



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 29
HCA/2023/000427/XC

Lord Justice Clerk
Lord Matthews
Lady Wise

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

CA

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Culross; Faculty Services Limited for JBM Law Ltd, Larkhall
Respondent: The Lord Advocate (Bain KC); the Crown Agent

17 July 2024

Introduction

[1] This is an appeal against conviction and sentence following the appellant's conviction after trial on two charges. Charge 1 libelled the sexual assault, sexual assault by penetration and rape of a young child M, on various occasions between 1 August 2011 and 19 December 2014, when M was 5-8 years of age. Charge 2 libelled sexual assault by

penetration of a young child E, on various occasions between 1 June 2011 and 19 December 2014, when E was 5-9 years of age. The appellant was, at the time of the offences, between 13 and 16 years old. In due course, on 18 August 2023, he was sentenced to 6 years' imprisonment.

[2] The appeal against conviction is based on an alleged misdirection by the trial judge on what use could be made of evidence of the complainers' distress at the time of making certain disclosures in 2020 and 2021. The sentence is argued to be excessive on the basis that the trial judge failed to give sufficient weight to a variety of mitigating factors.

The appeal against conviction

[3] The offences were said to have occurred during periods when the appellant's mother, who operated a child minding business at her home, looked after M and E as young children. M's evidence was taken in the form of three Joint Investigative Interviews, the recordings of which were played to the jury (who also had transcripts) as prior statements in terms of s 271M of the Criminal Procedure (Scotland) Act 1995 Act. E gave evidence at a commission and the recording of her evidence, where she was cross-examined, was played to the jury.

Evidence of distress

[4] M's mother spoke to M's various cognitive and mental health difficulties. M made disclosures to C in the second half of 2020 to the effect that the appellant sexually abused her. At the time of doing so she was extremely upset and "talking on and off". M initially did not want to go to the police, but wanted to do so by March 2021.

[5] In about June 2021 E's mother received a phone call from a police officer, DC Jamieson, who wanted to speak to E. E's mother was not present during the call, but

when she got home she saw that E was distressed. She was shaking and crying and looked very anxious. She spoke a little but was not ready to talk and only disclosed minor details. DC Jamieson said when she had spoken to her, E made an allegation of abuse. She was upset over the phone and was crying.

The case as presented at trial

[6] The Crown case was based on a traditional application of the rule of mutual corroboration. Prior to speeches the Advocate Depute confirmed that this was the basis upon which the Crown sought a conviction. In addressing the jury it was clarified that the offences against M in charge 1 depended for proof on the evidence of E in charge 2 and *vice versa*, which the Advocate Depute maintained amounted, by reason of similarity of time, circumstances and conduct, to a single course of conduct by the accused. The defence speech took no issue with the proposition that the circumstances of the offences, if true, were sufficiently similar to permit in theory the application of the rule of mutual corroboration. However, counsel emphasised that it was “essential for the Crown case” that the jury accepted the evidence of the complainers as credible and reliable, adding reasons why they should not so conclude.

[7] There was limited reference to the distress evidence in the speeches. The Advocate Depute simply asked the jury if they believed that M and E were upset at the time of making the disclosures. The value of this evidence was not addressed.

The trial judge's charge

[8] The trial judge explained to the jury that in the second part of his charge he would deal with certain matters in relation to evidence; and then direct them on where corroboration could be found. He explained that before the jury could convict the accused

they would have to regard the evidence of the two complainers as credible and reliable in its essentials. He then gave the challenged directions on distress:

“... evidence of their distress is simply a piece of circumstantial evidence; you can accept or reject it.

If you do accept it, it cannot of itself corroborate their evidence about what they say happened to them during these alleged incidents, but, if accepted, it could confirm that the complainers suffered from a distressing event; it could corroborate their evidence about their state of mind at the time of the incident; it can also support the credibility of their evidence.

