

SCOTLAND / JUDGMENT

Wilson v HM Advocate [2017]

ScotHC HCJAC_3 (19 January 2017)

[2017] ScotHC HCJAC_3

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[2017] HCJAC 3, 2017 GWD 3-32, 2017 SCL 237 [New search] [Help] APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 3 HCA/2016/185/XC Lord Justice General Lord Bracadale Lord Malcolm OPINION OF THE COURT delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL in NOTE OF APPEAL AGAINST CONVICTION by CRAIG WILSON Appellant against HER MAJESTY'S ADVOCATE Respondent Appellant: Dean of Faculty (Jackson QC), CM Mitchell; Faculty Criminal Appeals Unit (for McLennan Adam Davis, Ayr) Respondent: Niven Smith AD; the Crown Agent 29 November 2016

Introduction

- [1] On 9 March 2016, at the sheriff court in Kilmarnock, the appellant was convicted of a charge which libelled that: “on 12 April 2014 at ... Saltcoats you ... did assault [CD] ... then aged 20 years ... and did repeatedly put your arms around her, repeatedly kiss her on the lips and sexually penetrate her vagina with your fingers all while she was under the influence of alcohol and asleep and incapable of giving or withholding consent; CONTRARY to Sections 2 and 3 of the Sexual Offences (Scotland) Act 2009”. On 30 March 2016, he was sentenced to 30 months imprisonment.
- [2] The issues raised in the Note of Appeal all relate to whether the sheriff misdirected the jury in relation to evidence of distress, which the complainer displayed to a friend about 30 hours after the sexual assault was alleged to have occurred, and to a statement made by her at that time. However, as the oral argument developed, the submission came to be one relating more to the sufficiency of the evidence available to corroborate the complainer's account of lack of consent. Evidence

- [3] During the evening of Friday 11 April 2014, the complainer, who was aged 20, had been at a party to mark the departure of her friend JM from their mutual workplace. The appellant, who was 41, was the partner of JM. It was to the flat occupied by JM and the appellant that those at the party returned. The complainer had accepted an offer to stay overnight. She had changed into pyjamas, given to her by JM. The last thing that the complainer recalled, before falling asleep on the livingroom floor, was drinking Bailey's.
- [4] One of the company, FC, left the flat at about 5.30am, at which point she described both the appellant and the complainer as having been asleep on the livingroom floor for some time.
- [5] The complainer recalled "coming round" and being touched sexually. She had been unable to move and had fallen asleep once again. She had been aware of something being put inside her, perhaps fingers. When she awoke for a second time, she found herself on a couch with the appellant on top of her. He had put his lips to hers.
- [6] The complainer awoke on the following morning (Saturday 12 April) at about 10.30. She felt sore in the vaginal area and her bottom. She sent a text to her boyfriend to come and pick her up. She did not mention the incident in the text because, she said, she thought that he would have reacted badly and probably attacked the appellant. There would have been "World War 3".
- [7] The complainer had spoken to JM in the morning, but had not mentioned the incident to her. She maintained that she had done this deliberately, as she did not want to give an "inkling" that she was aware of what had happened to her until she had left the flat. She was "worried" for JM. JM gave evidence that she had noticed nothing out of the ordinary in the complainer's behaviour.
- [8] By 12 noon, the complainer had returned home. She had not spoken to her mother, but had simply gone upstairs to her room, had a shower, and gone to bed. She had been shocked and scared and had not known what to do at that point. Her mother described her as appearing very tired, but sober. She was "very inward", although normally very lively. She had not spoken. She had slept all day on the Saturday through to the Sunday. She had not gone to work on the Monday, but had remained in bed.
- [9] On the early Saturday evening, there had been an exchange of Facebook messages between the complainer and JM. JM had said that FC had left "after u n [the appellant] crashed out on the floor". JM asked if the complainer wanted to come over and finish off the wine. The complainer declined the invitation and said that she would pick her car up on the Sunday. The appellant became involved in the exchange, which mainly concerned the amount of drink consumed. There was no mention of any sexual encounter.
- [10] The first person in whom the complainer confided was her best friend, LM. The complainer was not asked what she had said to LM, although she did say that she had been really upset when she had spoken to her. LM described herself as having been the complainer's best friend for a period of 10 years, since primary school. On the Sunday afternoon, the

complainer had sent her a text to ask if they could meet. The complainer drove to near LM's house, where they met in a car park. LM thought that this was strange, but it was because the complainer had wanted to speak with her in private, rather than at one of their houses where their mothers might be present.

