APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 11
HCA/2020/64/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST CONVICTION

by

SB

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Findlater; Paterson Bell Solicitors (for Duncan McConnell, Solicitors, Dundee)
Respondent: G Jessop (sol adv) AD; the Crown Agent

21 January 2021

[1] In this appeal the appellant challenges his conviction on the basis that the jury returned verdicts which no reasonable jury, properly directed, could have returned. Separately, he contends that the trial judge misdirected the jury in relation to the docket attached to the indictment which he faced, resulting in a miscarriage of justice.

The indictment

[2] The appellant and his co-accused SM faced an indictment which alleged a number of charges of both a physical and sexual nature perpetrated against two young and vulnerable teenage girls. The events were said to have taken place at addresses in Cupar and Dundee between December 2002 and March 2006. The appellant was in a relationship throughout that period with the complainer JB and his co-accused was in a relationship with the complainer DS throughout much of that time.

[3] The appellant and SM were charged, whilst acting together, with assaulting each of the complainers on different occasions. Each was also separately charged with assaulting the respective complainer with whom he was in a relationship. They faced separate charges of indecently assaulting each of the two complainers, whilst acting together, and they each faced a charge of individually raping the complainer DS. In addition, both faced charges of raping each of the two complainers, on various occasions, by compelling them to engage in sexual intercourse with both males at the same time.

[4] During the course of the trial various charges were withdrawn against the co-accused and he was acquitted no case to answer by the trial judge of the remaining charges which he faced. Certain charges were also withdrawn against the appellant, with the result that the jury were left to consider four charges against him, two of which resulted in convictions. The charges of which the appellant was convicted were as follows:

> "(004) on various occasions between 6 February 2003 and 31 March 2006, both dates inclusive, at (addresses in Cupar and Dundee) you SB and SM did indecently assault and rape JB, … and did compel her to engage in sexual intercourse with both of you at the same time and you SM did penetrate her anus with your penis and you SB did penetrate her vagina with your penis and you SB and SM did thus indecently assault and rape her;
>
> (007) on various occasions between 14 January 2003 and 31 December 2004, both dates inclusive, at (addresses in Cupar) you SB and SM did indecently assault and

> rape DS, … and did compel her to engage in sexual intercourse with both of you at the same time and you SB did penetrate her anus with your penis and you SM did penetrate her vagina with your penis and you SB and SM did thus indecently assault and rape her all to her injury;"

In due course, the appellant was sentenced to a *cumulo* period of six years imprisonment in respect of the two charges.

[5] Attached to the indictment which the appellant and his co-accused faced was a docket which gave notice that the Crown intended to lead evidence that the appellant had sexual intercourse with JB on various occasions at an address in Cupar when she was aged 15 years old; that on one occasion at the same address in Cupar the co-accused had sexual intercourse with DS when she was 15 years old; that on various occasions between 2006 and 2017 at addresses in County Durham and Bournemouth the appellant demanded that JB have sexual intercourse with him and assaulted her in a variety of different ways; that on various occasions between the same dates and at the same locations the appellant forced JB to have sexual intercourse with SM without her consent and made video recordings of the activity on some of those occasions; that on various occasions between the same dates and at the same addresses the co-accused SM had sexual intercourse with JB without her consent; and that on one occasion in October 2016 at an address in Bournemouth the appellant demanded that JB have sexual intercourse with him and attempted to have intercourse with her without her consent.

The evidence

[6] The Crown case against the appellant depended upon the evidence given by the two complainers. DS was led as the first witness.

The complainer DS

[7] In summary, the evidence given by this witness was that she had been friends with JB since school. She had learning difficulties at school and attended a special needs section of a college. She began a relationship with the co-accused SM when she was 15 years old and he was around three or four years older. He was originally from England and had moved to live in a bedsit flat in Cupar. His friend the appellant, whom he knew from England, moved to stay with him in that flat. On moving to Cupar the appellant commenced a relationship with her friend JB.

