APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 28
HCA/2021/000412/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

WM

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: W Hay; John Pryde & Co, Edinburgh for MSM Solicitors, Glasgow
Respondent: A Edwards QC, AD; Crown Agent

14 July 2022

Introduction

[1] The appellant was convicted after trial of two charges. The first was a charge of assaulting his son, A, then aged 6, on various occasions over a 5 month period, by repeatedly striking him on the head with his hand and repeatedly pulling him by the hair. The second was a charge of assaulting another boy, B, on various occasions over the first

four months of his life, by numerous means, and failing to provide and seek appropriate, timely and adequate medical aid for the child, all to his severe injury and the danger of his life.

[2] The appellant was in a relationship, and cohabited with JG, the mother of both children. He was the father of A, and JG maintained that he was the father of B, although the evidence suggests that there was some doubt on this point in the mind of the appellant. The children had four other siblings.

[3] The jury were directed that in respect of each charge they could convict on the basis of the evidence led on those charges alone. They could treat the various statements made by the appellant as admissions. They were also directed, as an alternative, that they could convict on the basis of mutual corroboration. The appeal proceeds on the basis that there was insufficient evidence on charge 1 standing alone and that it had been a misdirection to tell the jury otherwise. It proceeds also on the basis that it was in any event open to the jury to proceed on the basis that the evidence in respect of each charge was capable of being mutually corroborative, leave to appeal that point having been refused.

The evidence

[4] The primary evidence in relation to charge 1 came from the child in question. His evidence consisted of a JII recorded when he was 6, and cross-examination on commission when he was 14. His evidence in chief was to the effect that the appellant "kept on" hitting him (and, led without objection, his siblings) about the head. It happened about 20 times and was sore. His mother was good to them, and did not hit them: "She tells ma dad to stop it." In cross-examination he retracted this evidence, stating that the allegations in the JII were not true. He had made them up because his granny had told him to.

[5] The corroboration relied on was in the form of comments made by the appellant in the course of telephone calls made between him and JG during his period on remand, which calls had been recorded and transcribed. Much of the content related to assaults on B. There were however other passages relied on in relation to A.

[6] In one call the two were discussing the children in general, albeit with some specific reference to B, and the issue of his parentage. The appellant stated that he wanted all the children "Every single wan ah them" home (they were by then in foster care). JG disputed this, repeatedly saying "Naw ye don`t". and "Naw ye don`t … ye don`t even give a Fuck". The appellant then said "They`re aw ma boys ….aye they are, that`s the wie ah see them". The conversation continues with comments about child B, and then turns to the issue of the appellant`s past disciplining of the children where he says-

> "An even you, even you did me for when Ah grabbed G by the face. Ah know Ah've done that a couple of times an you get me tolt for that baby an Ah love you for it. Stop bein that rough wi him he`s only fuckin 10 an aw that baby. Ah love you for that Ah dae. Ah dae baby so see it doesnae matter what anybody…. See any times that Ah have wanted tae an Ah`ve been beelin` baby you shout, you shout behind me they`re only fuckin weans you, fuckin wrap it and it makes me stop you know that dain`t ye?"

[7] There shortly follows a further exchange as follows:

> "Appellant … Ah`m sorry ..for all the bad years we had. Am ur. They fuckin haunt me baby.
>
> JG Baby it`s awright.
>
> Appellant: They geen me the guilty heed baby. Ah`m sorry baby.
>
> JG Well stop hittin them.
>
> Appellant Yer ten times better than that baby. You`re a million times better than one, you`re ma darling you ur. Man you`re no even that an aw you`re ma big smoking hot darling".

Submissions

[8] It was submitted that the responses by the appellant could not properly be regarded as an unequivocal admission in relation to conduct libelled in charge one. It was too generalised to be capable to being construed as such. Nor could it be construed as any kind of implied admission, the necessary context to permit this being missing - see *Greenshields* v *HMA* 1989 SCCR 637. The comment "stop hitting them" comes not from the appellant but from JG. It is not acknowledged or admitted by the appellant. There was no form of admission made by the appellant in response to any clear and specific allegation. There was no standalone sufficiency in respect of charge 1, and it was a misdirection to tell the jury otherwise. *Esto* the Crown submission was correct, the trial judge did not direct the jury how to assess the response, or lack of it, from the appellant.

[9] The Advocate Depute was right to submit that the important evidence lay not so much in what was said by the appellant but by his failure to deny or contradict JG when she made the remark "Well stop hittin' them".

Analysis and decision

[10] The issue of the use of an admission as corroboration of primary evidence was recently considered in *CR* v *HMA* [2022] HCJAC 25, where the court noted (para 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 ...".

[11] Given that the question is such a fact-specific one, individual cases offer little assistance to the determination in other cases. 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 *HM Advocate* 1998 JC 94). Moreover, it is well established that it is not only clear and unequivocal admissions which have evidential value. The same applies where the significance of the evidence is that an appellant had failed to respond or react to an allegation in circumstances where that failure could be regarded as criminative.

[12] However, it is important to distinguish the case where such evidence is relied upon as the primary evidence in a circumstantial case, and one where it is relied upon as corroboration of other evidence which constitutes the primary evidence. In the former, the nature of the surrounding circumstances may be such that only a clear and unequivocal admission, made in the context of a specific allegation, or lack of reaction to a clear allegation, may be sufficient for the purpose. Everything depends on the context. However the present case is one in which there was clear primary evidence, should the jury choose to accept it. It was entirely open to the jury to accept the evidence in chief as the truth and to reject the evidence given on commission. The point which then arises is whether that evidence was sufficiently corroborated in terms of *Fox* v *HM Advocate*.

[13] The statement "Well stop hittin' them" was made in the context of a much broader conversation in which the appellant made comments regarding his attitude and behaviour towards the children in question. The fact that he did not remonstrate with the comment, deny or dispute it, may be a relevant factor in considering what to make of the conversation as a whole, but it is the conversation as a whole which must be examined to identify whether the evidence may properly be said to be criminative of the accused.

[14] The statement made by JG to the appellant was made in the course of a conversation in which the appellant refers to disciplining the children to such an extent that JG required to intervene to stop him. This also accords with the evidence of A regarding JG, that "She

tells ma dad to stop it." It would be open to the jury to treat the relevant parts of the conversation as criminative of the appellant having hit the children, including A. It is correct to say that the trial judge did not give specific directions in relation to the failure of the appellant to respond to what was said by JG. However that was not the real issue: the real issue, as his directions made clear, was whether the conversation provided corroborative support for the primary evidence. The trial judge directed the jury that the content of this, including to some extent what was said by JG, could provide independent corroboration. The jury were directed that it was a matter for them to determine the significance of what was said in the phone calls, and that the conversations had to be taken as a whole. The evidence of the conversation as a whole was clearly capable of providing support for the primary evidence in the case. The appeal will therefore be refused.