APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 83
HCA/2017/000126/XC

Lady Paton
Lord Drummond Young
Lord Turnbull

OPINION OF THE COURT

delivered by LADY PATON

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

JGC

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Forbes; Capital Defence Lawyers
Respondent: Farquharson AD; Crown Agent

15 November 2017

Introduction

[1] On 19 January 2017, after a trial in Glasgow High Court, the appellant (then aged 43) was found guilty of the following charges as amended, relating to offences committed when he was aged between 22 and 26:

> "(001) on various occasions between 1 June 1996 and 2 July 2000, both dates inclusive, at [addresses in Livingston, Rutherglen, and Shotts] you … did use lewd,

indecent and libidinous practices and behaviour towards [R] born 3 July 1988, aged 7 to 11 years … slap and handle her bottom, induce her to expose her naked bottom to you, touch her vagina, expose your penis to her, masturbate to ejaculation in her presence, make indecent remarks to her, show her pornographic magazines and induce her to adopt sexual poses shown therein, expose your naked body to her, induce her to touch your body, place your naked penis against her vagina, induce her to expose her breasts to you, penetrate her vagina with your fingers, photograph and film her while she engaged in sexual activity in front of you, take indecent photographs of her body and private parts, kiss her all over her head and body, lick her vagina and penetrate her vagina with your tongue, penetrate her mouth with your penis, induce her to masturbate you, show her adult pornographic websites and induce her to engage in sexual conversations with adults on internet chat rooms;

(002) on various occasions between 3 July 2000 and 19 November 2000, both dates inclusive, at [an address in Shotts], and in car journeys … to various locations in Livingston and West Lothian, and elsewhere, you … did use lewd, indecent and libidinous practices and behaviour towards [R], born 3 July 1988, aged 12 years … a girl of or over the age of 12 years and under the age of 16 years and did penetrate her vagina with your fingers, lick her vagina and penetrate her vagina with your tongue, penetrate her mouth with your penis, induce her to masturbate you: CONTRARY to the Criminal Law (Consolidation) (Scotland) Act 1995, Section 6;

(003) on various occasions between 1 June 1996 and 2 July 2000, both dates inclusive, at [addresses in Rutherglen and Shotts] you… did assault [R], born 3 July 1988, aged 7 to 11 years ... and rape her by penetrating her vagina with your penis;

(004) on various occasions between 3 July 2000 and 19 November 2000, both dates inclusive, at [addresses in Shotts], you … did assault [R], born 3 July 1988, then aged 12 years ... and rape her by penetrating her vagina with your penis;

(005) on various occasions between 1 August 1996 and 25 October 1997, both dates inclusive, at [an address in Rutherglen] you … did use lewd, indecent and libidinous practices and behaviour towards [L], born 26 October 1985, then aged between 10 and 11 years … induce her to play indecent computer games and expose your naked penis and testicles to her;

and

(006) on various occasions between 26 October 1997 and 19 November 2000, both dates inclusive at [addresses in Rutherglen and Shotts] you … did use lewd, indecent and libidinous practices and behaviour towards [L], born 26 October 1985, aged 12 to 15 years, ... a girl of or over the age of 12 years and under the age of 16 years, induce her to play indecent computer games, induce her to put a provocative photograph on her MSN profile, rub her legs, place your hand under her shorts and touch her vagina: CONTRARY to the Criminal Law (Consolidation) (Scotland) Act 1995, Section 6."

The verdict in respect of charges 1 to 4 was unanimous. In respect of charges 5 and 6, it was by majority. Subsequently, on 15 February 2017, the trial judge (Lord Clark) imposed a *cumulo* sentence of 10 years imprisonment, backdated to 19 January 2007 in respect of charges 1, 3, 4 and 5. In respect of charges 2 and 6, he imposed 2 years imprisonment, to run concurrently with the 10 year sentence.

[2] The appellant appealed against conviction and sentence.

Grounds of appeal

[3] Grounds of Appeal 1 and 3 passed the sift.

[4] Ground 1, read short, contended that there was insufficient evidence in relation to charges 3 and 4 (the rape of R). The trial judge had erred in refusing a "no case to answer submission" in terms of section 97 of the Criminal Procedure (Scotland) Act 1995. The evidence given by L in relation to charges 5 and 6 (lewd and libidinous practices) could not be used by the jury as a basis for the application of the *Moorov* doctrine. A challenge was also made in respect of the conviction of charges 1 and 2 insofar as relating to the penetrative elements.

[5] Ground 3 submitted that the sentence imposed was excessive, for the reasons outlined.

Submissions

[6] The submissions are reflected in the Discussion section below. The challenge in respect of charges 1 and 2 was not insisted upon.

Discussion

[7] This case involved three sisters. A fourth sister did not figure in any of the circumstances of the offences. In 1995, the sisters' parents separated. In 1996, the oldest of the three, B, became engaged to the appellant. That gave him access, as a trusted family member, to B's two younger sisters, L and R.