Before you could regard that evidence of distress as a source of corroboration, you would need to be satisfied that the distress was genuine, and that it was due wholly or partly to M and E reacting to what the accused did, and not wholly to some other reason. ...”

This passage is not contained in the part of the charge in which the trial judge was directing the jury on the corroboration requirement. It is followed immediately by his discussion of the rule against hearsay. The judge then gave directions about the status of a Joint Minute, hearsay and how to treat inconsistencies. He explained that the JMs were an exception to the hearsay objection, but drew attention to the fact that M’s evidence therein was not given on oath and not tested by cross-examination.

[9] After a lunch break he turned to the issue of corroboration and gave directions on mutual corroboration which are unexceptional and unchallenged. He directed the jury specifically:

“In this case, if you accept a complainer’s evidence in a charge, then you would have to find corroboration from the other complainer whose evidence you accept as credible and reliable who speaks to the other charge. ... if you accepted E as credible and reliable but you either did not believe M or you had a reasonable doubt about her evidence, ... then that would be the end of the case, and you would require to acquit the accused, because the only positive source of corroboration for E comes from the evidence of M if believed and if reliable.

The same would apply if you accepted the evidence of M but rejected the evidence of E, or had a reasonable doubt about its truth. In both those situations, you would be

left with one source of evidence against the accused, and that by law is insufficient to convict, and, in that circumstance, if it arose in your judgement of the case, you must acquit the accused. “

[10] Later he said

“What you make of the Crown case is for you to decide, but on this indictment in relation to these two charges you cannot convict of one charge and acquit of the other. That is because of the need for corroboration on each charge, and the way that the special rule relating to corroboration operates.”

Submissions for the appellant

[11] Counsel for the appellant submitted that the trial judge had misdirected the jury on the use that could be made of the distress evidence. The effect was to make it available as corroborative evidence. The distress was not *de recenti* and too far removed from the events to provide corroboration. The directions might have confused the jury into believing that there was an alternative route to conviction other than mutual corroboration.

Submissions for the Crown

[12] The Lord Advocate submitted that on the facts of the present case the direction served no purpose given it was not necessary for the crown to prove that the victims, young children, did not consent. Had the directions related to an adult they would have been accurate, but had no application in the case of children. It would be wrong to describe it as a misdirection. In any event, if it were a misdirection it was of no materiality and was not productive of a miscarriage of justice.

Analysis and decision

[13] It is clear that the judge erred in giving the direction he did, since the issue was not germane to the matters which the jury had to decide. In the particular circumstances of this case it is difficult to see that such distress as might have been exhibited, so far removed from the events, had any part to play. The complainers were children at the time of the offences,

so no issue of consent, the primary purpose of consideration of state of mind, could arise.

The directions were not only unnecessary, they were wrong, since state of mind is not a relevant consideration in offences against children and further in seeming to equiparate non-corroborative distress with the effect of a *de recenti* statement. That the direction was a misdirection is accordingly established. Accordingly, it is not necessary to discuss any implications from the lapse of time between the events and the distress.

[14] However, this is a case in which it was made abundantly clear to the jury that the only route to verdict was through the acceptance of both complainers as credible and reliable witnesses. The directions on this matter were clear, and correct. This accorded with the terms of both speeches which proceeded on the basis that the case was one which depended for proof entirely on the application of the doctrine of mutual corroboration. It is trite that jury directions ought to be looked at in context and not scrutinised in isolation or as if they were part of a conveyancing document (*Sim v HM Advocate* 2016 JC 174 at para 32). The charge should not be scrutinised as if the jury has not heard the evidence and the speeches (*ibid*).

[15] By the time the jury came to deliberate it must have been abundantly clear to them that in order to convict they had to be satisfied that both complainers were credible and reliable. In light of the whole context of the trial, the issue presented to the jury by counsel, and the details of the charge quoted above plainly identifying the only route to verdict as one dependent on mutual corroboration, it is fanciful to suggest that the jury might have gained the impression that the distress evidence was another source of evidence from which they could find corroboration as a basis upon which they could convict. The misdirection had no materiality and could not be said to have been productive of a miscarriage of justice. The appeal against conviction will therefore be refused.