[8] DS regularly visited the flat in Cupar and had consensual sexual intercourse with SM there. She explained that SM told her that he and the appellant were in a gang and that they undertook jobs which involved watching and harming people. The appellant was present when these things were said and agreed with what SM had said. The things which SM said made her confused and scared. At the time she thought what she had been told was true and there were occasions on which she was told that there were certain things which she would have to do on behalf of the gang.

[9] DS explained that she regularly visited the flat with JB and that they would drink alcohol whilst there. She gave evidence of various things which happened. She described an occasion when all four played a game called "Spin the Bottle" which resulted in the girls being told that they would require to give oral sex to one or other of the males. During the course of describing this conduct she explained that the appellant became aggressive towards JB. He shouted at her and dragged her out of the room by her hair. After they returned DS was required to give oral sex to the appellant and JB was required to do the same to SM. She explained that she did so because she was scared and that she could tell JB was unhappy about having to do so as well.

[10] DS went on to explain that, beginning when she was 16 years old, she was required on a number of occasions to have "threesomes" in which she had to have sexual intercourse with each of the two accused at the same time. This conduct began in the bedsit flat at Cupar and continued after the appellant and the co-accused moved into a larger flat at a different address in Cupar. Her evidence was that she did not wish to engage in these "threesomes" but agreed to do so because she was scared of what would happen if she did not. SM had told her that there would be consequences if she failed to participate. Her family would be hurt and they would be shot.

[11] On the first occasion of this conduct the appellant penetrated her anus and she told him to stop because it was painful but he refused to do so. On subsequent occasions she told the appellant and the co-accused that she did not want to participate in this group activity but SM told her she required to do so. On one occasion he explained that it was in order to allow other people to watch through cameras which had been fitted into the flat. On one occasion, after she refused to participate, the co-accused pinned her to the floor and behaved violently towards her during the course of which he turned to the appellant and said "show her the gun". In response SB had stood up and placed his hands under his jumper giving the impression that he had something there. DS explained that all of this conduct frightened her and she participated on the various occasions that she did because she was scared of them and she was frightened of the threats that her family would get hurt.

[12] She also gave evidence about other conduct, including being required to have sexual intercourse with the appellant on his own and being required to engage in oral sex with him on the instruction of SM. She complied with these demands because of her fear of what would happen to her and her family if she did not. She explained that around the middle of 2005 she told her mother who informed the police and statements were taken. She stopped

seeing both SM and the appellant at that stage. Her relationship with the co-accused had lasted for around two years. Subsequently, in around 2017, she was revisited by the police who asked her whether she knew about conduct between the appellant, the co-accused and JB.

[13] On behalf of the appellant, the lines of cross-examination explored with DS were to the effect that she had fabricated parts of her testimony about sexual activity, that whilst the two males did have sexual intercourse with her at the same time that occurred with her consent, that she had made up the account of gang membership and that she was jealous of SM's involvement with a subsequent girlfriend. In addition, she was examined about accounts which she had given to police officers which were apparently inconsistent with her evidence and it was suggested to her that her explanations for participating in sexual conduct against her will were inherently improbable.

The complainer JB

[14] Like DS, this witness described herself as having a mild learning disability and she received learning support throughout her schooling. She met the appellant when she was 14 years old and he was 18. She had known SM for a number of years before that. She commenced a relationship with the appellant which continued from when she was aged 14 until she was around 29 years old.

[15] JB explained that she and her best friend DS would visit the bedsit flat in Cupar at the weekends and would regularly stay over. Alcohol was consumed and she described being drunk when various sexual games were played. She described two occasions when the appellant grabbed her by the hair and pulled her. On the first occasion she said that she ran out of the building and hid before telephoning her sister to arrange to be collected. On

another occasion she described the appellant pulling her out of the flat by her hair and being pulled along a path beside a river at the back of the building.

