APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 10
HCA/2017/000391/XC

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST CONVICTION

by

JW

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Paterson, Sol Adv; Paterson Bell
Respondent: McSporran, QC, Sol Adv, AD; Crown Agent

19 December 2017

[1] At the hearing of this appeal on 19 December 2017 we announced our decision refusing the appeal and said that we would give our reasons in writing at a later date. This we now do.

[2] On 8 May 2017, the appellant JW, now aged 42 years, was convicted of the two charges on the indictment which he faced. The charges each concerned sexual activity

directed at young girls which was said to have taken place at different addresses in Methil, Fife.

[3] The first charge concerned conduct said to have occurred on 2 December 2006 and concerned behaviour directed at the complainer KD, then aged 11 years. It was libelled as an offence of lewd, indecent and libidinous practices and behaviour. The second charge was said to have occurred on a date in January 2015 and concerned behaviour directed at the complainer RD, then aged 13 years. It was libelled as a contravention of section 30 of the Sexual Offences (Scotland) Act 2009. The charge also gave notice that the Crown intended to lead in evidence that on the same occasion the appellant had penetrated the vagina of RD with his penis.

[4] The charges against the appellant therefore concerned two separate incidents separated by a period of 8 years. The Crown relied upon the doctrine of mutual corroboration in respect of each charge and the appellant was granted leave to appeal on a ground which argued that the sheriff erred in law in rejecting the submission of no case to answer made on his behalf at the conclusion of the Crown case.

The evidence

[5] The relevant evidence may be summarised as follows. The father of the complainer KD had a friend referred to as MF. MF had younger children with whom KD had played. The appellant lived in the flat occupied by MF. KD had stayed over at the flat on a previous occasion without incident.

[6] On 1 December 2006, KD's mother left her at the flat. There were three adults present, including the appellant, and the two younger children of MF. The adults were drinking and there came a stage when the two younger children had gone to bed and KD was playing alone on a Play Station device in the appellant's room. Having fallen asleep she

woke up to find she was on the bottom of the bed with the appellant beside her and facing her. The appellant had his hand down the inside of her pants. The complainer feigned sleep and tried to roll over. He continued to touch and rub her vagina and tried to pull down her jeans which were unbuttoned and unzipped. The complainer managed to roll out of the bed onto the floor where she stayed. She remained there until she concluded that the appellant was asleep. She then got off the floor, went to the kitchen and cried. She wanted to leave but was unable to do so. She then remained in the living room until collected later that day by her mother's boyfriend.

[7] In January 2015 the complainer RD had just turned 13 years old. She lived with her mother and three sisters. Her mother was friendly with the appellant whom she had known for many years. The complainer had a difficult relationship with her mother, with whom she didn't get on, and from time to time she was told by her mother to stay with the appellant. She explained that the appellant would try to be nice to her, to understand her and to sit beside her in her room, although his behaviour changed if her mother was present. The complainer's evidence was that she stayed at the appellant's house one night in every two weeks on around 10 – 12 occasions.

[8] On the occasion specified in the charge the complainer had gone with the appellant to his home, at her mother's insistence, arriving there at around 8pm. Around midnight she went to bed wearing an all in one set of pyjamas over her underpants. Around 1:30am she heard the bedroom door open and felt the appellant get into the bed beside her. She was aware of her pyjamas being opened and pulled down to her ankles with her underpants. The appellant got close to her and then on top of her. She was then aware of something inside her private parts whereupon she pushed the appellant off her onto the other side of the bed and ran to the bathroom where she locked herself in.

[9] Although there was certain other evidence led in support of each charge, the Crown relied upon the evidence of the appellant's conduct in submitting that the doctrine of mutual corroboration could properly be applied.

[10] In his report to this court the sheriff summarised the submissions which were made to him and noted that he was referred to a number of recent cases in this area of law, which he cited. In addressing the question of whether the charges could be said to be so connected in time, circumstances and character to suggest that there was a single course of conduct, systematically pursued by the appellant, the sheriff explained that he addressed himself to whether there were special features which could suggest that the circumstances and characteristics of the crimes were so similar as to suggest a course of conduct.

[11] Relying on what had been said in *JL* v *HM Advocate* 2016 SCCR 365 the sheriff explained his reasoning as follows at paragraph [11] of his report:

> "The case of JL gives guidance as to what might be thought as special or compelling, sufficient to take the evidence into a Moorov type situation. In the present case, these included the accused's behaviour in relation to the victim and their families; the offences taking place at night, when victims were sleeping; the similar ages of the girls; the undoing of clothing; the nature of the behaviour complained of, involving vaginal contact; the stealth involved, by entering his own bed on which the victims were sleeping; the absence of any kissing or fondling; the taking of alcohol by the accused; the absence of any family member; the breach of trust displayed. Having regard to all these circumstances, I concluded that notwithstanding the eight year gap, there was sufficient compelling, indeed exceptional, evidence to allow the case to go to the jury, for them to consider."

Submissions for the appellant

[12] In advancing the argument on behalf of the appellant Mr Paterson focused on the length of time between the two single incidents of offending and upon the nature of the conduct specified in each charge. Whilst it was acknowledged that there was no upper limit of time beyond which the doctrine could not be applied, he submitted that the period of

8 years could properly be regarded as a significant gap in time, particularly where there were only two incidents alleged. He submitted that the time could not be explained by lack of opportunity, as it had been in certain other cases. RD had been in the appellant's company on a number of occasions without incident and a joint minute of agreement had been entered into which agreed that none of RD's younger sisters had disclosed any adverse behaviour by the appellant. Mr Paterson also submitted that the offence in charge 1 could be seen to have been an opportunistic event whereas, by comparison, it could be said that there was an element of grooming involved in the circumstances of charge 2.

