APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 14
HCA/2019/331/XC

Lord Justice General
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

PGT

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Shand; The Cumbernauld Law Practice
Respondent: Edwards QC, AD; the Crown Agent

2 April 2020

General

[1] On 8 May 2019 at the High Court in Glasgow the appellant was convicted of 3 charges as follows:

> "(1) On an occasion between 13 March 1997 and 12 March 1999 … at an address in Beechwood Road … Cumbernauld you … did indecently assault [GT] born … 1985, your nephew, and did induce him to consume alcohol, remove his lower clothing,

touch his penis, masturbate him, push him face down onto a bed, lie on top of him, penetrate his anus with your penis and have unnatural carnal connection with him;

(2) on an occasion between 1 … and 31 March 2000 … at an address in Beechwood Road, Cumbernauld … you … did indecently assault [GT], born … 1985, your nephew … and did touch his penis and testicles over his clothing; and

(3) on an occasion between 1 January … and 31 December 2006 … at … Dalshannon Place, Cumbernauld you … did assault [BT] your wife … and did seize hold of her, remove her lower clothing, lie on top of her, penetrate her vagina with your penis and you did thus rape her."

The appellant was sentenced to 10 years imprisonment.

Evidence

[2] The complainer in charges (1) and (2) is the appellant's nephew. On the first charge, he spoke to an incident in which, as libelled, the appellant had assaulted him and committed an act of sodomy. This took place when the complainer was 12 or 13 years of age. He had gone to the appellant's home in Cumbernauld in response to a request to fix a computer. The appellant had given the complainer alcohol, which had made him feel dizzy. The complainer and the appellant had gone into a bedroom. The complainer remembered lying on his back. The appellant had come in, removed the complainer's clothing and committed the act libelled. He said to the complainer that he (the complainer) was the black sheep of the family and that he would get him into trouble with his parents unless he co-operated. This made the complainer afraid, as he did not wish to upset his mother and father.

[3] The second charge related to an incident in March 2000 when the complainer was 15 years of age. It also occurred in the appellant's home, after a party at the complainer's grandparents' home to celebrate their golden wedding. The complainer had been drinking at the party. He was given more drink when he arrived at the appellant's home. The incident took place in the bedroom. The appellant threatened to tell the complainer's

parents about his (the complainer's) bad behaviour unless he co-operated. The appellant began to touch the complainer's private parts over his clothing. The complainer was frightened and ran out of the house. He did not tell anyone about either incident until 2017, when he reported it to the appellant's former wife (BT) who was the complainer in the third charge.

[4] BT gave evidence about charge 3. It had occurred in 2006 when she and the appellant had returned home after a social event. The appellant was "very drunk". The complainer had wanted to go to sleep and had put the light out. The appellant became angry. He had said "you're my wife so don't turn off the light". He said that he could tell her what to do, because she was his wife. He told her that she was not going to sleep. He then removed her lower clothing, lay on top of her and raped her. After the incident, the appellant told the complainer not to tell her parents or sister about what had happened. He gave her £10 to "keep her mouth shut". The complainer had not told the police about the incident until 2017, when she had told the complainer in charges 1 and 2.

[5] The trial judge repelled the no case to answer submission on the basis of the following similarities between the offences which were said to permit the application of mutual corroboration: (1) the offences took place in the appellant's home; (2) both major incidents involved forced penile penetration; (3) both complainers were vulnerable; (4) each was a relative of the appellant; (5) in each crime the appellant removed the complainer's lower clothing; (6) the crimes were committed in a bedroom with no-one else present; (7) in each crime the appellant took steps to ensure that the complainer did not tell anyone else; and (8) both crimes were committed when both complainers were under the influence of alcohol, to a greater or lesser extent, and the appellant had also consumed

alcohol. The judge took the view that the time gaps involved were not so lengthy that compelling or extraordinary similarities were needed.

