APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 16
HCA/2023/422/XC

Lord Justice General
Lord Matthews
Lord Boyd of Duncansby

OPINION OF THE COURT
delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

WILLIAM BAIN

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Barr; Paterson Bell, Edinburgh (for McClure Collins, Glasgow)
Respondent: Harvey AD; the Crown Agent

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25 April 2024

[1] On 7 July 2023, at the High Court in Glasgow, the appellant was convicted of a contravention of section 1 of the Domestic Abuse (Scotland) Act 2018. This libelled a course of behaviour towards his partner between July and December 2021. This comprised a series of assaults by, for example, head-butting the complainer, spitting on her, pushing her, compressing her neck, dragging her from one room to another, attempting to push her over

a wall, taking money from her, brandishing a knife at her and striking her on the head and body with a hammer. It also included damaging her property; notably shredding her clothing and smashing her mobile phone. The libel continued with the following allegation:

> "and on an occasion when she was asleep and intoxicated and unable to consent you did penetrate her anus with your fingers and penis without her consent".

[2] The trial judge imposed an extended sentence of 13 years, nine years of which was the custodial element.

[3] There was ample evidence from several witnesses, including friends, relatives and the police, of the complainer being, at various times, in a state of extreme distress. There was corroboration of the physical assaults by way of bruising and swelling to the complainer's face and body. Witnesses had seen a broken mobile and ripped dresses. They had observed the complainer's house in disarray. Threatening texts were adduced in evidence. The appellant himself admitted "choking" the complainer, although he said that was with her consent.

[4] There was no direct corroboration of the allegation of non-consensual anal intercourse. The jury acquitted the appellant of other allegations of a sexual nature.

[5] The trial judge directed the jury that, for a conviction, they required to be satisfied that the course of behaviour had to be proved by corroborated evidence. In particular:

> "At least two incidents forming the alleged course of behaviour must be proved by evidence coming from at least two sources. Provided that is the case, then ... [whether] you can convict of elements of the charge which are spoken to only by a single witness, depends on whether you're satisfied that those elements were part of the same course of abusive behaviour as I've defined that term."

[6] The appellant accepted that section 1 of the DASA created an offence which could be proved by two or more witnesses speaking to two or more incidents in a course of abusive behaviour (*CA* v *HM Advocate* 2023 JC 8 at para [9] *et seq.*). It was accepted that, in terms of

the DASA (s 2(2)(a) and (4)(a)), such incidents could involve sexual as well as physical violence. For these reasons it was not disputed that there was sufficient corroboration to prove the charge as a generality. The ground of appeal was one of unreasonable jury verdict (1995 Act, s 106(3)(b)). The contention, which has a somewhat tenuous connection with reasonableness of verdict, was that allowing minor non-sexual behaviour to corroborate a serious sexual offence, which could have been libelled as rape, gave rise to a situation in which an individual could be convicted of extremely serious conduct which was not directly corroborated. This could result in wrongful convictions. For these reasons, appropriate directions had to be given to avoid that outcome. There was a need for there to be a nexus or link between the serious and non-serious activities (*DF* v *HM Advocate*, unreported, Lord Matthews, 10 August 2021 at para [49]). The directions which had been given were not adequate and a miscarriage of justice had occurred. No reasonable jury, properly directed, could have convicted the appellant of the sexual element in the charge.

[7] The Crown replied that Parliament had made it clear that sexual violence could form part of a course of abusive behaviour and thus form part of a charge under section 1 of the DASA. Once that were accepted, there was no basis for distinguishing incidents of sexual violence, however serious, from other forms of abusive behaviour. It was sufficient that at least two of the incidents were proved by corroborated evidence, thus enabling the jury to convict of the remainder, albeit uncorroborated, elements, if they were part of the relevant course of conduct. There was no need for a direction on there being a link. The jury had been properly directed in accordance with the recent jurisprudence (*CA* v *HM Advocate* at para [10] *et seq*).

[8] The Domestic Abuse (Scotland) Act 2018 creates an offence of engaging in a course of abusive behaviour towards a partner or ex-partner. What requires to be proved by

corroborated evidence is the course of abusive behaviour; not individual elements within it. Following the ordinary principles of corroboration, where there are several instances of abusive behaviour, as there must be to constitute a relevant course, the offence will be proved if two or more of the incidents are spoken to by different witnesses (including the partner or ex-partner) and these incidents can be seen as being part of a course of behaviour libelled (*DF* v *HM Advocate*, (unreported, 10 August 2021, Lord Matthews at para [49]); *CA* v *HM Advocate* 2023 JC 8, LJC (Lady Dorrian) delivering the Opinion of the Court, at para [10] *et seq*). One act will inevitably be more or less serious than the other or other acts, but "behaviour" includes both sexual and violent behaviour (DASA 2018, s 2(4)).

[9] It is not disputed that there was a sufficiency of evidence. The trial judge gave adequate directions on what constituted a sufficiency. In particular, he said that they could only return a verdict of guilt on an element which was only spoken to by one witness (ie the complainer) if it was "part of the same course of abusive behaviour". The jury must have believed the complainer in relation to the sexual element under consideration; as they did with many of the physical behaviours. Following the judge's directions, the jury must have accepted that the sexual element formed part of the course of conduct. In that situation, the jury would have had little difficulty in reaching the rational conclusion that the appellant should be found guilty of that sexual element.

[10] The appeal is accordingly refused.