APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 47
HCA/2022/000199/XC

Lord Doherty
Lord Matthews
Lady Wise

OPINION OF THE COURT

delivered by LORD DOHERTY

in

Appeal against Conviction

by

LC

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg (sol adv); PDSO, Edinburgh
Respondent: Edwards KC, AD; Crown Agent

13 October 2022

Introduction

[1] This is an appeal against conviction which the court heard and granted on 13 October 2022. The court indicated then that it would give its reasons in writing, which it now does.

[2] On 2 March 2022 at the High Court of Justiciary at Edinburgh the appellant was convicted of a contravention of section 1 of the Domestic Abuse (Scotland) Act 2018

(charge 1) and of a contravention of section 1 of the Sexual Offences (Scotland) Act 2009 (rape) (charge 2). Both charges involved his partner. The verdict on charge 1 was unanimous and the verdict on charge 2 was by a majority. He was sentenced to 9 months' imprisonment for charge 1 and to 4 years' imprisonment for charge 2. The sentences were consecutive. He appeals his conviction on charge 2.

The evidence relating to charge 2

[3] The appellant and his partner had been on a night out. They had been drinking. At about 4 am they returned to the complainer's flat. After engaging in other forms of sexual relations, the appellant penetrated the complainer's anus with his penis with her consent. They used a lubricant. The first attempt at penetration stopped because the complainer found it sore. A few minutes later, after the application of more lubricant, they tried again. The complainer's evidence was that it was still painful and that at that stage she withdrew her consent to it, but that the appellant continued to penetrate her and did not stop until she grabbed his neck.

[4] The appellant did not give evidence. The Crown led evidence of his police interview, during which he denied continuing with penetration after the complainer asked him to stop. He said that he stopped straight away. In relation to the second episode of penetration he stated:

> "Tried again and then em this time I'd.. I'd went in a bit too hard and then as soon as she said ow stop sort of thing, I was straight out again because....I wouldn't hurt her. And obviously next morning she (*sic*) very sore from that. She'd ...said herself that she's very sore… But it was both consensual and both had agreed…"

Later in the interview the following exchange took place between the police ("DC1") and the appellant ("S"):

> "DC1 Okay. Did [the complainer] sustain any injuries because of this?

S Yeah, she got.. well she said that she was sore.
DC1 Mm-hmm.
S Em, I.. I don't recall her saying that she bled or anything.
DC1 Okay.
S But she said that she was very sore and obviously it was..
DC1 Mm-hmm.
S I guess it's my fault cause I'd gone in sort of thing.
DC1 Yeah.
S And she said stop, so as soon as I stopped, I was straight out so."

[5] There was also evidence that later that day the complainer met a friend in a public house. The friend testified that the complainer seemed upset. She was not crying, but she was very anxious and nervous and not looking at her friend.

The advocate depute's speech

[6] In his jury speech the advocate depute submitted that the complainer's account of penetration continuing after she had withdrawn consent could be corroborated (i) by evidence of her distress the following day; or (ii) by the appellant's statement that he had "maybe went in a bit too hard"; or (iii) by his statement "I guess it's my fault because I'd gone in sort of thing."

The judge's directions

[7] In addressing the jury at the outset of the trial the judge advised them that "if necessary, I will tell you what you may or may not do with particular pieces of evidence." He gave them standard directions on corroboration, stating *inter alia*:

> "But please note that in a case where there is a main source of evidence such as a witness describing the event in which a crime was committed, corroborative evidence does not need to be more consistent with guilt than innocence. All that is required for corroboration is evidence which provides support for, or confirmation of, or fits with, the main source of evidence about an essential fact."

[8] Towards the beginning of his charge he directed them:

> "It's your, not only your recollection of the evidence that counts, but it's also what you make of the evidence and what importance you think that various bits are (*sic*), that is important. And please bear that in mind."

He told them that the live issue on charge 2 was whether the appellant continued to have intercourse after consent had been withdrawn:

> "The issue for you is actually quite a sharp one for you resolve. And the important thing is this: the question is not whether it was sore for [the complainer] on either occasion but particularly the second one, but whether on the second occasion, whether [the appellant] pulled out immediately he was told to stop, or whether he carried on until [she] jabbed him in the throat."

[9] After dealing with questions of credibility and reliability, the judge turned to the need for corroboration of the complainer's account. He dealt first with the advocate depute's reliance on the appellant's statement that he had gone in a bit too hard:

> "Now, as I understood the advocate depute, he relied on the words, 'I went in too hard' as constituting an admission. But with the greatest of respect to the advocate depute, that is not the issue. You may think that you cannot, indeed you cannot really divorce those words from the explanation that has been given because as soon as she's, according to him, of course you may not accept this, but according to him, as soon as she said 'ow', he had stopped. So, ladies and gentlemen, I suggest that that is not corroboration."

