APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 12
HCA/2023/381/XC

Lord Justice Clerk
Lord Matthews
Lady Wise

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

Appeal against Conviction and Sentence

by

AX

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Party
Respondent: G Anderson, KC; the Crown Agent

8 April 2024

Introduction

[1] The appellant was convicted after trial of 5 charges. In brief they were as follows:

1. On or between 1 December 2016 and 30 April 2017 sending sexual and indecent communications to KD, born 26 September 2004 and attempting to induce her to

meet him for sexual intercourse, contrary to section 24(1) of the Sexual Offences (Scotland) Act 2009;

2. On or between the same dates, causing KD to look at a sexual image (a penis), contrary to section 23 of SOSA 2009;
3. On or between 1 November 2017 and 31 December 2017 sending indecent communications to LR, born 5 December 2002, contrary to section 7(1) SOSA 2009:
4. On or between 1 December 2017 and 28 February 2018 sending indecent communications to FE, born 7 November 2003, and asking to meet her for sexual intercourse, contrary to section 34(1) of SOSA 2009; and
7. On 11 December 2019 taking or permitting to be taken or made indecent photographs or pseudo-photographs of children, contrary to the Civic Government (Scotland) Act 1982, section 52(1)(a) as amended.

[2] Charges 5 and 6, which involved sending sexual communications to and attempting to meet for sex with a putative child, who was in fact a paedophile hunter were withdrawn at the close of the Crown case. Evidence had been led on these charges, which remained relevant to a degree in relation to the question of identification.

[3] In due course the sheriff imposed a *cumulo* sentence of imprisonment for 16 months on charges 1 to 4 and admonished the appellant on charge 7. He is subject to the notification provisions of the Sexual Offences Act 2003 for 10 years. Leave to appeal has been granted against conviction in relation to charges 1-4, and sentence.

The issue at trial

[4] Each of the respective complainers gave evidence that they had received indecent messages from a Facebook Account *inter alia* in the name "Andy Gordon". The Crown also

lodged as productions screenshots of messages received by LR, whose evidence was thus corroborated independently. The defence did not challenge this evidence. It was not disputed that the similarities in the offences were such that the complainers could corroborate each other as to what happened, or that the details spoken to by them constituted the offences libelled. The sole issue at trial in relation to charges 1 to 4 was whether the appellant was the sender of the communications. It was acknowledged that he had a Facebook profile in the name Andy Gordon, but submitted that there was no evidence to link this account with the one from which the communications had been sent, rather than one of the many other accounts which existed in that name.

The evidence

[5] None of the complainers could positively identify the appellant as the sender. Proof of identification depended on inference to be drawn from numerous elements of circumstantial evidence.

1. Each complainer spoke to having received indecent messages from a profile named "Andy Gordon". The conduct involved was similar in each case.

2. "Andy Gordon" told KD he was from Inverness and was 24, an age and location which were consistent with those of the appellant at the relevant time. Although the person over time used 5 or 6 different accounts, including Andy X (the appellant's name), she was sure the communications were from the same person.

3. LR was sent a photograph of "Andy Gordon" which was the same as the image shown on the appellant's student matriculation card.

4. FE was also sent a photograph of "Andy Gordon" which was the same as the image shown on the appellant's student matriculation card.

5. In connection with the withdrawn charges, KM, a decoy for paedophile hunters, spoke of receiving messages in April 2019 from a profile in the name Andy Gordon, the profile photo of which was the same as in the matriculation card. The number used by this Andy Gordon when communicating with KM matched with a number known to be used by the appellant.

6. A forensic computer analyst examined a Lenovo laptop seized from the appellant which disclosed that it had one user account "Andrew", and contained documents relating to the appellant, such as a CV, and housing documentation.

7. The laptop had been used to visit Facebook profiles for KD and FE between August and October 2019. Internet explorer had also been used to conduct searches for the names KD, LR and FE. Facebook URLs revealed photograph searches for KD in October 2017; and visits to Facebook profiles including FE and LR between October and December 2017.

8. A further search term "Badoo under 18" was found, with the message "hey, im Andrew, 25 from inverness, hope we can start talking you are gorgeous;)x".

[6] There was no evidence relating to devices used by the complainers in charges 1-4, and therefore no evidence as to the details associated with the Andy Gordon account that sent the messages to them.

