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Title: *Donegan v HM Advocate*[1]: A step in the right direction for female complainers in sexual offences?

Philip Donegan lodged an appeal against two convictions of rape under the Sexual Offences (Scotland) Act 2009 section 1, pertaining to two female complainers. This appeal was argued on the grounds that: (i) the Moorov doctrine should not have been applicable given the differences between the two complaints and that (ii) complainer A lacked credibility to such an extent that no reasonable jury would be able to accept her evidence as truthful.

A. THE MOOROV DOCTRINE

The Moorov doctrine[2] allows for corroboration to be offered by special means: that two or more charges can mutually corroborate one another if sufficiently connected. Modern interpretation of the doctrine has dictated that this similarity must be in terms of time, place and circumstance.[3] Although not limited to application to sexual crimes, it has particular significance within this category of offences given the obvious problems of corroborating acts which are likely to have taken place in private between two individual with competing accounts of the same facts.

In response to the appellant's argument, the Court in *Donegan* recognised the different circumstances advanced by each of the two female complainers: complainer A's complaint pertained to vaginal, anal and oral rape followed by denial from Donegan of any criminality and a refusal to accept the significance of the incident (despite complainer A's visible distress). Complainer B detailed consensual vaginal intercourse which then continued after consent had been withdrawn, followed by Donegan's contrition and acknowledgement (witnessed by a third party) of the breach of trust which had occurred. The Court's view was that, despite these differences, unity could be satisfied by several common features of the two cases: Match.com as the original point of contact between the parties, the ages of the complainers, their ages in relation to the accused, the vulnerability of both complainers, the calculated behaviour of the accused towards both women, his "accelerated development of a sexual relationship in each case"[4] and his alcohol consumption at the time of the offences. The Court noted the trial judge's approach to dealing with the similarities between the two offences might not "seem entirely conventional" but advised that "the circumstances just reflected human conduct and sexual mores in the modern world."[5]

However, it could be argued the Court's approach in *Donegan* is not especially unconventional. The decision comes against the history of recognition that the doctrine can be applied even where there are differences between cases[6] and recent applications of Moorov in particular have adopted the doctrine in a flexible and realistic manner. Particular flexibility has been granted in relation to the length of time which can be accepted between offences as evidenced by *S v HM Advocate*[7] where an

* I am grateful to Professor Fiona Leverick for her comments on an earlier draft of this work.

[1] [2019] HCJAC 10.

[2] As originated from *Moorov v HM Advocate* 1930 J.C 68.

[3] *MR v HM Advocate* 2013 J.C 212

[4] *Donegan* (n 1) at para 8.

[5] *Donegan* (n 1) at para 9.

[6] *Reynolds v HM Advocate* 1995 J.C 142

[7] 2015 SSCR 62. See also the recent decisions of *JL v HM Advocate* [2016] HCJAC 61 and *RG v HM Advocate* [2016] HCJAC 60. Both involved charges libelling sexual abuse with significant time between the alleged offences. The Moorov doctrine was held to apply in *JL* but in *RG* the convictions were quashed as it was held

18 year gap was accepted. In accepting this exceptionally long lapse of time between offences, the Court emphasised that where a time gap between offences is significant, a high degree of similarity between cases is required. Elsewhere, other approaches towards allowing special means of offering corroboration has been equally flexible: in the recent case of *Wilson v HM Advocate*[8], evidence of distress exhibited by the complainer 30 hours after the alleged incident was allowed to be put before the jury for their consideration as supporting evidence of her lack of consent. Although distress has long been an established means of providing corroboration for a lack of consent[9], the time frame has been restrictive historically [10]. More than just an extension of time beyond what had previously been accepted by the courts[11], *Wilson* also allowed for the evidence of distress to be put before the jury, despite the fact that the complainer had been seen by another witness earlier in the day in an unstressed state- something the Court in *McCrann*[12] had previously highlighted as problematic in the application of the distress doctrine. The Court's application of Moorov is, therefore, arguably an extension of an increasingly flexible approach to the special means by which corroboration can be offered in sexual offences in particular.