[8] In her evidence (in respect of charges 1 to 4 of the indictment, and noted in the judge's report at paragraphs [12] to [14]), the youngest sister R described times from the age of 7 until 12 when she found herself alone with the appellant at home or nearby. She described horseplay, games, touchings, magazines, photographing and filming, the use of a computer, and various other activities with the appellant, leading in a gradual escalation to the offences libelled in the charges. Her evidence disclosed a "grooming" of her by the appellant, developing into sexual activities including penetration by tongue, finger, and penis (including full sexual intercourse). There were over ten rapes of R. Only latterly, as R was growing up and understanding more, did she begin to realise that what was happening was wrong, and that she did not want it to continue.

[9] Evidence from R's sister L, who was older than R by 2 years 9 months, disclosed certain behaviour on the part of the appellant when L was between the ages of 10 and 15. As recorded in the transcript of the "no case to answer" submissions, (page 25 *et seq*) and as noted in the judge's report at paragraph [15], [17] and [19], L gave evidence about several incidents. She spoke of an incident when she was watching TV in the living room. The appellant came in and sat on the edge of the seat, staring at her. His dressing gown was open, and his bare legs were spread open. L talked about seeing his scrotum, not his penis, and about getting a fright. The next incident was a "naked Tetris" computer game, which the appellant put on for her and played with her. Then there was an incident in the kitchen

when the appellant placed his penis on or through a piece of bread when he was having a "carry-on" with B: L came into the kitchen and saw what was going on. Subsequently, as noted in paragraph [15] of the judge's report, another incident occurred:

> " … the appellant was alone with her. [L] described an occasion when the appellant was rubbing her bare legs while she was wearing shorts, and he then, having gradually rubbed higher up her legs, put his hand under her shorts and touched her vagina over her pants."

The advocate depute and defence counsel listened to the tapes of L's evidence concerning this incident, and entered into a Joint Minute for the purpose of the appeal. That Minute noted the following.

> "1. That in her evidence [L] stated *inter alia* that on an occasion within the libel when she was aged about 14, she was in the appellant's then home …
>
> 2. That [L] and the appellant were sitting on the couch together watching television. Her older sister [B], (the appellant's then partner), was upstairs, in the same house. The appellant was seated normally on the couch with his feet on the floor and the complainer was sitting with her legs over him resting on his lap. This she said was normal behaviour at that time. The complainer said she and the appellant would be 'always touchy, feely and close'.
>
> 3. That on an occasion within the libel, the complainer described the actions of the appellant, rubbing her shin (the bit that was on his lap) gently. This was not unusual. She then described the appellant going further up and further up then back down her leg. This made her think 'what is going on' but she did not say anything because she felt scared.
>
> 4. That the complainer was wearing a pair of football shorts with pants on underneath. She further described the shorts as 'short shorts' just covering her bottom.
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> 5. That the appellant's touching reached a stage where he was rubbing up her leg and under her shorts on her thigh, and then back down. This action continued for approximately ten minutes, culminating in a point when the appellant's hand travelled up under the complainer's shorts again. On this last occasion he moved his hand over so it touched her vagina over her pants. His touch lasted for just a second as the complainer immediately hit the appellant's hand away. She then swung herself around to sit properly on her seat.
>
> 6. That the appellant did not say anything to the complainer over the course of this last incident of touching.

7. That the appellant then left the room. He returned a short time later and stood at the arm of the couch where the complainer was now lying across it. The appellant started tickling her legs and she responded by what she described as 'play kicking' the appellant and putting her feet up behind his head and squishing it. The appellant said to the complainer 'we can't do that, [B] is up the stair'. The complainer inferred from this comment that the appellant thought she was flirting with him, but in her mind she was just playing."

[10] Finally, another incident involving L was described in the judge's report at paragraph [19] as assisting L in relation to a photograph on her MSN profile. The incident was referred to by defence counsel at pages 27 to 28 of the transcript as relating to:

> "… the computer at [an address] and the MSN image which he put up, an image of a girl, [L] thought not older than 16, and wearing a strappy top, covered in bed, told to say it was her boyfriend that took it."

[11] On behalf of the appellant, counsel accepted that there were requisite similarities in relation to time and place, but not in relation to the character of the offences. Accordingly it was submitted that R's evidence relating to charges 3 and 4 could not be corroborated on the basis of the *Moorov* doctrine by L's evidence relating to charges 5 and 6. There was no evidence from L about penetration, and no evidence from which either penetration, attempted penetration, or intention to penetrate could be inferred (in contrast with the circumstances in *JC* v *HM Advocate* [2016] HCJAC 100, and *MR* v *HM Advocate* 2013 SCCR 190, where the underlying similarity was of actual or attempted sexual activity involving penetration). There was no evidence from L from which the jury could infer even an intention to penetrate L digitally. It would be speculation for the jury to infer that there had been a wish to penetrate. Matters might be different had L spoken of being touched on the vagina over pants by the appellant's "finger" rather than by his hand. The trial judge had therefore erred in holding that the evidence about the non-penetrative sexual activity in

charge 6 was capable of providing the requisite underlying similarity of conduct for the rape charges 3 and 4.