[7] In a police interview in December 2019 the appellant gave his age as 26 and confirmed his phone number. He did not think anyone else had access to it or to his social media accounts. In his oral testimony he accepted that he had used an account for Andy Gordon on Facebook and Tinder, both of which used the photograph on his matriculation card. He used the alias to hide from his family that he was on Tinder. He admitted messaging KM, for legitimate reasons connected with his disapproval of vigilantes, but denied contact with any of the other complainers.

[8] The account communicating with the complainers was not his, and the user must have found his photograph online, where it was freely available. Facebook users frequently get "friends" suggestions, and the complainers' profiles must have cropped up in that way on his laptop, when he would have clicked on them when idly browsing. The fact that visits/searches were shown on more than one occasion suggested that the profiles had cropped up this way on multiple occasions. He accepted that he must have visited these profiles and looked at photographs, although he had no memory of doing so.

[9] Two issues arose in connection with the behaviour of the Procurator Fiscal. At the end of the Crown case charges 5 and 6 were withdrawn. In the course of cross-examination the procurator fiscal depute asked certain questions about the evidence led in those charges, which led the appellant to say

> "those charges have been dropped because there's no criminality involved in them."

The PFD responded

> "I chose not to move those charges. Whether there's criminality involved or not, that was my decision."

[10] The appellant stated that he recognised the pictures of the complainers from their social media which he checked after he was released on bail from the sheriff court. There could be no objection to his having done so, but the PFD started to explore whether this constituted a breach of bail conditions. An objection swiftly closed down that line of questioning. The Crown concede that in both respects the approach of the PFD was inappropriate.

No case to answer submission

[11] A submission of no case to answer was made in relation to charges 1 to 4, on the

basis that the evidence in respect of identification was simply insufficient to enable the jury to conclude beyond reasonable doubt that the appellant was guilty.

[12] The sheriff rejected that submission. The evidence, although largely circumstantial, was potentially very powerful.

Speeches

[13] During her speech the PFD recognised that none of the complainers could identify the sender of the communications. However, there were various strands of evidence which pointed to the appellant as the perpetrator of the offences, which circumstances she enumerated. She stated there was enough evidence to convict the appellant of the offences and turned to the individual complainers, whose evidence

> "paints a story of a man who took pleasure in messaging young girls for his own sexual gratification and who was reckless as to whether or not his behaviour humiliated, distressed or alarmed them."

[14] She examined their evidence in turn, stating: "What this case comes down to is, do you believe [the complainers]?"

[15] She focused on reasons to consider them credible and reliable (which were not, of course, in issue). She then turned to the issue of mutual corroboration, submitting that:

> "there is an overriding similar course of conduct **in Andrew X's behaviour** that allows mutual corroboration to be applied." (emphasis added)

[16] She did not make it clear that she was using mutual corroboration only for the purpose of establishing commission of the offences. She then said:

> "If you believe all the strands of evidence that the crown have presented to you, how then can what Andrew X said be the truth? If you believe the crown witnesses …..and the police interview, and I suggest you should, does that not mean that [the appellant] has not told the truth? That he has no credibility and reliability."

[17] The defence solicitor's speech was poorly structured but acknowledged that the only real issue on charges 1 to 4 was identification - there was no challenge to the evidence that someone had sent these messages, that the complainers received them, and that the messages constituted the offences libelled. The sole issue was whether the Crown had proved that the messages were sent by the appellant. He submitted that the jury could not be satisfied that the appellant was the sender of the communications, the evidence being relied on to establish that being of insufficient evidential strength.

Charge to the jury

[18] The sheriff identified that the crux of the case was whether the appellant was the person who sent the communications to the complainers (p 18 of the charge):

> "[the appellant] denies that he was responsible for sending the various communications …. [his solicitor] says you cannot possibly be satisfied that Andrew Gordon was [the appellant]. It is for you to decide based on the evidence you have heard whether you are persuaded beyond reasonable doubt that [the appellant] was the person who sent the communications. As I say, that is an exercise you'll require to carry out in relation to charges 1 to 4 inclusive."

He made one further reference to the question of identification, at p23, when, in connection with the sending of messages to LR he said "but from whom, that is the crux of the defence argument".

[19] Beyond these two references to identification the sheriff did not address the matter at all, despite it being the only issue in dispute in the case. The sheriff addressed at some length the issue of mutual corroboration; the credibility and reliability of the complainers; and the ingredients of the offences.