- [11] LM gave evidence without objection that the complainer was in an abnormal mood. She had been crying and was quite upset. As the complainer told her what had happened, she had become hysterical, breaking down and crying. They were in the car for about two hours before driving around. LM had stayed with the complainer for most of the night. She was asked if the complainer had mentioned any physical "ailments". She said that she knew that she was in pain from something which had happened to her back passage. Apart from that, she was not asked to state what the complainer had said. LM was not cross-examined.
- [12] The appellant was interviewed by the police. He admitted consensual sexual contact with the complainer; stating that he had "assumed" that he had inserted his fingers into the complainer's vagina. The complainer had not been asleep.
- [13] There was no submission based on an insufficiency of evidence, nor was there a request for a direction on the corroborative effect of the distress.
- [14] The appellant gave evidence that he had fallen asleep, but had woken up at about the time FC left (5.30am) before falling asleep again. His next memory was of being on the floor with the complainer, laughing. The complainer was kissing him. They had touched each other and he had put his hand inside her pyjama bottoms. He remembered touching the complainer in the vaginal area and assumed that he may have penetrated her. Charge to the jury
- [15] The sheriff directed the jury that it was for the Crown to prove that the complainer had been penetrated vaginally by some part of the appellant's body and touched by him sexually. The conduct had to be intentional or reckless and the complainer must not have consented. The sheriff explained that the issue was whether what had happened between the appellant and the complainer had been consensual or not. The appellant maintained that the complainer had been a willing participant and it was for the Crown to prove absence of consent.
- [16] The sheriff then turned to certain aspects of the evidence and, in particular, the evidence from LM about what had happened on the Sunday evening. He observed that there had been no detail about the content of the discussion between the complainer and LM, other than in relation to the complainer reporting pain. Nevertheless, having directed the jury that what the complainer had said could not corroborate her own evidence, the sheriff did say that a recent statement was admissible for the limited purpose of helping in the assessment of the complainer as a witness. If what she had been saying to LM appeared to be similar to what she had said later in court, then that consistency could reflect favourably upon her credibility and reliability: "... though the longer the delay between the incident ... and her account of it to the witness ... then the less recent it is and the less value it has in supporting her credibility and reliability. ... the less detail there is ... then the less value it would have in

supporting her evidence. So again it's a matter for your assessment".

- [17] The sheriff went on to deal with the evidence of LM about the complainer's distress. He explained that this was "simply a piece of circumstantial evidence" which the jury could accept or reject. It could not corroborate the complainer's evidence about what had happened during the incident, but it could confirm that she had suffered some distressing event. It could corroborate her evidence about her state of mind at the time of, or soon after, the incident. Her distress, as spoken to by LM, could corroborate the complainer's testimony that she had not consented to what had taken place. "To that extent, it could support her credibility as a witness". Before it could be regarded as corroboration, the jury had to be satisfied that the distress was genuine and that it was due wholly or partly to her not having consented to what the appellant had done and not to some other cause. The sheriff explained that it had been suggested by the defence that the complainer's distress could have been as a result of fear of being exposed as having cheated on her boyfriend. He therefore said that the jury had to look at the evidence about distress "carefully" and to decide what was responsible for it.

Submissions

Appellant

- [18] There were three grounds of appeal. The first was phrased as a misdirection in relation to the evidence of distress. It came to be a submission that this evidence should not have been regarded as providing corroboration. There was accordingly insufficient evidence of lack of consent. In relation to the use of distress as corroboration, there were circumstances which should persuade a judge that no reasonable jury could hold that the distress had been caused by the alleged attack (*Moore v HM Advocate* 1990 JC 371; *Cannon v HM Advocate* 1992 JC 138; and *McCann v HM Advocate* 2003 SCCR 722). In such cases, despite the absence of any submission to that effect, there was an obligation upon the trial judge to direct the jury that they could not regard the distress as corroboration (*Moore v HM Advocate* (*supra*), LJG (Hope) at 377, Lord Cowie at 378; and *McCann v HM Advocate* (*supra*), LJG (Gill) at para [17]). This was such a case. The complainer had not been distressed or shocked when in the company of JM on the morning of the incident. She had not displayed any distress to her boyfriend. There were no signs of distress or upset when she had arrived back at her mother's house. Retiring to bed for the remainder of the day was not significant. She had exchanged certain good-natured texts with JM and the appellant.
- [19] The second ground of appeal was that, if the jury had been entitled to rely upon the distress for the purposes of corroborating lack of consent, then they should have been directed to treat the evidence of distress with "caution". The sheriff had given such a direction in relation to what he considered to have been a *de recenti* statement to LM. He should have done the same in relation to the distress.

