

SCOTLAND / JUDGMENT

CH v HM Advocate [2016] ScotHC HCJAC_4 (19 January 2016)

[2016] ScotHC HCJAC_4

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

[Home] [Databases] [World Law] [Multidatabase Search] [Help] [Feedback] [DONATE]

Scottish High Court of Justiciary Decisions You are here: BAILII >> Databases >> Scottish High Court of Justiciary Decisions >> CH v HM Advocate [2016] ScotHC HCJAC_4 (19 January 2016) URL: [https://www.bailii.org/scot/cases/ScotHC/2016/\[2016\]HCJAC4.html](https://www.bailii.org/scot/cases/ScotHC/2016/[2016]HCJAC4.html) Cite as:

[2016] HCJAC 4, 2016 SCL 288,

[2016] ScotHC HCJAC_4, 2016 GWD 6-131 [New search] [Help] APPEAL COURT, HIGH COURT OF JUSTICIARY

[2016] HCJAC 4 HCA/2014/004165/XC Lady Paton Lord Bracadale Lord Malcolm OPINION OF THE COURT delivered by LORD BRACADALE in APPEAL AGAINST CONVICTION by C H Appellant ; against HER MAJESTY'S ADVOCATE Respondent : Appellant: C M Mitchell; Paterson Bell Solicitors Respondent: McSporran Sol Adv AD; Crown Agent 19 January 2015

[1] On 26 August 2014 after trial at the High Court at Glasgow the appellant was found guilty of two charges of rape of AB (charges 10 and 11). These charges related to two acts of rape committed on 2 January 2014 in the course of a journey in a van in Renfrewshire. A further three charges, charges 5, 8 and 9, were found not proven by the jury: charge 5 was another charge of rape of AB alleged to have been committed between 1 March and 30 April 2013 at an address in Greenock; charge 8 was a charge of rape of EG alleged to have been committed on an occasion between 1 and 31 July 2013 in a motor vehicle in Wemyss Bay; and charge 9 was a charge of rape of EG alleged to have been committed in a motor vehicle in Gourrock between 1 and 31 July 2013. All the remaining charges on the indictment had been withdrawn by the advocate depute.

[2] It was common ground that charge 5 in respect of AB and charges 8 and 9 in respect of EG could be proved only by finding mutual corroboration in the evidence of the two complainers, each of whom had been in a relationship with the appellant. In respect of charges 10 and 11 there was other evidence that would allow these charges to be proved independently. The evidence in relation to charges 10 and 11 The evidence of AB

- [3] AB had been in a relationship with the appellant for about three years commencing in 2010. Together they had a child who was born in 2011. The relationship, which ended at the start of 2013, had been characterised by emotional turmoil and was described as being "always up and down". At times the appellant's behaviour could be erratic. After the relationship ended AB saw the appellant from time to time.
- [4] At 9 pm on 2 January 2014 AB finished work at the nursing home at which she was employed. The appellant had earlier contacted her by text message asking if she wanted to be picked up from work. She had indicated that she did not wish that to happen. She did not want the appellant at her place of work; she wanted the relationship to remain at an end. Despite her response, when she left her place of work the appellant was waiting outside in a blue van. He told her to jump in the van as he wanted to talk to her. She refused and told him to go away. He left and she got a lift home from a colleague who dropped her in the street outside her mother's house. The appellant contacted her again by mobile phone and came to the street in his van. Knowing that she wanted cigarettes he said that he would take her to the shop. She got into the van and they went to the petrol station where she bought cigarettes for herself and Red Bull for the appellant. She returned to the van expecting to be taken home. The appellant did not take her home but drove away. He was interested to know with whom she had been exchanging texts. He became aggressive. He stopped the van at a remote location. AB got out of the vehicle and the appellant grabbed her by the jacket and pulled her back. She tried to make a run for it but the appellant chased her and frogmarched her back to the van. He threatened her. She suggested that he should take her back to his mother's house and even offered to sleep with him if he would do that. This was a tactic to get back to the mother's house. The appellant demanded sex and had sexual intercourse with her outside the van. AB was crying.
- [5] Later, the appellant drove AB to another place which she did not recognise. He was gritting his teeth and hissing at her; he threatened her that he was going to bury her and take her to a cemetery. He parked outside a cemetery. AB got out and tried to run towards a house. The appellant pursued her in the van and then got out of the van. AB was screaming; he told her to stop because people would hear. She was shaking and crying. He wanted to have sexual intercourse again; she said that she did not want to but he insisted and they had intercourse outside the van in a standing position. This sexual intercourse occurred in Auchentiber Road. Other evidence in relation to charges 10 and 11
- [6] MB, a work colleague of AB, was in the company of AB when she finished work on 2 January 2014. She described an exchange between AB and the appellant in which AB told the appellant to "Fuck off" and slammed the door of his vehicle.