[20] His directions on mutual corroboration included:

> "Sometimes crime[s] are committed and for various reasons there is little or no eyewitness evidence. In such cases a special rule can apply. The doctrine applies where an accused is charged with a series of similar crimes and there's a different

> person being the complainer in each of these crimes. 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. Well, the rule is that if you are satisfied that the crimes charged are so closely linked by their character, the circumstances of their commission and the time of commission as to bind them together as part of a single course of criminal conduct systematically pursued by the accused, then the evidence of one witness about the commission of one crime is sufficiently corroborated by the evidence of one witness about the commission of another crime. And in looking at the charges it is the underlying similarity of the conduct which is described by the witnesses which you have to consider in deciding whether the doctrine applies."

He did not make further reference to what was meant here by the reference to identification of the accused.

[21] The sheriff had told the jury in the written directions at the start of the case that

> "It may be that certain evidence will have a bearing on more than one charge. Nonetheless when you come to deliberate the evidence will have to be considered separately in relation to each charge."

He did not revisit this matter during his charge.

Submissions for the appellant

[22] Four grounds of appeal against conviction, in relation to charges 1-4 only, passed the sift.

(1) The sheriff erred in directing the jury to convict if they were satisfied that the appellant had used the alias Andrew Gordon, without further qualification of that direction. In particular, the sheriff had misrepresented the defence position by telling the jury that the appellant denied using the pseudonym Andrew Gordon, whereas the denial of using a profile in the name Andrew Gordon related only to the communications which were the subject of charges 1-4. Otherwise the appellant had admitted that he used such a profile. It was submitted that the sheriff in his report had admitted that this had been a misdirection, stating:

> "If reference to "Andrew Gordon" in this respect was a misdirection I would respectfully submit that it was not a material misdirection."

(2) The second ground concerned the sheriff's directions on mutual corroboration. This was not a simple case of separate eye witness complainer corroboration, nor was it a *Howden* type situation (*Howden* v *HM Advocate* 1994 SCCR 19). There being no identification from the complainers, mutual corroboration could only operate to prove the commission of the offences. More elaborate directions were required due to the complexity of the present case, where corroboration of identification relied on circumstantial evidence. The jury should have been told that the evidence relating to charges 5 and 6 was no longer relevant. Whilst evidence on withdrawn charges may be relevant this is so only where the doctrine of mutual corroboration arises and where the withdrawn charges might reasonably be considered part of the same course of conduct as the withdrawn charges.

(3) Third, the sheriff erred in failing to uphold the submission of no case to answer. The absence of any positive identification meant that stronger corroborative evidence was required and the low threshold that would generally apply to no case to answer submissions was inapt (*MacDonald* v *HM Advocate* 1998 SLT 37). The appellant's submission focused primarily on what he contended was the weak evidential value of the browser history and the photograph of the appellant sent to FE and LR which were not adequate proof of identity of the appellant as the offender. The evidence was both circumstantial and ambiguous, and it was not reasonable for the jury to interpret it as proof of guilt.

(4) The appellant submitted that his trial was prejudiced by questions asked by, and the conduct of, the PFD during his cross-examination, when she had implied that the appellant was guilty of charges of which he had been acquitted, stating, "I chose not to move those charges. Whether there's criminality involved or not, that was my decision". The general

nature of the cross-examination was an attack on the appellant's character. The prosecutor had not made an application under section 266(5) to do so, and the cross-examination went beyond that which was relevant in the circumstances of the case. In particular, he referred to questioning suggesting that his lengthy period of time on bail would have given him "time to make something up".

Submissions for the Crown

[23] The primary submissions for the Crown were twofold:

(a) That the sheriff had not erred in repelling the no case to answer submissions. Eyewitness identification on each offence was not necessary (*Lindsay* v *HM Advocate* 1993 SCCR 868 at 873E-F). There was corroborative evidence available on identification in respect of each charge. The photograph and the browser history were not to be viewed in isolation. This was strong evidence in the overall circumstances of the case.

(b) That the sheriff had adequately directed the jury. The directions were enough- perhaps only just enough – for the jury to see a route to verdict showing what they needed to be satisfied of regarding identification to convict. That was particularly so when the charge was considered in the context of the speeches which had preceded it. The sheriff's directions had to be considered with these in mind (*Sim* v *HM Advocate* 2016 JC 174, para 32). It would have been obvious from the evidence and the speeches where the jury were entitled to find proof of the appellant's identity as the sender. The direction on mutual corroboration was not a misdirection, since that doctrine was available as proof of the commission of the offences. The jury's verdicts were readily explicable.

