APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 22
HCA/2018/330/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

KHALID JAMAL

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Connelly; Paterson Bell (for Aamer Anwar & Co, Glasgow)
Respondent: J McDonald AD; the Crown Agent

21 March 2019

Introduction

[1] This appeal against conviction raises a question about corroboration of rape; specifically the element of penetration. Although the issue is focused in the context of mutual corroboration, it has a bearing on all rape cases.

Background

[2] On 22 May 2018, at the High Court in Glasgow, the appellant was convicted of one charge of sexual assault on CQ and separately one charge of rape and one charge of sexual assault on KL. The only evidence relied upon by the Crown was that of the complainers. The principle of mutual corroboration was therefore central to the Crown case.

[3] The convictions were as follows

> (1) on 24 December 2013 at ... Great Western Road, Glasgow you did sexually assault [CQ] … in that you did seize her, push her onto a bed there, restrain her, handle her breasts and kiss her on the neck**:** CONTRARY to Section 3 of the Sexual Offences (Scotland) Act 2009;
>
> (2) on an occasion between 1 April 2016 ... 31 May 2016 ... at ... Drunkinnon Road, Balloch ... you did assault [KL] … and did push her onto a bed there, restrain her, pull down her lower clothing, force her legs apart and penetrate her vagina with your penis and you did thus rape her: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009;
>
> (3) on 3 September 2016 at ... Springbank Gardens, Glasgow you did sexually assault [KL] … in that you did prevent her from leaving said house, push her onto a bed there, restrain her, handle her breasts, pull down her lower clothing, touch her on the body: CONTRARY to Section 3 of the Sexual Offences (Scotland) Act 2009."

The jury deleted the words "*and this you did with intent to rape her as defined in Section 1 of the aftermentioned Act*" from charge (1) and the words "*seize her, drag her into the house there, push her, put your fingers into her vagina, and this you did with intent to rape her as defined in Section 1 of the aforementioned Act*" from charge (3).

[4] The appellant was sentenced to a total 6 years imprisonment (12 months in respect of charge (1), 5 years in relation to charge (2) and 18 months for charge (3); the sentences on charges (1) and (2) running consecutively, with that on charge (3) to run concurrently).

The Evidence

[5] At the time of the offences the appellant was aged respectively 41, 43 and 44.

Charge (1)

[6] CQ and the appellant had contacted each other through an internet dating website. They met on a number of occasions. CQ was about 22 years old and thought that the appellant was 26 or 27. On 24 December 2013, CQ was at the appellant's home along with two others. The appellant asked CQ to come into his bedroom on the pretext that he wanted her to see his new ornamental fish. Once in the bedroom, he grabbed CQ, lifted her up, pushed her down on the bed, lay on top of her; rubbed her breasts and kissed her neck. He repeatedly said that he wanted to have sexual intercourse with her. CQ repeatedly said that she did not want to have intercourse with him. She tried to push him off and told him that, if he let her up, she would come back to visit the next day. The appellant did so and she left the room. CQ did not see the appellant again. She texted him later the following month, saying that she would tell the police about what he had done unless he gave her money. Her explanation for this was that she was angry and wanted to get back at him.

Charge (2)

[7] In 2015 the appellant contacted KL through an internet dating website. KL was 17 years old. They communicated for a couple of months before meeting up. The appellant had told her that he was a 24 year old doctor. KL travelled to Glasgow by train and met the appellant outside Central Station. He drove her to his house in Balloch. She sat in the living room area. He invited her to his bedroom where it would be more comfortable to sit on the bed. KL went to the bedroom and sat on the bed.

[8] In the bedroom, the appellant started to take his clothes off and invited KL to do the same. KL said that she was uncomfortable about taking her clothes off. The appellant, who was by then wearing only his underpants, sat on the bed and tried to put his arm around her. The appellant stood up and took off his underpants. He pushed KL onto the bed, held her down and pulled off her trousers. KL was shouting at him that she did not want to do anything. The appellant pulled her pants off, held her hands above her head and raped her. He penetrated her for around 5 to 10 minutes before getting up and leaving the room.

[9] About half an hour later, the appellant drove KL home. He texted her later to see if she was alright. She replied that he had hurt her and that she did not want to talk to him. She stopped all contact with him at that time.