Advocate depute's speech

[6] During the course of his address to the jury, the advocate depute explained why, in his submission, the jury should accept the complainer GT's evidence. This was that it was not the only evidence in the case. Quite apart from the application of mutual corroboration, the advocate depute said:

> "Why, you might ask yourselves would two entirely different people come forward and make such similar allegations against this man? Given what you heard from [the police] regarding the accused's position at interview and the lines of cross-examination … it is clear that it is the accused's position that both complainers are lying. But why? Why would both complainers say these things about the accused? Why would both [GT] and [BT] accuse him of, in effect, the same thing? ... [T]he answer is obvious: because they are telling the truth. [GT's] account is fully supported by that of [BT] because … If you step back and look at the case as a whole, they are really speaking about the same thing. They have both accused [the appellant] of abusing and sodomising or raping them because that is precisely what he did".

[7] In relation to BT's evidence, which was said to be corroborated by that of GT, the advocate depute submitted that:

> "The evidence of those two people make it crystal clear that the accused pursued a course of criminally sexual conduct towards them and that they were in effect, both speaking to the same thing. I have already explained why I suggest that that is so and I will not waste your time further in that regard."

Charge

[8] The trial judge gave the jury the standard directions on the application of mutual corroboration. He explained that, if the jury were satisfied that the crimes charged were so closely linked by their character, circumstances, place and time as to bind them together as parts of a single course of criminal conduct systematically pursued by the accused, then the

evidence of a single witness about the commission of one crime could be sufficiently corroborated by the evidence of another single witness about the commission of another crime or crimes. It was the underlying similarity of the conduct which had to be considered in determining whether the principle applied. In order to convict of any of the charges the jury had to accept the complainers as credible and reliable. The judge continued:

> "... [I]t is the underlying similarity of the conduct ... which you have to consider in deciding whether the doctrine applies. It does not matter that the charges have different names or are more or less serious. For the doctrine to apply, you have to believe the witnesses who speak to the individual charges at least about the essential parts of their evidence which you must also find to be reliable.
>
> ... [I]f you do not believe a complainer ... or you do not find his or her evidence to be reliable, that charge cannot be proved and you would be bound to acquit the accused of it. If you do accept the evidence of a complainer ... you may be able to find corroboration from the other witness who speaks to a different charge alleging broadly similar conduct.
>
> If you do accept that witness's evidence, you then have to decide if, by reason of the character, circumstances, place of commission and time of each charge, the crimes are so closely linked that you can infer that the accused was systematically pursuing a single court of criminal conduct. ...[I]t is not enough if all that is shown is that the accused had a general disposition to commit this kind of offence.
>
> … You have to apply this rule with caution, particularly where there are significant intervals of time as there may be in this case and where there are only two witnesses, which of course the bare minimum permissible in order to allow the doctrine to be applied. … The Crown says that the rule can be applied in this case. It relies on the points of similarity, which were highlighted to you by the advocate depute in his speech.
>
> If there are significant differences in the circumstances or the individual charges, it does not mean that you cannot find that there is mutual corroboration but the differences would form part of your exercise of evaluation as to whether it was being shown that there was a single course of conduct.
>
> [Counsel] for the accused says that the rule should not be applied. He relies upon the points of dissimilarity which he highlighted to you in his speech. …
>
> … It is entirely a matter for you to decide whether the rule can and should be applied in this case. … "

Submissions

Appellant

[9] The appellant submitted, first, that there was insufficient connection between charges 1 and 2 on the one hand and charge 3 on the other to allow the application of mutual corroboration. On no reasonable view could it be said that the circumstances were such as to demonstrate that the individual incidents were component parts of one course of conduct persistently pursued by the accused (*MR* v *HM Advocate* 2013 JC 212 at para 20, cf *Adam* v *HM Advocate* [2020] HCJAC 5). Mutual corroboration could be applicable between charges with a comparable level of similarity but with a much shorter time gap. It could be applicable between charges with a comparable time gap when the level of similarity was much greater. It had no application in cases such as the present where the circumstances were not particularly similar, the time gap between them was significant and the number of occasions when the behaviour was said to have taken place was small. It was the time gap which appeared from the evidence which was important; not that libelled in the charge. There was a lack of evidence on when the offences had occurred.

