APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 27
HCA/2019/000395/XC

Lord Justice Clerk
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

AADAM MOHAMMED

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg, (sol adv); John Kilcoyne & Co. Solicitors
Respondent: Prentice QC, AD; Crown Agent

17 June 2020

[1] The appellant was convicted of indecent assault on an occasion between 1 October 2009 and 31 October 2010 (charge 2) and rape on an occasion between 1 and 31 December 2009 (charge 3). A further allegation of rape in May 2009 (charge 3) was found not proven. Leave to appeal has been given in respect of grounds 1, 2 and 4(i). These are that:

1. The trial judge erred in directing the jury that mutual corroboration could be applied between the indecent assault and the 2 charges of rape, the said charges being insufficiently linked in character and circumstances for the said doctrine to apply.

2. In any event, the circumstances of charges 2 and 3 were too materially different to apply the doctrine, and in the event of acquitting on charge 1, the jury should have been told to acquit also on the remaining charges.

4. The circumstances of the two charges were so different, the verdict was one which no reasonable jury could have returned.

[2] Charges 1 and 2 were each alleged to have been committed in a parked motor car in Perthshire - charge1 at Moncrieff Hill or Kinnoul Hill, and charge 2 at Little Glenshee; charge 3 was at the complainer's address in Perth. Charge 1 libelled rape whilst holding the complainer down and lying on top of her; charge 2 libelled an indecent assault by repeatedly touching the complainer on the leg; charge 3 libelled that whilst the complainer was asleep and incapable of giving or withholding consent he pulled down her clothing and raped her.

Evidence

[3] The complainer in charge 2 was about 17 at the time.. The complainer, the appellant and a third party drove in the appellant's car to a remote spot in Perthshire to smoke cannabis without any risk of detection. The third party fell asleep. After this, the appellant (who had been in the driving seat) took a couple of bottles of wine and a duvet from the boot, and got into the back of the car with the complainer, saying that he had brought the bottles for her. She declined to take any alcohol, which appeared to upset the appellant, who complained that he had brought it for her – "I brought these just for you, go on have

some". It was snowing outside and it was cold. They covered themselves in the duvet. The judge in his report at para [3] says that they lay down, but this does not appear in the complainer's evidence. The appellant started to touch the complainer's leg, doing so four or five times. She pushed him away and moved herself away from him. She was scared. The appellant then fell asleep but she remained awake as she was concerned that he would touch her again.

[4] The third complainer was 20 at the time, and had been introduced to the appellant by a mutual friend. Both were going through difficult patches in their lives and they started communicating by MSN. She invited him round to her flat in Perth. He drove there, bringing a bottle of wine. He sat on a couch and she sat on a mattress on the living room floor. They chatted and she drank. She became sick and tired and felt unwell. She then lay down and went to sleep. When she woke her jeans and pants were down to mid-calf, and the appellant was lying behind her with his hand on her side. She knew he had penetrated her because of how she felt and when she went to the toilet she said she knew he had had intercourse with her. She returned to the living room where she found him doing up his shirt. He collected the wine bottle and other possessions and left.

[5] The trial judge considered that whilst the indecent assault was less serious than the rape alleged in charge 3, there were similarities between the two episodes. In both cases the complainers were offered a bottle of wine that had been brought by the appellant in his car for their consumption. Both episodes occurred at night. In one case the complainer was trying to sleep and in the other the complainer was asleep. Both incidents were relatively proximate in time.

Submissions for the appellant

[6] There was a sufficiency of evidence for charges 1 and 3, applying the doctrine of mutual corroboration. However, the circumstances of charge 2 were so removed from either charge of rape that this charge should have been withdrawn from the jury, notwithstanding that no submission to that effect was made at trial. The trial judge had an ongoing duty to review questions of law such as sufficiency of evidence as the trial proceeded - *Farmer* v *Guil*d 1991 SCCR 174 at 1788; *Wali* v *HMA* 2007 SCCR 106 at paragraph 9.

[7] Furthermore, the jury should have been directed that if they acquitted on charge 1 they could not convict of either charges 2 or 3. It was not enough to catalogue some similarities between two crimes and dismiss dissimilarities for mutual corroboration to apply. There had to be an overall similarity in the conduct identifying each charge as a component part in one course of criminal conduct persistently pursued by the accused - *HMA* v *SM (No 2)* 2019 JC 183.

[8] In *Watson* v *HMA* 2019 JC 187 the appellant was said to have rubbed the leg of one complainer, making a comment about having sex with her. The other complainer, who had been helped to bed because of intoxication, said that she woke when the appellant touched her private parts, and that he went on to rape her. The Lord Justice General, delivering the opinion of the court, stated (at paragraph [16]) that

> "In a case in which rape, including the use of force, is libelled, it will be seldom that mutual corroboration is afforded by proof of an assault by rubbing another woman's leg on a different occasion at a different time. It may be regarded as unlikely that the two incidents could be regarded as a single course of conduct. It is, however, a question of fact and degree."

[9] In the case in question the doctrine could be applied because of the many similarities which existed. The Lord Justice General explained the reasons for applying the doctrine:

> "In this case, it is significant that the two incidents occurred within hours of each other. They were both connected to the same celebration which was attended by both complainers and the appellant. They both involved the appellant, who was 46, assaulting young women. Both were cousins of the appellant's wife. Of particular significance was the appellant's comment to the complainer in charge 3 that he wanted to have sex with her 'later on'."

