APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 32
HCA/2019/585/XC

Lord Justice General
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

JAMES PENRICE

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant C Mitchell QC; McCusker McElroy Solicitors Paisley
Respondent: Prentice QC (sol adv) AD; the Crown Agent

4 August 2020

Introduction

[1] The appellant is now aged 72. In September 2019 he went to trial in the Sheriff Court at Glasgow on an indictment which alleged three charges of historical lewd, indecent and libidinous practices and behaviour. Charges one and two concerned the complainer AW and the third concerned a male child SD, who was the son of a family friend. The appellant

was acquitted of charges one and three and convicted on charge two. The terms of the charge of which the appellant was convicted were as follows:

> "On various occasions between 8 October 1983 and 7 October 1987 both dates inclusive at …. You did use lewd, indecent and libidinous practices and behaviour towards … a girl then of or above the age of 12 years and under the age of 16 years, and did on repeated occasions pull down her lower clothing and strike her buttocks with your hand and belt or similar implement, touch her breasts and buttocks and did on an occasion seize her on the hand, place her hand within your lower clothing and did attempt to induce her to touch your penis:
> Contrary to the Sexual Offences (Scotland) Act 1976, Section 5".

He received a sentence of 15 months imprisonment.

[2] The only available source of corroboration in respect of charge two was the evidence led in support of a docket which had been attached to the indictment and specified sexual behaviour comprising lewd, indecent and libidinous practices and behaviour perpetrated towards a young girl CL. The appellant had pled guilty to this conduct when he was prosecuted in respect of it in 2015 and received a sentence of 18 months imprisonment.

The appeal

[3] The appellant appeals against both conviction and sentence. The appeal against conviction concerns directions given by the sheriff in relation to evidence led in support of the docket. Both the complainer AW and the witness speaking to the docket, CL, gave evidence of similar conduct being perpetrated against them when they were children of roughly the same age and during a time span which roughly coincided. It was conceded that the evidence in support of the docket was capable of providing corroboration for the evidence of AW by application of the doctrine of mutual corroboration.

[4] At an early stage in the trial, when dealing with an unrelated objection, the solicitor acting for the appellant responded to an enquiry from the sheriff asking if he would be

cross-examining the witness speaking to the docket. The solicitor explained that the accused had pled guilty to that matter and he did not consider that it would be appropriate to challenge the credibility or reliability of that witness. When the evidence of CL was led the solicitor asked no questions at all of her in cross examination.

Submissions

Appellant

[5] In advancing the appeal senior counsel for the appellant drew attention to what had been said by the sheriff during the course of his charge under reference to the evidence of CL. She focussed on two passages. First, at page 17 of the transcript of the charge, where the sheriff had said:

> "Ladies and gentlemen, there was no challenge – in particular that she was either lying or that she was mistaken – to the evidence of (CL), and you can accept that what she said had happened to her in (the address) between 5 December 1980 and 4 December 1986 as true"

and second, at page 21 of the transcript, where the sheriff had said:

> "So you have to decide that if, if the evidence in respect of each charge is credible and reliable and you can accept the evidence relating to the docket as true."

[6] Counsel submitted that the sheriff had gone too far in these passages of his charge. It would be wrong for a judge to suggest that simply because a witness has not been challenged the evidence given requires to be treated as truthful. The directions which the sheriff gave in respect of this witness could be contrasted with what he said in relation to the two complainers. He had made it clear that the jury's function was to determine whether they could accept the evidence given by either or both of these witnesses as credible and reliable but, it was submitted, he had placed the evidence of the docket witness in a different position by directing the jury that this evidence was accepted and was to be treated as true.

[7] Under reference to the report from the presiding sheriff and the transcript of the speech to the jury by the appellant's solicitor, counsel recognised that some of what had been said in the course of that speech might have warranted a response from the sheriff in his charge. However, she submitted that if there had been any error on the part of the solicitor then the sheriff had over corrected matters in giving the directions which he did. All that needed to have been said was that the jury required to be satisfied that the witness giving evidence in support of the docket could be treated as credible and reliable. Support for this simple and straightforward approach was said to be available in the case of *Moynihan v HM Advocate* 2019 SCCR 61 (the opinion of the court given by the Lord Justice Clerk (Dorrian) at para 16). In directing the jury in the way in which he did the sheriff materially misdirected the jury and the consequence was a miscarriage of justice.

[8] In support of the appeal against sentence counsel submitted that the offending was at the lower end of the scale for such charges and the offences were of some age. Taking account of the appellant's age and the nature of the offending it could be said that the period of imprisonment selected was excessive.

Crown

[9] The advocate depute contended that the issue in this case arose out of the very particular circumstances which transpired during the course of the trial. The solicitor for the appellant had made certain observations during the course of his speech concerning how the jury should approach the evidence of the witness CL. What he had said was wrong and required to be corrected by the trial judge. In doing so the sheriff had acted appropriately. When the charge was looked at as a whole it was clear that he had not directed the jury that they must treat the evidence of the docket witness as true. On the Crown submission it was

obvious that the jury would have appreciated that they did not require to believe this witness. The sheriff had not misdirected the jury and in any event it could not be said that a miscarriage of justice had occurred.

