APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 25
HCA/2021/000376/XC

Lord Justice Clerk
Lord Matthews
Lady Wise

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

CR

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Gravelle, sol adv; Paterson Bell, Solicitors, Edinburgh for Beltrami & Co, Glasgow
Respondent: Lord Advocate; Crown Agent

28 June 2022

[1] The appellant was convicted of five charges of assault and lewd and libidinous practices and behaviour against his two foster daughters, JC and RC. Charges (2) and (3) relate to lewd and libidinous behaviour towards JC over a period from November 1978 to November 1985. These charges related to one continuous course of serious sexual conduct towards the child in question, including penetrative abuse, divided into two charges to reflect whether the complainer was under or over the age of 12 at the time. Charge 5 was

lewd and libidinous practices towards the other child by exposing himself on one occasion between August 1978 to June 1982.

[2] The trial judge directed the jury that the evidence of JC could be corroborated by the evidence of RC and a further witness, PW, as to admissions made by the appellant. The sole questions arising in this appeal are whether the admissions were capable of affording corroboration, and whether the jury were properly directed on the matter.

The evidence

[3] Each complainer gave evidence of the appellant's conduct towards them along the lines specified in the relevant charges. JC also spoke to certain admissions by the appellant, but this evidence did not have corroborative value, as the temporary judge correctly directed the jury. Otherwise, the evidence relating to the admissions was as follows:

The evidence of RC

The first admission at the appellant's home

[4] This admission took place at the home of the complainer. JC had been threatening to kill herself and RC "had reached a breaking point then and said right… we're going to go to Scotland and we're going to have this out, we're going to…we all know this happened and we're going to go and confront it." When arranging the visit, RC said that the appellant's wife was crying over the phone because in RC's perception "she knew what we were coming home for". At the appellant's home, RC, JC, the appellant and his wife were present.

[5] RC confronted the appellant and said:

> "you know why we're here, you know why we're here. You have to admit it because I can't take any more of this…J[C] can't take any more and we need to talk about what happened".

The appellant could not look at them and was looking at the floor:

> "he started to get upset because the emotion round the table was obviously very high and he said something along the lines of … I was angry and I called him, I'm not going to repeat the words in court, but I was angry and I called him, it was a profane word. And I said "you have to admit what you've done".

[6] When asked about the appellant's response, RC said:

> "Um, my recollection is he, I cannot say with 100 per cent … I cannot, I wish I could say he said 'Yes, I did it', but I, I would be lying if I said that so I'm not going to say that. But what I remember is him saying 'I couldn't help myself but I'm not like those people you hear about on the radio, on the news.' And that, to me, was an admission of his guilt".

The second admission over speakerphone

[7] RC spoke to an occasion when she visited the flat in England where JC lived with her partner, PW. JC called the appellant's home number and put the call on speakerphone. JC was upset and said something like:

> "I want you to admit what you did, why can't you just admit what you did."

> "[JC] was very upset…it was along the lines of 'I want you to admit what you did, why can't you just admit what you did'…"

RC's evidence continued:

> "And did she give him any indication as to what she wanted him to admit to?-To the sexual abuse.
>
> How did she make clear the sexual abuse? – I don't…I honestly can't recall specific, specific language she used to say that, but because…as a family we knew it didn't need to be specified in that way, that is my recollection, honest recollection.
>
> And then was there a response on [the appellant's] part? – he said something … he started to, I think he started to cry and said something like 'I've been carrying this, I've been carrying this around with me too all of these years".

The evidence of PW

The second admission over speakerphone

[8] PW spoke to the same incident over speakerphone. He had gone out for about an hour leaving the sisters together. On his return he heard part of the conversation over speakerphone. His recollection was of JC saying to the appellant that he wanted him to take responsibility for what he did to her, what he did to her sexually, and she wanted him to admit it. She told the appellant that he had abused her sexually. The accused replied, "I know I did, and I have had to bear that all my life. I've had to live with that all my life."