He continued:

> "The question for you is whether there is anything … to corroborate [the complainer's] account that she did withdraw consent and -- but having done so, [the appellant] had carried on regardless…"

[10] The judge then dealt with the advocate depute's reliance on the appellant having said "I guess it's my fault":

> "[H]e does say at one point, '… I guess it's my fault 'cause I'd gone in sort of thing…' Now, the question for you is whether that can constitute an admission. I'm leaving that matter for you but with this caveat: you must be careful not to take words out of context. Just after he said, I guess it's my fault, he adds, 'and she said 'stop', so as soon as I stopped, I was straight out…' So, ladies and gentlemen, you may think that that puts in context what [the appellant] said about 'I guess it's my fault'".

He went on to say:

> "Now, ladies and gentlemen, if you don't accept the advocate depute's suggestion that you'll find corroboration in the police interview, then there is another source of potential corroboration available to you, and it's this: evidence of a complainer's distress."

He then gave appropriate directions in relation to the distress evidence.

The grounds of appeal

[11] The grounds which were granted leave (grounds 1(i) and 1(ii)) are that the judge misdirected the jury in two material respects, *viz*. that neither of the statements upon which the advocate depute founded was capable of corroborating the complainer's account that penetration continued after consent was withdrawn. While the judge suggested to the jury that the first statement was not corroboration, he did not direct that it was not open to them to treat it as such (ground 1(i)). He cautioned them to read the second statement in context, but he expressly left it to them to decide whether it corroborated the complainer's account (ground 1(ii)). Each misdirection had resulted in a miscarriage of justice.

The judge's report

[12] The judge commented on ground 1(i):

> "With respect I consider that it is abundantly clear that I am explaining to the jury why it is not corroboration and they could have been in no doubt that they should not rely on the remark 'I went in too hard' as corroboration."

[13] In relation to ground 1(ii) he observed:

> "I took the view that the use of the words 'it's my fault' could constitute an acceptance of guilt as it referred to his state of mind about what had occurred. I cautioned the jury that they must consider the whole of what was said by the appellant in the interview."

Submissions for the appellant

[14] Ms Ogg submitted that both grounds of appeal should be upheld. Neither of the statements which the advocate depute founded upon had been capable of corroborating the complainer's evidence that the appellant continued to have intercourse after she had withdrawn consent. The judge ought to have given clear directions to the jury to that effect so that they were not led into error as a result of the advocate depute's speech (*Lundy* v *H M Advocate (No 1)* 2018 SCCR 269). He had not done so. In relation to the first statement, while he had suggested that it was not corroboration, ultimately he had left it to them to decide. With the second statement, he told them expressly that it was for them to decide whether it provided corroboration. There had been a miscarriage of justice. Each misdirection was material. There was no way of knowing which route the jury had taken to their verdict. They may have treated one or other or both of the statements as admissions of guilt.

Submissions for the Crown

[15] The advocate depute (who did not conduct the trial) submitted that the appeal should be refused. It was for the jury to assess what inferences could be drawn from the evidence. Provided the inferences which the Crown asked them to draw were reasonable inferences, whether to draw them should be left to the jury: *McPherson* v *HM Advocate* 2019 JC 171, paragraph 10. The judge had not misdirected the jury. So far as the first statement was concerned, he had made it clear that it did not provide corroboration. On the other hand, he had been correct to direct the jury that it was up to them to decide whether the second statement corroborated the complainer's account. Whether something said by an accused may be taken to be an admission was a matter of fact and circumstance to be determined by the jury: *CR* v *HM Advocate* 2022 SCCR 227, at paras [15] - [18]. An

admission of guilt need not be unequivocal in order to provide corroboration. It need only confirm or support or fit with the complainer's evidence on the crucial fact. Here, the jury could reasonably infer an admission of guilt from the second statement and its context. It confirmed or supported the complainer's account.

[16] If, contrary to the advocate depute's submission, the judge had misdirected the jury in either or both respects, there had not been a miscarriage of justice, because there had been other evidence capable of corroborating the evidence of the complainer - the distress evidence. Even if both criticisms of the charge were well founded, there would still have remained a sufficiency of evidence to convict.

Decision and reasons

[17] It is well settled that an admission need not be unequivocal in order for it to provide corroboration of an essential fact, as long as it is may reasonably be inferred from what was said and its context that it was indeed an admission which confirms or supports or fits with the principal evidence relating to that fact (*Fox* v *H M Advocate* 1998 JC 94; *CR* v *HM Advocate* 2022 SCCR 227). Where the evidence relied upon is reasonably capable of bearing such an inference, it is a question for the jury whether the inference ought to be drawn. However, whether it is reasonably capable of bearing the inference is a question of law for the judge, not a question of fact for the jury. If it is not reasonably capable of bearing the inference then it cannot provide corroboration.

