APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 77
HCA/2019/606/XC

Lord Justice General
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL UNDER SECTION 107A OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

HER MAJESTY'S ADVOCATE

Appellant

against

MM

Respondent

Appellant: S Fraser AD; the Crown Agent
Respondent: Hughes; Berlow & Rahman, Glasgow

5 November 2019

[1] The respondent went to trial at the High Court of Justiciary in Glasgow on 18 charges. The first three of these, with which the appeal is not concerned, relate to physical assaults on his sister LM, born in 1975, EM, his mother, and TM, his brother over a period of 12 years, from 1981 to 1993. The respondent was born in 1969, and is thus about 6 years older than his sister. The respondent had been adopted by LM's and TM's parents.

The fourth to eighth charges consist of a variety of lewd, indecent and libidinous practices, indecent assaults and rapes on LM in the years over the same period, from when his sister was aged 6 in 1981 until she was 18 in 1993. All of the alleged offences involve non-consensual sexual activity, including anal, oral and vaginal penetration.

[2] LM described the first incident occurring when she was about 6 years old, when the respondent held her down and digitally penetrated her vagina. Similar assaults occurred some five or six times, with the respondent also forcing LM to masturbate him. The respondent was about 11 or 12 at the time. The first time she was raped was when she was 7. Thereafter, this occurred two or three times a week. She was anally raped when she was 8 or 9. This then occurred about once a month. By the time that LM was 16, the respondent was in a relationship with LQ. They had a child born in that year (1991). During this period the respondent continued to have vaginal, oral and anal sex with LM, although not as frequently as previously. It was occurring about once every week. The assaults ceased when LM was about 18.

[3] Charges 9 to 11 are physical assaults, this time on EQ, the appellant's brother TM, and his father, also TM. The appeal is not concerned with these charges.

[4] Charges 12 to 17 consist of a number of assaults, indecent assaults on, and a rape of, AC, between 1996 and 2001. The complainer, who was born in 1973, first met the respondent in a nightclub when she was 22 years old in 1995. They had a consensual sexual relationship and were engaged to be married. During their first attempt at consensual anal sex, AC had asked the respondent to stop. He did not do so. This forms the basis of charge 12. Charge 13 libels offences of physical assault over most of the period of the relationship. Charge 17 is a single assault in 2001. AC gave evidence that, on several occasions in their relationship, when she was sleeping, the respondent would touch her

vagina both externally and internally. This is charge 15. There is a single episode of assault with intent to rape (charge 14). There is an allegation of attempted oral rape after they had separated in 2000.

[5] The final charge (18) is one of indecent assault on LM, contrary to section 3 of the Sexual Offences (Scotland) Act 2009 in 2012.

[6] On 31 October 2019, the trial judge sustained a no case to answer submission and acquitted the respondent on charges 4 to 8, 12, 14, 15 and 18. He did so because he did not consider that mutual corroboration could operate between the sexual offences involving LM and those involving AC. The former commenced when both LM and the respondent were children. They occurred with great regularity over a prolonged period of time. The offences initially took place in a park and then in the family home, which LM and the respondent shared with their parents. In contrast, the evidence from AC related to events occurring in the context of a consensual relationship between adults. Charge 12, involving anal rape, occurred during the course of a consensual sexual encounter. The judge did not consider that this was similar in character to the matters spoken to by LM. It occurred in a room in a hotel. Charge 14 occurred when the respondent and AC were living together. The judge did not consider that what was libelled as an assault with intent to rape was comparable to the offences described by LM. Charge 15 involved a number of episodes of sexual touching. AC had been asleep and the events had occurred, again in the context of a consensual sexual relationship. Charge 18 related to matters far too removed in time to satisfy the mutual corroboration test.

[7] The trial judge was not satisfied that there were the conventional similarities in time, place and circumstances, which demonstrated that the individual offences were part of a course of criminal conduct persistently pursued by the respondent. Although the question

of similarities was a matter of fact and degree, the disparities were such that he could not say that they were sufficient to allow these charges to go to the jury. Caution was required when there were only two complainers (*Mackintosh* v *HM Advocate* 1991 SCCR 776).