- [7] In a joint minute it was agreed that on 5 January 2014 a knotted condom containing fluid was found on a grass verge at the junction of Auchentiber Road and Auchenbothie Road near Kilmacolm. On the inside sperm matching the DNA profile of the appellant was found; a mixed profile of cellular material within the condom matched the appellant and AB and cellular material from the outside of the condom matched the DNA profile of AB. This evidence was supportive of penetrative sexual intercourse having occurred.
- [8] The mother of AB, JG, gave evidence that on 2 January 2014 AB arrived home late from work: while she would normally arrive home at 9.30 pm, on this occasion she did not return until after 11.30 pm. JG described AB as being in a "frozen state", unable to speak. She eventually told her mother that the appellant had raped her. JG said that AB, who was normally a very strong person, broke down and sobbed; she was very upset. JG had not seen AB sob like that in years. As the advocate depute put it in his speech to the jury, "In short, JG described AB in very apparent and significant distress".
- [9] This evidence of distress was capable of providing corroboration for the absence of consent and the use of force or the threat of force. In addition, it would be a reasonable inference that if the appellant required to use force or the threat of force in order to have sexual intercourse with AB, he could not have had a reasonable belief that she was consenting. The evidence of MB as to AB's reaction to the appellant outside their place of work was an adminicle of evidence which could also support absence of reasonable belief. The approach of the Crown at the trial
- [10] In his speech to the jury the advocate depute relied heavily on the doctrine of mutual corroboration between the complainers. In following that approach he was, no doubt, conscious that charge 5 in relation to AB and charges 8 and 9 in relation to EG could not be proved without resort to mutual corroboration. In addition, however, he did make reference in relation to charges 10 and 11 to the evidence of the recovery of the condom and the forensic evidence about it. He submitted that that was consistent with the appellant and AB having penetrative sexual intercourse on 2 January 2014. He also made reference to the evidence of distress of AB on the occasions libelled in charges 5, 10 and 11 as being supportive of the evidence of AB. The challenge to the trial judge's charge
- [11] Leave to appeal had been granted in respect of three grounds. In the event, Ms Mitchell, who appeared on behalf of the appellant, restricted her submissions to the third ground: the trial judge's directions on the availability of distress for corroboration were in conflict with the earlier, repeated directions on mutual corroboration. The result was a failure to provide clear instructions to the jury as to how they should understand and apply the law to the evidence. The directions in a judge's charge provided a procedural safeguard to ensure that when a jury returned a verdict the independent observer could be satisfied that a reasoned judgement had been returned. The trial judge had not been clear enough in explaining to the jury what precisely was the route to the verdict. The nature of the directions was such that the jury would be bound to be confused by them. When the issue of distress was raised it was not done in a straightforward way. While lawyers might be able to identify a route to

corroboration apart from mutual corroboration it would be unlikely that the jury would be able properly to understand the relevant concepts. This had resulted in a material misdirection which led to a miscarriage of justice. Crown submissions

