APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 27
HCA/2021/000375/XC

Lord Justice Clerk
Lord Malcolm
Lord Matthews

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

DM

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: F MacIntosh QC, Brannigan; Paterson Bell, Solicitors, Edinburgh for John Kilcoyne, Solicitors, Glasgow
Respondent: A Prentice, QC, Sol Adv, AD; Crown Agent

12 July 2022

Introduction

[1] The appellant was convicted in the High Court of 14 charges which included rape, domestic assault, indecent communications and threatening, abusive and controlling behaviour, relating to four complainers. His appeal against conviction proceeds on the basis that the trial judge failed to provide the jury with specific directions identifying those

charges which relied upon the doctrine in *Moorov* for corroboration, and those in respect of which other corroborative evidence was available.

[2] The charges spanned the period December 2009 to June 2019. All but charges 13 and 18, which contained specified dates, were libelled as occurring on various occasions over a period of time. All but the common law assaults in charge 11 and 13, and the abusive behaviour in charge 14, averred repeated instances of behaviour. There were also two dockets, the first relating to a non-sexual assault on one complainer and the second relating to threatening and abusive behaviour or what would have been a breach of special conditions of bail relative to another complainer.

[3] The complainers were each in a relationship with the appellant at the time of the offences to which they spoke. In turn they each spoke to a serious course of obsessive, controlling, violent, threatening and abusive behaviour, including repeated sexually abusive and violent behaviour, on the part of the appellant throughout the period of their relationships. All four complainers spoke to physical assaults in similar circumstances and three of them spoke to being sexually assaulted and raped, again in similar circumstances.

[4] For the appellant, it was submitted that the trial judge had failed to provide specific directions about which charges required the application of *Moorov* and which were supported by independent evidence. It was accepted, that the trial judge need not analyse the evidence in a compartmentalised way (*McA* v *HMA* 2015 JC 27), but it was submitted that to understand the doctrine, the jury needed examples. In the absence of these the jury might have thought that abusive behaviour and breach of bail might be seen as illustrative of a course of conduct such as would allow that evidence to corroborate the sexual charges. The trial judge had been correct to direct the jury that the evidence of rape could not be corroborated by evidence of a non-sexual assault (*Duthie* v *HMA* 2021 JC 207 and *Stalley* v

HM Advocate 2022 JC 121). However, he failed to direct them that the sexual charges had to be considered together and separately from the other charges which could not provide corroboration for the sexual charges. They needed a direction to consider the sexual charges as one group, and the remainder as a separate group, or potentially two separate groups. That was missing, and led to a miscarriage of justice. The focus of the charge was on the need for the jury themselves to decide whether the evidence in respect of different charges was sufficiently similar for the doctrine to apply, rather than directing them that the evidence on sexual and non-sexual charges required to be considered separately.

Analysis and decision

[5] The issue in this case is not whether the trial judge clearly identified instances where independent corroboration might be available, since in essence this really only applied in connection with charge 13, as his directions made adequately clear. That was the only charge in respect of which there was independent corroboration, although one of the many assaults comprised in charge 1 was also corroborated by evidence of injury on a particular date.

[6] The real issue is whether the trial judge gave the jury a sufficient road map to enable them properly to identify those circumstances and charges in respect of which the doctrine of mutual corroboration could apply, and those where it could not. It is not suggested that there were any charges on the indictment incapable of proof by reference to the doctrine of mutual corroboration; rather the issue is whether the trial judge gave adequate directions which would enable the jury to identify those types of behaviour, or sets of charges, which might legitimately be grouped together for the application of the rule of mutual

corroboration, and those which did not. The course of conduct which involved sexual offending was different from that relating to the purely physical and abusive offending.

[7] Perhaps it would have been desirable had the trial judge given more direct instruction to the jury on this issue, and to focus less on the issue of individual charges as opposed to establishing a course of conduct. Take this passage at page 64 of the charge:

> "Now, if we turn to the sexual conduct charges, these allege a range of things from rape to things like touching the breasts of the complainer, compelling her to masturbate the accused, and also to taking and having sent naked photographs. I'm not identifying all of the alleged factors in the crime. The law recognises that more serious charges of sexual conduct may be corroborated by less serious charges if the jury decides that the requirements of the rule of mutual corroboration are satisfied. So that's a matter for you, ladies and gentlemen. There are also the charges of non-sexual assault and threatening and abusive behaviour. It's a matter for you to decide whether the evidence in respect of any individual charge can corroborate and be corroborated by the evidence about another."

