APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 22
HCA/2017/000293/XC

Lady Paton
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LADY PATON

in

APPEAL AGAINST CONVICTION

by

SM

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: E Forrest; John Pryde & Co
Respondent: J Farquharson, AD; Crown Agent

13 March 2018

Introduction

[1] The appellant was born on 17 January 1976. On 27 March 2017 he was convicted after trial of a series of sexual offences committed against two boys, AG, a neighbour, and PM, his nephew. He was sentenced to 8 years imprisonment.

[2] The offences of which the appellant was convicted comprised lewd and libidinous

practices (charges 1 and 3), indecent assaults (charge 2), and sodomy (charge 4). The charges, read short, were as follows:

> Charge 1: 3 June 1994 to 2 June 1997, lewd and libidinous practices when aged 18 to 21 towards his neighbour AG, born on 3 June 1983 (then aged 11 to 14), and "did handle his buttocks and thighs, show him pornographic magazines, induce him to masturbate in your presence, masturbate yourself in his presence, ejaculate and show him your semen, induce him to enter [a pond] and swim naked with you, touch his private parts with your feet, cause him to expose his penis to you, handle his penis and cause him to watch pornography."
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> Charge 2: 3 June 1997 to 2 June 2001, indecent assaults when aged 21 to 25 on AG (then aged 14 to 18), and "did handle his buttocks and thighs, show him pornographic magazines, induce him to masturbate in your presence, masturbate yourself in his presence, ejaculate and show him your semen, induce him to enter [said pond] and swim naked with you, touch his private parts with your feet, cause him to expose his penis to you, handle his penis and cause him to watch pornography."
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> Charge 3: 26 August 1997 to 24 May 2001, lewd and libidinous practices when aged 21 to 25 towards his nephew PM (then aged 10 to 14), and "did make sexual remarks to him, kiss him on the mouth, handle his penis, induce him to handle your penis, induce him to perform oral sex on you, and cause him to watch pornography."
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> Charge 4: 26 August 1997 to 24 May 2001, when aged 21 to 25, commit sodomy on his nephew PM (then aged 10 to 14), and "did penetrate his anus with your penis and have unnatural carnal connection with him."

[3] The appellant appeals against conviction on two grounds, both of which passed the sift. In the first ground, the appellant contends that there was insufficient evidence to corroborate charge 4 and that a "no case to answer" submission to that effect should have been sustained. The second ground was not insisted upon at the appeal hearing.

The trial judge's report

[4] The report by the trial judge (Temporary Judge Graham K Buchanan) notes as follows:

> "[26] Both of the complainers were male. They were significantly younger than the appellant. [AG] was 7 years younger and [PM] was 11 years younger than the appellant. The vast majority of the incidents described by both complainers took place in or around Port Glasgow. It was clear from the evidence of the complainers that the appellant conducted his relationships with them in a controlling manner. The

nature of the appellant's conduct towards each complainer was not only sexually abusive but also humiliating and degrading. There was a striking similarity in relation to how the relationships with each of the complainers began in that the first contact between the appellant and the complainer involved a violent act where the appellant hit the complainer and apologised shortly afterwards.

[27] A further similarity was that the appellant provided both complainers with what could be described as 'treats'. Those involved beer and cigarettes in the case of [AG] and ice-cream and food in the case of [PM]. The appellant took both complainers to Port Glasgow swimming baths where sexual abuse occurred, albeit that in relation to [AG] the conduct took place both in the water and in the changing rooms whereas in relation to [PM] it only occurred in the cubicles. The appellant showed pornography to both complainers. He took them away on trips. He took [AG] out cycling and sexually abused him on numerous occasions. He took [PM] on trips to the seaside at Saltcoats and on one occasion committed sodomy upon him in a caravan. Each of the complainers spoke to incidents of sexual abuse taking place in the appellant's home in Port Glasgow which happened when the appellant's mother had gone out and he and the complainers were left there alone. The appellant also told both complainers that they should not tell anyone, including members of their families, what he had been doing.

[28] There were, of course, certain dissimilarities between the circumstances of charges 1 and 2 on the one hand and charges 3 and 4 on the other. The most obvious dissimilarity was that in relation to charges 1 and 2 there were no acts involving penetration or attempted penetration whereas in respect of charges 3 and 4 [PM] described acts which did involve penetration. It is suggested in the first ground of appeal that the behaviour of the appellant towards [AG] occurred in circumstances where the complainer regarded himself as a good friend of the appellant. By contrast, it is said, the behaviour of the appellant towards [PM], the complainer in charge 4, was violent and threatening."

