APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 17
HCA/2023/000289/XC

Lord Pentland
Lord Matthews
Lady Wise

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

Appeal against Conviction

by

CATHAL KELLY

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: D Adam; Livingstone Brown, Glasgow
Respondent: A Prentice KC, Sol. Adv, AD; Crown Agent

2 May 2024

[1] On 17 May 2023, after trial, the appellant was convicted of a charge that on 8 and 9 November 2019, while the complainer was asleep, he repeatedly pulled down her lower clothing and penetrated her vagina with his fingers, and after she had awoken continued to penetrate her vagina with his fingers, and thereafter, again while she was asleep and after she had awoken, touched her breasts and raped her. The charge was aggravated in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

[2] In due course he was imprisoned for 4 years. There is no appeal against sentence.

[3] This was the second charge on the indictment. The first one alleged very similar behaviour towards the same complainer on 23 and 24 October 2019. It was withdrawn at the close of the Crown case.

[4] According to the complainer, she had met the appellant at a wedding in Ireland in late September and they got on well. He came to visit her but on the last night of the visit she woke a number of times to find him touching her intimately and when she finally awoke in the morning he was having sex with her. On each occasion she had told him to get off, that she did not want to and that she was tired. He was getting frustrated and annoyed, making it clear that as his girlfriend she should want to have sex on their last night. She did not realise it was a sexual assault and did not contact the police but she remonstrated with him that he had kept her up all night and told him never to do it again. If he wanted sex he should wake her up. He apologised and said he would never do it again.

[5] He returned to Ireland but he constantly needed to communicate with her. She ended the relationship on 7 November, the night before he was due to visit her again. He called her at 07.00 on 8 November, saying that he had arrived at Edinburgh airport and they exchanged a number of messages, culminating in her telling him to meet her at Cameron Toll. According to her, they argued during the day. At one point he asked if she was on her period and she told him that she was. He said he would go to bed with her if that was all right and he went upstairs.

[6] The complainer described feeling uncomfortable and, as they went to bed, the appellant asked her whether she had changed her tampon, which disgusted her. She remembered having some difficulty in getting to sleep but she was awoken by feeling two of the appellant's fingers in her vagina. She jumped up out of the bed and said: "What the

fuck are you doing?" The appellant responded by accusing her of lying about being on her period. At this point, she was not sure what to do. She was concerned about her children but eventually, she went back to sleep. When she woke again it was the morning. She was wakened because the appellant was penetrating her vagina from behind with his penis, her pyjamas and underwear having been pulled down, her pyjama top raised and her bra unhooked. As soon as she woke, she jumped up to the top of the bed, pulled up her pyjama trousers, curled her knees up and asked the appellant what he thought he was doing. The appellant responded along the lines that he was really horny and had hoped to spend some time with her before her children woke up. He also said that she must have been really out cold as he had been really going for it and she had not woken up. She felt shocked, angry and disgusted but tried not to raise her voice because she did not want her children to come through or wake up. Eventually, she heard her son going to the bathroom and she used this opportunity to go through to his room. Thereafter, following further protracted argument between her and the appellant, he left her house to return home to Ireland.

[7] Certain footage was played from a camera which was in the complainer's living room. The parts led in evidence included the following:

- Footage from the evening of 8 November 2019, when the complainer was asked whether she was still on her period and she responded that she was;
- Footage showing the appellant and the complainer going upstairs;
- Footage from the morning of 9 November 2019 of the complainer and the appellant coming back downstairs;
- Footage from the morning and afternoon of 9 November 2019 when the complainer can be heard, on a number of occasions, arguing with the appellant, including the exchange which is at the heart of this appeal.

[8] The relevant passages are as follows:

> "The complainer: Don't dare fucking wake me up if you're ever here for another night.
>
> The appellant: I promise I will never do that ever again.
>
> The complainer: You said that last time but you fucked up before you left last time. You woke me up twice I think and then carried on fucking talking to me the last time keeping me awake so long in the night and then said you would never do that again and then last night was the first night you had the chance to prove that and you just woke me up again…
>
> The appellant: Maybe
>
> The complainer: Why do you think I find it hard to believe what you say?
>
> The appellant: Ok. Ok. Ok. I see all of that."