- [20] The third ground was that, despite the absence of any objection, the evidence by LM, of what the complainer had said to her, was inadmissible as hearsay. It was not *de recenti* in the sense of having been given to the first natural confidant (Walker and Walker: Evidence (4th ed) para 8.3.1). The statement had been made more than 30 hours after the event. LM had spoken to the complainer, saying that she had been sore in the area of her bottom. This was a matter which was not covered in the libel. Contrary to the sheriff's direction, it could not be used to support her general credibility. Crown
- [21] The advocate depute submitted that the circumstances in *Moore v HM Advocate* (*supra*) and *McCraan v HM Advocate* (*supra*) were easily distinguishable. The question for the jury was whether the explanation given by the complainer, in failing to report the matter earlier, was reasonable. Time was not of the essence. By the time the complainer had arrived home, she was not acting as normal.
- [22] In relation to sufficiency, distress was only one element providing corroboration. There were also the other circumstances, including FC's testimony that, when she had left, the complainer had been asleep for some time. There had been no prior sexual relationship. There was a significant age gap. Both the complainer and the appellant had been in long term relationships.
- [23] The jury had been made aware of the need for corroboration. Even if the sheriff had erred in relation to his directions on the statement made to LM, it had been of no moment in the context of the case as a whole. The sheriff had said that, in so far as the statement might enhance the credibility of the complainer, there were caveats to that in terms of delay and detail. However, the statement, which had not been objected to, had been *de recenti* (see *RWP v HM Advocate* 2005 SCCR 764). The direction had been adequate. Decision
- [24] A complainer's evidence of lack of consent may be corroborated by the testimony of another witness about the distressed condition of the complainer after the alleged assault has taken place. That was the ratio of *Yates v HM Advocate* 1977 SLT (notes) 42, in which the Lord Justice General (Emslie), delivering the Opinion of the Court, stated (at 43; see also 1990 JC 379) that it was a "broad and clearly correct proposition that evidence as to the condition of the alleged victim of rape is capable of affording corroboration ... that she had been raped".
- [25] The distress in *Yates* had been more or less immediate (see also *Gracey v HM Advocate* 1987 SLT 749). In *Moore v HM Advocate* 1990 JC 371, the complainer said that she had been in a state of distress after the accused had driven her home. The problem with that was that her then boyfriend, whom she had met on her return, denied this. The Crown sought to rely on evidence of distress observed by the complainer's aunt about 12 hours later, after the complainer had visited two pubs and a house searching for her handbag. The court rejected a contention that corroboration could only come from distress which was observed immediately after the incident (LJG (Hope) at 376). Nevertheless, in the particular circumstances, the jury ought to have been directed that the distress was not capable of corroborating the complainer's evidence. The question was not whether there was a close

connection between the distress and the alleged event, but whether it had been caused by it and “thus so independent of her own account as to amount to a separate source of evidence that a rape occurred” (ibid 377; cf Lord Cowie at 378).

- [26] In *Cannon v HM Advocate* 1992 JC 138, a 12 hour time delay was not regarded as a bar to evidence of distress being corroborative. It was said (LJG (Hope) at 143) that the time interval was not the important point “as such”, but rather whether the distress had been caused by the rape. Opportunities to exhibit distress to others were merely factors to be taken into account. It was said, as it had been in *Moore* , that: “As a general rule the question will be one for the jury to decide ... But there may be cases ... where the circumstances are such that no reasonable jury ... could find corroboration in the distress”. Despite the explanations given in *Cannon* , there are passages in both cases which are not easy to reconcile. Although the jury would, in each case, have had to have accepted that the distress was genuine and had been caused by the rape, the issue of whether it could amount to corroboration was a matter of law for the trial judge to determine.
- [27] In *Stobo v HM Advocate* 1994 JC 28 the Lord Justice General (Hope) was at some pains to point out (at 34-35) that, contrary to the concession by the advocate depute, distress could corroborate a complainer’s evidence of what had happened to her. The circumstances relied on to provide corroboration of the complainer’s account did not require to be incriminatory in themselves. It was sufficient that they were consistent with what the complainer had said. Nevertheless, distress could corroborate neither identification nor, in assaults to injury, the nature of the assault nor, in rape cases, penetration.
- [28] This whole area was analysed in considerable detail in the several opinions of the full bench in *Smith v Lees* 1997 JC 73. The court rejected a radical argument that recent distress was to be equiparated with de recenti statements which, following the opinion of the full bench in *Morton v HM Advocate* 1938 JC 50, could never amount to corroboration. It was accepted in *Smith* (LJG (Rodger) at 79) that circumstantial evidence of post incident distress could be used to corroborate, that is to say to confirm or support, that of a complainer; yet, what might be described as the compromise reached was that it could only support an account in so far as it demonstrated that what occurred had done so without the complainer’s consent (ibid 80-81). The dicta of the Lord Justice General (Hope) in *Moore v HM Advocate* (supra) and *Stobo v HM Advocate* (supra) was scrutinised with meticulous care and criticised (eg LJG (Rodger) at 88) as, amongst other things, confusing what may in fact support a reasonable verdict with what is in law sufficient evidence. Ultimately, the Lord Justice General (Rodger) concluded (at 90) that evidence would afford corroboration on a crucial fact if it confirmed or supported that fact by “showing or tending to show that what the [complainer] said happened did actually happen”.
- [29] It is not necessary, in the context of this case, to examine how the other eminent judges in *Smith* described corroboration. It is sufficient to note that the correctness of *Mackie v HM Advocate* 1994 JC 132 was raised, but not determined. In early course, *Mackie* was overruled by the full bench decision in *Fox v HM Advocate* 1998 JC 94, which reaffirmed (LJG (Rodger)