[8] Read in isolation one might reasonably say that the delineation between a course of sexual assault, whereby evidence of one complainer regarding the individual incidents thereof may be corroborated by evidence of another complainer of a similar incident, and a course of physical and verbal abuse which required to be considered separately, was not made sufficiently clear.

[9] However, as is ever the case, the effect of individual passages in a judge's charge must be read in the context of the charge as a whole. If one does that it becomes clear that in the last two lines of this passage the trial judge is identifying for the jury a different category of behaviour in respect of which the evidence of the witnesses may be found to be mutually corroborative. This is clear from two main parts of the charge. The first is that at an early stage in his charge the trial judge identified that the charges essentially fell into three categories: charges of a sexual nature, charges of a non-sexual nature, and charges of threatening and abusive behaviour. Each charge identified the crime asserted, and the

manner by which it was said to have been committed. He then went through the individual charges, identifying for the jury the category into which each fell. Turning to the issue of corroboration, he noted that there was independent corroboration in respect of charge 13 but that "to a large extent" the Crown relied upon a special rule of corroboration, which he then explained to the jury, saying that the rule

> "can apply where an accused is charged with a series of similar crimes, there's a different person in each crime, the commission of each crime is spoken to by one credible and reliable witness, and the accused is identified as the person who committed each crime."

[10] His reference to "similar crimes" must be noted in the context of his having spent some considerable time identifying for the jury the categories of each offence. In the second place, the passage from page 64 of the charge, quoted above, was immediately followed by this passage:

> "You couldn't, for example, find that the evidence about rape in respect of one complainer could corroborate and be corroborated by the evidence of a non-sexual assault in respect of another complainer; those crimes are too different for the rule to apply. But there are a number of crimes in the indictment which, it's a matter for you, are not sufficiently different and to which the rule can apply."

[11] This is precisely the sort of example which the appellant submits should have been given. In addition the directions given about the use to which evidence relating to the docket might be used were consistent with the trial judge's overall approach to categorising the evidence. He directed the jury that the evidence relating to the first paragraph in the docket, concerning physical acts of violence, could be mutually corroborative of the evidence of other complainers in respect of assault on them; whereas that relating to the second paragraph, which narrated abusive conduct might be capable of corroborating the evidence of other complainers in respect of charges of threatening and abusive behaviour.

[12] The dangers of mentioning and perhaps adopting the Crown speech were highlighted in *Stalley*. It was submitted for the appellant here that by making reference to the Crown speech as identifying similarities in the evidence of different complainers, the trial judge erred; and that his directions regarding mutual corroboration could only be understood in the context of the Crown speech, which did not itself delineate between different courses of conduct. It is true that the Crown speech did not itself make a clear distinction about the different types of behaviour wherein mutual corroboration might be found. It is also correct that the judge stated to the jury:

> "Now, you've heard what's been said about it, the Crown says the rule can be applied in this case and it relies on what the advocate depute described as a very similar pattern, and she listed the points of alleged similarity."

[13] However, this is only one sentence from the charge. The trial judge did identify the different courses of conduct during his charge, and we do not consider that the jury could have been in any doubt as to the task before them. As we have already noted the trial judge had given an example, which was perfectly adequate for the circumstances of this case. Taking the charge as a whole, it can be seen that the trial judge directed the jury that they could not find corroboration for the evidence on sexual charges in evidence on non-sexual charges, that corroboration for evidence on assault charges could be found in evidence of assault and that corroboration of evidence of threatening and abusive behaviour could be found in other such evidence. It was correct to direct the jury that whether they were satisfied that the requisite similarities and conditions of the doctrine existed before they could apply it was a matter for them. Whether the offences required to be considered as falling into three categories to which *Moorov* might apply, as directed by the trial judge, or only two (sexual offences on the one hand and the remaining abusive and violent behaviour)

is a moot point, but the direction was favourable to the accused in any event. The appeal will be refused.