[16] She described beginning her sexual relationship with the appellant when she was 14. She explained that the appellant told her he was a gangster and that he used to use guns and sold drugs. He told her that he and SM knew Paul Ferris, whom she understood to be a Glasgow gangster. The appellant talked about this sort of thing all the time, as did SM. JB described feeling scared because she believed them at that time. She explained that the two men asked her and DS to undertake tasks for them which were associated with their gang, such as taking down car registration numbers and delivering parcels to an area near to the train station at Cupar. At the time she believed what the appellant was telling her about he and SM being gangsters.

[17] From when she was aged 15 years old the appellant persuaded her to have sexual intercourse with both him and SM at the same time. She explained that this happened every weekend and that she was pressured into doing it although she did not want to. The appellant told her it would keep him happy if she engaged in sexual conduct with SM. She told the appellant she did not like doing this but he kept asking and asking and she agreed just to keep him happy. She thought that he would hit her if she did not agree to this. In addition, she said that the appellant made threats against her father quite a lot. He told her that he would take her father to a factory unit and cut his fingers off if she did not agree to participate in the sexual activity. He made such threats almost every time they had an argument about not wanting to engage in "threesomes". She eventually agreed.

[18] JB became pregnant in 2004 while she was living with her mother in Dundee. After her son was born, in March 2005, she continued to visit the appellant and SM but they had moved to a different address in Cupar by this time. SM was no longer in a relationship with

DS. On occasions in this flat the witness had sexual intercourse with SM at the encouragement of the appellant. The appellant instructed her to record the intercourse on video camera on one occasion.

[19] JB also gave evidence about moving to England to live with the appellant at an address in County Durham. SM was living in the same village. She continued to engage in sexual activity with both the appellant and SM whilst living there. She did so because the appellant was constantly pressurising her and she agreed to participate to keep him happy and so that he would not hit her. The appellant used to record this on a camera. After she and the appellant moved to Bournemouth SM moved there to be with them. By this time the appellant was behaving more violently towards her. She eventually left the appellant in around May 2017 and returned to Dundee with her children.

[20] The witness acknowledged that she had been spoken to by police officers in about September 2005 in response to the complaints which had been made by DS. She told the police that she had engaged in sexual activity with both SB and SM but that it had been consensual. She did so because she was scared of the appellant.

[21] JB was cross-examined by counsel for the appellant, at length and effectively, about the differences between her evidence and the various accounts which she had given to police officers in the course of a number of statements which had been taken from her. The circumstances which led to her being scared of the appellant were examined. It was put to her that she was lying about the appellant pulling her hair. It was suggested to her that the reasons which she gave for participating in sexual activity against her will were inherently improbable. It was suggested that she engaged in sexual activity with the two men consensually. She agreed that she had not told police officers the appellant had threatened to cut her father's finger off. She said she had only remembered that recently. She was

examined about her attitude towards the allegations which DS had made to the police in 2005 and she was examined about her account of violence by the appellant whilst they lived in England. She was examined about failing to inform police officers about the appellant's sexual and physical conduct towards her in the course of giving a statement when the appellant had raised a court action seeking access to their children. She was examined about why she did not tell people what the appellant had done to her after she moved back to Dundee

[22] JB was also she was also cross-examined about her testimony to the effect that she was required by the appellant to have intercourse with SM in Bournemouth. In support of the contention that this was consensual, a portion of an audio recording during which she was having intercourse with SM was played in order to suggest to the complainer that she could be heard encouraging him.

Defence evidence

[23] The appellant gave evidence on his own behalf and called the former co-accused SM as a defence witness. The appellant's evidence was that he and SM did have sexual intercourse with JB at the same time on various occasions. The same behaviour was engaged in with DS. Each girl had consented to this conduct.

The submissions on appeal

Appellant

The first ground of appeal

[24] In the note of appeal, and in the arguments presented in support of it, it was accepted that each complainer had given evidence which, taken at its highest, constituted

evidence of having been raped by the appellant whilst acting along with the co-accused. It was accepted that the evidence given in support of each of charges 4 and 7 was capable of being corroborated through the application of the doctrine of mutual corroboration. Put short, the argument was that no reasonable jury could have found the evidence given by JB to be credible or reliable.