Charge (3)

[10] A few months later, KL got in touch with the appellant as she had two tickets to an event at a nightclub. She invited the appellant to join her, so that they could go out as friends. It was agreed that they would go and the appellant would drive KL home. The event lasted longer than expected and they were late leaving the nightclub. The appellant said that he had been drinking and was not fit to drive KL home. He said that he had a new house and they could go there. He could then rest before taking her home. He drove KL to his house in the east end of Glasgow. KL was persuaded to go into the house to see the appellant's new ornamental fish.

[11] The appellant took KL into his bedroom and asked her to keep quiet as his housemate was asleep. KL sat on the bed. She asked the appellant to drive her home or phone a taxi. He said he would call a taxi and picked up his phone, saying that he was looking for taxi companies. KL made to get up off the bed. The appellant came over to her

and pushed her back onto the bed. KL asked him to stop. He replied that he could do what he wanted. He grabbed hold of KL's legs and climbed on top of her, sitting on her and straddling her with his legs. She struggled and tried to push him off. He took hold of both her hands and held them above her head. He pulled down her trousers and pants and handled her body. After about 15 minutes, he got up. KL put on her lower clothing. The appellant called a taxi which arrived a short time later.

Submissions

Appellant

[12] There were two grounds of appeal, but they raised the same basic issue of whether mutual corroboration applied so that evidence of the sexual assault on charge (1) could corroborate the rape on charge (2). It was clear from the jury's deletions in charge (1) that they did not consider that the appellant had attempted to rape CQ. The circumstances of the behaviour and the character of the offences were therefore different. They could not provide mutual corroboration (*Reynolds* v *HM Advocate* 1995 JC 142). The need to provide evidence which was sufficient to corroborate penetration or intent to do so was still required. The case was distinguishable from the circumstances of *AD* v *HM Advocate* [2017] HCJAC 84 in which it was clear that the intent of the appellant had been to commit a further assault.

[13] It was accepted that, in appropriate cases, a lesser charge could corroborate a more serious one. The *nomen criminis* need not be the same for mutual corroboration to apply (*MR* v *HM Advocate* 2013 JC 212 at para [20]; *KH* v *HM Advocate* 2015 SCCR 242 at paras [34] and [35]). It was also accepted that, in terms of time and place, the principle could apply. In essence, mutual corroboration was not apt to apply in the circumstances between charges (1) and (2) as found proved by the jury. The case could be distinguished from *AD* v *HM*

Advocate (*supra*) in which the jury would have been entitled to hold that it was only by the robust response of one complainer that the assault against her had not gone further.

Crown

[14] The Crown relied on the evidence of the two complainers establishing an underlying course of conduct. The appellant had not testified on his own behalf, but evidence of his police interview had been led. This involved denials that the incidents in charges (1) and (3) had happened at all and that consensual activity of a different nature, which did not involve penetration, had occurred on the occasion libelled in charge (2).

[15] On charge (1), there had been evidence of a desire to have sexual intercourse. The similarities between the offences were that: (i) the appellant had met both complainers through an internet dating website; (ii) the appellant had pretended that he was younger than he was; (iii) the conduct took place in the appellant's bedroom; (iv) the complainers found themselves in his bedroom on a pretext; and (v) the conduct of the appellant's was sexual in nature and persisted in despite the complainers' protestations.

[16] In *AD* v *HM Advocate* (*supra*), the anal rape of a male child was held to be corroborated by a sexual assault on a female child. There was little difference between that and CQ persuading the appellant to desist by making a promise to come back the next day. There had also been an escalation in the appellant's conduct. His partial success in relation to charge (1) may have emboldened him when the opportunity arose in charge (2), particularly as there was no-one else present in the house.

[17] The basic principle of mutual corroboration was whether there was an underlying unity of conduct. This was a question of fact and degree (*McMahon* v *HM Advocate* 1996 SLT 1139; see also *RB* v *HM Advocate* 2017 JC 278 at para [24], *MR* v *HM Advocate* (*supra*); *TN* v

HM Advocate 2018 SCCR 109. In *MR*, it was held that a charge of indecent assault could corroborate a charge of rape, where there had been near penetration in the indecent assault and the accused had expressed a desire to achieve it (see also *HMcA* v *HM Advocate* 2015 JC 27 at para [9]).

Decision

[18] It is accepted that, in all rape cases, there requires to be proof, by corroborated evidence, that the crime has been committed; that is that sexual intercourse has taken place without the complainer's consent. This has come to be understood as meaning that the two elements ought to be looked at separately, or in isolation. This has led to an assumption that the act of penetration, when spoken to by a complainer, requires corroboration by scientific or medical evidence, such as the finding of semen in, or injuries to, the vagina, by an admission of intercourse, or, very much more rarely, at least prior to the growth in video, an eye or ear witness account of the event. In some situations, in which a complainer has given evidence of penetration, it has been held that only a conviction of attempted rape was available. This is both strange and anomalous.

