APPEAL COURT, HIGH COURT OF JUSTICIARY
SITTING AT GLASGOW

[2014] HCJAC 70
Appeal No: XC651/13

Lord Justice General
Lord Menzies
Lord Brodie

OPINION OF THE
LORD JUSTICE GENERAL

In the appeal against conviction by

WILLIAM FENTON
Appellant;

against

HER MAJESTY'S ADVOCATE
Respondent:

_____

For the appellant: Ewing, Sol Adv; Gilroy & Co, Glasgow
For the Crown: Wade QC, AD; Crown Agent

10 June 2014

Introduction

[1] On 13 May 2013 at Glasgow High Court the appellant was convicted of the following charges:

> "(002) on an occasion between 1 June 2011 and 31 August 2011, both dates inclusive, at 123 Princes Court, Ayr you WILLIAM DENNIS FENTON did intentionally administer to, or cause a substance to be taken by [*complainer A*] … for the purpose of stupefying or overpowering her so as to enable any person to engage in sexual activity involving the said [*complainer A*], in that you did place a substance in her drink and induce her to drink same, thus rendering her unconscious, and thereafter, you did sexually assault said [*complainer A*], in that you did rub baby oil on her bare stomach and back whilst she was unconscious: CONTRARY to section 3 and section 11 of the Sexual Offences (Scotland) Act 2009;

(003) On an occasion between 1 October 2011 and 30 November 2011, both dates inclusive, at 123 Princes Court, Ayr you WILLIAM DENNIS FENTON did intentionally administer to, or cause a substance to be taken by [*complainer B*] … for the purpose of stupefying or overpowering her so as to enable any person to engage in sexual activity involving the said [*complainer B*] in that you did place a substance in her drink and induce her to drink same, thus rendering her unconscious and thereafter, you did sexually assault said [*complainer B*], in that you did repeatedly kiss her on the lips, touch her breasts over clothing and repeatedly attempt to separate her legs with your hand: CONTRARY to section 3 and section 11 of the Sexual Offences (Scotland) Act 2009.

(004) On an occasion between 1 January 2012 and 29 February 2012, both dates inclusive, at 123 Princes Court, Ayr you WILLIAM DENNIS FENTON did intentionally administer to, or cause a substance to be taken by [*complainer C*] … for the purpose of stupefying or overpowering her so as to enable any person to engage in sexual activity involving the said [*complainer C*], in that you did place a substance in her drink and induce her to drink same, thus rendering her unconscious and thereafter, you did assault said [*complainer C*] and while she was unconscious and incapable of giving or withholding consent, penetrate her vagina with your penis and you did thus rape her: CONTRARY to section 1 and section 11 of the Sexual Offences (Scotland) Act 2009.

(005) On 26 April 2012 at 123 Princes Court, Ayr you WILLIAM DENNIS FENTON did intentionally administer to, or cause a substance to be taken by [*complainer D*] for the purpose of stupefying or overpowering her so as to enable any person to engage in sexual activity involving the said [*complainer D*] in that you did place a substance in her drink and induce her to drink same, thus rendering her unconscious and thereafter, you did sexually assault said [*complainer D*], in that you did remove her clothing and touch her naked breasts and film said [*complainer D*] when she was naked and when you were touching her naked breasts: CONTRARY to section 3 and section 11 of the Sexual Offences (Scotland) Act 2009."

[2] The defence was that the appellant had not administered any stupefying substance to any of the complainers and that any sexual activity with the complainers had taken place with their consent. The appellant did not give evidence. The defence made a submission of no case to answer on the whole libel. The trial judge refused it in respect of all of the charges on which the appellant was convicted.

[3] The appeal is maintained on the grounds that (1) the jury were misdirected as to their right to make deletions from any of the charges and (2) the trial judge misdirected the jury in relation to corroboration and the application of the *Moorov* principle.

The trial judge's directions

[4] The trial judge gave the following directions on the question of deletions:

> "It's very important that you consider each charge as a separate unit, and you must bring in a separate verdict on each of the charges that remains. The evidence in respect of each charge is given from a different … by a different complainer and is in many respects different, and depends upon your assessment of each of the individual complainers who appear in that charge. Although separate statutory charges are alleged within the charges, section 11 in each and section 3 in some and section 1, in charge 4, I consider that in respect of each of those charges the separate crimes either stand or fall together. So it would not, not be open to you to convict of a contravention of only one element of any of these charges …
>
> If you are, if you are finding the accused guilty of any charge, you could delete any part of the charge not proved to your satisfaction, as I say although beyond what I have already described as substituting sexual assault for rape in charge 4, there's not a great deal that could be removed and still leave a description of the crime charged sufficient to be a proper verdict of guilty, but, for example, ladies and gentlemen, in charge 2 you could delete the words where they appear on line 26, the words, "and back". So, you could delete the allegation that he rubbed baby oil on the back of the complainer if you weren't satisfied about that, but that's simply an example, but there is very little that you could remove otherwise and still leave a relevant guilty verdict charge."

[5] On the question of corroboration of the complainers' lack of consent, the trial judge gave the following directions:

> "[Secondly], the Crown have to prove by corroborated evidence that the complainer did not consent to that act, if you find it proved. Again, the primary source of evidence is from [*complainer C*] herself. She told you that she did not consent, and her evidence was that she had no memory till she woke up at about 5.30, since she had become unconscious or fallen asleep. So that is the first source of evidence.

