APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 54
HCA/2017/000643/SC

Lady Paton
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by LADY PATON

in

APPEAL AGAINST CONVICTION

by

CS

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Paterson (sol adv), Robertson (sol adv); Paterson Bell Solicitors
Respondent: McSporran QC, AD; Crown Agent

3 October 2018

Introduction

[1] The appellant was born in October 1967. On 18 October 2017, at the High Court in Edinburgh, he was convicted of the following offences (numbered as in the jury copy indictment):

1. The rape of SCB on an occasion between 23 April 1993 and 31 October 1993.
2. An assault on SCB (by punching to the head) on an occasion between 23 April

1993 and 31 October 1993.

3. Assaults on HBR (to her severe injury and permanent disfigurement) on various occasions between 1 May 1995 and 23 February 2003.

4. An assault on HBR (by trapping her head in a car window and driving the car forward) on an occasion between 1 May 1995 and 23 February 2003.

5. Assaults on HBR (to her injury, the danger of her life, and with intent to rape her), on various occasions between 1 May 1995 and 23 February 2003.

6. The rape of HBR on an occasion between 1 May 1995 and 23 February 2003.

8. An indecent assault on HBR (involving a shampoo bottle) on an occasion between 1 May 1995 and 31 December 1997.

11. Assaults on LAR on various occasions between 1 May 1995 and 23 February 2003.

17. Assaults on CEW on various occasions between 1 April 2014 and 31 October 2014.

18. The rape of CEW on an occasion between 1 August 2014 and 30 September 2014.

19. The rape of CEW on an occasion between 1 April 2014 and 31 October 2014.

SCB was the appellant's partner in 1993. HBR was his partner during the period from 1995 to 2003. LAR was HBR's daughter. In 2008, the appellant married XY. While he was still married to XY, CEW (unaware that he was married) was his partner in 2014.

[2] An extended sentence of 15 years (13 years custody, and 2 years extension) was imposed.

A "no case to answer" submission in respect of charges 17, 18, and 19

[3] At the close of the Crown case on 16 October 2017, the defence presented a "no case to answer" submission in relation to charges 17, 18, and 19. The trial judge sets out the submissions in his report as follows:

> "*Section 97 Submission –*
>
> [11] At the end of the Crown case a submission was made on behalf of the appellant that he had no case to answer in relation to charges 17, 18 and 19 on the final indictment…

Defence submissions:-

To prove these charges, the Crown would require to rely on the doctrine of mutual corroboration or the Moorov principle with reference to other similar charges on the indictment. The time gap in relation to other relevant charges was a minimum of 11 years. This was too long. There were no exceptional or unusual features to justify such a long period. It was submitted that an examination of the evidence did not disclose a course of action. It was accepted that there were similarities in the evidence of the various witnesses about the appellant's behaviour but there were also significant differences and as a result the principle of mutual corroboration could not apply. I was referred to the case of J.L. v H.M.Advocate, [2016] HCJAC 61…

Counsel submitted that the Crown had not overcome this test and that there was no underlying unity of intent which would indicate a course of conduct on the part of the appellant. There was a substantial time gap between the various incidents alleged by each of the appellant's three previous partners who had given evidence in this case. Reference was made to the case of Reilly v H.M. Advocate [2017] HCJAC 5 and in particular to the discussion set out in para. [17]. Therein there is reference to the proper approach to see an accumulation of violent and sexual behaviour directed against different partners as reflecting an underlying course of conduct of domestic abuse. Counsel submitted that there was no such campaign in the present case. Because of the lapse of time the incidents would have to be viewed in isolation. The time gap between the incidents alleged by the three former partners could not be bridged.

Crown submissions:-

[12] The advocate depute submitted that the appellant had a case to answer. He submitted that the Crown case disclosed a course of conduct on the part of the appellant which was persistently pursued. He referred to the case of Reynolds v H.M. Advocate (1995) SCCR 504. Therein it was held that that was a case in which a process of evaluation had to be conducted, because there were dissimilarities as well as similarities, but that the court did not accept that on no possible view could it be said that there was any connection between the two offences and that that was a case which fell within the province of the jury rather than the judge and was properly left by him to them. It was submitted by counsel that this was a similar type of case and that it was for the jury to look at the evidence and make the appropriate decision. He submitted that there were compelling circumstances and similarities which made it appropriate for the decision in this case to be left to the jury. He submitted that there was a substantial amount of evidence for the jury to consider. The first partner, [SCB], referred to an unusual sexual attack by the appellant which took place on her. There had been an argument between them. He knew that she did not want anything to do with him but he waited until she was asleep and then proceeded to sexually assault her. He forced himself upon her against her will. The second partner, [HBR], gave evidence of a similar nature which was striking. She alleged that he raped her whilst she was asleep. She was not capable of defending herself. Both of the