The appeal against sentence

Circumstances of the case

[16] Both complainers spoke to the terms of the relevant charges which libelled as follows:

“(001) on various occasions between 1 August 2011 and 19 December 2014, ... did assault M ... pull down her lower clothing, touch and kiss her vagina over her underwear, place your hand over her mouth, sexually penetrate her vagina with your fingers and on one occasion you did pull down her lower clothing and underwear, pull her by the body, place your hand over her mouth, and did penetrate her vagina with your penis and thus rape her and you did instruct her not to disclose your conduct towards her: CONTRARY to Sections 18, 19 and 20 of the Sexual Offences (Scotland) Act 2009;

and

(002) on various occasions between 1 June 2011 and 19 December 2014, ... did assault E, seize her by the body, place your hand over her mouth, place her on your lap and sexually penetrate her vagina with your fingers and penis: CONTRARY to Section 19 of the Sexual Offences (Scotland) Act 2009.”

[17] During the period libelled the appellant was aged between 13 and 16 years. His mother, owned and operated a child minder business in her 3 bedroom mid-terraced home which was attended by the complainers. Each complainer spoke to incidents happening when they went upstairs to use the bathroom, or to get changed there for swimming lessons. The accused would take them into his bedroom and assault them. They both spoke to digital penetration on repeated occasions. E spoke of thinking that penetration was sometimes with the appellant’s penis, because of how she was sitting on his lap, and the degree of pain, but was somewhat uncertain of this. M spoke of one incident of penile penetration. M’s Victim Impact Statement spoke to the detrimental effect of these offences on her mental and physical health.

[18] The trial judge imposed a sentence of 6 years’ imprisonment. He concluded, having regard to the nature of the offences, their duration, and all the circumstances of the case,

including the personal circumstances of the appellant, that only a custodial sentence would be appropriate. That decision is not subject to challenge in this appeal. As to the length of sentence, the judge reached the figure by (a) assessing that the sentence for an adult committing these offences might have been one of 12 years custody; and (b) applying a fifty per-cent discount for the appellant's youth.

Submissions for the appellant

[19] The submission which underpins the appeal against sentence is that the trial judge failed to give sufficient weight to a number of factors.

(1) The appellant's age at the time of committing the offences (13-16), at the time of conviction (24). The Sentencing Young People Guideline applied. Had he come before the court when the offences were committed, when he lacked intellectual and emotional maturity, his culpability would have had a lower assessment and the prospects of rehabilitation would have been significant.

(2) The absence of further offending since the offences, attributed in the CJSWR to the "natural maturation process", confirms that belief in rehabilitation would have been justified.

(3) The appellant's personal circumstances: his mental health which had deteriorated and for which he had sought therapeutic support; his role in caring for his mother, suffering from a serious illness.

Analysis and decision

[20] The appellant was convicted of serious offences against young children over an extended period. Whilst there were mitigatory factors available, in terms of his youth, the lack of subsequent offending, and his personal circumstances, the nature of the offending and the harm caused meant that a custodial sentence was inevitable. The grounds of appeal

focus on a submission that the trial judge failed to give proper consideration to the factors available in mitigation. There is however, an anterior issue, which relates to the process by which the trial judge arrived at the length of the sentence imposed. It is clear that he erred in starting with what he considered to be the appropriate sentence for an adult and thereafter reducing it to take account of the appellant's youth. See *Hay v HM Advocate* 2020 JC 325 in which the court stated:

"[17] It is because the exercise of sentencing a child or young person is different from that of sentencing an adult, that an approach which simply addressed the sentence which would be imposed on an adult and then applied a discount to reflect the fact that the accused is a child or young person would be inadequate. This is a point which has been addressed several times. In *Hibbard* (para 15) the court noted that while it was not illegitimate to have regard to adult sentencing levels to provide a background understanding of the general sentencing range for the offences in question, nevertheless 'any sentence imposed on a child, with his welfare as a primary consideration, ought normally to be significantly below those levels'. The court observed that: '[T]he sentencing process should not simply involve an exercise of looking at past cases involving adult offenders committing similar crimes and then deducting a percentage'.