[25] In support of this argument the note of appeal and the written submissions drew attention to various aspects of the evidence given by JB. It was suggested that in cross-examination she had agreed to the proposition that she felt threatened or pressured into having unwanted sexual intercourse with the appellant and SM on the basis of nothing more than two occasions of her hair being pulled. Attention was drawn to the inconsistencies between what she had told police officers in 2005 and 2017 and her testimony in court. Attention was drawn to the passage of cross-examination in which a selection of text messages were examined which had been exchanged between the complainer and the appellant shortly after their relationship had ended. It was pointed out that although the complainer was complaining about aspects of the appellant's behaviour in these text messages, she did not accuse him of physical or sexual violence. The audio recording of the complainer apparently encouraging SM to have intercourse with her was referred to. Individual passages of the complainer's testimony were drawn attention to in support of the contention that her account contradicted the suggestion of a lengthy period of non-consensual sexual activity. Reliance was placed on a passage in re-examination where the complainer appeared to explain that she only became uncomfortable about sex with the appellant shortly before leaving him in England to return to Dundee, a point around 13 years after the last date on the libel.

[26] In oral submissions it was argued that the central issue in the case was consent. Examination of the transcript of the complainer's evidence demonstrated that she was able on occasions to indicate a lack of consent and that this was acted upon by the appellant. It was argued that the elements of violent conduct which the complainer referred to were mostly episodes which occurred after she and the appellant had moved to England. Logically, such events could not provide an explanation for participating out of fear in the sexual conduct which predated this. Her evidence, looked at broadly and in the round, was to the effect that she had gone along with the appellant's suggestion that sexual activity involving all three of them would be fun and that she did not participate out of a sense of fear or violence, but rather to keep the appellant happy. The complainer's evidence on the central issue of consent was so confused that there was no sense in which it could have been found credible and reliable. Her evidence was contradictory to the extent that it did not make sense, either within itself or when taken in the context of the trial as a whole. Although the test to be met by an appellant arguing a ground of appeal of this sort was a high one, in the circumstances of this case that test was met.

The second ground of appeal

[27] The docket attached to the indictment gave notice that the Crown intended to lead evidence of the sort described at paragraph [5] above. It was observed that the bulk of the docket referred to sexual matters occurring in a period of just over a decade or so between 2006 and 2017 when the appellant, JB and SM were all living at addresses in England. Evidence was given in relation to the docket by JB. This comprised a substantial body of evidence in the case which was of a prejudicial nature to the appellant. The trial judge had said nothing at all about the docket in his charge.

[28] The appellant submitted that the judge ought to have given the jury directions explaining the use to which they could legitimately put the evidence led under reference to the docket. In addition, he ought to have instructed them that the material specified in the docket (which was enumerated into separate paragraphs) did not comprise separate charges. Although the trial judge had made some reference to the docket in his introductory remarks, reliance was placed on the decision of the court in the case of *Lyttle* v *HM Advocate* 2003 SCCR 713. In particular, counsel for the appellant relied on what was said by the Lord Justice Clerk (Gill) in delivering the opinion of the court at paragraph 18. He had stated that introductory remarks made by a judge to the jury are not part of the formal procedure of the trial and, that where the trial judge has omitted a material direction in the course of the charge, neither the trial judge nor the Crown can pray in aid anything that the judge may have said in the course of those remarks.

[29] In the circumstances of the present case the trial judge's failure to give directions in respect of the docket constituted a material misdirection resulting in a miscarriage of justice.