witnesses referred to the appellant's violent, controlling and jealous behaviour towards them both. The witness [HBR] referred to his administration of drugs on her. This is also corroborated by the witness's sister… She was also sexually attacked by the appellant whilst she was sleeping. This was a course of conduct persistently employed by the appellant. This was a matter which should be considered by the jury. The jury could look at the manner in which the appellant developed his relationships with his former partners and the extent of the physical violence and sexual violence he used against them. He used belittling and controlling conduct on the complainers. The last former partner to give evidence, namely [CEW] (in respect of charges 17, 18 and 19) had referred to the appellant administering drugs to her and raping her whilst she was sleeping. There were obvious similarities to the evidence of the other former partners of the appellant. He had developed his relationship with the witness in the same manner as his other former partners. He was violent towards her. He embarked on a course of conduct which belittled her, controlled her, left her lacking self-confidence and actively stopped her from being in contact with others. He had forcibly raped them all and displayed no remorse whatsoever. In all of the circumstances the advocate depute submitted that there was a compelling case for the appellant to answer."

[4] The defence submission was refused.

Appeal against conviction

[5] The appellant appealed against both conviction and sentence. The appeal against conviction passed the sift.

[6] The grounds of appeal, paraphrased, are as follows:

1. The trial judge should have sustained the "no case to answer" submission in respect of charges 17, 18, and 19, as the time gap between those charges and earlier charges was a minimum of 11 years, without any exceptional or unusual feature which would justify the application of the *Moorov* doctrine.

2. There was a misdirection in respect of mutual corroboration (the *Moorov* doctrine) in that:

   (i) The directions were too basic.

   (ii) The judge failed to define a course of criminal conduct, or to give an

appropriate example.

(iii) There was no proper analysis of the charges and how the jury could apply the doctrine to the different types of charges the appellant faced.

(iv) The jury were not directed that the assault charges could not corroborate the sexual offences, or *vice versa.*

(v) The jury were not properly directed about how to consider charges with a significant time gap.

(vi) The judge failed to direct the jury that charges 1 and 2 could not be corroborated by charges 17, 18, or 19, and *vice versa*, taking account of the nature of the charges and the time gaps between them.

3. The judge failed to direct the jury that mutual corroboration could not apply between charges 17, 18 and 19 on the one hand, and the other charges on the indictment, given the significant time gap and the lack of any exceptional or unusual circumstances, and the material differences between the nature of charges 17, 18 and 19 on the one hand and the other charges on the indictment.

Charges 17, 18, and 19: the *Moorov* doctrine and a minimum time gap of 11 years

[7] As outlined in the trial judge's report, CEW gave evidence about assaults and a rape occurring during the period between 1 April 2014 and 31 October 2014 (charges 17, 18, and 19). If the jury were to seek corroboration of CEW's evidence in the evidence of HBR, the latest offending behaviour against HBR occurred on 23 February 2003 (charges 3, 4, 5, and 6, and details of the evidence set out in the judge's report). The minimum time gap between the events referred to by CEW and the events referred to by HBR was therefore eleven years. That is a long period, bearing in mind the purpose of the *Moorov* doctrine which is to find

corroborated proof of a course of criminal conduct achieved through the testimony of two or more individual victims of constituent offences (*dicta* of Lord Emslie in *AK* v *HM Advocate* 2012 JC 74, paragraph [23]). The period becomes even longer, namely approximately 21 years, if the jury were to seek corroboration of CEW's evidence in the evidence of SCB.

[8] Lord Justice Clerk Gill explained in *AK* v *HM Advocate cit sup* at paragraph [14]:

> "It is common ground that there is no maximum interval of time fixed by law beyond which the *Moorov* principle cannot apply and that where the interval is a long one, it is necessary to consider whether there are any special features in the evidence that nonetheless make the similarities compelling (*Dodds v HM Advocate, Stewart v HM Advocate) ...*"

[9] Similar observations were made by the appeal court in *KH* v *HM Advocate* 2015 SCCR 242, paragraph [28], in circumstances where the relevant time interval was just under eight years. It was held that the Crown had to be able to identify some special or compelling feature in order to link two alleged incidents. None was identified. As a result the court concluded that the jury were not entitled to infer the necessary underlying unity of intent or purpose which is the prerequisite to the application of the *Moorov* doctrine.

[10] In a recent decision, *JM* v *HM Advocate* 2018 SCCR 149, the appeal court held that there were no compelling circumstances capable of overcoming a substantial time gap of 17 years.

[11] In the present case, we have been unable to identify a direction in the judge's charge which gave the jury sufficiently clear guidance about the correct approach when facing a time gap of eleven years or more, in particular the need for some special feature of the behaviour, making the similarities compelling despite the substantial time gap. At page 31 *et seq* of his charge, the judge directed the jury that there is no fixed time period beyond which the *Moorov* doctrine cannot be applied, and continued (at page 32):

> " … the longer the time gap, the more difficult corroboration can become. However,