In this case there was a marked difference between the conduct in each charge and the provision of wine in each case was only a tenuous link. The trial judge was wrong to say that in one case the complainer was trying to sleep and in the other the complainer was asleep. The trial judge should have withdrawn charge 2 from the consideration of the jury. Furthermore, given the circumstances as outlined, no reasonable jury could have convicted the appellant.

Advocate Depute

[10] There was a sufficiency of evidence at the conclusion of the Crown case. Charge 1 involved isolating the complainer in a car, and there was a sufficiency for a compelling course of conduct and no basis for removing charge 2 from the jury' consideration. The evidence would allow the jury to draw the inference that the unity of purpose was to obtain sexual gratification by taking and providing alcohol and intoxicant which he did not drink but persuaded the complainers to drink. The provision of alcohol by the appellant in the form of cider and beer had been a feature of charge 1. There was also cannabis taken in both charges 1 and 2. The case was a narrow one but the evidence was sufficient, and charge 2 should have been left to the jury. There remained a sufficient unity between charges 2 and 3 even after charge 1 had been rejected.

Analysis and decision

[11] That it is not enough for the application of the doctrine in *Moorov* that the offences

display a general predisposition to commit a certain type of offence is axiomatic. The doctrine requires that the charges display such similarities in time, place and circumstances of the behaviour proved in the terms of the libel, as demonstrate that the individual incidents had been component parts of one single course of criminal conduct persistently pursued by the accused. There is no rule that what might be perceived as less serious criminal conduct cannot provide corroboration of a libel seen as more serious. The fact that the nature of the alleged criminality varies significantly in degree is not of itself a reason for disapplication of the doctrine. It is the underlying similarity of the conduct described in the evidence, not the label which has been attached to it in the indictment, which must be examined in order to see whether the rule can be applied. Thus in *Watson* the doctrine was applied because the circumstances of both incidents were such as to be indicative of a course of conduct. Whether the doctrine can be applied to two such charges in other circumstances will always be a question of fact and degree according to what the evidence in the case reveals, although, as observed in *Watson*, no doubt it will be "seldom" that mutual corroboration is afforded by proof of an assault by rubbing another woman's leg on a different occasion and at a different time from an alleged forcible rape. Where there are only two incidents, care must be taken in the application of the doctrine, for obvious reasons.

[12] Bearing in mind these principles, at the close of the Crown case there was a sufficiency of evidence in respect of all three charges. The trial judge has not given a report of the evidence in respect of the first charge, and no detailed explanation of the evidence was placed before us. However, from the terms of the charges, and the supplementary information provided by the Advocate Depute, it appears that there was a sufficiency for all three charges at the close of the Crown case, largely because of the link which charge 1 provided to both the other charges. Charges 1 and 3 were both charges of rape, where the

complainer had consumed an intoxicant, in one case alcohol and in the other alcohol and cannabis. The locus and general circumstances of charge 1 seem to be very similar to those in respect of charge 2. In both instances, the appellant and the complainer were in a car in a remote location, seemingly chosen in each case as a secluded place to smoke cannabis. In each case the incident seems to have occurred after the cannabis had been taken. From the complainer's evidence about the amount of snow on the ground at the time of charge 2, charges 2 and 3 appear to have occurred very close in time (the complainer placed it at December 2009 or January 2010), and the gap between charges 1 and 3 was not a particularly long one. Overall the evidence provided a sufficiency for all charges at the close of the Crown case.

[13] However, the situation changed once the jury determined to reject the evidence in relation to charge 1. Having done that they were left with two charges where the nature of the allegations, the circumstances of commission and the locus were all quite different. The trial judge erred in saying that the complainer in charge 2 was trying to sleep, thus providing a link with the complainer in charge 3 who was asleep. The agreed transcript of the evidence of the complainer in charge 2 suggests that she was ready to go home, and expected the appellant to drive them home. The appellant fell asleep, but she did not and there is no reference to her trying to sleep. The similarity that both events occurred "at night" is a neutral one. The other similarity referred to by the trial judge was that the appellant had provided alcohol in each instance, for the complainer, but on the evidence this too is a tenuous link. In respect of charge 2 there is an indication in the evidence that the appellant was encouraging the complainer to drink in the face of her refusal, and she declined. In respect of charge 3 there is no indication that the appellant encouraged the appellant to drink in the face of her refusal. The Advocate Depute suggested that in all three

cases the appellant provided alcohol and took none himself, a factor he relied on for establishing a unity of purpose across the charges. Were that so, that might have strengthened the link especially if associated with encouraging others to drink against their will, but we have no information to enable us to conclude that this was the case. The statement in the trial judge's report that "She gave evidence that they chatted and she drank", may imply that the appellant did not drink, but it is not a clear indication one way or the other. Moreover, this was not a feature referred to by the trial judge who focused only on the provision of alcohol by the appellant. In any event, it seems that in both charges 1 and 2 the appellant had indulged in an intoxicant in the form of cannabis.

[14] In all the circumstances we are satisfied that once the jury discarded charge 1 it was not open to them to conclude that charges 2 and 3 created the circumstances necessary for the application of *Moorov* and they should have been told that if they rejected the evidence of the complainer on charge 1 they required to acquit on the remaining charges. The appeal must therefore succeed.