[9] The complainer's position was that the reference to "waking up" related to the appellant having sexual intercourse with her while she was asleep and the reference to "last time" was to the events of charge 1 but there was no direct accusation of sexual misconduct or indeed any mention of it.

[10] During the course of that evening the complainer, in a state of distress, told her friend KD what had happened and KD gave evidence about that. It was agreed by joint minute that the appellant had penetrated the complainer's vagina with his penis on 9 November 2019. There was thus sufficient evidence.

[11] The appellant accepted having sexual intercourse with the complainer but said that it was with consent and he gave a somewhat convoluted explanation about why there was an argument about him waking her up. It was nothing to do with sex but apparently about him talking to her seeking reassurance about their relationship.

[12] At the close of the evidence the trial judge asked the advocate depute about the Crown's approach to sufficiency. The depute relied on the evidence of the complainer, her

distress as spoken to by KD and the exchange between the parties which we have set out above. When it was considered in the context of the evidence as a whole it was said to be capable of corroborating the complainer's evidence that she had been asleep and awoken by the appellant's having sex with her. In his speech to the jury the depute reminded them that the complainer had been angry and emotional when challenging the appellant. The appellant must have known to what she was referring.

[13] In his speech, senior counsel for the appellant suggested that the complainer's concern had been that the appellant had been talking to her, not raping her, and there was no mention of sex.

[14] On behalf of the appellant it is submitted that the trial judge was wrong to direct the jury, as he did, that the appellant's responses during the argument could amount to an admission of the offence. It was accepted that an admission did not have to be unequivocal. *CR* v *HM Advocate* 2022 JC 235. However, the only reasonable inference which could be drawn was that the appellant had accepted he had awoken the complainer by talking to her.

[15] The advocate depute, on the other hand, under reference to a number of authorities, including *CR*, *WM* v *HM Advocate* [2022] HCJAC 28 and *McPherson* v *HM Advocate* 2019 JC 171 submitted that whether an alleged admission could be corroborative was fact specific but all that was required for corroboration was something that confirmed or fitted with the principal source of evidence. In the context in which they were made the appellant's comments could relate to his having woken up the complainer by penetrating her with his fingers and penis.

Analysis

[16] It is settled law that an admission does not have to be unequivocal. *CR* v *HM Advocate*. Whether it can amount to corroboration is, as is recognised, entirely fact specific. If one reasonable interpretation is that it is an admission of the conduct complained of then it does not matter if other interpretations are open. On the other hand, whether the evidence is reasonably capable of being interpreted in such a way is a question of law. *LC* v *HM Advocate* [2022] HCJAC 47. In this case, however, the most that can be said is that the appellant accepted waking up the complainer. That was the complaint she had made to him. She compared it with the previous occasion when he had kept her awake by talking to her but did not remonstrate with him for anything done to her while she was asleep, which continued after she awoke. For the jury to read any more into it was to indulge in speculation and to stretch the plain meaning of the words beyond breaking point. Whatever may have happened on the previous occasion, it is simply not tenable to interpret an admission of waking up the complainer as amounting to an admission of sexually assaulting and raping her. In directing the jury on the route which they would have to follow in order to convict the appellant, the judge drew to the jury's attention (without adverse comment) the Crown's reliance on the discussion between the complainer and the appellant in the living room and to the advocate depute's submission that when taken in context the appellant's statements amounted to an admission corroborating the complainer's evidence. The judge thereby left it open to the jury to treat the appellant's statements as an admission of sexual assault and rape. It follows that the judge misdirected the jury by allowing them to treat his comments as corroboration. The statements were not capable of amounting to an admission and the jury should have been unequivocally directed to that effect. There was sufficient evidence without the alleged admission but, given the potential importance of the

evidence of an admission, we are satisfied that the misdirection was material, as it was in *LC*, and that there has been a miscarriage of justice.

[17] We shall allow the appeal and quash the conviction.