Crown

The first ground of appeal

[30] The advocate depute reminded the court that the test to be applied in an appeal based upon this ground is an objective and a high one. This had recently been confirmed in the Full Bench case of *Al Megrahi* v *HM Advocate* [2021] HCJAC 3 at paragraphs [53] to [56]. It was accepted that the Crown had led sufficient evidence to corroborate the evidence given by the complainer JB and the appellant himself had confirmed that the relevant conduct which she described did take place. The sole issue was whether the jury were entitled to

conclude beyond a reasonable doubt that the conduct occurred without the complainer's consent.

[31] The evidence in relation to consent had to be seen in the round, it was not appropriate to simply view it from the perspective of the passages selected by the appellant. There was adequate material within the complainer's evidence to permit the jury to conclude that that she had been pressurised by the appellant and that she had participated in the sexual behaviour described as a consequence of pressure and fear. She had given evidence that she was subject to physical violence if she did not agree to participate. The jury were entitled to accept her evidence that she had believed the appellant and his co-accused when they told her that they were gang members, had guns and were involved in the supplying of drugs.

[32] In assessing the complainer's evidence the jury were entitled to take account of her vulnerabilities, including her age and her limited intellectual capacity. In assessing whether to accept JB as a credible and reliable witness the jury were also entitled to take account of the evidence given by DS – see the case of *PGT* v *HM* [2020] HCJAC 14. It was important to remember that no criticism of the evidence given by DS was advanced in the appeal.

[33] The advocate depute also submitted that it was not uncommon for victims to delay or stagger reporting, or to be inconsistent in doing so. The presence of these features within the evidence of the complainer JB did not mean that the jury could not reasonably have accepted her testimony. There was available what had been referred to in the case of *McDonald* v *HM Advocate* 2010 SCCR 619, as a baseline of quality within the testimony given.

The second ground of appeal

[34] The advocate depute drew attention to the fact that whilst the trial judge did not

mention the docket in his charge, he had made it plain in his introductory remarks that the docket only had an evidential function and that the jury would not require to return a verdict in relation to it. He had also made it clear that separate verdicts were to be returned on the four remaining charges. Clean copy indictments comprising only the remaining charges were given to the jury before speeches. The Crown speech had referred only to the evidence on the remaining charges. The jury could not have been confused by the docket or left in any doubt as to its purpose.

[35] The advocate depute submitted that solemn procedure had moved on significantly since the case of *Lyttle* and that the decision had no application to current High Court practice. There had been no misdirection by omission and no miscarriage of justice.

Discussion

The first ground of appeal

[36] Section 106(3)(b) of the Criminal Procedure (Scotland) Act 1995 provides an appellant with the opportunity to bring under review of the High Court any alleged miscarriage of justice based on the jury having returned a verdict which no reasonable jury, properly directed, could have returned. The approach which the appellate court should take in assessing an appeal of this sort was recently revisited in the Full Bench decision of the court in the case of *Al Megrahi* v *HM Advocate*. In delivering the opinion of the court at paragraph [53] the Lord Justice General (Carloway) explained:

> "[53] There is no dispute about the test which applies to this ground of appeal. It was recently outlined in *Smith* v *HM Advocate* 2017 JC 54 (LJG (Carloway) delivering the opinion of the court) as follows:
>
> > '[37] The test in relation to the unreasonableness of a jury's verdict, as described in section 106(3)(b) of the 1995 Act, is an objective and a high one (*Geddes* v *HM Advocate* 2015 JC 229, LJC (Carloway), paras 4 and 88). It is

> only in the most exceptional circumstances that an appeal on this ground will succeed (*Harris* v *HM Advocate* 2012 SCCR 234, Lord Bonomy, para 67). A verdict will be quashed only if the court is satisfied that no reasonable jury could have been satisfied beyond reasonable doubt that the appellant was guilty (*King* v *HM Advocate* 1999 JC 226, LJG (Rodger) p 230). The determination of fact remains the province of the jury, even if there must be a baseline of quality (*McDonald* v *HM Advocate*, 2010 SCCR 619, Lord Carloway, para 27).'"