[24] *Esto* there had been a misdirection, even a material one, whether a miscarriage of justice had resulted hinged on various factors including the seriousness, importance and

materiality of the error which arose, assessed in the context of the evidence at trial. (*MacDougall* v *HM Advocate* [2021] HCJAC 32 at para [18]). Taking all the circumstances of the trial into account, there was not a real possibility that the jury would have arrived at a different verdict (*DM* v *HM Advocate* [2023] HCJAC 44, paras [16]-[17]).

[25] The conduct or comments of the procurator fiscal depute were unlikely to have influenced the jury's consideration of the remaining charges on the indictment.

Analysis

[26] It is convenient to deal with the grounds of appeal in an order different to that in which they were presented.

Ground 3: sufficiency

[27] The sheriff was clearly correct to repel the no case to answer submission. There was ample evidence from which the jury could find that the appellant was the sender of the communications, all as specified at para [5] above.

[28] The appellant is in error in suggesting that the case of *MacDonald* indicates that the threshold for a no case to answer submission alters depending upon whether there is a positive identification. *MacDonald* was simply a case presented as one with a positive identification supported by circumstances, but where the court considered that there was no such positive identification and thus there could not therefore be a sufficiency of evidence. It was not a circumstantial case.

[29] Circumstantial evidence may by its very nature be ambiguous and open to more than one possible interpretation. Even if each element on its own is individually of weak evidential value, taken together it may provide a strong basis for establishing proof of the identity of an offender. The evidence relied upon in this case was capable of doing so: the

task of assessing the weight to be given to the various elements, and whether to accept any qualification offered with potentially incriminating evidence, was one for the jury.

Ground 1: The sheriff's categorisation of the defence case

[30] The appellant's suggestion that the sheriff conceded that he had erred in this respect is incorrect and proceeds on considering one sentence isolated from its context, which is a suggestion that *esto* there was a misdirection it was not material. As to the assertion that the sheriff directed that the jury could convict merely if they were satisfied that the appellant had used an alias Andy Gordon, and that he had wrongly categorised the defence as a complete denial of having used such a profile, this is simply incorrect. The sheriff said neither of these things. He pointed out that the appellant denied sending the messages to KD and "the other complainers" but it is clear in the context that he was referring to the complainers on charges 1-4, and not suggesting that the appellant denied ever using such a pseudonym. It was clear on the evidence that the appellant had admitted using such a profile when dealing with KM, and for purposes related to his Tinder account. The jury could have been under no misapprehension on this matter. In this respect at least there was no mis-categorisation, no misstatement and no misdirection.

Ground 4: PFD's conduct and inappropriate questioning

[31] The Crown accepts that the statement "Whether there's criminality involved or not, that was my decision" should not have been made. It was submitted that it did not however amount to an unequivocal allegation that the appellant was guilty of the withdrawn charges, and that it is not likely that this one statement might have prejudiced the jury's assessment of the evidence, or the verdicts reached in relation to the remaining charges. The exploration of breach of bail conditions was curtailed very swiftly. It was submitted for the Crown that neither of these issues resulted in a miscarriage of justice.

[32] The PFD's remarks about charges 5 and 6 were petulant and inappropriate. However, neither those remarks nor the cross examination regarding bail conditions resulted in a miscarriage of justice. The former, however, emphasises the need for the sheriff to have directed the jury of the use to which evidence led in support of charges 5 and 6 could be put.

Ground 2: Mutual corroboration and proof of identification

[33] The charge in this case is a classic example of one which was not tailored to the circumstances of the trial or the issues in dispute. There was no dispute as to the facts spoken to by the complainers, their credibility or reliability, or that the facts spoken to constituted the offences libelled. In respect of all of these matters only brief directions were required. No doubt the sheriff was required to give directions about these matters but they should have been brief and summary in nature. The focus should have been on the true issue in dispute, namely whether the Crown had proved that the appellant was the person who sent the messages and was thus guilty of the offences libelled. This was the only dispute for the jury to resolve. Instead the sheriff rehearsed at length the issues of mutual corroboration; the credibility and reliability of the complainers; and the ingredients of the offences, in directions that extended over 15 pages – half the length of the charge, without addressing how any of this impacted on the issue in dispute. By contrast there were only two very brief and uninformative references to the issue of identification as we have already noted.