Discussion

[11] It is necessary to begin by considering what had been said on behalf of the appellant to the jury by his solicitor. Having addressed the jury on the evidence given by the two complainers he turned to the evidence given by CL. What was said merits full repetition:

> "Now, the last thing I want to say about the evidence is in relation to the evidence given by (CL) and, again, the fiscal made a big deal about the fact that I didn't cross-examine her. Well, the position is quite simple, ladies and gentlemen. When I sit down his Lordship will give you directions about what you have to do, and he will be saying to you, I suspect, that you do not have to return a verdict in relation to that allegation. That's not why we're here. So why should I waste your time? What's the point? Why should I suggest to that lady all sorts of things, the kind of cross-examination that I adopted in relation to (AW) and in relation to (SD), because it really doesn't matter. You're not being asked to return a verdict on that. You're only being asked to return a verdict in relation to charges 1, 2 and 3.
>
> So, so what? Do we really care what she says? His Lordship will say to you, well, you could use that to corroborate other things. You're entitled to do that if you wish, but that's the position. You're not being asked to return a verdict. I don't care about that, and neither should you."

[12] The first point to note is that it was incorrect to say that the procurator fiscal had made a "big deal" about the absence of cross examination of this witness. In her speech to the jury the procurator fiscal observed, correctly, that the evidence given by CL was uncontested by the accused, not subjected to any cross examination and the truthfulness of what she had said had not been challenged. This was in the context of the procurator fiscal moving on to invite the jury to apply the doctrine of mutual corroboration. Having introduced her reference to this evidence in the way explained, the procurator fiscal went on to say to the jury:

> "If you're satisfied that (CL) was a credible and reliable witness and that the conduct that she described is similar in character of either (AW) or (SD), or both, you can use her evidence to provide support or, in other words, corroborate the accounts given by (AW) and (SD)."

All of what was said was accurate, moderate and appropriate.

[13] By contrast, it was quite wrong of the appellant's solicitor to suggest that the jury should not care about the evidence of the witness CL. The legal effect of her evidence, as he knew, was important, as it was available to provide corroboration for the evidence of either or both complainers. Of even more importance however was the suggestion that he had chosen not to cross-examine this witness in order not to waste the time of the jury and the implication that there was available to him a basis to challenge the witness's credibility and reliability in the same sort of way as he had in cross-examining the two complainers.

[14] The reason the solicitor for the appellant did not cross-examine the witness CL was, as he had earlier confirmed to the sheriff, because the appellant had pled guilty in earlier proceedings to the conduct which the witness gave evidence about. As he had said in giving that explanation to the sheriff, he did not consider that it would be appropriate to challenge the credibility or reliability of that witness. In these circumstances, contrary to what he suggested to the jury, it is difficult to see how the solicitor could have had any basis in his instructions for challenging the credibility or reliability of the evidence given by CL. It was not suggested in the appeal that the comments made could be justified in any way.

[15] In light of this it was plainly necessary for the sheriff to correct what had been said, to explain the use to which the evidence of CL could be put and to give directions about how to approach her evidence. In evaluating how the sheriff conducted this exercise it is necessary, of course, to take account of all that was said and not to isolate the passages founded upon in the appeal from the rest of the charge.

[16] In opening his charge the sheriff explained that it was the function of the jury to decide what has been proved and what has not and that to do that they required to consider all of the evidence. At pages 2 and 3 of the transcript of his charge he explained to the jury that it was their function to judge the quality of the evidence of each witness. He explained that this involved an assessment of the twin aspects of credibility and reliability. At pages 3 to 4 he pointed out that both the complainer AW and the witness CL had given evidence whilst screened from the accused. He explained that notwithstanding these arrangements the evidence from these witnesses was to be judged in the same way as the evidence from anyone else who gave evidence without such arrangements.

[17] At page 17 the sheriff explained that the evidence led in relation to the docket was evidence in the case and that the jury would have to assess it when considering their verdict on the charges. He went on to explain that the defence were wrong in suggesting that the jury should ignore that evidence. He directed them that they should treat the evidence of CL as evidence in the case. It was immediately following these directions, and in this context, that the sheriff gave the direction first focused on in the appeal. In our opinion it is clear when seen in this context that in this passage the sheriff was doing no more than explaining to the jury that they were entitled to accept the evidence of CL as true.

[18] Nor do we accept that any valid criticism can be made of the second passage focused on in the appeal. At this stage of his charge the sheriff was concluding his directions on the application of the doctrine of mutual corroboration. When seen in context, the direction complained of did no more than explain to the jury that if they decided that the evidence in respect of each charge was credible and reliable and decided that they could accept the evidence relating to the docket as true, then they could go on to consider whether the

necessary link in time character and circumstances had been established. In the circumstances as set out we do not consider that there was any misdirection by the sheriff.

[19] In determining the appropriate sentence the sheriff took account of the appellant's age and the possibility that in other circumstances the charge of which he was convicted might have been prosecuted on the same indictment as his earlier conviction. As set against these considerations he took account of the abuse of trust involved in the appellant's conduct and its effect on the complainer. He also noted that the appellant denied any responsibility for sexual offending and showed no remorse. As was accepted on the appellant's behalf, no criticism could be advanced in respect of the factors which the sheriff took into account. The submission was simply that in the circumstances the sentence was excessive. We do not agree. We consider that the sentence selected was appropriate. For these reasons the appeal against both conviction and sentence is refused.

[20] Before leaving the appeal however we wish to return to the matter of the statements made by the appellant's solicitor during the course of his speech to the jury. It is a fundamental requirement of the privilege and right to appear on another's behalf in court that the legal representative conducts himself in accordance with recognised standards of propriety. The most obvious of such standards is that the legal representative must not make a statement to the court which he knows to be incorrect or misleading. This duty is reflected in Section B Rule B1.13 of the Law Society of Scotland Practice Rules 2011. We understand that the solicitor who acted for the appellant was a senior member of the profession with around 30 years' experience. Much of the process of advocacy is learned through observation. It is all the more important that those from whom newer members of the profession will learn about the process of advocacy adhere to the recognised standards of propriety which both the court, and the profession generally, expects to see.