APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 44
HCA/2020/000133/XC

Lord Justice Clerk
Lord Menzies
Lord Turnbull

STATEMENT OF REASONS

Issued by LADY DORRIAN, the LORD JUSTICE CLERK

In the appeal against Conviction and Sentence

by

GH

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Scott, QC (sol adv), McCulloch (sol adv); Paterson Bell, Solicitors
Respondent: Farquharson, QC; the Crown Agent

14 October 2020

Introduction

[1] The appellant was convicted at the High Court at Glasgow on two charges libelling sexual offences against two complainers, separated by a period of 12 years and 8 months. The trial judge repelled a submission of no case to answer and held that the doctrine of mutual corroboration could apply between the two incidents. It is that decision which is the

subject of this appeal. The appeal is also against the length of the custodial element (7 years) of an extended sentence of 10 years.

Background

[2] The complainer in the first charge, the appellant's younger brother "A", was 5 years old at the time the abuse began, the appellant being between the ages of 16 and 19 at the time. The abuse took place on multiple occasions over a period of two and a half years and involved repeated penile penetration of A's anus. The complainer in the second charge "B", the nephew of the complainer, was also 5 years old at the time of the abuse, the appellant being 31. On occasions over the period of a week the appellant touched and masturbated B's penis. On the evidence this might have occurred on only one occasion.

Submissions for the appellant

[3] It was submitted that the trial judge erred in repelling the submission of no case to answer. The gap in time in the present case was "exceptionally long" (c.f. *Adam* v *HM Advocate*, 2020 SCCR 123 at para [35]), similar to the period in *RBA* v *HM Advocate*, 2020 JC 16; 2019 SCCR 349 where the gap was viewed as excessive, having regard to the absence of striking or extraordinary features. At the outset of the offences the appellant was himself a child so the reference in *Adam* to the peculiar crime of the sexual abuse of children by adults has less relevance, and in any event the importance to be attached to that was diminished by the passage of time, as noted in *Adam* (para 35). It was submitted that in the present case there were only two charges and two complainers, representing the *Moorov* doctrine at its extreme limits, where caution must be taken: *Mackintosh* v *HMA* 1991 SCCR 776 at 779. There were notable differences in circumstances, context, gravity, nature

and extent of offences libelled. In the second charge there was no suggestion of penile penetration or any attempt at such. The evidence in the present case was such that it fell on the wrong side of the "open country" referred to by Lord Sands in *Moorov* v *HM Advocate*, 1930 JC 68 at page 88 (and quoted with approval in *Adam* v *HM Advocate*, 2020 SCCR 123 at para [33]). In an appeal it was a matter for the appeal court to reach its own conclusion on the matter (*ibid)*. A course of conduct involved the concept of "continuity" which was absent here. (*RBA* v *HMA* 2010 JC 16).

Sentence

[4] The appellant is 33 years old. He has no previous convictions for any sexual offences. As a child, he suffered significant physical and emotional abuse at the hand of his father, leading to absence, and ultimate expulsion from school, mental health problems, alcohol/drug misuse and general disruption of his life. Having regard to the terms of the CJSWR in which this background is explained, he may be viewed as a childhood victim of abuse, and the custodial part of the sentence is excessive.

Submissions for the Crown

[5] The evidence must be taken at its highest, and thus at its most favourable for the Crown – *Williamson* v *Withers* 1981 SCCR 214. It was not a matter whether inferences ought to be drawn, but rather it is a matter whether inferences could be drawn from the evidence – *Xiao Pu Du* v *HMA* 2009 SCCR 779 (at para 3). In *Adam and Daisley* v *HMA* 2020 JC 141, following *Reynolds* v *HM Advocate* 1995 JC 142), the court stated (para 29) that only where on no possible view could it be said that the incidents constituted parts of the one course of conduct persistently pursued should a no case to answer submission be upheld. The court noted (para 36) that in

> "the peculiar crime of the sexual abuse of children by adults, there already exists a special, compelling or extraordinary circumstance which will be sufficient for the jury to find the necessary course of conduct established, at least in cases which do not involve an exceptionally long gap in time."

[6] The nature of the conduct was a high starting point with which to consider the other evidence supporting the inference of a persistent course of conduct. The trial judge took account of the nature of the conduct, and the family context, which was highly relevant (*AS* v *HMA* 2015 SCCR 62 (paras 11 and 12). The trial judge correctly identified numerous factors which were sufficient to allow of the application of the *Moorov* doctrine.

[7] *RBA* v *HMA* 2020 JC 16 was quite different in circumstances. There it was conceded that evidence of a "continued flow" of children in and out the appellant's house during the relevant time suggested opportunity to offend, but not taken, so that a course of conduct persistently pursued could not be inferred. By contrast, the charges here represented the only occasions when the appellant had family access to boys of that specific age. In any event, this was a matter for the jury: *Adam and Daisley* v *HMA*, para 39.

