APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 16
HCA/2019/000708/XC
HCA/2019/000727/XC

Lord Justice Clerk
Lord Turnbull
Lord Pentland

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK
in

APPEAL AGAINST CONVICTION

by

AW

and

APPEAL AGAINST CONVICTION
by

HB

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

First Appellant: K Johnston, sol adv; More & Co
Second Appellant: L Glancy; Beaumont & Co
Respondent: A Edwards, QC, AD; Crown Agent

28 January 2021

Introduction

[1] The appellants were each found guilty of raping the complainer during the same incident at the flat of the second appellant in Edinburgh. Prior to repairing to the flat the three had spent time in each other's company at a nightclub in the city. The complainer was intoxicated. The first appellant and the complainer had previously had a relationship over a period of about 6 months. Charge one, a charge against the first appellant of having unlawful intercourse with the complainer when she was 14, during 2011, was withdrawn at the conclusion of the Crown case.

Background

[2] It had been agreed by joint minute that scientific evidence in relation to the finding of DNA could be explained by the second appellant having vaginal intercourse with the complainer and by the first appellant having vaginal and/or anal intercourse and/or oral sex with the complainer, all as alleged in the charge. Medical examination of the internal part of the complainer's genitalia revealed numerous small healing abrasions, and the area was noted to be tender. The latter could have been sustained as a result of blunt force, penetrative trauma within the timeframe given for the alleged incident, although the findings did not shed light on whether that had been as a result of a consensual act.

[3] At the commencement of the trial consent was a live issue, each appellant having lodged a special defence. Neither appellant gave evidence nor were any prior statements by them led in evidence. The special defences were not withdrawn, nor did the trial judge *ex proprio motu* direct the jury to disregard them.

[4] The primary issue as the case developed related to the complainer's credibility and reliability. The contents of various text messages between the complainer and her boyfriend in the aftermath of the incident were agreed by joint minute. He also gave evidence about retrieving certain voice mail messages on the morning after the incident which had been left on his mobile phone during the course of the night. The text messages included one at 0436, when she would have been at the locus, referring to her being with "Alan's friend" and being "scared"; at 08.43 stating "Andy, something really really, really, really bad happened and I'm really scared and I can't stop crying."; and at 09.26 stating ""He held me up against the wall and his friend shoved like half a pill down my throat, I don't know what it was. Then I barely remember anything apart from being in a taxi." She admitted to having lied about some of the contents of the text messages sent to her boyfriend, and in particular in relation to the one sent at 0926. She had no recollection of leaving the voicemails and only knew about them when her boyfriend told her later.

[5] To corroborate the complainer's evidence as to lack of consent the Crown relied upon:

(i) Extreme distress exhibited by the complainer to her boyfriend in a phone call after she left the locus in the morning, some time after 0915 hrs. She was described as incredibly distressed, distraught, and incoherent. He had to ask her to calm down multiple times because he couldn't understand what she was saying, she was in hysterics.

(ii) The evidence of her boyfriend as to the contents of voicemails from her, including one at a time when it could be inferred she was at the locus with the appellants, wherein she sounded in distress, saying "No", "Please don't" and "leave me alone", audible to him over a background of male laughter. The actual recordings were not led in evidence. [Although it was arguable that what he heard during this call was *res gestae* the Crown did not present

the matter on this basis. We note that in the course of his earlier police statements the witness had made no reference to these voicemails, which were not available in court, the witness stating that they had been recorded on an old phone he no longer had, and that he had not preserved them].

(iii) Evidence of a medical examination of the complainer about 60 hours after the alleged incident, which revealed bruising to the complainer's arms, on the inner aspect of the left thigh, close to the groin, and which were in keeping with pressure from fingertips/hands applied to these areas within the timeframe of the alleged incident.

[6] The Advocate Depute submitted to the jury that they could accept the distress as genuine and directly attributable to the incident. The text messages and other voicemails were addressed by the Advocate Depute in the context of the credibility and reliability of the complainer. She submitted that there was in fact no evidence that the complainer consented, and that there could have been no basis for a reasonable belief in consent.

The Charge

[7] The trial judge gave a basic direction on the need for corroboration in the form of evidence from "a separate source which confirms or supports the principal source of evidence". That other source could be direct, such as an eye witness or a document, or indirect in the form of supporting facts and circumstances.