[19] This understanding has perhaps been prompted by the former idea that the most serious element in rape was the penile penetration of the vagina and the several consequences which that had in relation to the woman's "honour and value". That idea has given way to a much broader concept whereby rape is regarded as serious because it involves a violation of a person's physical and sexual autonomy (Scottish Law Commission Report (No. 209) *Rape and Other Sexual Offences* paras 3.1 and 3.11). Thus, what may now be characterised as a sexual "attack" may be committed against both the male and the female and not only by penile penetration of the vagina, but also by anal or oral penetration. It was

because of the serious nature of penile penetration, especially vaginal penetration in the context of the risks of pregnancy and the transmission of particular diseases, that the *nomen criminis* was retained.

[20] There is no sound reason for restricting the availability of corroboration of the act of rape to the type of scientific, medical or other evidence set out above. In relation to penetration, corroboration can be found in facts and circumstances which "support or confirm" the direct testimony of the commission of the completed crime by the complainer (*Fox* v *HM Advocate* 1998 JC 94, LJG (Rodger) at 100). In a situation in which rape is alleged, a broad approach should be taken. It has been said that distress may not be capable of corroborating an account of the acts which caused that distress. This was conceded by the Crown in *Smith* v *Lees* 1997 SCCR 139 (LJG (Rodger) at 79). Accepting for present purposes that the concession was well made, care must still be taken not to eliminate distress, especially if it is of an extreme nature, as a significant factor which, at least when taken with other circumstances, "supports or confirms" a complainer's account that she was raped in the manner which she has described. Thus there will be many situations, such as dishevelment or loss of clothing, where direct testimony of rape, in whatever form, can be seen as being corroborated when all the surrounding facts and circumstances are taken into account.

[21] In a mutual corroboration case, the confirmation or support in respect of both lack of consent and penetration comes from the existence of testimony from more than one witness speaking to different incidents which demonstrate an underlying unity of conduct (*McMahon* v *HM Advocate* 1996 SLT 1139, LJG (Hope), delivering the opinion of the court, at 1142; *B* v *HM Advocate* 2009 JC 88; LJG (Hamilton) at para [6]). There is no principle whereby what might be perceived as less serious criminal conduct, such as a non-

penetrative offence, cannot provide corroboration of what is libelled as an apparently more serious crime involving penetration (*MR* v *HM Advocate* 2013 JC 212, LJC (Carloway), delivering the opinion of the court, at para [21]; *HMcA* v *HM Advocate* 2015 JC 27, LJC (Carloway), delivering the opinion of the court, at para [9]). The fundamental issue is whether the evidence demonstrates a course of conduct systematically pursued (*HMcA* v *HM Advocate* (*supra*) at para [11]; *RB* v *HM Advocate* 2017 JC 278, LJC (Dorrian) at paras [18], [23–24]). The cases referred to demonstrate that in a charge of rape, where the Crown rely on mutual corroboration, the necessary support for the complainer's evidence of penetration can be found in other evidence which satisfies the jury that the accused was engaged in a course of sexual criminal conduct. It is not necessary for this purpose to seek to label or to define the precise nature of that course of conduct. Evidence of non-penetrative sexual conduct is capable of providing corroboration of penetrative conduct. It is all a question of fact and degree.

[22] The appellant met both complainers on an internet dating website. Both complainers were much younger than the appellant. The appellant held himself out to both complainers to be much younger than he was. Once at his home, the appellant invited the complainers into his bedroom to see his ornamental fish or to collect something. Once in the bedroom he pushed the complainers onto his bed and sexually assaulted them. Although he did not rape the complainer on charge (1), the appellant had gone as far as pushing her onto a bed, lying on top of her and telling her that he wanted to have sexual intercourse with her. The jury were entitled to identify similarities in time, place and circumstances in the behaviour described by both CQ and KL, such as to demonstrate a course of conduct systematically pursued by the appellant. They were entitled to take the view that the different outcome in

CQ's case was attributed to her greater maturity and the presence of another couple in another room. The different outcome for KL in charge (3), as opposed to charge (2), could also be explained by the presence of another in the flat.

[23] The appeal against conviction is refused.