- [12] The advocate depute submitted that there was no misdirection. The verdict was consistent with the directions. Even if the court considered that the directions could be described as confusing, misleading or inconsistent that could operate only in favour of the appellant. If the direction was that the jury required to use the doctrine of mutual corroboration in order to convict of any charge then that would be a misdirection in favour of the appellant. The advocate depute drew attention to the discerning nature of the verdict, particularly with respect to charge 5. It was clear that the jury had rejected the application of the doctrine of mutual corroboration. The verdict in respect of charge 5 could be explained only by the jury having understood perfectly the directions which they had been given. There was no confusion. Discussion and decision
- [13] The terms of a trial judge's charge to the jury should be such as to enable the informed observer, who has heard the proceedings at the trial, to understand the reasons for the verdict. In other words, there must be a discernible route to the verdict. This approach meets the requirement for a reasoned verdict (Judge v United Kingdom
- [2011] ECHR 367 ; 2011 SCCR 241 at paras 35 - 39, following Taxquet v Belgium
- [2012] 54 EHRR 26 ; Younas v HM Advocate 2014 SCCR 628 Lord Justice Clerk (Carloway) at para [68]).
- [14] The trial judge developed her charge in four chapters, the fourth of which related to the available verdicts. At the outset of her charge she told the jury that in the first part she would give them guidance of a general nature as to how to assess evidence and explained some important rules which she described as the four "cardinal rules" that applied in every criminal trial. One of these was the requirement for corroboration. She stated that in the second part she would give them more specific guidance on certain particular types of evidence which had featured in the trial. In the third part she would explain to them what had to be proved in order to establish the guilt of an accused person of the offence of rape.
- [15] At page 19, in the course of developing the first chapter of her charge, the trial judge said: "Now in this case in respect of the charges concerning the first complainer, and these are charges 5, 10 and 11, the main source of evidence is the first complainer, AB. And in respect of charges 8 and 9 the only source of evidence is the second complainer." (emphasis added)
- [16] At page 22 the trial judge began her directions on mutual corroboration. This was in the context of dealing with corroboration as one of the "cardinal rules" in the first chapter of her directions. She said that the Crown's position meant that in this case the Crown was dependent on the jury accepting and applying mutual corroboration. This led her at pages 23 - 24 to say: "So accordingly, even if you accept the evidence of the first complainer as credible and reliable you could only convict the accused of the charges concerning her, in

other words, 5, 10 and 11 if you also accepted the evidence of the second complainer as credible and reliable."

- [17] At page 26 the trial judge commenced the second chapter of her directions in which she was to give more specific guidance on certain particular types of evidence which had featured in the trial. This led her at page 40 to return to the issue of mutual corroboration. After giving some general examples and explaining that the rule of mutual corroboration could not be used to prove the charges relating to the same complainer, she went on at page 44 to say: "So let me stress that you must accept both the first and second complainers as credible and reliable in the essentials of their evidence. Even if you accept one complainer as credible and reliable but you do not accept the other you are bound to acquit the accused of the remaining charges, even those in relation to the complainer who you accept, where you are relying on mutual corroboration to satisfy the requirement of corroboration."
- [18] At page 50 the trial judge moved on to the third chapter; she went on to give directions on the offence of rape. She dealt with each of the three essential elements of the offence and explained that the doctrine of mutual corroboration could apply to corroborate each of the three elements of the crime of rape. She repeatedly stressed the need to find the evidence of both of the complainers credible and reliable: at page 61 she said: "And I have also explained to you that you must find each complainer credible and reliable if you are to convict the accused of the crimes which he has been charged and relying on the rule of mutual corroboration."
- [19] At page 63, dealing with the requirement for corroboration of penetration, the trial judge made the first reference to the possibility of proof of charges 10 and 11 independently, without the application of the doctrine of mutual corroboration. Under reference to the joint minute she said that defence counsel had accepted that there was evidence that the appellant and AB had had sexual intercourse on the night of 2 January. She said: "And so you may consider this relevant to the proof of penetration at least in respect of those charges" [charges 10 and 11] She went on to say that otherwise in respect of corroboration of the penetrative act for the other charges there was no other evidence apart from that of each complainer and applying the rule of mutual corroboration.
- [20] At pages 69-71, in the course of her directions on absence of consent, the trial judge again made reference to mutual corroboration but went on to give directions on distress: "Now you may recall that in respect of the first complainer, AB, the advocate depute, as I understood him, did offer a different source of evidence as possibly being available to you, if you accept it, to corroborate the complainer's evidence about the second element, in other words, the issue of consent or lack of consent ... There was also evidence by the first complainer's mother as to the condition or state of the first complainer on her return home late on the evening of 2 January and that those are the events that are described in charges 10 and 11 ... So let me explain how or to what extent evidence of distress may be relevant because the advocate depute relies on it for the purposes of corroboration on the second element of the crime, but only in respect of the charges concerning the first complainer. So

in a sense his reliance on distress is an alternative way to corroborate apart from mutual corroboration."