[34] The sheriff, in explaining the doctrine of mutual corroboration stated that it only applied where there was proof of identification but did not explain to the jury how proof of that element of the case might be established on the evidence led. In elaborating on his

directions on mutual corroboration he did not address that issue. This was compounded by his summary of the parties' attitudes on the point:

> "Now, the Crown say that the rule can be applied in this case. The defence don't suggest that the circumstances of each incident are so dissimilar that the rule can't be applied."

Again this was not qualified in respect of the issue of identification.

[35] The charge, read as a whole, suggests that mutual corroboration was a route by which the offences overall, including the identity of the perpetrator, could be established. In the absence of clear directions to the contrary indicating where proof of identity could be found, there was a risk that the jury might be misled into thinking that if the evidence of the complainers was sufficiently similar in character, time and circumstances nothing more was needed for proof of the case. In reality there can only be a course of conduct if the same person is involved in each incident, and the critical issue was whether the jury could be satisfied on the evidence as a whole that this person was the accused. That the jury heard speeches in which the matter was, arguably, slightly more focused did not absolve the sheriff from giving the appropriate legal directions. That is particularly so given that at one point in her speech the depute stated that the case hinged on the credibility and reliability of the complainers, and spent a considerable time discussing this, and the requirements of mutual corroboration in respect of similarity of the offending behaviour. The effect was that the sheriff did not provide the jury with a route to verdict insofar as proof of identification was concerned. He left it open to the jury to conclude that they could be satisfied of the appellant's guilt if the respective testimonies of the complainers had conventional similarities in time, place and circumstances, despite the fact this did not establish who was the sender of the communications.

[36] The matter was worsened by the fact that the sheriff went on to direct the jury that in each charge they had to decide whether they could infer "that the accused" was pursuing a single course of crime. This reference to the "accused" is one which was repeated throughout the charge, for example during the elaborate passages dealing with the ingredients of the various offences. A few of the many examples may be given:

> "That the accused acted intentionally and for the purpose for which the activity was done must be a matter of inference."
>
> "The accused, as I've said, must have acted intentionally, not just recklessly."
>
> "The crime [charge 2] consists of the accused intentionally causing the child to look at a sexual image."
>
> "How do you judge the accused's purpose……"
>
> " why would the accused send it or direct it or cause it to be seen by the complainer."
>
> "[The Crown] must show that Mr X intentionally caused the child to look at a sexual image."

[37] The overall effect of this was to convey the impression that proof of identity was a "given", implying an assumption that the identity of the appellant as the perpetrator had been established. While the use of the term "accused" in these directions probably echoes the specimen directions in the jury manual, those are clearly drafted with the traditional eye-witness *Moorov* in mind. It is always incumbent on the individual judge to ensure that the directions given are apposite for the circumstances of any trial, and where the terms of the jury manual require adaption to revise them accordingly. Had these multiple references occurred in a context where clear and specific directions were given as to the need for proof of identity which did not hinge solely on the evidence of the complainers, along with directions on the sources of evidence for such proof, the looseness of expression would have

been of less significance. As it was they compounded the failure to give the necessary directions.

[38] The sheriff ought to have directed the jury that proof of identification could come from the circumstantial evidence, whether or not he referred to it, and not from applying the principle of mutual corroboration. His directions on mutual corroboration ought to have included a direction on how it could apply in the particular circumstances of the case.

[39] The matter was further exacerbated by a failure to give directions in relation to the evidence which had been led on charges 5 and 6, which had been withdrawn. Clearly, some of the evidence in respect of those charges remained relevant to proof of the remaining charges as part of the circumstantial evidence relating to the one area of dispute, identity, namely the use by the appellant of a profile in the name "Andy Gordon" and the use of the matriculation photograph in that connection. Other aspects of the evidence, relating to the alleged circumstances of charges 5 and 6, the content of messages allegedly sent, and so on, were of little or no relevance to the issues in dispute. The sheriff's failure to revisit these issues during the charge meant that he did not offer the jury guidance as to the use to which evidence led in connection with charges 5 and 6 could, or could not, be put. The jury were left to make of this what they would, even though some of it was now of no real import. In all we are persuaded that these were material misdirections in which the possibility of the jury being misled was sufficiently great as to constitute a miscarriage of justice.

[40] In these circumstances, the appeal against conviction must succeed, and the appeal against sentence does not arise.