[10] When determining whether it could be inferred that two incidents were truly component parts of a course of conduct persistently pursued, time was a crucial consideration (*Moorov* v *HM Advocate* 1930 JC 68 at 89, cited in *RB* v *HM Advocate* 2017 JC 278 at para 28). There was no arbitrary dividing line between long gap cases, which required compelling or extraordinary similarities, and standard gap cases, which did not. The question was always whether the allegations were capable of being considered as constituent parts of a course of conduct persistently pursued. A lack of strength in one similarity required extra force from the others (*Tudhope* v *Hazelton* 1985 SLT 209 at 212 citing *Ogg* v *HM Advocate* 1938 JC 152). It was not possible to lay down a maximum period beyond

which mutual corroboration could not be applied (*Dodds* v *HM Advocate* 2003 JC 8), but a minimum gap of 7 years was substantial (*ibid*).

[11] The observations in *Reynolds* v *HM Advocate* 1995 JC 142, that the application of mutual corroboration was something which should be left to the jury unless on no possible view could it be said that there was any connection between the charges, were, if not wrong, prone to be misunderstood. They involved an incorrect understanding of what was said in *Moorov*. What had been said in *Reynolds* was merely shorthand for saying that a submission ought only to be sustained when, on no possible view of the similarities and dissimilarities in time, place and circumstance, could it be held that the individual incidents were component parts of one course of conduct persistently pursued (*A(R)* v *HM Advocate* 2019 SLT 1171; *Donegan* v *HM Advocate* 2019 SCCR 106 at para [38]). References to "open country" and "middle ground" tended to suggest the existence of wide open expanses in which the matter would lie within the province of the jury. *Donegan* v *HM Advocate* (*supra*) was also apt to be misunderstood. It was not correct to say that, at the stage of a no case to answer submission, it did not matter if there were dissimilarities. The court rejected the idea that it was only in extreme cases that a no case to answer submission should be upheld (*RF* v *HM Advocate* 2016 JC 189 at para 23). The role of the trial judge at that stage was more significant than some of the observations in *Donegan* might suggest. The need for the court to conduct a vigorous analysis of the evidence was doubly important, given the risks in a mutual corroboration case. *Donegan* was contrary to *Moorov* and the reasoning in it could not be justified by reference to *Reynolds*. The principle in *Moorov* had been developed since the 1930s, but there were now expressions of opinion to the effect that it had been extended beyond what had been intended (*A(R)* v *HM Advocate* 2019 SLT 1171 at paras [43] and [48]).

[12] It was not enough simply to catalogue some similarities and to dismiss others for mutual corroboration to apply. There required to be an overall similarity (*HM Advocate* v *SM (No 2)* 2019 SCCR 262 at para [8]). The phrase "a course of conduct" may be a useful shorthand, but it came with the rider of "systematically pursued" (*RB* v *HM Advocate* 2017 JC 278 at paras [21-22]). The charges involved only 2 complainers and 3 incidents. There was a significant passage of time between charges 1 and 2 on the one hand and 3 on the other. The similarities indicated little more than a disposition towards general sexual offending. Whilst each offence occurred in the context of familial relationships, that was no more than a coincidental connection.

[13] The second ground of appeal was the failure of the trial judge to correct the error in the advocate depute's speech in relation to using the similar nature of the different charges in the assessment of the complainers' credibility and reliability. The correct approach was for the jury to assess the credibility of each complainer separately, based solely on their own testimony and any other evidence specifically relating to the particular allegation, and without reference to testimony concerning other allegations. Only if the jury found each complainer to be credible and reliable could they go on and consider the applicability of mutual corroboration. The trial judge ought to have a clear and emphatic direction that the approach advocated by the advocate depute was incorrect. He should have directed the jury that it was not open to them to use another sexual allegation by a different complainer to support the credibility and reliability of a complainer in a general way, separate from and prior to its use as corroboration. The *obiter* opinions of the court in *Dreghorn* v *HM Advocate* 2015 SLT 602 (at [35] and [42] *et seq*) were divided. Lord Malcolm's observations were correct.