- [21] The trial judge then went on to give standard directions about distress and at page 72 said: "So it could corroborate her evidence that she did not consent to what happened or that the threat of force was used." At page 72 she said: "And if you thought that the distress observed by others was genuine and caused at least in part by the complainer's lack of consent, that evidence could corroborate that fact. If you accept that the first complainer was observed to be distressed and it was genuine and caused at least in part by her not having consented to the conduct in question you could draw the further inference that the threat of force was used".
- [22] Immediately thereafter she gave directions on the third element, namely, the absence of a reasonable belief. She told the jury that they should look objectively at what the facts told them about the interaction between each of the complainers and the accused and the shared understanding of what was happening. Later, after the jury had retired to consider their verdict, the trial judge brought them back to court to give further directions on the absence of reasonable belief; she did so because she considered that she had earlier omitted to give certain directions. She directed the jury that in relation to absence of reasonable belief they would be entitled to have regard to the same chapters of evidence as related to the second element, namely, lack of consent. That, of course, would include the evidence of distress.
- [23] In a supplementary report to this court the trial judge explained that in giving her directions on mutual corroboration she was following the approach of the advocate depute. Her directions were intended to reflect the Crown's reliance on the doctrine. When, for example, at page 24 she used the phrase "where the Crown is relying on the doctrine of mutual corroboration..." she did so in order to explain that these directions were to be understood as relating to that part of the case that relied on mutual corroboration.
- [24] We are inclined to think that the somewhat elaborate structure adopted by the trial judge in her charge led her to give repeated directions on the requirements of mutual corroboration and the need to accept the evidence of both complainers. As a result, we consider that the directions in the first and second chapters of the charge would have been likely to have led the jury to understand that without the application of the doctrine none of the charges could be proved. In addition, we consider that it would have been desirable for the trial judge to have given clearer directions to the effect that charges 10 and 11 could be proved independently. She might, for example, have drawn together the means by which the three essential elements of the offence of rape could be proved without relying on mutual corroboration. That said, in the course of the third chapter of the charge the trial judge did give directions to the effect that in respect of each of the three essential elements of the offence of rape it was open to the jury to find charges 10 and 11 proved without the application of the doctrine of mutual corroboration. In our view the independent observer, having considered the charge as a whole, would conclude from their verdict that the jury had decided against the application of the doctrine of mutual corroboration and had then

considered whether they were satisfied beyond reasonable doubt that charges 10 and 11 were proved by another route. We consider that it is particularly instructive to note that the jury returned a verdict of not proven in respect of charge 5 in relation to AB as well as charges 8 and 9 which related to EG. This demonstrates that having considered and rejected the application of mutual corroboration, the jury acquitted the appellant of all the charges that required mutual corroboration for proof but convicted him of the two charges which were capable of proof by another route. This demonstrates that the jury were not confused and that the judge's charge did provide sufficient directions in law. The verdict, therefore, may be seen as a discerning one and the informed observer would understand the reasons for it.

[25] We are satisfied that the verdict of the jury may be seen to be a reasoned one and the appeal must be refused. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: [https://www.bailii.org/scot/cases/ScotHC/2016/\[2016\]HCJAC4.html](https://www.bailii.org/scot/cases/ScotHC/2016/[2016]HCJAC4.html)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/scot/cases/ScotHC/2016/>

CASE PAGE <https://chat.esheria.ai/case-law/scotland/ch-v-hm-advocate-2016-scothc-hcjac-4-19-january-2016>

Prepared on 29 October 2026 · Esheria