The charge to the jury

[9] The emphasis in the extracts which follow is ours. As to the first admission, the trial judge directed the jury that they would be:

> "entitled to treat what [RC] says was said by the accused as an admission to some sort of sexual abuse, even if the expression, sexual abuse was not used given what [RC] says that the accused said."

[10] He then recapped the evidence as to the speakerphone incident before saying:

> "Now in most of the conversations about which we heard evidence the allegation made was relatively unspecific and was explicitly or impliedly about sexual *(sic)* abusing [JC]. The evidence of [RC] and [PW] in that regard is evidence, *if you accept it,* of an admission to sexual abuse of [JC] and it is evidence which you would be entitled to treat as an admission by the accused as regards the activity in charges 2 and 3".

[11] Later in his charge, turning specifically to the issue of corroboration, he said:

> "Now, turning firstly to charges 2 and 3, there is no direct eyewitness corroboration of [JC]'s evidence as regards these charges and the only possible source of corroboration comes from admissions made by the accused to sexual abuse *if you accept that he made such admissions. If you do accept that he made such admissions and accept that [JC] is credible and reliable with regard to what she says was done to her and in her presence,* I can direct you that such an admission *could be accepted by you as corroboration* in respect of these two charges…
>
> Corroborative evidence does not need to be more consistent with guilt than innocence. All that is required for corroboration is evidence which provides support for or confirmation of or fits with the main source of evidence about an essential fact.

> An admission of sexual abuse if it was made by the accused would be sufficient in law."

[12] He also directed the jury elsewhere that they had to assess whether the witnesses who spoke to these remarks by the appellant were giving truthful evidence; and the evidence of the appellant that he had made no such comments and no admissions. In response to questions from the jury, the trial judge said this,

> "You can convict on charges 2 and/or 3 if you regard [JC's] evidence as to what she said happened as credible and reliable, *and if you accept that the accused admitted responsibility for sexual abuse to at least one other person* that other person could be [RC] or [PW] but it does not have to be both of them … you are entitled to found on the evidence given by either or both of [RC] and [PW]."

Analysis and decision

[13] The thrust of the grounds of appeal are that the Sheriff misdirected the jury. He should have directed them that there had to be evidence of the detail of the conduct in question having been put to the appellant, to which his answers were a response, before the answers could be regarded as an admission. The directions that the comments of the accused could be taken as admissions, having regard to the lack of specification being put to the appellant, was not consistent with *Gracie* v *HM Advocate* 2003 SCCR 105 and *G* v *HM Advocate* 2012 SLT 999. Further, in view of the generality of the accusations, and the replies, this was a case where the jury required directions on the law applying to statements by an accused person and the conditions to be satisfied if those statements are to be treated as admissions to the charges. Thus the jury should have been directed that they had to be satisfied that the admissions, if made, were true and related to the sexual conduct libelled rather than the charges of assault.

[14] In relation to the first of these arguments, this appears to merge into a question of sufficiency of the evidence of the admissions, or at least some of them, yet no argument on

sufficiency was made. In the course of argument reference was also made to *Murray* v *HM Advocate* 2008 SCL 1147; *McGartland* v *HMA* 2015 SCCR 192 *CH* v HMA [2016] HCJAC 4; and *Goldie* v *HMA* 2020 JC 164. The Lord Advocate referred to *Fox* v *HMA* 1998 JC 94; *Greenshields* v *HM Advocate* 1989 SCCR 637; and *Stirling* v *McFadyen* 2000 SCCR 239.