[8] The purpose of the special defence was to give notice to the Crown, did not alter the burden of proof, so the defence did not need to lead evidence in support of it, and any evidence relating to it should simply be considered along with the rest of the evidence. He then said this:

> "In this case, the accused are both saying that the sexual behaviour between them and FS was consensual, hence they should be acquitted of the charge against them."

[9] Having defined the crime of rape he went on to say:

> "Now, these three things, the intentional or reckless penile penetration, lack of consent by the person and the absence of reasonable belief by the accused that she consented all have to be proved by corroborated evidence."

He gave an appropriate definition of consent, then addressed the issue of reasonable belief, in the course of which he stated:

> **"**Here obviously the issue is that there was belief that she was consenting**."**

[10] He explained that any belief had to be reasonable, not simply honest, adding:

> "…. you look objectively at what the facts tell you about the interaction between the person and the accused and their shared understanding of what was happening. To decide if the accused's belief that the person was consenting was reasonable you have to have regard to, for example, whether he took any steps to find out if she was consenting, and what those steps were."

[11] In the course of his charge the trial judge made no reference to the issue of distress, or its evidential significance, nor to the medical evidence, or its evidential significance. He did not direct the jury as to the use to which the text messages or voicemail messages could be put, and gave no directions on hearsay, save to the extent that he had previously given directions on the use of police statements.

Other matters

[12] Two matters were raised by the administrative judge during the single judge procedural hearing in this case. The first was that the court required to see the section 275 applications which had been lodged and granted in the case. The second was that the court wished to be addressed on the appropriateness of the directions given by the trial judge in relation to reasonable belief in consent, as noted above.

Section 275

[13] Each appellant had lodged an application under section 275 of the Criminal Procedure (Scotland) Act 1995, which were allowed at separate preliminary hearings. Paragraphs (a) – (c) and (f) of the first appellant's application were granted unopposed. The application for the second appellant was granted unopposed. On the morning of the trial a second application was granted, unopposed, in favour of the first appellant.

First appellant

[14] The first application granted for the first appellant was in the following terms:

(a) That between 1 April 2011 and 30th June 2011 the accused and the complainer were in a sexual relationship with each other. During that period, the accused and the said complainer experimented with rough, forceful sex. The complainer at that time told the accused that she liked him to use force, and that she liked being spanked. The complainer was aware that the accused enjoyed sadomasochistic sex

(b) That in 2015 and 2016, the complainer … and the accused contacted each other using social media and met up with each other in person.

(c) That between January 2016 and the date libelled, the complainer ... and the accused maintained contact through the dating app Tinder as well as by text message. During those communications, the complainer and the accused discussed meeting up with each other for the purpose of engaging in sexual activity. They also frequently discussed the sexual activities in which they liked to engage. The complainer in one message suggested that she liked to engage in sexual intercourse with two men.

(f) That the complainer had reported a phobia of doctors.

[15] Paragraphs (a) – (c) were said to be relevant to the issue of consent, and in the case of (a) and (c) to the issue of reasonable belief in consent; (f) was said to be relevant to distress, and to offer an alternative explanation of the apparent fact that the complainer was distressed during the medical examination. In relation to paragraph (c) it was suggested that the evidence referred to therein would allow the inference that the complainer wanted to engage in sexual activity with the accused on the date libelled. The same inference was to be drawn from paragraph (a), which related to activity which was said to have occurred 5 years before the libel, and when the complainer was only 14.

Second application for first appellant

[16] This contained one paragraph, namely that between 02.10 am and 02.46 am on the 4th May 2016 the complainer behaved in a sexual way towards the appellant outside the nightclub they had been in prior to the alleged incident, and had put her arm around the appellant, cuddled him, kissed him, held his hand, and put her hand on his waist. This was said to be relevant to consent and reasonable belief in consent because the behaviour suggested she was interested in him sexually, and the inference to be drawn was that she consented to the acts libelled.

