:

> "the dispute is whether the Crown has proved that any such sexual activity took place when the girl concerned, [KJ], was under 16, and rather than anything, that's what's at issue. Is there corroborated proof that sexual activity took place and charge 4, the travelling to these locations, took place when she was 16?
>
> So, for the Crown to prove the charge, you would need to be satisfied that the victim was under 16; the accused had previously met or communicated with her; and that subsequently he met, travelled to meet, or arranged for her to travel to meet with him for the purpose of engaging in sexual activity at a time when she was (inaudible-coughing) age."

[17] The sheriff directed the jury that charge (4) was "linked" to charge (5). The sheriff gave the jury directions on charge (5), with which no issue is taken, which stressed the need

for the Crown to prove, by corroborated evidence, the intentional or reckless penile penetration of the complainer, when she was under 16.

Submissions

Appellant

[18] The appellant advanced two grounds of appeal against conviction. First, although charges (4) and (5) were separate, they both required the conduct to take place when the complainer was a child. The only live issue was the age of the complainer. No reasonable jury could have acquitted of one charge and convicted of the other (*Mitchell* v *HM Advocate* 2008 SCCR 469 at para [111]). Penetration had not been raised as a topic for the jury's consideration. It was a step too far to surmise that the jury had themselves identified corroboration of this element as a problem. Secondly, the evidence of the inappropriate or indecent communication between the appellant and AW, other than as libelled in charges (1) and (2), was either irrelevant, relating to character under section 270 of the 1995 Act, or unfair as evidence of a crime not charged (indecent communication with a child; 2009 Act, s 34; *HM Advocate* v *Mair* 2014 JC 137 at para [9]).

Decision

[19] The test for a successful appeal based upon an unreasonable verdict is a high one. It involves demonstrating that no reasonable jury could have returned that verdict. The jury found the appellant guilty of sexual "grooming" at various unspecified locations in Dumfries and Galloway whilst she was under 16, yet acquitted him, by the verdict of not proven, of unlawful sexual intercourse in the various banks where he worked as a cleaner. The contention that these verdicts are inconsistent is not made out. It is correct to say that, if

the only issue at trial had been the complainer's age at the time of any sexual intimacy, there would have been force in the view that the verdicts were inconsistent. However, that is not the case.

[20] Although it is said that the defence position was simply that any sexual intimacy took place after the complainer was 16, at no point was it agreed, or conceded by the appellant, that sexual intercourse had taken place. The need for corroboration was raised in the Crown speech, in relation not only to age but also to the act of intercourse. The charge to the jury covered the need for corroboration not only of age, but also of sexual intercourse. In these circumstances, the obvious explanation for the jury's verdicts is not irrationality, but that the jury perceived, not unreasonably, that the evidence of the Facebook message, notably that depicting the snake, was not sufficient to support the complainer's initial testimony that sexual intercourse had occurred before the complainer had reached the age of 16. There was, on the other hand, ample evidence from the complainer KJ and the surrounding facts and circumstances, including the Facebook material and KJ's mother, that the appellant had travelled to the various banks with the intention of engaging in sexual activity with the complainer when she was under 16. This ground must accordingly be rejected.

[21] The charges involving the complainer AW were that the appellant had sexually assaulted her by, first, in late 2012 or 2013, lying on top of her, producing a condom and making a sexual remark about her need for such a condom (charge (1)) and, secondly, in 2015 by pressing and rubbing her thigh (charge (2)). The evidence which was objected to was that the appellant had sent Facebook messages to her, at or about the relevant time, including "U should be sleeping lol xx" and "Is that u just getting home tut tut lol". These may have conveyed a flirtatious tone on the part of the appellant; inappropriate perhaps but

not *per se* illegal. Section 270, upon which the original objection was based, relates to defence evidence or defence questions, and has no application. It is going too far to categorise the messages as evidence of bad character, such as material demonstrating criminality. The question is whether the evidence was relevant to the establishment of one or other of the charges; that is whether it made the commission of the offences, or one or other of them, more or less likely. In the sense that they demonstrated a flirtatious interest on the part of the appellant, and thus that any action on his part involving the complainer, may have had a deliberate sexual element, the test of relevancy is met. This ground also falls to be rejected, with the consequence that the appeal against conviction must fail.

Sentence

[22] The cumulative sentence of imprisonment of 16 months was said to be excessive. At the time of the appeal hearing, the appellant had already served seven months. He had never previously received a custodial sentence. The Criminal Justice Social Work Report had said that he was eligible and suitable for the Moving Forward: Making Changes programme. The appellant would be subject to the notification requirements under the Sexual Offences Act 2003 for a period of 10 years. During any release on licence, he would not be able to return to live with his wife because there was a 5 year old child in the household. The appellant would require to seek homeless accommodation.

[23] It was submitted that the sheriff's reasoning, while expressly noting the acquittals on charges (2) and (5), appeared to condemn the appellant for his behaviour in engaging in a sexual relationship with KJ after her 16th birthday. A non-custodial sentence could be appropriate where no sexual intimacy took place (*Kilgallon* v *HM Advocate*, unreported, High Court of Justiciary, 7 May 2010). A Community Payback Order with a programme

requirement, unpaid work, and a restriction of liberty order would have met the requirements for punishment, deterrent and denunciation. Alternatively, the sentence of imprisonment was excessive, where no sexual activity with the complainer, KJ, was proved to have taken place before her 16th birthday.

[24] The sheriff considered that the charges involved predatory behaviour by a man in his forties towards teenagers. He referred to the planned, manipulative and controlling conduct of the appellant. He disagreed with the assessment of a "low risk" of further offending in the CJSWR. In 2013, the appellant had been convicted of an assault on a child. He had already been the subject of a CPO for benefit fraud with a significant number of hours of unpaid work. Because of his denial of the offences, participation in a sex offender's programme was unlikely to be successful. The sheriff therefore considered that a custodial sentence was merited.

[25] Had charge (1) stood alone, a custodial sentence could not have been regarded as appropriate. On the other hand, as distinct from *Kilgallon* (*supra*), the appellant was not a first offender and the conduct in charge (4) was repeated and the offences involved two complainers. In these circumstances, it is not possible to fault the sheriff's reasoning that only a custodial sentence was appropriate to reflect the gravity of the combined offending, especially that in charge (4). Having regard to the court's view that, had charge (1) stood alone it would not have attracted a custodial sentence, a consecutive disposal cannot be regarded as appropriate. The sentences will be quashed and a cumulative sentence of 12 months substituted.