at 100-101) that corroboration, in the context under consideration here, was simply evidence which supports or confirms that of the complainer. Each case will turn on its own facts and circumstances. Those in *Moore v HM Advocate* (*supra*) and *McCraan v HM Advocate* 2003 SCCR 722 differ materially from those in the present case.

- [30] The question in this appeal is therefore whether the distress described by LM could support or confirm the complainer's account of lack of consent during an incident which had occurred more than 24 hours previously. Of course the jury had to be satisfied that the distress was caused by the event, and not by some extraneous element, but the sheriff gave clear directions on that matter. The interval between the alleged offence and the point at which distress is observed is a factor which a jury will wish to consider, but the important point is whether the jury are satisfied that the distress was caused by the offence. The occurrence of intervening occasions on which a complainer might have exhibited signs of distress, but did not, may be of some significance, but there is no fixed interval after which distress cannot constitute corroboration (*RWP v HM Advocate* 2005 SCCR 764 , Lord Hamilton at 771). Intervals of more than 24 hours have been considered relevant (*ibid* , see also *Paterson v HM Advocate* 1999 SCCR 750, LJC (Cullen) at 759).
- [31] The complainer explained why she had not told JM, or her boyfriend, or her mother what had occurred, or exhibited any signs of distress to them. It was a matter for the jury to determine whether to accept that explanation. The evidence from her mother was that she had been behaving in an unusual manner when she returned home. Her mother's reference to "inward" behaviour and sleeping excessively could well have been indicative of a distressed state, although the sheriff did not direct the jury to that effect. Be that as it may, the evidence of distress as observed by LM could be taken as confirming or supporting the account of lack of consent by the complainer. In these circumstances, the sheriff did not err in directing the jury that they could derive corroboration from the complainer's distress, as spoken to by LM. The first ground of appeal is accordingly rejected.
- [32] Had the issue in the appeal been one of pure sufficiency, different factors would have to have been considered. As the advocate depute submitted, distress was not the only circumstance pointing to a lack of consent by reason of the effects of alcohol and sleep; both elements remaining in the jury's verdict. There was a significant age gap between the complainer and the appellant. There was no prior sexual intimacy. At 5.30am, when FC left, the complainer had been asleep for some time. The complainer's behaviour on returning home, as described by her mother, had been abnormal. These factors could all have been said to have contributed towards a strong circumstantial case. However, the court has focused on the terms of the ground of appeal; that being based upon a misdirection.

- [33] On the second ground, the sheriff's directions on the way in which the jury should have approached the evidence of distress were adequate. He told them specifically that they had to look at this evidence "carefully" and decide what was responsible for it. That was sufficient by way of a cautionary remark to alert the jury to the potential difficulties with this type of testimony.
- [34] On the third ground, the issue is whether the jury could regard the limited statement of the complainer about her feeling pain as the first reasonable opportunity to speak to a natural confidant (Anderson v McFarlane
- (1899) 1F (J) 36, LJC (Macdonald) at 37). The period within which a statement is admissible as de recenti will depend on circumstances and a considerable latitude is allowed in cases of sexual offending (Dickson: Evidence (3 rd (Grierson) ed) at para 261).
- [35] Once it is accepted that the evidence of distress was admissible as potentially corroborative, it would in any event be unrealistic to exclude evidence of what the complainer had said at the time when the distress was observed. It is not clear why the Crown were so circumspect in not leading evidence of what the complainer had said, given that, in due course, the jury had to decide whether the distress had been caused by the incident. Once evidence of what was said was adduced, as it was without objection, it became advisable, if not a requirement, for the sheriff to direct the jury, as he did, that this evidence could not provide corroboration but could be used in the assessment of the complainer's credibility and reliability. That is what the sheriff did; drawing the jury's attention to the lapse of time and lack of detail, as matters for their legitimate consideration. In any event, even if a strict approach were to be adopted in relation to the use of the prior consistent statements of witnesses, whose testimony is challenged (see eg Clark v HM Advocate 2016 SCCR 203 at para [5]), it is difficult to argue that a miscarriage of justice could possibly have arisen on this ground. The third ground is therefore rejected.
- [36] In all these circumstances the appeal against conviction is refused. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: [https://www.bailii.org/scot/cases/ScotHC/2017/\[2017\]HCJAC3.html](https://www.bailii.org/scot/cases/ScotHC/2017/[2017]HCJAC3.html)

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