[15] Whether, and to what extent, a comment or reply made by an accused person may properly be regarded as an admission is a fact specific question, the answer to which depends on the nature and content of the comment and the circumstances in which it is made. The contextual situation is important. In both *Gracie* and *G* the court concluded that the context was such that the comments could not properly be regarded as admissions of criminal conduct. In *Gracie* there was no specific context in the phone conversation in which the comment by the accused, that he would be pleading guilty, was made. To establish context the attempt was made to link the comment with allegations referred to either in a different telephone conversation on another date, or a prior police interview the contents of which were not led in evidence. Rightly or wrongly, the court in *Gracie* considered that there was insufficient means of identifying the nature of the conduct to which the appellant's comment related. In *G* the Crown sought to associate the alleged admissions with the contents of a diary, about which there was no evidence. The jury were thus left to speculate about what the alleged admission might relate to. These cases are readily distinguishable from the circumstances of the present case, where the context of the admissions was clearly an allegation of having sexually abused JC. This is particularly so in relation to the speakerphone conversation, but it also applies to the earlier confrontation if the evidence of RC about knowledge of the abuse within the family was accepted. In this respect, RC's evidence about her perception of why the appellant's wife was weeping when she knew the girls were coming home may be relevant. Moreover, the jury would be

entitled to infer from the reply "I couldn't help myself but I'm not like those people you hear about on the radio, on the news", that the appellant understood the allegations being made to relate to sexual abuse of JC. The inferences to be drawn from all this was, as the trial judge correctly directed them, a matter for the jury.

[16] It is as ever important to consider the specific directions relating to the evidence in question in the overall context of the charge as a whole. The jury had the benefit of written directions as well as the oral charge. They were clearly directed, amongst other things, that:

(a) the assessment of evidence was entirely a matter for them;

(b) they were entitled to draw inferences such as the evidence might reasonably bear but were not entitled to speculate;

(c) that they could only convict on the basis of evidence which they found credible and reliable;

(d) that for corroboration there had to be two separate credible and reliable sources of evidence which, taken together, implicated the appellant in the commission of the crime libelled; and

(e) that where discrepancies arose it was for them to determine their importance and the effect they had on the assessment of evidence.

[17] On that latter point, specific directions were added, viz:

> "Now, when you consider the evidence of any admissions which witnesses say were made by the accused, you must of course consider any differences in their accounts of what happened or was said on the same occasion. Are they being truthful? Are differences explained by the passage of time and general variations and recollection, or do they cause you to doubt the reliability of that evidence, and of course on looking at that evidence you have to take account of the accused's evidence that there were no admissions, there were no confessions."

The jury would be in no doubt from the charge as a whole that it was for them to determine on the evidence, as they understood it, (i) whether the remarks were made, and that in

determining that their assessment of the credibility and reliability of the crown witnesses was relevant, as was their assessment of the evidence of the appellant that no such admissions were made; (ii) whether the remarks constituted an admission to sexual abuse of JC; and (iii) whether the admissions were such, taken with the primary evidence, to implicate the appellant in the crimes charge and so corroborate the primary evidence.

[18] In the present case, in the context of each of the confrontations spoken to by RC, the jury would have been entitled to conclude that the appellant was responding to an allegation of sexual abuse which constituted the abuse specified in charges 2 and 3. They would have been entitled to conclude that the responses of the appellant constituted admissions to that offending. No speculation was required for such a conclusion to be reached. From the directions given to them the jury would have understood that it was for them to decide whether the statements were made by the appellant, whether they were made in the context asserted, whether they were true and whether they should be treated as admissions to the conduct libelled in charges 2 and 3.

[19] If the impression has been gained from *Gracie* and *G* that only unequivocal admissions in the clearest terms may provide corroboration of a crime, that is not consistent with long established authority. In the first place, such an approach would not be consistent with the law on corroboration. In order to be corroborative, evidence does not require to be more consistent with guilt than with innocence. It is sufficient if it is capable of providing support for or confirmation of, or fits with, the principal source of evidence on an essential fact (*Fox* v *HMA*). The trial judge properly directed the jury that where there is a primary source such as an eye witness,

> "all that is required for corroboration is evidence that provides support for or confirmation of, or fits with the main source of evidence about an essential fact."

[20] In relation to admissions, it is well established that it is not only clear and unequivocal admissions which have evidential value. In *Greenshields* v *HM Advocate* 1989 SCCR 637 a reply to being cautioned and charged for murder and dismemberment that "You don't think I did it myself do you; but I'm telling you nothing about it until I see my lawyer", was considered to be capable of constituting an implied admission to murder.

[21] The appeal is refused.