Submissions for the appellant

[5] Counsel for the appellant submitted that while there were similarities in time and place between the allegations made by the two complainers, the character of the offence in charge 4 (sodomy) was materially different. The offences in charges 1 and 2 did not involve any element of penetration. Nor was there any evidence from which penetration, attempted penetration, or intention to penetrate, could be inferred. There were further dissimilarities. AG was a neighbour, whereas PM was a relative. Most of the incidents involving AG took place out of doors, whereas all of the incidents involving PM occurred indoors. AG said that

he always went cycling prior to a relevant incident; PM never mentioned cycling. AG spoke of a jokey element to the incidents, without any violence, whereas PM described the sodomy as extremely violent, accompanied by threats that he would not see his family again if he told anyone about what was happening. AG said that he was given beer and cigarettes on every occasion of sexual abuse. PM made no mention of either, but spoke of being given food and ice-cream. AG spoke of the appellant masturbating in his presence. PM made no mention of any such act. AG did not say anything about kissing, whereas PM stated that the abuse always began with the appellant kissing him on the mouth and neck. AG did not mention having his clothing removed, whereas PM said that the appellant removed his (PM's) clothing before sodomising him. AG did not describe any attempts at penetration, whereas PM said that the sexual assaults began with kissing and after a few months the appellant sodomised him. AG said that incidents of sexual assault occurred in a public swimming pool, whereas PM said that he was not touched in the pool as there were other people there, but he was touched in the changing cubicle. The essential underlying unity could not be established. There was such a significant difference in character that the behaviour described could not comprise component parts of one course of conduct systematically being pursued by the appellant. AG's evidence in respect of charges 1 and 2 could not therefore corroborate PM's evidence in respect of charge 4. The trial judge should have sustained the submission that there was insufficient evidence for charge 4, and the conviction of charge 4 should be quashed. Reference was made to *B(R)* v *HM Advocate* 2017 SLT 714, paragraphs [18] to [28]; *MR* v *HM Advocate* 2013 JC 212; *B* v *HM Advocate* 2009 SLT 151; *F* v *HM Advocate* 2016 SLT 746, paragraph [23]; *Ogg* v *HM Advocate* 1938 JC 152, at page 158; and *Moorov* v *HM Advocate* 1930 JC 68, at page 73. Recent authorities such as *AD* v *HM Advocate* [2017] HCJAC 84 and *JGC* v *HM Advocate* [2017] HCJAC 83 could be distinguished, as there had been

nothing in AG's evidence to suggest that there were actings which might have led to penetration.

Submissions for the Crown

[6] The advocate depute submitted that evidence given in respect of a less serious charge could corroborate evidence given in respect of a more serious charge. Evidence about non-penetrative behaviour could corroborate evidence about penetrative behaviour (*HMcA* v *HM Advocate* 2015 JC 27). The offending conduct had to be looked at as a whole. The significant escalation of behaviour in the case of PM was partly attributable to the fact that he had been unable to fend off the appellant: AG, by contrast, had at certain stages told the appellant to "f--- off".

[7] The alleged dissimilarities in the character of the offences referred to by counsel for the appellant were superficial. The similarities in character pointed to a course of conduct. In particular, in both cases there was an element of physical assault at the beginning of the relationship (the appellant hit or grabbed hold of AG making him cry, and in PM's case the appellant slapped him on the head, making him cry). In both cases there was an element of age-appropriate grooming (cigarettes, alcohol, swimming, cycling and fishing for AG, ice-cream and the swimming baths for PM). In both cases there was an element of isolation: attacks on AG occurred in country lanes, or when his mother was out of the house; attacks on PM took place in the changing cubicle at the baths, or when his grandmother was out. There was an element of escalation in both cases, but AG managed to prevent further developments whereas PM did not. In each case there was a sustained attempt to control and dominate, although in PM's case, using violence.