[13] Mr Patterson also drew attention to one aspect of what the sheriff had said in his charge about the time gap. The sheriff reminded the jury of the appellant's evidence to the effect that he had been spoken to by the police after the first allegation and gave evidence that he did not want to be in that situation again. The sheriff directed the jury that it would be open to them to conclude that the appellant rested his behaviour until he felt sufficiently confident to resume it. It was submitted that if this was to be seen as a break in the appellant's conduct then that was not consistent with the concept of a course of conduct persistently pursued.

[14] Mr Paterson submitted that in the present case the character and circumstances of the offence could not be described as compellingly similar and that the sheriff had been wrong to do so. It was argued that the circumstances of charge 1, being opportunistic and involving the appellant placing his hand inside the complainer's underpants and touching her vagina area, were significantly different form the circumstances of charge 2, which involved penile penetration, in effect rape. Notwithstanding the similarities identified and relied upon by the Crown, Mr Paterson argued that the two events were capable of being viewed as isolated incidents.

Submissions for the Crown

[15] The advocate depute submitted that the evidence of the two complainers demonstrated a course of conduct in which the appellant partially undressed and sexually assaulted underage girls at night while they were sleeping in his bed. It was recognised that the time interval in the present case could be described as a significant one but the advocate depute submitted that there were compelling similarities between the offences such as to dilute the importance of the period which had elapsed. He submitted that there were a number of listed similarities in the appellant's conduct as follows:

- Both complainers were girls of a similar age and maturity.
- The appellant had been friendly towards both complainers before the offences and had a role as a "caregiver".
- The appellant had been drinking alcohol on both occasions.
- Both offences took place during the night when the girls were staying overnight at his house. Neither complainer had a family member present at the locus.
- Both offences took place in bed, in the appellant's bedroom, whilst the complainers were sleeping. The complainers were in bed first and the appellant later got into bed beside them.
- In both offences the appellant partially undressed the complainers whilst they were asleep. Both complainers woke to find themselves exposed below the waist.
- In both offences the appellant made contact with the complainer's vagina. There was no other fondling or kissing involved and the appellant did not speak.

- On both occasions the appellant's conduct began in a similar way until it was interrupted by the complainer removing herself from the situation. The appellant's conduct was therefore similar in so far as he had been able to behave.
- On both occasions the appellant stopped his offending when he realised the complainer was awake and did not attempt any further sexual contact after that point.

[16] The advocate depute submitted that the accumulation of these factors allowed the sheriff to conclude that compelling similarities were present as between the two events which were such as to demonstrate a course of conduct on the appellant's behalf.

[17] The advocate depute also pointed out that there was a basis in the evidence for explaining why the appellant had targeted KD rather than any of her sisters. The complainer's own evidence was that she was not her mother's favourite. This had been confirmed in the evidence of her sister. The sheriff had noted the complainer's evidence to the effect that the appellant was closer to her than to her sisters and it could be said that she was seen as different from the other sisters.

[18] It was submitted that the Sheriff had been correct to explain to the jury that they would have been entitled to draw the inference that the appellant had rested his behaviour until he felt sufficiently confident to resume it and that this did not preclude a conclusion that the appellant was engaged in a course of conduct. Attention was drawn to the case of *DS* v *HMA* 2017 SCCR 129 and to what had been said by Lord Brodie in giving the opinion of the court at paragraph [17] about the process of "grooming" being, on occasion, a lengthy process.

[19] Relying on what had been said by Lord Justice General Hope in *Reynolds* v *HM Advocate* 1995 JC 142, the advocate depute submitted that the matter should be left to the

jury unless it could be said that on no possible view could there be a connection between the charges. In these circumstances he submitted that the sheriff was correct to have repelled the submission.

Discussion

[20] The time gap in the present case is properly to be regarded as a significant one. Before the sheriff and before this court the Crown submitted that there was sufficient by way of compelling similarities to permit consideration of the whole circumstances by the jury, despite this passage of time.

[21] In our opinion, it is important to bear in mind that the essential circumstance which permitted the appellant to have access to the complainer RD was his friendship with her mother. Through their friendship he was able to spend time with the complainer and did so in preference to spending time with her sisters. He made this choice, it could be inferred, because of the vulnerable situation she was in as a consequence of her poor relationship with her mother. This conduct could be seen as falling into the recognisable pattern of behaviour often described as "grooming". In the case of *DS* in giving the opinion of the court at paragraph [17] Lord Brodie said the following:

> "What can be described as "grooming" is, or may be, a lengthy process. The appellant succeeded in gaining the trust of the complainers' respective families to what seems a remarkable extent. That, it might be thought, must have taken some time."

[22] Whilst we recognise the force of the submissions made by Mr Paterson concerning the length of time between the two incidents in the present case, the observations made by the court in DS, as quoted above, are apposite to the circumstances of the appellant's conduct towards RD. We also note the careful manner in which the submission on behalf of the appellant was presented by Mr Paterson. He was correct to say that the two events were

capable of being viewed as isolated incidents. The test which the sheriff had to apply was a different one though. Taking account of the similarities and the dissimilarities which were identified the sheriff concluded that a process of evaluation was required and he addressed himself to whether on no possible view could it be said that there was any connection between the two offences (*Reynolds* at page 146). He concluded that the similarities identified by the Crown were capable of being viewed as sufficiently compelling to entitle the doctrine to be applied despite the lengthy time gap. In our opinion, the accumulation of the factors relied upon by the Crown, as listed in paragraph [15] above entitled the sheriff to arrive at this conclusion.