[12] We cannot accept that submission. As has been made clear in authoritative decisions to date:

1. For the application of the *Moorov* doctrine, the *nomen juris* of each criminal act is immaterial: the question is whether there is an underlying unity of conduct (*McMahon* v *HM Advocate*, 1996 SLT 1139, Lord Justice General Hope at page 1142E-F; *B* v *HM Advocate*, 2009 SLT 151, Lord Justice General Hamilton at paragraph [6]).
2. In the context of sexual offences, the law concerning the application of the *Moorov* doctrine has continued to develop over the years, keeping pace with changing societal attitudes (*MR* v *HM Advocate*, 2013 SCCR 190, 2013 JC 212, Lord Justice Clerk Carloway at paragraph [17]).
3. There is no rule of law whereby what might be perceived as less serious criminal conduct (for example, a non-penetrative sexual offence) cannot provide corroboration of what is libelled as a more serious sexual crime involving, for example, penetration (*MR cit sup*, paragraph [21]; *HMcA* v *HM Advocate* 2015 JC 27, Lord Justice Clerk Carloway at paragraph [9]).
4. The fundamental issue is whether the evidence is capable of indicating a course of conduct systematically pursued by an accused (*HMcA cit sup*, Lord Justice Clerk Carloway at paragraph [11]; *B(R)* v *HM Advocate* 2017 SLT 714, Lord Justice Clerk Dorrian at paragraphs [18], [23]-[24]). Each case involves a question of fact and degree (*MR cit sup*, paragraph [20]).

5. Any course of conduct must be viewed as a whole, rather than in individual compartments (*HMcA cit sup,* paragraph [11]; *JC* v *HM Advocate* [2016] HCJAC 100, paragraph [12]; *M* v *HM Advocate* [2017] HCJAC 55, paragraph [29]).

6. The outcomes of cases concerning individual complainers responding to the behaviour of an accused might be different, but a jury would be entitled to conclude that any difference was attributable to the individual reaction of each complainer (*JC cit sup,* Lord Brodie at paragraph [16]) – the different reactions often reflecting the age and understanding of the particular complainer.

[13] In the present case, the evidence available to the jury included the following.

[14] The appellant was a member of the family circle and in a position of trust. By a gradual process including game-playing, magazines, computers, photographing, filming, and close physical contact, he groomed R from the age of 7 to accept and participate in what became sexual behaviour, for his own sexual gratification. The grooming and the escalating practices took place in a home context, when R was alone with him. Strokings, touchings, and other contacts ultimately became penetration by tongue, finger and penis. Latterly R was raped on over ten occasions. In relation to the older complainer, L, there were several incidents, outlined in paragraphs [9] and [10] above, which the jury could assess and consider.

[15] In our opinion, in the light of the *Moorov* doctrine as discussed and developed in authorities such as *McMahon, HMcA, B(R), BM,* and *JC,* the jury would be entitled, on the evidence before them, to identify similarities in time, place and circumstances in the behaviour described by R and the behaviour described by L, such as to demonstrate a course

of conduct systematically being pursued by the appellant. The jury would be entitled to conclude that the appellant's behaviour with L represented the early stages of the progressive escalation of grooming carried out with R, and to infer that, but for the reaction of L (then aged 14) in knocking the appellant's hand away from her vagina, clearly indicating that she wanted him to stop, the appellant's advances would have continued and escalated, as they had in R's case. The jury would be entitled to take the view that the different outcome in L's case was attributable to her greater maturity and awareness of the sexual connotations of the behaviour, and her greater ability to rebuff it.

[16] In the result, therefore, we do not accept that the trial judge erred in refusing the "no case to answer" submission. In our opinion, there was a sufficiency of evidence.

Decision

Appeal against conviction

[17] For the reasons given above, we refuse the appeal against conviction.

Appeal against sentence

[18] These were very grave offences, where the appellant surreptitiously preyed upon two young girls in the context of a family home, and subjected them to sexual behaviour for his own sexual gratification. He acted in breach of his position of trust, and in breach of any normal standards of behaviour in a civilized society. The catalogue of actions (in particular those concerning R, a child in his care at the time) places this case at uppermost end of the range of possible disposals. R's victim statement makes all too clear the devastating effect which the appellant's conduct has had on her life. Thus the nature and gravity of the offences alone justify a substantial custodial sentence. But the additional fact that the

appellant's convictions disclose (i) a conviction in 2001 of a contravention of section 52 of the Civic Government (Scotland) Act 1982 (possession and distribution of indecent images of children) resulting in a sentence of imprisonment of 2 years, and (ii) convictions in 2006 of seventeen offences under the Criminal Justice Act 1998 in respect of making and possessing indecent images of children, resulting in a sentence of imprisonment of 4 years, was a further consideration to be taken into account.

[19] The sentencing judge took those matters into account. He also took full account of the appellant's personal circumstances together with all the mitigatory factors in his favour. In the result, we have not been persuaded that the disposal in this case fell outwith the range of reasonable disposals open to the sentencing judge. We refuse the appeal against sentence.