[8] The appellant submitted that the test was, as the trial judge had set out, whether there were the conventional similarities in time, place and circumstances such as could demonstrate that the individual incidents were component parts of one course of criminal conduct persistently pursued by the respondent (*MR* v *HM Advocate* 2013 SCCR 190). This was a question of fact and degree for the jury to assess (*HMCA* v *HM Advocate* 2015 JC 27 at para 9; *McMahon* v *HM Advocate* 1996 SLT 1139). Caution was required when only two instances, not two complainers, were involved (*Mackintosh* v *HM Advocate* (*supra*)). The correct approach was to look at the character and circumstances of the individual offences as a whole and not in a compartmentalised or individual manner. The question was whether the necessary inference could be drawn from the whole circumstances (*Donegan* v *HM Advocate* 2019 SCCR 106 at para [38]). The evaluation process should be left to the jury unless on no possible view could the relevant inference be drawn (*Reyonlds* v *HM Advocate* 1995 SCCR 504 at 508). It was accepted that there were differences between the circumstances of the offences relating to LM and those involving AC. However, the similarities which existed were sufficient to permit the matter to be remitted to the jury.

[9] The respondent submitted that the trial judge was correct in holding that mutual corroboration could not apply, given the differences in the conduct libelled. That involving LM consisted of an "industrial level" of sexual abuse occurring every other day. That involving CA involved relatively few episodes in the context of a consensual sexual relationship. Under reference to *CAB* v *HM Advocate* 2009 SCCR 106, although the complainers could be dissimilar in age, the appellants' evocation of an emotionally

controlling relationship was not present in both relationships (see also *Dreghorn* v *HM Advocate* 2015 SCCR 349, Lord Malcolm at para [45]). The fundamentals of mutual corroboration, as set out in *Jamal* v *HM Advocate* 2019 JC 119, were not met. There must be some cases which "did not make the cut".

[10] In *HM Advocate* v *SM (No. 2)* 2019 SCCR 262, the court reiterated (at para [6]) that:

> "In any case in which mutual corroboration is relied upon, the court is looking for 'the conventional similarities in time, place and circumstances in the behaviour proved in terms of the libel ... such as demonstrate that the individual incidents are component parts of one course of conduct persistently pursued by the accused (*MR* v *HM Advocate* 2013 JC 212, LJC (Carloway), delivering the opinion of the Full Bench, at para 20)'. 'Whether these similarities exist will often be a question of fact and degree requiring in a solemn case assessment by the jury ... under proper direction of the trial judge' (*ibid*). In a case where there are similarities as well as dissimilarities, it has been said that a submission of insufficient evidence should be sustained only where 'on no possible view could it be said that there was any connection between the two offences' (*Reynolds* v *HM Advocate* 1995 JC 142, LJG (Hope), delivering the opinion of the court, at 146). That is a shorthand expression which means simply that such a submission ought only to be sustained where, on no possible view of the similarities and dissimilarities in time, place and circumstances, could it be held that the individual incidents were component parts of one course of conduct persistently pursued by the accused (see also *Donegan* v *HM Advocate* 2019 SCCR 106, LJC (Dorrian), delivering the opinion of the court, at para [38])."

[11] In this case, the first episodes of criminal conduct involving LM related to what was alleged to be non-consensual sexual activity between the respondent, who was a child at the time, with his younger sister, who was also a child. The second series of episodes involved alleged non-consensual sexual activity, but occurring between adults in the context of a consensual sexual relationship. The trial judge was certainly correct therefore to identify significant differences in the conduct. However, before sustaining a no case to answer submission, he had to be satisfied that on no possible view could the two series of episodes be regarded as component parts of a single course of conduct persistently pursued by the

respondent (*Reynolds* v *HM Advocate* (*supra*), LJG (Hope), delivering the opinion of the court, at 146).

[12] The court does not consider that such a view can be taken on the evidence in this case. As the advocate depute pointed out, on the accounts given by them: both complainers were significantly younger than the respondent; the relationships both involved the use of violence towards persons with whom the respondent was in a position of some trust; the alleged offences generally occurred in a domestic context; and they involved similar sexual acts, including anal intercourse without consent. On the complainers' accounts, the respondent sought to gain sexual gratification irrespective of their views. It is therefore open to the jury to determine that mutual corroboration is applicable.

[13] The court will accordingly allow the appeal, repel the no case to answer submission, with the exception of that made in relation to charge 18, which is in a separate category in terms of time and place.