> the search is for evidence indicative of an underlying similarity between the circumstances of the offences such as to enable the conclusion to be drawn that there was a course of conduct that was being persisted in by an accused person. It is a question of fact and degree whether the nature of the evidence is such that it would be legitimate to draw the inference that the incidents were indeed components of one course of criminal conduct. So that's a matter for you, ladies and gentlemen. You can use your commonsense in dealing with this matter.
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> The appeal court is saying it's entirely appropriate for the jury to deal with this matter because it's a matter for you. You look at all of the evidence. You look at all of the witnesses who have been in court, and it's a matter for you to do this search. The search is for evidence indicative of an underlying similarity between the circumstances of the offences such as to enable the conclusion to be drawn that there was a course of conduct which was being persisted in by an accused. It is a question of fact and degree whether the nature of the evidence is such that it would be legitimate to draw the inference that the incidents were indeed components of one course of criminal conduct or not. That's entirely for you, ladies and gentlemen. You can accept it, or you can reject it. It's up to you.
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> So, effectively, ladies and gentlemen, it's for you to consider that evidence and it's also quite clear that because it's a special rule, it's got to be applied with caution. You've got to be careful when you're using it, but you're using your common sense and that's why you're here, to use your common sense, ladies and gentlemen."

These were appropriate directions, but in a "long time gap" context, further guidance to the jury was necessary, namely a clear mention of the need for some special or compelling feature of the conduct being considered such that the jury would be entitled to apply the *Moorov* doctrine despite the significant time gap. We have found no such direction. The jury were not alerted to the fact that if they considered that no such special or compelling feature could be identified, they were not entitled to rely upon the *Moorov* doctrine.

[12] In the circumstances of this case, we consider that the omission amounted to a material misdirection leading to a miscarriage of justice in respect of charges 17, 18, and 19, whether that issue is assessed in terms of the test in *McInnes* v *HM Advocate* 2010 SC (UKSC) 28, 2010 SCCR 286 ("a real possibility [that] the jury might reasonably have come to [a different verdict]") or *Brodie* v *HM Advocate* 2013 JC 142, 2013 SCCR 23 (a more flexible test, as set out in paragraphs 40 to 43 of that case). We shall therefore sustain ground of appeal 3

in so far as relating to charges 17, 18, and 19.

Charges 1 to 6, 8 and 11

[13] Mr Paterson, on behalf of the appellant, submitted that the convictions of the remaining charges 1 to 6, 8 and 11, also fell to be quashed, for the reasons outlined in the grounds of appeal and in oral submission.

[14] We are not persuaded that any miscarriage of justice has occurred in relation to those charges. The jury's verdict demonstrated that they believed and accepted the evidence of SCB in respect of charges 1 and 2, HBR in respect of charges 3 to 6 and 8, and LAR in respect of charge 11. SCB gave evidence about a rape and an assault during the period between 23 April 1993 and 31 October 1993 (charges 1 and 2). HBR gave evidence about rape, sexual assaults, and assaults during the period between 1 May 1995 and 23 February 2003 (charges 3 to 6 and 8). LAR gave evidence about assaults during the period 1 May 1995 and 23 February 2003 (charge 11). The advocate depute addressed the jury on the basis that, when considering whether, and if so how, to apply the *Moorov* doctrine, they had to consider the evidence relating to assaults in one chapter, and the evidence relating to rapes and sexual assaults in a separate chapter (see paragraph [13] of the Crown's written submissions; and cf *Reilly* v *HM Advocate* 2017 SCCR 142).

[15] There was, in our opinion, a clear sufficiency of evidence in each chapter to go to a jury, properly directed. The time periods were of sufficient proximity to entitle the jury to apply the *Moorov* doctrine if they so chose (a matter of fact and degree for the jury to decide: *MR* v *HM Advocate* 2013 JC 212, paragraph [20]; *JL* v *HM Advocate* [2016] HCJAC 61 paragraph [33]; *Reynolds* v *HM Advocate* 1995 JC 142 at page 146). As for the directions given in respect of these charges, we do not accept that it is mandatory in every case for a judge to

provide a definition of a course of criminal conduct, or to give an example thereof. Further, any lack of repetition of the approach to be adopted concerning separate chapters for assaults and rapes/sexual offences respectively did not, in this particular case, amount to a material omission leading to a miscarriage of justice, standing the approach adopted by the advocate depute whose address was referred to by the judge at page 34 of his charge. As for ground of appeal 2(vi), had the jury returned verdicts of guilty in respect of charges 1 and 2, and charges 17 to 19, but not charges 3 to 6, 8, and 11 (in other words, demonstrating acceptance of the evidence of SCB and CEW, but not the evidence of HBR or LAR), there might have been more force in the appellant's argument (cf the observations at paragraph [31] of *Cannell* v *HM Advocate* 2009 SCCR 207). But standing the jury's clear acceptance of the evidence of all four witnesses, we are not persuaded that there has been any miscarriage of justice in relation to charge 1 to 6, 8, and 11.

Decision

[16] For the reasons given above, we sustain the third ground of appeal in so far as relating to charges 17, 18, and 19. We quash the convictions of charges 17, 18, and 19. *Quoad ultra* we refuse the appeal against conviction.

[17] The partial success of the appeal has potential implications for the appellant's sentence. A hearing will be arranged for submissions on that matter.