APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 49
HCA/2023/278/XC

Lord Justice General
Lord Matthews
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

APPEAL

by

SCOTT FAULKNER

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Jones KC, Miller; PDSO Edinburgh
Respondent: Cameron, KC, AD; the Crown Agent

13 December 2023

Introduction

[1] The appellant was convicted of six charges. Charge 1 was in the following terms:

> "on various occasions between 1 January 2012 and 25 December 2015, both dates inclusive, within (various addresses and a motor vehicle), you SCOTT FAULKNER did abduct (the complainer), and did restrain his hands with handcuffs, tie his legs to a bedframe with rope, seize him on the body, blindfold him, and detain him against his will, assault him in that you did utter sexual remarks towards him, touch him on the body, touch his penis, remove his lower clothing, take photographs of him whilst he was restrained and in a state of undress, threaten to expose said photographs

> should he not comply with you, masturbate him, insert his penis into your mouth, cause him to ejaculate, place your penis in his hands whilst they were restrained and cause him to masturbate you, masturbate and ejaculate in his presence, instruct him to undress and lie on the ground, insert his penis into your anus, cause him to be present when you engaged in sexual activity with another adult male, cause said male to engage in sexual activity with (the complainer) in that said male did touch him on the body, masturbate him, and he did penetrate the anus of (the complainer) with a sex toy, and you did instruct (the complainer) to penetrate your anus with his penis and you did penetrate his anus with your penis, and you did thus rape him, all to his injury: CONTRARY to Sections 1 and 3 of the Sexual Offences (Scotland) Act 2009 and the common law"

[2] On 31 May 2023, at an adjourned diet, the trial judge sentenced the appellant to imprisonment for 12 years *in cumulo*, to run from 1 March 2023 to take account of certain periods on remand. Charge 1 would have attracted a sentence of 10 years on its own while for the remaining charges, the details of which we need not set out, the sentences would have totalled 2 years.

[3] Conviction is only challenged in relation to Charge 1 and the only ground is misdirection as to corroboration. There is also an appeal against sentence but this is predicated on success in the appeal against conviction.

The circumstances

[4] The evidence of the complainer disclosed a continuing course of criminal conduct, systematically pursued by the appellant over the period in the libel. By a combination of (a) coercive grooming, involving continuing threats by the appellant that, unless the complainer complied, he would distribute compromising photographs of him, taken without his consent, and to some extent without his knowledge, and (b) detaining him against his will, the appellant committed numerous and repeated acts of sexual assault, involving non-penetrative sexual acts, oral sex, masturbation, ejaculation over him, and on at least one occasion, anal rape, against the complainer. A common detail was the use of

restraint: the complainer would be handcuffed during the incidents, either with his hands behind his back, or handcuffed to a bed. The complainer's evidence was that such was the case, with the exception of only two or three of the incidents. In was agreed in a joint minute that on 28 February 2021 a pair of handcuffs was found within a suitcase on the bed in the second bedroom of the appellant's home. Scientific evidence confirmed that the complainer's DNA was present on the handcuffs, as was the appellant's. As a result of the threats, and the appellant's constant assertion that the complainer was himself "gay", the complainer felt unable to tell his parents. When the course of conduct began, the complainer was aged 13 –14 years, and the appellant was aged 22 years. They met at a local first aid agency. In the course of attendance at various associated outside events, the complainer was reliant on the appellant to provide him with transport and they would generally travel together, alone in the appellant's vehicle.

[5] When travelling to or from such events, the appellant would take the complainer to abandoned buildings, or, on one occasion, a wooded area, and there subject him to sexual assault. The complainer repeatedly indicated his lack of consent, and was repeatedly faced with threats that if he did not comply the compromising photographs taken by the appellant during the continuing course of conduct would be distributed. In addition, the complainer feared that if he did not comply, the appellant would leave him stranded and would not deliver him home. Latterly, the continuing sexual abuse was also perpetrated in the appellant's home.

[6] On one occasion, the appellant took the complainer to the home of another, the witness J, who spoke to the appellant indulging in sexual activity with the complainer, albeit with consent. J is the adult male referred to in the latter part of the charge. The appellant told him that he had been seeing the complainer. Under reference to his police statement, J

said that the complainer was being encouraged by the appellant and he had the feeling that the complainer would have sat and chatted had that not been the case, although that was at the beginning of the visit. J did not speak to any distress on the complainer's part nor to the use of any restraints.

[7] As well as the evidence outlined above, a witness E spoke to the appellant's saying that he and the complainer had "done stuff" and that they had "done stuff with other people". The witness took this to mean sexual stuff. He also told her that the complainer was "really gay" and showed her a photograph on his phone of a young boy tied up in front of his car, although the Crown did not suggest that the boy was the complainer.