Second appellant

[17] The application for the second appellant was in these terms:

(a) That between January and April 2016 the complainer and the first appellant were in social media contact with one another, sent messages of a sexual nature to each other, including one in which the complainer said that she liked "being double teamed" i.e. to have sexual activity with two males at the same time;

(b) That shortly before the alleged incident, whilst they were standing waiting for a taxi, the complainer grabbed this appellant's penis and stated "Are you going to be my daddy?".

(c) That in addition to consenting to the sexual activity libelled, on the occasion in question the complainer also performed consensual oral sex upon the second appellant, handled his penis and masturbated him.

[18] The nature of the questioning to be anticipated included:

(a) That she sent the message because she wanted to have sexual activity with two men at one time, and on the occasion libelled, acted on that desire.

(b) That she initiated sexual contact with the second appellant, having recently met him for the first time.

(c) That the activity in question took place during the alleged incident.

The issues to which these paragraphs were said to be relevant were the credibility and reliability of the complainer, in that the evidence that she sent messages or demonstrated behaviour of a sexual nature had a bearing on consent.

Submissions

Appellants

[19] The appeal for each appellant was advanced on similar grounds, maintaining that a miscarriage of justice has resulted from a failure by the trial judge to direct the jury on a number of essential matters, namely:

(i) The sources of evidence available to corroborate the charge.

(ii) How to treat the evidence of distress and its evidential value.

(iii) Exceptions to the hearsay rule and in particular the evidential value of the voicemail messages spoken to by the complainer's boyfriend, and texts messages; and

(iv) How to treat the medical evidence and to what extent it could provide corroboration.

[20] The nub of the argument in each case was that the trial judge failed or omitted to assist the jury to distinguish between evidence which was capable of corroborating the complainer's account and that which was not. It was imperative to provide guidance on the available sources of corroboration; and to identify evidence which was incapable of falling into this category. There was evidence which was capable of providing corroboration of the complainer's evidence – distress *de recenti,* and the medical evidence. There was other evidence, in the form of *de recenti* statements which were relevant only to credibility and reliability. There was even evidence which might have been construed as part of the *res gestae.* The trial judge had an obligation to guide the jury on these different categories of evidential significance attributable to different pieces of evidence. His failure to do so constituted material misdirections by omission and resulted in a miscarriage of justice.

Consent, reasonable belief and section 275

[21] In her written case and argument, the solicitor advocate for the first appellant submitted that there was evidence to justify the directions given, particularly in relation to the behaviour outside the nightclub, and the evidence that the appellant had acted "normally" after the alleged incident. In supplementary oral argument she referred to there being "very little basis if any" for the directions, but sought to maintain that the material elicited in consequence of the section 275 applications had provided such a foundation. She acknowledged that it had been a misdirection to tell the jury that the Crown required to corroborate an absence of reasonable belief.

[22] As to the section 275 applications, she recognised with hindsight that there were problems with these, but maintained that the paragraphs relating to the CCTV evidence and the complainer's alleged behaviour to the first appellant remained relevant.

[23] Counsel for the second appellant frankly acknowledged that the section 275 application could not be supported, save for the third paragraph. She accepted that there was no evidential basis for a reasonable belief in consent, and although she had not withdrawn the special defence she had not presented the case to the jury as one of consent or reasonable belief. The trial judge had misdirected the jury on the issue of reasonable belief (*Graham* v *HM Advocate* 2017 SCCR 497).

The Advocate Depute

[24] The Advocate Depute acknowledged that the trial judge did not specifically direct the jury on the matters raised in the grounds of appeal, but submitted that in the context of the case their absence did not constitute material misdirection or miscarriage of justice. The charge was short, but adequate, and in some instances was unduly advantageous to the appellants. The charge had to be looked at as a whole and in the context of what were the issues at trial, which essentially related to the credibility and reliability of the complainer.

[25] The trial judge referred to the parties' speeches, from which the jury had sufficient information regarding the sources of evidence available to them in support of the complainer's evidence. The Advocate Depute had addressed at some length the evidence available to corroborate the act of penetration, which was not in dispute; and had then concentrated on addressing the evidence available to corroborate lack of consent. She did not rely on any evidence which was not properly available for that purpose. She had referred to any text messages only in the context of credibility and reliability, and had not

suggested, as she might have done, that the text at 0436 was part of the *res gestae* (*Cinci* v *HM Advocate* 2004 JC 103*)*. The position was clearly put before the jury who could not have been confused or misled.