The transcript of the evidence given by the complainer JB reveals an account of domination and sexual degradation of her by the appellant over a period of years. On the appellant's behalf she was cross examined in detail, and at length, although in a professional and considerate manner. That cross-examination elicited inconsistencies in her evidence and discrepancies between the account which she gave in court and the accounts which she had given to police officers carrying out investigations into the appellant's conduct. The appellant's counsel highlighted what was suggested to be the inherently unlikely and implausible explanations for continuing to participate in sexual conduct against her will over a period of years. In all of these aspects, and more, an independent observer might well have concluded that the cross examination was highly successful.

[37] However, the combined experience of the court permits it to agree with the submission of the advocate depute to the effect that it is not uncommon for victims of sexual abuse to delay or stagger reporting, or to be inconsistent in doing so. Neither can it be said that there is, or must be, a particular response to non-consensual sexual behaviour, such as can permit a truthful account to be distinguished from an untruthful one. It is the function of the jury to assess the credibility and the reliability of the particular account given to them in light of the whole and unique circumstances of each particular case.

[38] When assessing JB's evidence the jury were entitled to take account of the age difference between her and the appellant and to take account of her learning disability.

They were entitled to take account of the evidence of the appellant's violent conduct towards her, both as described by JB and by DS. At pages 41 to 44 of the transcript of JB's evidence on 11 December 2019 there is a telling passage. In it she testified that she thought that the appellant would hit her if she declined to acquiesce in his repeated requests to have intercourse with both him and SM. She explained that if she failed to comply she thought that the appellant would hurt her by grabbing her by the hair or that he would hurt her father. At pages 42/43 she said that the appellant threatened to take her father to a factory unit and cut his fingers off and that he made such threats all of the time in the context of the arguments which they had about him wishing her to participate in threesomes. The passage concluded with three important questions and answers:

> Q. - And, so, when he made these threats and you felt pressured, what did you say about the threesomes?
>
> A. - I said yeah to them, just so he'd stop asking.
>
> Q. - How would (SB) know that you weren't wanting to have a threesome?
>
> A. - Because I told him before.
>
> Q. - How often did you tell him?
>
> A. - Every time he asked.

This passage of evidence was given under express reference to what took place at Cupar and was not related to events which took place after the parties moved to England. A further aspect of the complainer's account which was of relevance to her state of mind, and the dominance exerted over her by the appellant, was her evidence that in the early stages of her relationship with him he told her that he was a gangster, that he used to use guns, sell drugs and knew Paul Ferris.

[39] Having listened to the evidence given by JB in the round, including all that she had said in cross-examination, the jury would have been entitled to conclude that she was to be accepted in the essentials of what she had said about why she participated in sexual activity

with both SB and SM. They were entitled to conclude that she was credible and reliable in testifying that she had not consented to doing so and had participated out of fear. There was a necessary baseline of quality.

[40] However, there is a further aspect of the jury's assessment of JB's evidence which did not feature in the submissions for the appellant. The jury would not have considered the evidence of JB in isolation, they would have taken it along with, and in the context of, the other testimony at the trial. There was no attack made in the appeal on the evidence of DS. It was not suggested that there was any reason why the jury ought not to have, if they saw fit, accepted her evidence as compelling. The jury plainly did accept her as truthful and reliable in respect of charge 7, but the potential value of her evidence did not end there. The jury would have been entitled to take account of the evidence which DS gave as to the circumstances in which she came to participate in the activity which she described. They would have been entitled to take account of her evidence of being scared of what would happen if she did not and of what caused her to be scared. They would have been entitled to take account of her evidence of the things said to her about the appellant and the co-accused being gangsters and about references being made to guns.