[8] The accused was interviewed by the police but made no comment in relation to charge 1. He relied on a special defence of consent to the effect that between September 2015 and July 2016 there was consensual sexual activity between the complainer and him on various occasions, specifically oral and anal intercourse and masturbation, while on one occasion there was consensual touching, anal intercourse and masturbation involving another male, presumably J. In his evidence the appellant said that he first engaged in sexual activity with the complainer towards the end of 2015 or the beginning of 2016 and he understood the complainer to be 18 years old. It was just consensual mutual oral sex at that point and he had no photographs of the complainer. A sexual relationship ensued and lasted until July 2016. During that time period he thought that he was penetrated anally by the complainer but not the other way round. The complainer would turn up randomly at the appellant's house and they mostly indulged in oral sex and masturbation. Ropes and handcuffs were not used. In about May 2016 they were at J's house and they all ended up naked and performing various sexual acts on each other. He did not think he had sex with the complainer on that occasion. After that, he and the complainer indulged in sexual

activity but he was not sure if there was intercourse. Handcuffs and ropes were never used in 2015 or 2016. The appellant then became involved with another man and he and the complainer drifted apart but from about the middle of 2019 till September 2020 they began again to engage in sexual activity including having intercourse with each other, once every month or two. On one occasion, in late 2020 he used handcuffs on the complainer and then the complainer used them on him. He never forced or threatened the complainer and did not say anything to E about doing "stuff" with him.

The appeal and the appellant's submissions

[9] The ground of appeal proceeds on the basis that the jury were wrongly directed that they could use the evidence of J about what happened in his house to corroborate the complainer's evidence that he was sexually assaulted by the appellant and thereafter consider all of the other episodes in the charge on the basis of mutual corroboration. In submissions, this was refined. The direction was said to be that the jury could use the evidence of J to corroborate sexual activity with the complainer and thereafter to proceed on the basis of mutual corroboration in respect of the whole charge. However, J's evidence, which made no reference to handcuffs or distress, was of a consensual episode and mutual corroboration could not operate. His account was broadly to the effect that the complainer removed articles of his own clothing and was very keen. For mutual corroboration to operate as envisaged in *Taylor* v *HM Advocate* and *Rysmanowski* v *HM Advocate* 2020 JC 84, it was essential that one component of the composite charge was fully corroborated. All that had been corroborated was sexual activity but not non-consensual sexual activity.

[10] Nothing said by the trial judge later in his Charge could cure the misdirection, his comments then being merely a summation of the advocate depute's speech as opposed to the giving of directions.

The respondent's submissions

[11] There was sufficient evidence. A no case to answer submission had been repelled. The Crown had sought to argue in responding to that submission that corroboration of sexual activity could be found in the DNA on the handcuffs, the evidence of E, particularly the comments made to her by the appellant, and the evidence of J about sexual activity, on the basis of mutual corroboration. The trial judge repelled the submission but only because mutual corroboration of sexual activity was available, using the evidence of J, and that was the basis on which the Crown addressed the jury. The trial judge's directions in relation to charge 1 were to be found in various parts of the Charge, which had to be read as a whole. He correctly defined the charge and what had to be proved in respect of it. He gave general directions as to mutual corroboration in respect of charges 2 and 4 before explaining how it might work in relation to charge 1, where there was a single complainer but a number of episodes. As the judge said in his report, he did not intend in his directions to suggest that the evidence of J corroborated anything more than the occurrence of sexual conduct rather than sexual assault and that was not the import of the directions. It was not necessary for one aspect of the composite charge to be fully corroborated. While the judge went on to discuss the Crown's approach, he did not stop there but provided a route to verdict which made clear what the jury could make of the evidence of J.

Discussion

[12] It is unnecessary for any part of a composite charge to be fully corroborated, in the sense of there being two witnesses speaking to that part. That was the case in *Taylor* but mutual corroboration can apply even if the complainer does not speak to part of a composite charge which is spoken to by another witness. However, in those circumstances what that other witness speaks to must be a crime. Mutuality in this context implies that two or more pieces of evidence rely on each other for corroboration. It is a two way street. This Crown case, however, which was something of a jigsaw, does not fit easily into the category of cases of which *Taylor* and *Rysmanowski* form part. The evidence of J did not require corroboration. On the other hand, he was said by the Crown to provide corroboration of part of the evidence of the complainer, namely sexual activity with the appellant. The complainer spoke of non-consensual sexual activity involving restraints and threats. The DNA on the handcuffs supported the use of restraints and support for the fact that there was sexual activity was, so far as the Crown case went, to be found in the evidence of J. It is not suggested before us that there was insufficient evidence but to categorise J's evidence as mutually corroborative, particularly where he said that the complainer consented, causes us some difficulty and we tried in vain to obtain an answer as to how it could operate. In due course the appellant gave evidence confirming sexual activity on various occasions and the use of handcuffs on one occasion, so sexual activity on various occasions was eventually corroborated by the time the case went to the jury without considering the evidence of J and, treating the DNA on the handcuffs as providing sufficient support for the complainer's account of restraint on various occasions, there was sufficient evidence without venturing into mutual corroboration at all. On first principles, it can probably be said that if a particular activity can be said to be part of a course of conduct systematically pursued then the evidence of one witness about an accused

engaging in it can be corroborated by another witness speaking about similar conduct on a different occasion. That may be so even though the conduct may not have all the features of criminality on each occasion. However, that would not amount to the full corroboration of criminal activity which can be found using mutual corroboration, as that term is properly understood, and would only go part of the way. This would appear to be the basis on which the judge intended to charge the jury but using the language of mutual corroboration was misconceived. The question for us ultimately is whether it was a material misdirection providing the jury with an illegitimate route to their verdict.