[8] The advocate depute referred to, and relied on, the summary of similarities in

paragraph 26 *et seq* of the judge's report. Both complainers were male, and significantly younger than the appellant. The majority of the incidents occurred in the Port Glasgow area. In each case, the appellant adopted a controlling manner, and an approach which was sexually abusive and humiliating. He took each complainer to the swimming baths, showed each pornography, took each on trips (AG on cycling trips, PM to the seaside). He told both complainers that they should not tell anyone what he had been doing. There were therefore compelling similarities in the character of the conduct described by AG and PM. The trial judge was justified in putting the case to the jury for their consideration. Whether or not the jury considered that *Moorov* applied was a question of fact and degree for the jury to consider (*HMcA* v *HM Advocate* 2015 JC 27). The appeal should be refused.

Discussion

[9] Counsel for the appellant accepted that there was ample evidence to establish the elements of time and place necessary for the proper application of the *Moorov* doctrine. Counsel's submission was that the character of the conduct described by AG was so different from the sodomy described by PM (charge 4) that AG's evidence could not corroborate PM's evidence in respect of charge 4. Thus the submission in terms of section 97 of the Criminal Procedure (Scotland) Act 1995 should have been sustained, and the appellant should have been acquitted of charge 4.

[10] We do not agree. As was said by Lord Hope in *Reynolds* v *HM Advocate* 1995 JC 142, at page 146:

> "…cases of this kind, while they must be approached with care, raise questions of fact and degree. That is especially so where, to use Lord Sands' expression, the case falls into the open country which lies between the two extremes … We accept that there was a process of evaluation to be conducted, because there were dissimilarities as well as similarities. On the other hand, we do not accept that on no possible view could it

> be said that there was any connection between the two offences. Where the case lies in the middle ground, the important point is that a jury should be properly directed so that they are aware of the test which requires to be applied. In this case no criticism has been made of the directions which were given by the trial judge as to the application of the *Moorov* doctrine to the facts of this case … When the case is looked at in that light and regard is had to the fact that there are items in the evidence which may on one view be regarded as similarities and then balanced against dissimilarities, we consider that this case fell within the province of the jury rather than the judge. It was therefore one which the trial judge properly left to the jury to decide."

[11] Those observations are entirely apposite in the present case. When assessing the submission made in terms of section 97, the trial judge had to view the appellant's conduct as a whole, rather than in individual compartments (*HMcA* v *HM Advocate* 2015 JC 27 paragraph [11]). When so viewed, a jury would be entitled to conclude that the appellant's behaviour towards AG and PM was controlling and dominating conduct directed to using each boy for the appellant's own sexual gratification, and going as far as he could with each boy. The fact that there was penetration in PM's case, but not in AG's, would not be determinative (*MR* v *HM Advocate* 2013 JC 212 paragraph [21], *HMcA* v *HM Advocate* 2015 JC 27, paragraphs [9] and [11]). A jury would be entitled to take into account the ages, stages of development, and personalities of AG and PM, and to conclude that PM had been less able than AG to prevent the appellant from doing what he wanted to do or from using violence towards him (cf *C* v *HM Advocate* [2016] HCJAC 100, 2017 SCL 53, paragraph [16]). A jury would be entitled to conclude that the fact that the behaviour towards AG took place mostly out of doors, whereas that towards PM took place inside, simply reflected the opportunities available to the appellant. A jury would be entitled to regard the different types of enticement used by the appellant (for example, cigarettes and alcohol in AG's case, food and ice-cream in PM's case) as being age-appropriate treats used in order to groom AG and PM. A jury would be entitled to give considerable weight to many or all of the similarities referred to by the trial judge and the advocate depute, and to give lesser weight to

the dissimilarities referred to by the appellant's counsel.

[12] In the result, it is our view that it cannot be said that the evidence in this case was insufficient to entitle a jury, properly directed, to conclude that there was a course of conduct systematically being pursued by the appellant towards the two complainers (*HMcA cit sup* paragraph [11], *B(R)* v *HM Advocate* 2017 SLT 714 paragraph [18] *et seq*). No criticism is made of the directions given by the trial judge. It was therefore for the jury to balance the various similarities and dissimilarities referred to above, to evaluate questions of fact and degree, and to reach a view as to whether and to what extent the *Moorov* doctrine applied (*MR* v *HM Advocate* 2013 JC 212; *HMcA* v *HM Advocate cit sup* paragraph [9]).

Decision

[13] For the reasons given above, we are not persuaded that there is any merit in this appeal. The appeal is refused.