APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 42
HCA/2019/725/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION

by

AS

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: J Keenan (sol adv); Paterson Bell (for Neil McPherson, Solicitors, Kilmarnock)
Respondent: Prentice QC (sol adv) AD; the Crown Agent

24 September 2020

Introduction

[1] On 11 November 2019, at the High Court in Edinburgh, the appellant was found guilty of three charges involving the indecent assault, attempted rape and rape of his sister, AB, and an indecent assault on a male cousin, CD. By the time of the trial CD had died. The Crown relied upon a statement which he had given to the police in order to prove not only

the charge involving CD, but also, by way of mutual corroboration, those involving AB. The issue in the appeal is whether that reliance rendered the trial unfair in terms of Article 6 of the European Convention on the basis that the statement was "decisive" but hearsay and there were insufficient safeguards in place to secure the appellant's Article 6 rights.

The trial

[2] There were three charges involving the appellant's sister, AB. These libelled offences within the family home in Coatbridge between 1975 and 1980. They were, first, indecent assaults, including touching AB's vagina and attempting to rape her on various occasions, starting when she was only 11 and the appellant was about 14, and escalating to an episode of rape in 1979 or 1980, when she was 15 or 16 and the appellant was 19 or 20. AB did not report any of this until the police called upon her when making enquiries "into the family" in 2017. Her immediate reaction to the enquiries was "the bastard's done it to someone else", at which point she broke down.

[3] AB spoke to the terms of the libel. She also testified to visiting her aunt and uncle's house, where her younger cousin CD lived, on Christmas day and to the appellant playing with CD during these visits.

[4] The police had spoken to CD, because he had complained about having been abused. Arrangements were made for him to make a formal statement at the local police station. PC Caroline Patullo testified to the making of that statement. She said that CD had had no difficulty in understanding her questions. She had an initial discussion with CD during which he told her what had happened to him at the hands of the appellant. She went over the circumstances again and wrote down what he had told her. The completed statement ran to some 17 pages, albeit in large handwriting with only 20 lines per page. The statement

had been read over to CD, who had initialled some alterations to it. He certified that the statement was a true and accurate version of what had happened. The statement was signed by CD on every page and countersigned by PC Patullo and an appropriate adult who was also present. This process took around two hours.

[5] The statement described an incident which CD said had taken place in his home on Christmas day of 1976 or 1977, when he was aged about 5 or 6 years old. CD described the flat in some considerable detail. He also explained who had been present in the flat. This was his parents, his aunt and uncle and their two children, namely AB and the appellant, who was between 14 and 16 years old. At some point the appellant was told to go and play with CD, because the adults were drinking. The appellant encouraged CD to go into his parents' bedroom. The appellant then took his penis out. CD recalled being shocked at the sight of that. The indecent assaults then took place. These are described in graphic detail in the statement. They included an attempt at sodomy and the occurrence of oral intercourse.

[6] CD said that he had not seen the appellant, other than on one occasion, since this episode. He described having flashbacks about the incident all his life. He became a heavy drinker at the age of 15 and an abuser of drugs, notably heroin. He had taken an overdose in June 2017. He spoke about being paranoid and anxious and having become a recluse. He had recently told his doctor about the sexual abuse. He had also told his parents. At the time of the statement, CD said that he was on a methadone programme, but free from alcohol and other drugs. He provided a drawing of the flat in which the abuse had taken place.

[7] During the course of the trial the appellant lodged a minute raising a compatibility issue based upon the Crown's reliance on the hearsay of CD. The trial judge repelled the objection on the view that the hearsay of CD could not be characterised as decisive in the

sense of that term as understood in the jurisprudence of the European Court of Human Rights. That required the evidence to be of such significance as was likely to be determinative of the outcome of the prosecution. In this case, there was significant other evidence over and above CD's account to the police. Most important, there was the detailed evidence given by AB, which described the abuse in relation to herself and which might indicate that the appellant was, at that time, an opportunistic abuser of younger relatives. AB had spoken of visiting the family home of CD with the appellant at or about the time when CD maintained that he had been abused. She had described the children playing together during the course of Christmas visits. AB's evidence therefore added to the persuasiveness and reliability of CD's statement.

[8] Even if the hearsay had been regarded as decisive, there were, in the trial judge's view, sufficient safeguards available to ensure that the trial was fair. These included: (1) the fact that the statement was taken by an experienced police officer in the formal setting of a police station and was certified by CD as true and accurate; (2) the giving of strong directions to the jury on the limitations of hearsay evidence, with a particular caution in relation to how it should be approached; (3) the opportunity for the appellant to lead evidence, which he did from other close relatives as well as testifying himself, to rebut the content of the statement; and (4) the ability of the appellant to make submissions to the jury, which stressed the hearsay nature of CD's account and invited the jury to hold that it should not be relied upon.