[14] Thirdly, the trial judge had misdirected the jury in relation to the approach to mutual corroboration. The direction, that the existence of significant differences in the circumstances did not mean that the jury could not apply mutual corroboration, was inconsistent with the correct direction that the circumstances had to be "so closely linked" to bind them together as a single course of conduct systematically pursued. Given the time gap, the jury required to find more than simply "broadly similar" conduct. It was incumbent on the judge to give the jury a direction that they would need to find some special feature of the behaviour which rendered the similarities compelling (see Scottish Jury Manual: *Possible Form of Direction on the Moorov Doctrine*; *CS* v *HM Advocate* 2018 SCCR 329 at para [11]). It was the existence of the significant time gap that triggered the direction recommended in the Jury Manual. If the time gap was not sufficient to require the suggested direction, some other direction should have been given to make it clear that the longer the time gap, the greater the need for strong similarities in character and circumstance (cf *RMY* v *HM Advocate* 2018 SCCR 253).

Respondent

[15] The advocate depute submitted that the evidence led was eloquent of a single course of criminal conduct persistently pursued by the appellant. The trial judge had correctly allowed the matter to be considered by the jury. Although there was no maximum interval beyond which mutual corroboration could not apply, where there was a decrease in the similarities in time, there required to be a corresponding increase in the similarities of circumstance. Where the gap was significant, extraordinary features of circumstance were required (*RBA* v *HM Advocate* 2019 SCCR 349 at para [35]; *AK* v *HM Advocate* 2012 JC 74 at paras [14-15]; and *Adam* v *HM Advocate* (*supra*) at para [35]). No compelling or extraordinary

similarities were required in this case (*RMY* v *HM Advocate* (*supra*) at para [5]). There was sufficient evidence, as described by the trial judge, from which it could be inferred that the individual incidents were component parts of the requisite course of conduct. Whilst there were dissimilarities, mutual corroboration could still apply (*Livingstone* v *HM Advocate* 2014 SCCR 675 at para [17]). It could not be said that on no possible view could the episodes be regarded as component parts of such a course (*Reynolds* v *HM Advocate* (*supra*) at para [146]; and *HM Advocate* v *SM (No. 2)* (*supra*) at para [8]). The offences occurred in a domestic setting against a background of coercion and control. Taken in conjunction with the penetrative nature of the sexual activity, the totality of the conduct displayed the requisite course (*SM* v *HM Advocate* [2018] HCJAC 22 at paras [9-12]; *TN* v *HM Advocate* 2018 SCCR 109 at paras [11-17]; *HM Advocate* v *MM* 2020 SCCR 41 at paras [11-12]; *McCafferty* v *HM Advocate* [2019] HCJAC 92 at paras [19-20]; and *AL* v *HM Advocate* [2016] HCJAC 120 at para [8]).

[16] The jury were entitled to take into account the totality of the evidence when approaching credibility and reliability of the complainers (*Dreghorn* v *HM Advocate* 2015 SCCR 349 at para [35]). Although mutual corroboration concerned sufficiency, it could also assist in determining whether the testimony of a witness should be accepted (*Adam* v *HM Advocate* (*supra*) at para [28]). The comments of the advocate depute had not detracted from the cautionary directions given by the trial judge.

[17] The charge required to be looked at as a whole (*Walker* v *HM Advocate* 2014 JC 154 at para [25]). The reference by the judge to "broadly similar conduct" had to be seen in its context, which was within his directions on mutual corroboration. The direction was at that point in the charge when the judge was directing the jury that they had to consider the course of conduct regardless of the particular *nomen criminis*. The trial judge required to

tailor his directions to reflect the live issues at trial (*Lauder* v *HM Advocate* [2016] HCJAC 30 at para [13]; *Elshirkisi* v *HM Advocate* 2011 SCCR 735 at para [13]; *Fenton* v *HM Advocate* 2014 SCCR 489 at paras [6] and [11]; and *Sim* v *HM Advocate* 2016 JC 174 at para [32]).

