APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 18
HCA/2018/650/XC

Lord Justice Clerk
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL UNDER SECTION 74 OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

RG

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Barr; John Pryde & Co
Respondent: Prentice, QC AD; Crown Agent

15 March 2019

[1] This concerns an application under section 275(1) of the Criminal procedure (Scotland) Act 1995, which was granted by the sheriff, save as concerning the evidence sought to be admitted in terms of para 1(e) of the application, which sought to admit:

> "Evidence that on the occasion referred to in Charges (*sic*) 6 in the indictment, [the complainer] attended, by prior arrangement, at the applicant's father's flat … together with the applicant's then girlfriend … That shortly before engaging in the sexual activity referred to in Charge 6, [the complainer] engaged in consensual oral sex with a person known as [AB] in the presence of the applicant and [his girlfriend],

> and thereafter had consensual sexual intercourse with the said [AB] whilst the applicant and [his girlfriend] were in a neighbouring room."

The sheriff, correctly, addressed the question whether the evidence would be admissible at common law, taking account of the case of *LL* v *HMA* 2018 JC 182. Unsurprisingly, no other view being tenable, he determined that the evidence in question was not relevant and would thus be inadmissible at common law. The submissions to us that this was not collateral, was part of the r*es gestae* and could have a bearing on the appellant's reasonable belief as to the age of the complainer are wholly unsound and misconceived, and do not bear repeating. The evidence is entirely collateral and is inadmissible at common law, as the sheriff was correct to conclude.

[2] Somewhat surprisingly, having reached that conclusion, the sheriff then turned to the statutory provisions, asking whether any of the exceptions to section 274 of the Act, contained within section 275, applied.

[3] In *LL* v *HMA* (para 22) the court pointed out that the evidence being irrelevant at common law it was not necessary to consider the statutory provisions. The position was fully explained in *M* v *HMA* (No 2) 2013 SLT 380, where the Lord Justice Clerk (Carloway) observed (para 43):

> "Suffice it to say, as the heading to s.274 (supra) makes clear, the provisions are intended to restrict the admissibility of evidence which would be permissible at common law. Thus, they are intended to, and do, sweep away the common law "specialities" in relation to sexual offences against women,.."

At para 45 he noted that:

> "… despite clear *dicta* to the contrary ..., there remains a tendency amongst practitioners to regard s.275 as providing exceptions not only to the restrictions in s.274 but also to the common law rules on the expedient exclusion of collateral material."

[4] That tendency appears to have been acted upon in the present case. The first of the *dicta* to which the Lord Justice Clerk was referring is *Thomson* v *HMA* 2010 JC 140, para 16, Lord Kingarth delivering the opinion of the Court:

> "… as has recently been stressed, the relevant sections in the 1995 Act (both before and after amendment) are designed not to replace the common law but to provide for further potential restriction (see, in particular, *Moir* v *HM Advocate* and, by way of illustration, *HM Advocate* v *Ronald* (No 1))."

The second was *Moir* v *HMA* 2007 JC 131, in the opinion of Lord Johnston (para 27):

> "The reason I have sought fit to set these matters out at some length is that upon any view of the matter having regard to the professed aims of the legislation any interpretation or construction of it must not expand the existing common law position at the time of its enactment and it is more likely that its intention was to limit it in its effect. Accordingly, when consideration is given to a detailed application, at least conventionally, the starting point should be whether or not it would have been permissible to maintain such line of questioning at common law before the enactment of the legislation. I consider that, if it was not admissible under the common law at the material time, sec 274 should not arise whatever its phraseology. But in any event, sec 275 if brought into play may exclude the questioning."

and in the opinion of Lord Eassie, para 41:

> "Section 275 of the legislation was not, in my view, intended to relax the general law of evidence and any application under sec 275 must proceed upon the basis that the evidence with which it is concerned would otherwise be admissible under the general law of evidence in criminal trials."

[5] The emphasis in each case is ours. Despite these observations, the tendency referred to by the Lord Justice Clerk in *M* v *HMA* continues to hold sway. For the sake of absolute clarity therefore, we repeat that unless the evidence in question would be considered admissible at common law, no further question arises. Only if the evidence would be admissible at common law would the question of whether there is a further statutory prohibition against its admission ever arise.