The application of the Moorov doctine in *Donegan*, whether accepted as unconventional or simply seen as a further, consistent development of the doctrine, is at one level positive. Whilst the controversy surrounding corroboration continues to be the subject of discussion amongst Scottish commentators[13], the reality for complainers of sexual offence already engaged with the system at this time remains that in order to see their accuser convicted, the essential facts of the case must be corroborated- and this can be especially difficult in this category of offences. Cowan's recent article acts as an important reminder about the significance of such offences (both in terms of volume and treatment), setting out an up to date picture of the Scottish landscape. She notes that such crimes make up 75 per cent of COPFS High Court work.[14] When discussing the "rancorous debates" about corroboration which followed the *Carloway Review*, Raitt previously commented that if such debates were "to galvanise a broader debate about the levels of gender violence in Scottish society, the *Carloway Review* would have an entirely different legacy."[15] This point, also evident in Cowan's recent work, will be returned to below. Burman and Brooks-Hay have recently considered why Scottish conviction rates for rape remain so low, despite the fact that victims are now more willing to report such offences to the Police, linking this to how procedural safeguards are used in practice for those who give evidence.[16] In 2017/18, the Scottish Government statistics show that a total of 247 people were proceeded against for charges of rape and attempted rape. Of these: 2 per cent were later deserted, 36 per cent resulted in findings of acquittal via a not guilty finding, 19 per cent

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the similarities between the offences were superficial and there existed substantial differences between the allegations

[8] 2017 JC 135

[9] *Yates v HM Advocate* 1977 SLT (Notes) 42

[10] See *Moore v HM Advocate* 1990 JC 371

[11] 24 hours in *P v HM Advocate* 2005 SCCR 764.

[12] 2003 SCCR 722.

[13] For recent discussion of corroboration and the concept of access to justice for female complainers, see Carirns, I. Access to Justice' for Complainers? The Pitfalls of the Scottish Government's Case to Abolish Corroboration, chapter in P. Duff and P.R Ferguson (eds*), Scottish Criminal Evidence Law: Current Developments and Future Trends* (Edinburgh: Edinburgh University Press, 2017)

[14] S. Cowan. "Sense and sensibilities: A feminist critique of legal interventions against sexual violence" (2019), 23 Edin. L.R 22, quoting the Inspectorate Prosecution in Scotland.

[15] F. Raitt. "Cooroboration in cases of gender violence: a case for special treatment" (2014) 18(1) Edin. L.R 93 at 97.

[16] M. Burman and O. Brooks-Hay. "Victims are more willing to report rape, so why are conviction rates still woeful?" Conversation 8 Mar (2018)

resulted in acquittal through the not proven verdict and 43 per cent resulted in the charge being proved. To draw a comparison, 539 people were proceeded against for robbery and 75 per cent of these proceedings resulted in a conviction.[17]

B. THE CREDIBILITY OF THE COMPLAINER

The introduction of section 288DA into the Criminal Procedure (Scotland) Act 1995 (herein after CPSA) has been an important journey for victims of sexual offences. Notably in *Grimmond*[18], the Appeal Court rejected the Crown's submission that expert testimony was required to explain why two boys would disclose their evidence of sexual abuse in stages. Although the general rule that an expert cannot give evidence on matters of ordinary human nature and behaviour remains, section 275C of the CPSA introduced[19] exceptions to this rule for sexual offences, allowing psychological or psychiatric evidence to be provided on the complainer's behaviour in order to rebut adverse inferences to their credibility or reliability as a witness. Section 288DA of the CPSA, as introduced by the Abusive Behaviour and Sexual Harms Act 2016, took this position further, formally undermining the Appeal Court's assertion in *Grimmond* that knowledge pertaining to delayed and staggered reporting in sexual offences was within the expected knowledge of a jury. Instead the section formally recognises the prejudices which exist in relation to delayed reporting, holding that judicial direction *must* be provided to the jury of a sexual offence case in order to clarify that a delay in reporting does not speak to the credibility of the complainer. The difficulty of disclosing complaints of sexual offences has, therefore, been recognised formally by the creation of section 288DA.[20]

The circumstances of *Donegan* include the fact that complainer A had initially provided inconsistent accounts to investigating officers, initially denying that any offence had taken place (despite the suspicion of the officers that this was not in fact the case). Her anxiety over disclosing the rape was later explained by the witness herself during her testimony when she spoke of her shame and humiliation over the incident. It was further evidenced by her attendance at her GP following the incident (where she did disclose that she had been the victim of a sexual offence). Rejecting the argument that no reasonable jury could consider complainer A credible, the Court emphasised the newly introduced section 288DA. However, their judgment also discussed the "wholly inappropriate"[21] behaviour of the original trial judge, who engaged in activity akin to a cross-examination of the complainer over her lack of initial reporting of the offence:

> "You could phone the police. You could walk out your property and get help, go to a neighbour, contact a friend, contact the police….Did you consider any of these things?"[22]

This is not the first time that the Appeal Court has had to remind lower court judges of the boundaries of cross examination: recent cases such as *CJW*[23] and *M*[24] have reiterated that sections 274 and 275 of the CPSA, which pertain to the leading of sexual history evidence, were never