[41] All of this testimony was available to the jury in deciding whether to treat JB as a credible and reliable witness as well. In the case of *T(P)* v *HM advocate* [2020] HCJAC 14 the court referred to what had been said by Lord Bridge of Harwich in delivering the judgment of the Privy Council in the case of *Attorney-General of Hong Kong* v *Wong Muk Ping* [1987] AC 501 at page 510:

> "It is a commonplace of judicial experience that a witness who makes a poor impression in the witness box may be found at the end of the day, when his evidence is considered in the light of all the other evidence bearing upon the issue, to have been both truthful and accurate. Conversely, the evidence of a witness who at first seemed impressive and reliable may at the end of the day have to be rejected. Such

> experience suggests that it is dangerous to assess the credibility of the evidence given by any witness in isolation from other evidence in the case which is capable of throwing light on its reliability; it would … be surprising if the law requiring juries to be warned of the danger of convicting on the uncorroborated evidence of a witness … should have developed to the point where … the jury must be directed to make such an assessment of credibility in isolation."

Having drawn attention to this *dictum,* in giving the opinion of the court in *T(P),* at paragraph 21, the Lord Justice General (Carloway) said:

> "… once evidence is deemed admissible, it is available for the jury's consideration at large in the manner which the jury deem appropriate. It is simply not practicable, nor does it accord with common sense, to direct a jury that, although they, as well as the trial judge, may, in the modern era, require to determine whether a complainer's testimony is formally corroborated by that of another, they cannot take the existence of that other's testimony in determining whether the first complainer's account is credible and/or reliable. It defies reason to suggest that the existence of a second complainer, with an account of the same nature as is required to establish mutual corroboration, can play no part at all in assessing the credibility of the first complainer and vice versa."

It can therefore be seen that there were aspects of JB's evidence which the jury could have accepted and which would have demonstrated the appellant's guilt on the charge to which she spoke. Those aspects of her evidence were sufficiently coherent to allow the jury to accept that she did not consent to the conduct participated in, despite all of the points made in cross-examination. Separately, there was other evidence, in the form of the testimony given by DS, which was of behaviour directed against her of a similar nature to that described by JB, and which had the same effect upon her as that described by JB. Since the jury accepted DS as credible and reliable they were entitled to weigh their conclusions about her evidence in their assessment of what to make of the account given by JB.

[42] In all of these circumstances the court rejects the contention that that no reasonable jury could have been satisfied beyond reasonable doubt that the appellant was guilty on the evidence as given by JB. The criticisms of her testimony are not sufficient to demonstrate

that this case falls into the category of the most exceptional circumstances necessary for an appeal on this basis to succeed. The first ground of appeal must therefore be refused.

The second ground of appeal

[43] In his report to this court, the trial judge explains that in his introductory remarks, at the commencement of the trial, he gave information to the jury about the docket. He explained to them that the individual elements of the docket were not charges. He explained the charges which the appellant and his co-accused faced were those which he drew attention to in explaining the content of the indictment. He told the jury that they would not be required to return verdicts on any aspect of the docket but only on the charges. He informed them that the purpose of the docket was to give notice that, in the course of the trial, the Crown might lead evidence bearing on the matters set out in the docket.

[44] By the stage of the judge's charge the jury had been provided with a clean copy of the indictment containing only the four remaining charges. The docket was not attached to it and the trial judge explained in the course of his charge that they were only concerned with these four remaining charges.

[45] Counsel for the appellant recognised that what the trial judge had said about the docket was accurate and could not be faulted. His submission, based squarely on the decision in the case of *Lyttle* v *HM Advocate*, was that the only relevant legal directions which the jury received were those given in the course of the charge. It was therefore not legitimate to consider the weight of an argument based on misdirection by omission by taking account of what had been said in the introductory remarks.

[46] That submission raises the question of whether the case of *Lyttle* continues to represent an accurate statement of the legal position, or whether solemn trial procedure has

changed and developed to the extent that the decision no longer has application in the context of current practice.

[47] The trial in the case of *Lyttle* took place in the High Court in 2002. Significant changes have certainly been introduced to solemn procedure, both in the High Court and in Sheriff Court, since then. Two matters of particular importance fall to be taken account of.