...

[21] It appears, therefore, that the appropriate punishment part was selected by considering that which would be appropriate for an adult and reducing it to take account of the youth of the appellant. As the authorities show, the problem with this approach is that it is unlikely truly to reflect the fact that the exercise of sentencing a child or young person is different from that of an adult. Such an approach is unlikely to result in a full and careful evaluation of the factors which make the exercise different of the type which was conducted in *Campbell v HM Advocate* having regard to the issues identified by Lady Hale in *R (Smith) v Secretary of State for the Home Department*."

[21] That sentencing a young person is a different exercise from that of sentencing an adult is specifically recognised in para 3 of the Sentencing Young People Guideline issued by the Scottish Sentencing Council. This is particularly because a young person will generally have a lower level of maturity, and a greater capacity for change and rehabilitation, than an older person. In sentencing a young person, particular regard should

be had to the maturity of the young person; and rehabilitation (para 9). In addition, the best interests of the young person should be considered in every case, and must be a primary consideration when the young person is under the age of 18 (para 8). The trial judge having adopted an incorrect approach to sentencing by commencing with the appropriate sentence for a mature adult rather than as a separate exercise for sentencing a young person, the matter is at large for this court.

[22] As already noted, the appellant is someone to whom the Sentencing of Young People Guideline applied at the time of sentencing. Furthermore, the court was obliged, by normal sentencing principles, to have regard to his age and maturity at the time the offences were considered when assessing culpability. This is provided in the Sentencing Process Guideline at para 10, consistent with the case of *Greig v HMA* 2012 JC 135.

[23] The CJSWR disclosed that

“The emotional care that Mr A experienced is likely to have been problematic and he suffered the effects of childhood adversity. His mother had her own difficulties, and this is likely to have appears to have impacted on her ability to manage the demands of parenthood (*sic*). As a young person Mr A experienced the impact of domestic violence, parental absence, parental mental health difficulties and family breakdown. Secrecy – deliberate or otherwise – is also something that has continued to be a factor in family life. It is likely that all these factors were relevant to his harmful sexual behaviours and continue to impact on his mental and emotional wellbeing.”

[24] The CJSWR contained a risk assessment, although this was noted to be a much less in-depth one than would have been carried out had he been convicted at the time of the offences. On a statistical assessment he was assessed as medium risk for both sexual violence and non-sexual violence. This seems essentially to have been based on the commission of the present offences. A further assessment suggested he presented a minimum risk. The social worker notes that there have never been concerns about harmful sexual behaviour before or after the dates outlined in the index offence, but that denial of the

offences prevented further exploration of the circumstances of the offending behaviour. The social worker herself seems to have considered that the likelihood of repetition of a similar type of offending behaviour is low, and suggested that it is possible that his natural maturation process has been a factor that has enabled him to desist. Moreover she considered it is likely that he will not require risk management to desist in future. He appears to have been in full time employment since leaving school.

[25] Essentially almost 10 years have passed since the offences were committed. The appellant appears to have matured during that time, has been a useful and productive member of society and taken on the role of caring for his mother. The information available seems to indicate that it would be reasonable to consider him to present a low risk of reoffending. Reflecting the seriousness of the offences, but also acknowledging the lower culpability resulting from his youth at the time of the offences, the lack of repetition, the low risk, and the process of maturation we consider that an appropriate sentence is one of 4 years. We will therefore quash the sentence imposed and substitute one of 4 years imprisonment.