[18] Here, the essential fact which was in issue, and which required to be proved by corroborated evidence, was that the appellant continued having intercourse after the complainer's consent had been withdrawn. The complainer gave evidence to that effect, and

the Crown relied on the first and second statements as being admissions each of which was capable of corroborating the essential fact.

[19] Before this court the Crown did not contend that the trial advocate depute had been correct to say that the first statement could provide corroboration. The judge suggested to the jury that it did not. The difficulty is that while he advised the jury of his view, he did not direct that it was not open to them to take a different view. He had stressed that it was for them to decide what they made of the evidence and what importance they attached to various bits of it. He told them that "*if* you don't accept the advocate depute's suggestion that you'll find corroboration in the police interview, then there is another source of potential corroboration available to you". That was consistent with it being a question for them whether or not to accept the advocate depute's contention that the first statement provided corroboration, notwithstanding that the judge suggested that it did not. The judge ought to have directed, in clear and robust terms, that the first statement could not provide corroboration. It ought not to have been left "on the table" for the jury to use as corroboration if they did not accept the judge's suggestion. The court is satisfied that there was a misdirection in relation to the first statement.

[20] The context of the second statement is clear. The appellant had been asked whether the complainer sustained any injuries because of what happened. He answered that she said that she was very sore "and obviously it was… I guess it's my fault cause I'd gone in sort of thing." Read in context, that statement was not reasonably capable of bearing the inference that the appellant was admitting that he persisted with penetration after consent had been withdrawn. Indeed, the only reasonable inference was that he was accepting responsibility for the complainer feeling sore. It follows that the judge ought not to have directed the jury as he did in relation to this statement.

Miscarriage of justice?

[21] The court is also satisfied that the misdirections were material and that there has been a miscarriage of justice. It is simply not possible to be sure of the jury's route to their verdict. They may have relied upon one or other or both statements to corroborate the complainer's account of what had occurred. Moreover, if they treated one or both of the statements as admissions of guilt that may have weighed with them when they were deciding whether the complainer's evidence was credible and reliable. Had they been directed correctly it is not inevitable that they would have convicted the appellant. It is possible that they might have reached different conclusions in relation to the complainer's credibility and reliability. If they did find her to be credible and reliable they may or may not have been satisfied that the distress evidence corroborated her account.

[22] Had the only misdirection been in relation to the first statement, the court would not have been convinced that there would have been a miscarriage. On that scenario the position would have been that, although there was a misdirection, the judge gave a strong indication of his own view and it is highly likely that the jury would have followed it.

Authority to bring a fresh prosecution

[23] When the court announced its decision to allow the appeal the advocate depute moved for authority to bring a new prosecution in terms of sections 118 and 119 of the Criminal Procedure (Scotland) Act 1995. She recognised that the Crown bore some of the responsibility for what had happened. However, that was only one of the factors which had to be considered. Other important factors were (i) that the judge also bore some responsibility; (ii) that the alleged crime was a serious one; (iii) that there remained a

sufficiency of evidence; (iv) that the date of the alleged offence (January 2020) was relatively recent; (v) that a new trial would be likely to be quite short, and would focus on the complainer and the witness who observed distress; and (vi) that all of the witnesses remained available. It was in the interests of justice that the motion be granted.

[24] Ms Ogg opposed the motion. There had been substantial fault on the part of the Crown. The "admissions" had formed a significant part of the case against the appellant. The case had been hanging over him since January 2020. His uncertainty as to his future ought not to be further prolonged.

[25] The court was satisfied that the motion should be granted. While there was fault on the part of the Crown, that was just one of the factors which required to be considered (*Lundy* v *HM Advocate (No 2)* 2018 SCCR 285). Here, the fault arose from misjudgements by the advocate depute. It was not fault of a more egregious kind, such as was present in *Lundy* v *HM Advocate (No 1)*. The alleged crime was a serious one, there remained a sufficiency of evidence, and the charge related to quite a recent event. On balance, the interests of justice favoured granting the motion.

Disposal

[26] The court allowed the appeal, set aside the verdict of the trial court on charge 2 and quashed the conviction on that charge. It followed that the sentence of 4 years imprisonment also fell. The court also (i) granted authority to bring a new prosecution in accordance with sections 118(1)(c) and 119(10) of the Criminal Procedure (Scotland) Act 1995; (iii) granted the appellant bail; and (iv) on the unopposed motion of the advocate depute made an order in terms of section 4(2) of the Contempt of Court Act 1981 restricting publication of the argument and outcome of this appeal until the conclusion of the fresh

prosecution, or until a decision is taken by the Crown not to proceed with a fresh prosecution.