Submissions

Appellant

[9] The appellant contended that the trial judge had erred in determining that the

evidence was not decisive and that, even if it was, that there were adequate safeguards. The question was whether the evidence was of such significance or importance as was likely to be determinative (*Graham* v *HM Advocate* 2019 JC 26 at para [44], citing *Al-Khawaja* v *United Kingdom* (2012) 54 EHRR 23 at para 131). In *Graham* v *HM Advocate* (*supra*), there had been a significant body of evidence that directly supported the hearsay testimony. The appellant's case was very different. There was nothing directly supporting the credibility of the statement. There was no evidence of distress at or near the time, no *de recenti* account or evidence of injury. The account given was the only one provided by CD and available for scrutiny by the jury; the appellant's parents having both died in the two years prior to the trial. The statement was provided 40 years after the event.

[10] All of these matters presented substantial difficulties to the appellant in mounting a realistic challenge to the credibility of CD's account. When evidence was held not to be decisive, it was generally because the corroborative or supporting evidence bore directly on the hearsay (eg *Alongi* v *HM Advocate* [2017] HCJAC 18; *Horncastle* v *United Kingdom* [2014] ECHR 1394 at para 141; *Graham* v *HM Advocate* (*supra*) at para [51]; and *Lees* v *HM Advocate* [2016] HCJAC 16 paras [7] and [8]). In *Al-Khawaja* v *United Kingdom* (*supra*) there were *de recenti* statements.

[11] In relation to safeguards, in *M* v *HM Advocate* 2003 JC 140, it was held that the hearsay evidence was unfair in a three complainer mutual corroboration case. It was accepted that the trial judge had taken great care to invite the jury to approach the hearsay evidence with great caution. Nevertheless, the safeguards were insufficient to overcome the difficulties presented by its use. The appellant had been deprived of the ability to challenge the testimony and the appellant had not received a fair trial.

Crown

[12] The Crown responded by maintaining that the trial judge had not erred in repelling the compatibility minute. A three-stage test applied. The first was whether there was good reason for the non-attendance of the witness to which the hearsay related. That was clearly the case, given that CD was deceased and the requirements of section 259 of the Criminal Procedure (Scotland) Act 1995 had been met. Stage two involved determining whether the hearsay was the sole or decisive evidence against the appellant. Where the untested evidence of a witness was supported by other corroborative evidence, the assessment of whether it was decisive would depend on the strength of the supporting evidence *Al-Khawaja* v *United Kingdom* (*supra*). The stronger the corroborative evidence, the less likely it was that the hearsay should be treated as decisive.

[13] It was legitimate to prove a case using one witness speaking to one incident and the hearsay evidence of a deceased person speaking to another (*Lees* v *HM Advocate* (*supra*) at para [8]). That did not mean that the hearsay should be regarded as decisive (*HM Advocate* v *Alongi* (*supra*) and *Lees* v *HM Advocate* (*supra*)). Although CD's hearsay was the only direct evidence of the conduct libelled in the charge relating to him, there was significant other evidence in support of his account in the form of the testimony of AB who spoke to similar conduct in relation to her. There was a temporal connection. AB's evidence was capable of showing the appellant as an abuser of younger children within his extended family and in their family homes.

[14] The third stage of the test was whether, even if the hearsay was decisive, there were sufficient counterbalancing factors, including the existence of strong procedural safeguards which permitted a fair trial to take place. These factors included the circumstances of the statement, the directions to the jury, the availability of corroboration and the directions

thereon and the ability of the defence to lead evidence and make appropriate submissions to the jury. In assessing fairness, the proceedings had to be looked at as a whole, having regard not only to the rights of the defence, but also to the interests of the public, victims and witnesses (*Beurskens* v *HM Advocate* 2015 JC 91).

Decision

[15] There is no contention that the hearsay of CD was not admissible, standing the terms of section 259 of the Criminal Procedure (Scotland) Act 1995. The court had no discretion on this point, once the statutory conditions were met (*N* v *HM Advocate* 2003 JC 140, LJC (Gill) at para [22]). Evidence of CD's statement was competent because he was dead. It is then important to distinguish two different issues. The first is whether, in terms of the law of evidence, the testimony of AB and CD was mutually corroborative. Once again, it was not argued that it was not. The court must proceed on the basis that the evidence of each complainer demonstrated that the crimes charged were so closely linked by their character, circumstances and time of commission as to form parts of a single course of criminal conduct systematically pursued by the appellant. There is no difficulty in holding that the testimony of one complainer may be corroborated by the hearsay of another complainer (*Lees* v *HM Advocate* [2016] HCJAC 16 LJG (Gill) at para [8]).