Consent, reasonable belief and section 275

[26] The situation was similar to that in *MacDonald* v *HM Advocate* 2020 JC 244, in that there was no evidence led in support of the special defence for either appellant. The trial judge erred in saying that the appellants "were both saying" that the sexual behaviour was consensual, in his reference to reasonable belief, and in the direction that the latter required to be corroborated. These were misdirections in favour of the appellants. The special defences should have been withdrawn, failing which the trial judge should have withdrawn them from the jury's consideration *ex proprio motu*.

[27] Evidence of previous sexual communications or contact between the parties was of no relevance to consent on the occasion libelled, even if it related to events earlier the same evening. To that extent the Crown should have opposed these applications. Para (a) of the application for the first appellant related to events libelled in charge 1, and, given the nature of that charge, apart from the first sentence which was evidence of the events libelled, the matters narrated therein were irrelevant to the issue of consent on charge 2.

Analysis and decision

[28] We are satisfied that these appeals must succeed on account of the manifest deficiencies in the judge's charge. This is not a case such as *DS* v *HMA* [2011] HCJAC 125 where the deficiencies may be tempered by what was said elsewhere in the charge; on the issues which were the subject matter of the appeal the trial judge said nothing at all in his charge. In his report he said that he decided not to raise these matters because (a) the

medical evidence was neutral; and (b) in respect of the other matters, for fear of seeming to influence the jury. These statements are difficult to understand. In the first place, the medical evidence was not neutral, and had clearly been relied upon by the Advocate Depute in her speech as providing corroboration of the complainer's evidence as to lack of consent. As far as the other point is concerned, the directions which were required were directions on law, not directions on fact. All that was required was to explain to the jury the legitimate use to which these various pieces of evidence could be put, what they did with them thereafter would be a matter entirely for them and a direction on law cannot be said to risk seeming to exert any undue influence on the jury. On the contrary, it was an essential part of giving the jury the tools they needed to do their job.

[29] The trial judge correctly told the jury that the complainer's account had to be corroborated by evidence from another, separate, source. In the present case there were three pieces of evidence which might have provided corroboration. These were the extreme distress exhibited during the phone call later in the morning; the distress heard during the voicemail with male laughter in the background; and the medical evidence.

[30] The first of these was exhibited at the same time as the complainer made a *de recenti* statement, which was also evidence that the jury could take into account, but in that case only so far as it had a bearing on credibility and reliability. The jury also had to be told that in order to use distress as corroboration they required to accept it as genuine and to be causally connected to the incident libelled. There was an obvious need for legal directions on these different aspects of the evidence.

[31] The second of these occurred in circumstances where an argument could have been advanced that it fell into the category of *res gestae.* The Crown, no doubt for proper reasons, eschewed such an argument, but again a distinction required to be made between what the

complainer said and what was her objectively perceived demeanour, and the differing purposes for which these separate aspects of the evidence could be used. Whilst making reference to *res gestae*, given the Crown approach, might have added confusion, the trial judge at least had to tell the jury that the distress could provide corroboration if they were satisfied it was attributable to the sexual attacks, but, on the Crown approach, the statements only went to credibility.

[32] As to the medical evidence, it seems that evidence was led of distress exhibited during this and another examination, as well as of matters said by the complainer, in circumstances which could not possibly constitute either *de recenti* distress or *de recenti* statements. Again, this had to be explained to the jury.

[33] Quite apart from the observations made in *Dyer* v *HMA* [2009] HCJAC 7, para 22 and *DS* v *HMA* [2011] HCJAC 125, paras 13, 28 and 37, as to the need to give adequate directions on the issue of corroboration by distress, it should have been abundantly clear that these directions required to be given to enable the jury properly to carry out its task. In *McGartland* v *HMA* 2015 SCCR 192, Lord Malcolm noted (para 31) that "Juries are entitled to a bespoke charge adapted to the evidence and to the particular issues arising in the trial". In *DM* v *HMA* [2017] SCCR 235 the court clearly considered that directions must "…be sufficient to alert the jury as to how they should go about their decision making in every case. Effective jury directions must engage with the specifics of the particular trial and the particular issues that arise for decision." The directions given in this case significantly failed to meet this test. They were superficial and to a large extent formulaic. They failed to explain the legal significance of crucial aspects of the evidence.