[13] The trial judge gave general directions about mutual corroboration with different complainers in relation to other charges on the indictment before going on to discuss Charge 1. As far as that charge was concerned, he said, at the bottom of page 51, that there was a variation of the rule. He referred to it as an omnibus composite charge made up of several component parts, several different incidents, which could be considered to be part of a single course of criminal conduct. He went on:

> "But viewed in that way, you would have, as a starting point, the evidence of (the complainer), who gave evidence about (the appellant) having sexually assaulted him and penetrated him once with his penis. And you have the evidence of (J). He gave evidence that when (the appellant and the complainer) visited him at his home, sexual activity took place involving (the appellant) engaging in sexual activity with (the complainer); that there was mutual playing and sucking and touching, as he put it, and the advocate depute suggests to you that that was consistent with (the complainer's) evidence about sexual activity occurring, including rape.
>
> So, if you accept the evidence of these two witnesses-(the complainer and J)-in these respects, then the evidence of (J) could serve as corroboration for (the complainer's) evidence relating to sexual conduct involving (the appellant), if you accept that what J spoke about was one incident in a course of conduct systematically pursued by (the appellant) against (the complainer).
>
> So, in other words, we have a situation where (the complainer) speaks to the whole of charge 1, in effect. He described various incidents of sexual assault and rape. **And there could be corroboration of that from (J) in relation to the one incident that he spoke about." If you are satisfied that all the episodes referred to in the charge**

> **were parts of a systematic course or conduct pursued by (the appellant), you could use the evidence of J to corroborate all of the incidents which were described by (the complainer)** (our emphasis**).**

[14] The passage which we have highlighted is unhappily worded but the directions in relation to charge 1 did not stop there.

[15] In the transcript of the continuation of the Charge at page 4, the trial judge recapped some of what he had been saying and continued:

> "And I explained to you the operation of the rule of mutual corroboration, how it applies to charges 2 and 4, the two similar charges you'll recall, but also how it could apply to charge 1 and, in that situation, how it is that (the complainer's) evidence could be corroborated by the evidence of (J)"**.**

[16] He then reminded the jury of the evidence of the DNA on the handcuffs, it being attributable to both the complainer and the appellant. He reminded them about prior statements and then summarised the submissions of the Crown and defence counsel.

[17] He mentioned what the advocate depute had said about the nature of the crimes alleged, the use of handcuffs and the threats to show photographs of the complainer. Reference was made to the DNA and the complainer's evidence about being restrained and made to lie down, as well as saying "no". The judge also drew attention to what the advocate depute had said about the evidence of E, outlined above. He went on:

> "In relation to rape, the advocate depute drew your attention to (the complainer's) evidence that he told (the appellant) that he didn't want to be penetrated. That was a clear indication that he wasn't consenting. Secondly, (J's) evidence available as mutual corroboration of (the complainer's) account relating to the incident …..which involved him and (the appellant and the complainer), when (J) was describing the sexual activity which took place; and (the complainer's) evidence that he was injured in his intimate parts following what had happened.
>
> So, in relation to charge 1….it would be open to you to analyse the evidence in this way: **as to whether sexual touching and penile penetration has been established** (our emphasis), you could have regard to (the complainer's) evidence as to what occurred. You have then in effect, an admission by (the appellant) in the context of his special defence of consent, and you have the evidence of (J) that he saw (the appellant) engaging in sexual activity with (the complainer)."

[18] The judge then went on to discuss the evidence of lack of consent. That came from the complainer and the DNA evidence on the handcuffs.

[19] In these passages, the judge separated the issue of whether the activity took place, and in which context mutual corroboration was referred, from the issue of consent and reflected the approach of the advocate depute, who said in his speech that the jury:

> "could use (J's) evidence about what happened on that occasion to support the evidence of (the complainer) about sexual behaviour, including anal penetration, on other occasions".

[19] At a later stage, the advocate depute criticised the evidence of J in certain respects, including suggesting that the complainer was not as enthusiastic as J had made out, but he did not suggest that the jury could find that his evidence supported a lack of consent.

[20] The judge's comments explaining how the jury could analyse the evidence were not mere repetition of the Crown's position but were directions providing a route to verdict and making it clear that the evidence of J only went to sexual activity and did not provide corroboration for lack of consent. Even when that is understood, it was a misdirection to refer earlier to his evidence using the language of mutual corroboration but it was not a material misdirection. By the time the jury were considering their verdict there was no dispute before them that sexual activity had occurred on various occasions, that having been confirmed by the appellant himself. The evidence of J was by then superfluous. The dispute was as to consent and when the Charge is read as a whole it does not suggest that his evidence was relevant to that question.

[21] In these circumstances, the appeal against conviction falls to be refused, as does that against sentence.