[16] The second, and quite separate, issue is whether the appellant's trial had been unfair in terms of Article 6 of the European Convention because of the reliance on hearsay evidence. In *Schatschaschwili* v *Germany* (2016) 63 EHRR 14 the European Court revisited *Al-Khawaja* v *United Kingdom* (2012) 54 EHRR 23. It emphasised (at para 101) that the primary task for the court is to evaluate the overall fairness of the proceedings. The court must have regard to the rights of the defence, notably the right under Article 6(3)(d) to

examine witnesses, but also the interests of the public and victims in seeing that crime is properly prosecuted (*ibid*). The use of police statements was not *per se* inconsistent with Articles 6(1) and 6(3)(b), provided that the rights of the defence have been respected (*ibid* para 105). This was so whether or not the hearsay was the "sole or decisive" evidence, having regard to the task of examining whether the proceedings as a whole had been fair (*ibid* para 106). The admission of hearsay was an important factor to balance in the scales because of the inherent risks which such admission carried.

[17] The court required to examine whether: (i) there was a good reason for the non-attendance of the witness; (ii) the hearsay was the sole or decisive basis for the conviction; and (iii) there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence and to ensure that the trial as a whole was fair (*Schatschaschwili* v *Germany* at para 107). These elements are inter-related and are not to be looked at in any set order (*ibid* para 118). Even if there was no good reason for a witness's non-attendance, that would not automatically amount to a breach of Articles 6(1) and 6(3)(d), given that the evidence may be neither decisive nor even relevant (*ibid* para 112). Nevertheless, the lack of a good reason was a very important factor to weigh in the balance. No such factor exists in this case. CD was dead and could not be called as a witness.

[18] Even where it is not clear whether the hearsay was the sole or decisive evidence, the court requires to examine whether there were sufficient counterbalancing factors necessary for the trial to be considered fair (*Schatschaschwili* v *Germany* (*supra*) at para 116). The more important the evidence, the more weight the counterbalancing factors will have to carry. Whether evidence is to be regarded as decisive is to be narrowly interpreted as meaning evidence of such significance or importance as is likely to be determinative of the

outcome of the case (*ibid* para 123). On any view, CD's evidence was not determinative of charges 1 to 3. It may have been necessary in terms of Scots law's need for corroboration before a person can be convicted, but that is not a requirement of the European Convention. This appeal is therefore almost bound to fail in relation to charges 1 to 3, although the court must still look at the counterbalancing factors to ensure overall fairness.

[19] The counterbalancing factors must permit a fair and proper assessment of the reliability of the evidence (*Schatschaschwili* v *Germany* (*supra*) at para 125). The fact that the court has approached the untested evidence with caution, and given the jury specific directions on this, is an important feature (*ibid* at para 126). A further "considerable safeguard" is the availability of corroborative evidence (*ibid* at para 128). This includes evidence of a comparable offence, especially where the witness testifying to the latter has been tested in cross-examination (*ibid*). Another factor is the opportunity given to the accused to present his own version of the events and to cast doubt on the credibility of the hearsay, including the proffering of any motives which the witness may have for lying.

[20] Applying *Schatschaschwili* v *Germany* (*supra*) to the appellant's case, the court is satisfied that the appellant did have a fair trial. As already noted, there is no potential unfairness at all in relation to charges 1 to 3. The appellant was able to challenge the testimony of AB in the conventional manner. On charge 4, the nature of the statement is important. Although it would have been better if it had been audio or video recorded, it was in written form, taken in the relatively formal setting of a police station in front of not only a police officer but a responsible adult. It was detailed and signed on each page by the three persons present. CD initialled corrections. The prospect of the statement not being something which CD had said, whether true or reliable, is substantially diminished.

[21] The trial judge gave the jury specific directions on the dangers of accepting hearsay. He emphasised that the defence had had no opportunity to test the statement by cross-examination. The jury had not had the opportunity to assess CD's demeanour. The judge told the jury that they had to take "great care in evaluating the evidence". There was corroboration in the form of the testimony of AB speaking to what the jury must have accepted to be comparable offences; each being sexual abuse of younger children in the family setting. The appellant was able to testify on his own behalf and to lead evidence in support of his position. The deceased was a person known to the appellant who would have had some appreciation of his circumstances. The appellant was able to make submissions to the jury which were designed to cast doubt upon the veracity of the statement.

[22] For these reasons, the safeguards were sufficient to ensure that the appellant had a fair trial. The appeal is refused.