Analysis and decision

Merits

[8] The report of the trial judge contains details of the circumstances of both charges. The appellant, immediately prior to the commission of both offences, had been living in the central belt, where he had lived with his father from the age of 6, whilst other members of his family, including his mother ("C") and sister ("D"), lived in the Highlands. At the time of the first charge, the appellant had travelled North, initially for a holiday, although he ended up remaining there for some time. He stayed at his mother's, where A also lived, and it was mostly in that house where the abuse took place. The abuse was disclosed when the

child's behaviour at school deteriorated. An inquiry took place, but in the absence of corroboration, no proceedings were initiated.

[9] The appellant seems to have returned South following the disclosure, because at the time of the second charge he was again visiting the North for a holiday, this time staying with D. The appellant was ejected from D's house after returning drunk, incapable and under the influence of drugs. He had soiled himself, and various parts of the house. At this stage, C told D of the prior allegations. It was submitted that D, who would have been about 12 at the time of the earlier events, said she had been aware of them but the trial judge is clear in his report that D did not know about the earlier matter until this stage. At all events, something led D to question her own 5 year old son, B, who disclosed the abuse referred to in charge 2. The trial judge considered there to be a large number of factors of similarity. Accepting that the way in which these were listed by the trial judge may have risked a degree of double counting, we are nevertheless satisfied that the following factors were significant:

1. Each complainer was, at the material time, a male child.
2. Each complainer was a blood relative of the appellant, so the offending was in the context of a close family relationship. In each offence that family relationship was the means of access and opportunity.
3. At the material time each was 5 years old.
4. The appellant had prior access to both complainers, yet it was only at the age of 5 in each case that the abuse commenced.
5. On all but two occasions the abuse against A was perpetrated in his family home; the abuse against B was all perpetrated in his family home.
6. In each case the appellant was in a position of trust in relation to the complainer.

7. In the case of A the appellant had been living elsewhere and it was on his return that he carried out the abuse; in the case of B the appellant had been living elsewhere but had returned to visit and it was then he abused the complainer.

9. In each case upon disclosure the appellant quickly left the locus and returned South.

10. On the evidence, these were the only two periods where the appellant had family access to boys of this age.

[10] In our opinion the combination of these factors is sufficient to allow the operation of the *Moroov* doctrine. This is not a case in which it could be said that on "no possible view" could the individual incidents be component parts of the one course of conduct persistently pursued by the appellant. The appeal on the merits must fail.

Sentence

[11] The trial judge considered that the offences were grave ones, involving a serious breach of trust on the part of the appellant and abuse of children who cared for him, who were his own flesh and blood. They were also a breach of trust towards C and D who in each case had allowed him to stay with them. The criminal justice social work report suggested that he accepted no responsibility for his actions, which must have had a profound effect on his victims. The evidence of A in particular was described as "positively painful to watch". The trial judge considered B to be a deeply disturbed young man, and thought that it was not in any way speculative to suggest that at the very least the offences against him played a major part in leading him to his present sorry state. The CJSWR stated: "[The appellant] has no recognition of the trauma he has caused to these victims or the adverse effect his offending would have on their lives."

[12] Although the appellant had no analogous convictions, he nevertheless had an extensive record of offending for, amongst other things, offences of violence. Several of these were, like the present offences, aggravated by their domestic context. Standing the appellant's attitude to the present conviction and the domestic context of some of his prior offending, the trial judge considered that anyone in family or in a relationship with the appellant in the future would be at risk. The trial judge considered that an extended sentence was required, and that decision is not challenged. This was consistent with the assessment of risk in the CJSWR, which stated:

> "[The appellant] is a dangerous young man who has committed offences which have caused serious harm to his victims. He takes no responsibility for the offences stating the victims are 'liars' and they have 'made it up'.
>
> He has a history of violent behaviour and he has used weapons inflicting serious injuries to his victims. He has shown no remorse for his actions, instead he justifies or denies his behaviour, showing no regret for the impact he has had on the victims.
>
> He has a history of domestic violence so severe that his child was placed in the care of the local authority and then adopted. [The appellant] is a significant risk to children."

[13] The mitigatory effect of the appellant's youth at the time of the first offence is significantly elided by his commission of the second when a mature man. Having regard to the fact that the appellant committed the second offence notwithstanding that his earlier abuse within the same family had been discovered and reported, the trial judge was well entitled to conclude that an extended sentence was appropriate. We do not consider that the sentence as a whole, or any individual part of it, can be said to be excessive. In the circumstances the appeal against sentence must also fail.