In support of that, of course, are the other strands of evidence which the advocate depute referred to: the fact that she too had no prior relationship with the accused, met him only once before when she had made … been made to feel uncomfortable when he talked of paying money for threesomes, and, of course, she had gone there that night, according to her, with her boyfriend to the accused's house, and her boyfriend left unexpectedly.

There is also the evidence of [*complainer A*], who when she said she saw the accused on top of [*complainer C*], [*complainer C*] was not making any noise or moving, and from these circumstances the Crown ask you to infer a lack of consent, but I don't think on their own that would be sufficient corroboration, but, of course, ladies and gentlemen, there is also the section 11 element of this charge, also the rendering … the administration of substances rendering the complainer unconscious, and if he did that, if you accept that he put some substance in the drink of [*complainer C*] which rendered her unconscious in order to engage in sexual activity with her, then that would confirm or support her evidence of lack of consent, since if she was unconscious by that means she would be unable to give or withhold consent …

… So you're asked to infer from that evidence that her drink was 'spiked', and corroboration for that element of this charge could again come from mutual corroboration of the section 11 elements of the other charges, 2, 3 and 5, and in considering the corroboration in this context you will have to decide again whether the incident relating to the administration of the substance into the drink of [*complainer C*] in this charge, charge 4 and the same element in the other charges are sufficiently connected by time, character and circumstance to bind them together as parts of a single course of conduct by the accused … "

The trial judge's Report

[6] In his Report, the trial judge says:

"I required to tailor the charge so that it reflected the live issues before the jury at the stage of their deliberations. The position at that time, and indeed throughout the trial, was that the defence were contending that the accused had not spiked any drinks given to any of the complainers and had not sexually assaulted them in any way. There was a defence submission of no case to answer in respect of that matter among others. It was not therefore an issue raised at any stage of the trial that the accused should be found guilty of section 11 of the 2009 Act but not guilty of the other offences set out in the charges."

Submissions for the appellant

[7] The solicitor advocate for the appellant submitted that it was not a necessary element of an offence under section 11 that there should be any resulting sexual contact. Therefore it would have been open to the jury to convict only of a contravention of section 11, or simply of a sexual assault, in relation to each complainer. The trial judge failed in his duty to set out the options available to the jury in respect of an "obvious alternative verdict reasonably available on the evidence" (*Laura Stewart* v *HMA* [2012] HCJAC 126 at para [13]). The jury should have been directed that they required to be satisfied on all elements of a charge and that they could delete any element of an offence that had not been proven to their satisfaction (*Chalmers* v *HMA* 2002 SCCR 940 at para [9]).

[8] It followed that there had necessarily been a misdirection as to corroboration in respect of charge (4).

[9] The solicitor advocate for the appellant also submitted that the trial judge misdirected the jury on the issue of corroboration of the complainer's evidence that she did not consent. The principle of mutual corroboration applied as between crimes rather than the elements of them. The trial judge's direction in relation to corroboration of the lack of consent was at odds with his standard *Moorov* direction on charges (2), (3) and (5). The issue of mutual corroboration between charges might have been relevant to this issue, but charge (4) was specifically excluded from the directions given on the *Moorov* principle (Charge, pp 34 – 41). There was no requirement to distinguish between penetrative and non-penetrative offences when applying the principle of mutual corroboration (*MR* v *HMA* 2012 JC 212). Accordingly, there was a misdirection.

Submissions for the Crown

[10] The advocate depute submitted that the charge must be read as a whole. The trial judge had dealt with the defence as it had developed. He had not suggested that section 11 could not be a stand-alone crime, but in context was explaining that all the matters libelled were bound up together. The evidence showed a course of conduct that required the administration of a substance and then something of a sexual nature. The fact that the trial judge dealt with charge (4) as a stand-alone rape charge was favourable to the appellant since on that basis charge (4) required more corroboration than it would have required if the *Moorov* principle were applied. In any event, there was no miscarriage of justice.

Conclusions

[11] In my opinion, the trial judge's directions were correct. The trial judge was directing the jury in the context of the defence presentation, which was based on a denial that the appellant had spiked any drinks given to any of the complainers and had not sexually assaulted them in any way. It was unreasonable to expect the trial judge to explain every theoretical combination of the various charges. As he correctly pointed out, the charges stood or fell together. If the administration of a stupefying drug was removed, the complainers' lack of consent was also removed. There would therefore have been no basis on which the jury could convict.

[12] The submission that the *Moorov* principle cannot be applied in respect of individual elements of a charge is fallacious, in my view. The corroboration that the *Moorov* principle could supply in this case was corroboration of the *actus reus* of administering a stupefying drug and thereafter committing a sexual assault on the complainer.

[13] In this case the similarities in the charges were particularly strong. The complainers were young girls. They were strangers to the appellant. The offences took place in the appellant's house. All of the complainers were given an alcoholic drink by the appellant after which he engaged in sexual activity with them. These separate acts were closely linked in time, place and circumstances.

[14] Even if there had been a technical misdirection in this case, I would have concluded that there was no miscarriage of justice, such being the strength of the Crown case.

Disposal

[15] I propose to your Lordships that we should refuse the appeal

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[16] I am in complete agreement with the views expressed by your Lordship in the chair, and for these reasons I agree that this appeal should be refused.

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OPINION OF LORD BRODIE

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[17] I am also in complete agreement with the views expressed by your Lordship in the chair and for these reasons I agree that this appeal should be refused.