Decision

[18] The first question is whether the testimony of the two complainers displayed the requisite similarities in time, place and circumstance, such as could demonstrate that the individual incidents were component parts of one course of criminal conduct persistently pursued by the accused. Whether those similarities exist is a question of fact and degree (*Adam* v *HM Advocate* [2020] HCJAC 5, LJG (Carloway), delivering the opinion of the court, at para [29], citing *HM Advocate* v *SM (No. 2)* 2019 SCCR 262 and *MR* v *HM Advocate* 2013 JC 212). It is only where "on no possible view" could it be said that the individual incidents were component parts of such a course of conduct that a no case to answer submission should be upheld (*ibid*, citing *MR* v *HM Advocate* (*supra*); *Donegan* v *HM Advocate* 2009 SCCR 106; and *Reynolds* v *HM Advocate* 1995 JC 142). In this case, for the application of mutual corroboration, where there was a gap of several years between the offences, the similarities in the place and circumstances of the offences required to be such as allowed the jury nevertheless to draw the appropriate inference relative to a course of criminal conduct persistently pursued. As detailed by the trial judge (*supra*) at para [5], there were such similarities, notably the familial circumstances of the offences and the fact that they took place in the appellant's home. There were other similarities and dissimilarities, but it could not be said that on no possible view could the jury draw the appropriate inference. In the event they did so. The first ground of appeal accordingly fails.

[19] The appellant's second contention, that the credibility of a complainer in a mutual corroboration case should be tested within a single silo containing only evidence relating to that complainer's allegation, contemplates a situation whereby, no matter how many complainers have made allegations against an accused, perhaps of a very similar nature, the fact of the multiplicity of complaints cannot be taken into account in the credibility equation. This argument was rejected by the majority in *Dreghorn* v *HM Advocate* 2015 SCCR 349 (LJG (Carloway) at para [35], Lady Cosgrove at para [48]; see also *Adam* v *HM Advocate* (*supra*) at para [26]). Reference was made in *Dreghorn* to the reasoning in *Attorney-General of Hong Kong* v *Wong Muk Ping* [1987] AC 501[1] in which the Privy Council (Lord Bridge at pp 510-512) stated that potentially corroborating testimony can be taken into account in the assessment of the credibility of the witness whose testimony requires corroboration. In light of the submission made by the appellant, it may be of value to dig a little deeper into the Privy Council's reasoning to see how it might resonate in Scots law.

[20] The problem, which arose in *Wong Muk Ping*, concerned the principle whereby the trial judge required to direct the jury on the dangers of convicting a person on the basis of the uncorroborated testimony of accomplices. At that time, the same principle applied in Hong Kong to the evidence of complainers in sexual offences and that of young children. The ground of appeal against conviction had been the trial judge's failure to direct the jury that the evidence of an accomplice had to be regarded as credible before it could be used as corroboration. In particular, the contention was that the jury had, first, to consider the credibility of the testimony of the "suspect" witness in isolation from the other evidence in

[1] The citation at para [35] in *Dreghorn* to *R* v *Morris* is wrong and misplaced. It may have been intended to be a reference to *Morris* (1969) 54 Cr App R 69, but that pre-dated *Wong Muk Ping*. See, however, *Willoughby* (1989) 88 Cr App R 91 at 94 and *Jelen* (1990) 90 Cr App R 456 at 462.

the case. If they did not find it credible, it had to be rejected *in limine*. Only if the jury found the testimony to be credible could the jury proceed to the second stage and use it as corroboration. The precise *dictum* of the court was as follows (at 510):

> "It is a commonplace of judicial experience that a witness who makes a poor impression in the witness box may be found at the end of the day, when his evidence is considered in the light of all the other evidence bearing upon the issue, to have been both truthful and accurate. Conversely, the evidence of a witness who at first seemed impressive and reliable may at the end of the day have to be rejected. Such experience suggests that it is dangerous to assess the credibility of the evidence given by any witness in isolation from other evidence in the case which is capable of throwing light on its reliability; it would ... be surprising if the law requiring juries to be warned of the danger of convicting on the uncorroborated evidence of a witness ... should have developed to the point where ... the jury must be directed to make such an assessment of credibility in isolation."

It was, in short (at 511), wrong to direct the jury to adopt a two stage test.