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[17] Scottish Government, 2018. *Criminal Proceedings in Scotland 2017-18*. Percentages calculated from the figures in Table 2(a).
[18] 2002 SLT 508.
[19] Through the Vulnerable Witnesses (Scotland) Act 2004.
[20] See SPICe Briefing 2015. Abusive Behaviour and Sexual Harm Scotland Bill p15-17 esp. Available at: http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_15-74_Abusive_Behaviour_and_Sexual_Harm_Scotland_Bill.pdf (Last accessed 26 March 2019)
[21] *Donegan* (n 1) at para 55.
[22] *Donegan* (n 1) at para 54.
[23] [2016] HCJAC 111. *CJW* explored *Grimmond* in obiter, commenting that section 275C had effectively reversed the common law as stated in *Grimmond* in cases involving sexual offences to which it applied.
[24] *M v HM Advocate (No.2)* 2013 SLT 380.

intended to replace the common law position on the admission of such character evidence. They emphasised in both cases that such evidence is collateral and a threat to the dignity of the complainer in criminal proceedings. Cowan comments that the lack of judicial engagement with sexual offences is "neglectful"[25] and that guidance and leadership should be offered by the courts on the issue of interpreting legislation. Such guidance is evident in all three of these recent decisions.

The trial judge's behaviour discussed in *Donegan,* although the subject of criticism by the Appeal Court, is perhaps not surprising. Following the introduction of sections 274 and 275 into the CPSA in 2002[26], Burman *et al*'s socio-legal evaluation of sexual history and character evidence in the Scottish Courts concluded that the legislation had failed to meet its aims and that, in practice, section 275 was subject to liberal interpretations.[27] Drawing on Burman *et al*'s work, Cowan includes data pertaining to section 275 applications from a three month period in 2016. This data shows that 84 per cent of applications to include sexual history evidence were accepted (either partly or in full) and only 16 per cent were rejected. Ninety per cent of these applications were unopposed by the Crown. One reading of this could be that given so few applications are opposed, the statutory test contained within sections 274 and 275 has excluded inappropriate evidence which might otherwise have gone before the court; that is to say, it is working. However, recent cases such as *CJW* illustrate that evidence has been allowed under section 275 applications is not the type of evidence that the Court of Appeal considers to be admissible or within the spirit of the statutory provisions[28]. As such, these figures should be a concern.

As a feature of law, section 288DA is cautiously welcomed. Such caution arises from the larger problems pointed to by Cowan and other members of our critical legal feminist community: problems which legal changes alone may not be able to meaningfully remedy.[29] Despite this context, however, it would nevertheless be a concerning and regressive step if section 288DA[30] faced the lack of practical implementation that has been evidenced in relation to rape shield legislation, both by Burman *et al*. in 2007 and Cowan's more recent figures.

C. CONCLUSION

Donegan is (yet another) case which illuminates the problems of proper application of law in sexual offences. But as a judgment read independently, there are positive aspects. In response to the deeply concerning behaviour of the trial judge's approach to the complainer, the High Court sends a clear and unequivocal warning: a complainer's dignity must be respected and her credibility will not be undermined by delayed reporting. This is an important message and one which should not be underemphasised. The judgment also continues along a path marked by previous decisions where the Appeal Court has shown itself to take a practical and modern view of the application of doctrines designed to offer special means of offering corroboration in sexual offences and it comes at a time

[25] Cowan (n 14) at para 42.
[26] As introduced by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002.
[27] M. Burman, L. Jamieson, J. Nicolson and O. Brooks, O. 2007. "Impact of Aspects of the Law of Evidence in Sexual Offences Trials: An Evaluation Study*"* (2007) The Scottish Government.
[28] *HM Advocate v CJW* [2016] HCJAC 111
[29] Elsewhere, the appropriateness of using juries as fact finders at all in rape cases has been the subject of question by Callender. See IMF. Callender "Jury Directions in Rape Trials in Scotland" (2016) 20(1) Edin L.R 76.
[30] The other provision pertains to the direction that a lack of physical resistance to rape does not indicate consent to sexual contact. Cowan notes that there continues to be no direction on the complainer's emotional demeanour or clothing, however.

when the experiences of victims of sexual offences are about to be considered in more detail[31]. However, any positivity must be cognisant of the larger (problematic) treatment of sexual offences in Scottish criminal procedure, as espoused by Cowan in her recent work.

[31] See Scottish Legal News, "Judge-led review group to consider improving complainers experience without compromising accused's rights" available at: https://www.scottishlegal.com/article/judge-led-review-group-to-consider-improving-complainers-experience-without-compromising-accused-s-rights