[48] The first is the amendment brought about by section 63 of the Criminal Justice and Licensing (Scotland) Act 2010 to introduce section 288BA of the 1995 Act. The effect of this amendment was to introduce a statutory framework for the use by the prosecution of a docket to inform the defence of the prosecution's intention to lead evidence in sexual offence cases of an offence not charged. The introduction of this provision led to many cases in the High Court being tried on the basis of indictments to which such dockets were attached. As a consequence, the Lord Justice General issued Practice Note No. 2 of 2016 in order to give guidance to judges on the practice to be followed in cases where such dockets featured. In that Practice Note the guidance given included that:

> "In all such cases, when the indictment is read to the jury as required by s 88(5) of the 1995 Act, the docket should also be read to the jury and a copy of the docket should be provided to the jury.
>
> Judges may wish to include an explanation of the purpose of the docket in their introductory remarks to the jury."

As in the present case, judges almost invariably provided such an explanation to the jury at the commencement of the trial.

[49] The second matter concerns the recent introduction of some quite radical changes to the way in which instruction is delivered to juries by judges. In discussion between the Lord Justice General, the Lord Justice Clerk and the Jury Manual Committee of the Judicial Institute, it was agreed that from July 2020 jurors should be provided with certain materials

in writing at the start of the trial. These are, a note setting out the duties and responsibilities of a juror and a document setting out the general directions which apply in every case, as well as, if appropriate, setting out specific further directions which the judge considers are appropriate in the circumstances of the particular case.

[50] Accordingly, at the commencement of trials jurors are now given general oral guidance on the functions of the personnel and information about the timetabling of the case, all of which is intended to reinforce the written note setting out juror responsibilities which is issued to each juror on their arrival at the jury centre or court. This is then followed by the issuing of written instructions, which the trial judge will read to the jury, concerning the separate functions of judge and jury, the nature of evidence, how to assess witnesses, what is meant by an inference, the duty to decide the case only on the evidence, the presumption of innocence, the burden of proof, the standard of proof, corroboration, and how these issues impact upon the defence. Other written directions may be given as necessary concerning issues such as the purpose of a docket, a notice of special defence, the law as to concert and the concept of mutual corroboration.

[51] As counsel for the appellant acknowledged, his submission as to the effect of the decision in *Lyttle* v *HM Advocate* would mean that a judge who followed this new procedure, without then repeating all of the written directions in his concluding charge, would be faced with an unanswerable claim of having misdirected the jury by omission. Such an outcome would defeat the purpose of issuing written instructions. To require an oral repetition in the judge's charge of all that the jury had already been told, and which had been issued to then in writing, would impose a further burden on both the judge and the jurors for no obvious purpose.

[52] It is therefore clear that the import of the decision in the case of *Lyttle* is confined to the practice with which it was concerned. It was concerned with the then practice of making what were truly introductory remarks, in the sense of introducing the personnel and the general procedure. The case was not concerned with information which was encapsulated in writing and was introduced as legal directions which the jury had to follow.

[53] In conducting a trial in accordance with the recently introduced procedures a judge will no doubt think carefully about the issues and areas of law which he or she wishes to include in the charge. The content of the charge will vary according to the length of the trial and the issues raised. In many cases it may be sufficient to draw the attention of the jury to their copies of what was delivered earlier and to remind them that they must follow both those directions and what is said in the charge itself. In other cases the judge may feel it necessary, or appropriate, to recap some of what was said or to revisit some aspects of the earlier directions in more detail. The evidence led and the speeches of the crown and defence will doubtless inform the extent to which anything more need be said in relation to the written directions. In any charge, the directions as a whole must be tailored to the circumstances of each case.

[54] In the present case, the directions which the trial judge gave at the commencement of the trial were adequate to convey to the jury a proper understanding of the purpose and effect of the docket. He made it clear in the course of his charge that the jury were by that stage only concerned with the four remaining charges. The court does not accept that the jury may have been left with an impression that the docket referred to further charges against the appellant. There was no misdirection. The second ground of appeal therefore also falls to be refused.