[21] Generally, evidence is admissible if it is relevant to proof of a fact in issue; ie that it makes that fact more or less probable. That is subject to certain rules of evidence which exclude testimony on various grounds or prohibit its use for particular purposes. It is important that, in so far as it is necessary to do so, these rules can be explained to juries in an intelligible manner (see generally Scottish Law Commission: *Hearsay Evidence in Criminal Proceedings* (SLC no. 149) para 2.3 *et seq*). As a generality however, subject to these rules, once evidence is deemed admissible, it is available for the jury's consideration at large in the manner which the jury deem appropriate. It is simply not practicable, nor does it accord with common sense, to direct a jury that, although they, as well at the trial judge, may, in the modern era, require to determine whether a complainer's testimony is formally corroborated by that of another, they cannot take the existence of that other's testimony in determining whether the first complainer's account is credible and/or reliable. It defies reason to suggest that the existence of a second complainer, with an account of the same nature as is required

to establish mutual corroboration, can play no part at all in assessing the credibility of the first complainer and *vice versa*.

[22] The exercise for the jury is not one to be carried out in isolation or in strict sequence. The jury require to determine whether they accept the complainers as credible and reliable. They also need to decide whether mutual corroboration is applicable. If the jury does not consider both (or more) complainers to be credible and reliable, or if the jury consider that mutual corroboration does not apply, an acquittal must follow. How a particular jury goes about these tasks, which are concerned with the assessment of matters of fact, is for the jury to determine. There may be a degree of circularity, but it is none the worse for that. In some cases the value of the other complainer's evidence in the assessment of credibility and reliability may be minimal. In others, where the similarities are great, it may be considerable. These considerations fall firmly into the jury's province and involve a practical application of the jury's combined intelligence and experience. In the Scots system, as explained in *Adam* v *HM Advocate* (*supra*) at para [26], there is already a limiter on the type of evidence which is put before a jury for this exercise, notably the exclusion of general similar facts evidence which is not capable of providing mutual corroboration in the conventional manner. The trial advocate depute's approach in addressing the jury cannot be faulted. There was no need for a correction by the trial judge. This ground of appeal is rejected.

[23] On the third ground of appeal, the trial judge's directions on the application of mutual corroboration were unexceptionable. He stressed the need to hold that it could only apply if the jury held that the incidents were parts of a single course of conduct systematically pursued by the appellant. He focussed the jury's mind on the necessity to find an underlying similarity in the conduct. He said that mutual corroboration had to be

applied with caution, particular where there were significant intervals of time and only two complainers. The reference to "broadly similar conduct" was made in the context of a direction that it was not necessary for the nature of the conduct to involve the same crime or level of seriousness. No misdirection is apparent. This ground also fails, with the consequence that the appeal against conviction is refused.

Sentence

[24] The trial judge described the circumstances in charge 1 as a vicious attack, involving forced penile penetration committed against a 12 or 13 year old child. Charge 3 was the rape of the appellant's wife in circumstances in which he sought to exert control and authority over her as her husband and subjected her to a cruel and humiliating attack. The appellant had three previous convictions, all of which were for sexual offences. In 1980 he had been placed on probation on 4 charges of lewd and libidinous practices. In October 1980 in relation to that case, he had been committed to a mental hospital. In 1983 he was placed on probation in respect of 2 charges of lewd and libidinous practices. In 1985 he was convicted of assault with intent to ravish and again committed to a mental hospital. He was transferred to the State Hospital Carstairs, where he remained until 1988. He was discharged conditionally from Lennox Castle Hospital in 1992. Although the appellant did not suffer from a mental disorder, he was of low intelligence and suffered a degree of learning disability.

[25] It was submitted that 10 years was excessive, having regard to the appellant's mental deficiencies, the absence of previous custodial sentences and his age (56). He had had a heart attack in 2017 and suffered from high blood pressure. The judge could have imposed an extended sentence with a shorter custodial term.

[26] There was no basis for an extended sentence. For such a sentence to have been imposed, the sentencing judge would have to have been satisfied that, upon his release, the appellant would pose a risk of serious harm to the public (Criminal Procedure (Scotland) Act 1995, s 210A). Given that the most recent of the offences occurred at least 13 years ago and the appellant was now aged 56, it is difficult to say that, even were he to be released on parole in 4 or 5 years time, the appellant would pose such a risk; although that is what the Criminal Justice Social Work Report concluded.

[27] Were it not for the significantly low level of the appellant's intelligence, the period of custody selected by the trial judge could not be regarded as other than appropriate. Once the appellant's level of intellectual functioning is taken into account, the court is satisfied that the sentence is excessive. It will quash that of 10 years and substitute one of 8 years imprisonment.