[34] As has repeatedly been observed, the judge's charge is a central part of the framework in which our solemn criminal trials are decided and which assist our system in

meeting its obligations under article 6 of the European Convention of Human Rights. In *CH* v *HMA* [2016] HCJAC 4, giving the opinion of the court, Lord Bracadale observed (para 13), that:

> "The terms of a trial judge's charge to the jury should be such as to enable the informed observer, who has heard the proceedings at the trial, to understand the reasons for the verdict. In other words, there must be a discernible route to the verdict. This approach meets the requirement for a reasoned verdict."

[35] In *Goldie* v *HMA* 2020 JC 164 the court noted (para 27):

> "The verdict of a jury is, of course, not given in isolation, but as part of a framework which includes the speeches of counsel and the directions of the trial judge (*Beggs* v *HMA* 2010 SCCR 681, para 207). From this framework, including the evidence and the libel, the basis of any conviction should be discernible (ibid). This may not follow if the trial judge's directions are incomplete, fail to identify all the matters which the Crown required to establish for conviction, or are in any way confusing."

[36] In our view the charge to the jury did not provide the jury with the framework they needed. The fact that the Advocate Depute in her speech did not rely on any evidence for an impermissible purpose is beside the point. The obligation of providing the jury with the framework they need rests squarely on the judge. Although he had explained to the jury, in general terms, the need for another source of evidence to corroborate the evidence of the complainer, he gave the jury no assistance at all about where they would or would not be entitled to find that corroboration.

[37] The problems arising from the failure to give adequate directions were compounded by the erroneous directions given regarding consent and reasonable belief. In the first place the direction that an absence of reasonable belief was something which the Crown required to corroborate was a misdirection (*Graham* v *HM Advocate* 2017 SCCR 497; *Maqsood* v *HM Advocate* 2019 JC 45), as a glance at the jury manual would have shown. Secondly, the directions that the appellants "are both saying" that there was consent, and that "Here

obviously the issue is that there was belief that she was consenting" were again misdirections: *MacDonald* v *HMA* 2020 JC 244. The situation is on all fours with that case.

[38] The matter worsens when consideration is given to the defence speeches. Although counsel for the second appellant had not, as she should have done, withdrawn the special defence, in her speech she was scrupulous in making clear that she was not advancing any positive elements of a defence of consent or reasonable belief. Throughout she addressed the only remaining issue, namely whether the jury was satisfied that the Crown had proved its case. In support of the contention that it had not, she appropriately addressed issues regarding the credibility and reliability of the complainer, and highlighted numerous aspects of the evidence which she argued should cause the jury to pause or hesitate in reaching a conclusion in favour of the Crown. Her final submission was simply that the evidence led for the Crown fell far short of the high standard of proof beyond reasonable doubt.

[39] If counsel for the second appellant was scrupulous in this regard, the same cannot be said for the speech of the solicitor-advocate for the first appellant. Her speech was presented on the footing that there was a basis for the positive defence raised in the special defence, that the evidence would allow the jury to draw an inference that the complainer had consented to the acts in question, and in any event, would permit them to conclude that the appellant had a reasonable belief in consent. Leaving aside the issue of how both submissions could be presented, there was in fact no evidential basis for either. The situation was entirely that which arose in *MacDonald* where the court noted (para 41):

> "There was no evidence in support of the special defence of consent. In these circumstances the appellant's law agent ought, in accordance with the normal and accepted practice, to have withdrawn the plea in advance of addressing the jury (*Lucas* v *HM Advocate*, Lord Carloway, delivering the opinion of the court, para 12). The agent should at least have made the position clear in his speech to the jury (*ibid*).

> He did not. On the contrary, he maintained that the incident had involved consensual sex in the absence of any evidence for that line. He was, of course, entitled to address the jury on the basis that the Crown had not proved the case beyond reasonable doubt. He was free to make submissions on credibility and reliability. He was not entitled to suggest to the jury that a positive case of consent had been made out in the absence of any evidence to support that case. It was improper to do so."

[40] The exact same remarks may validly be made about the speech of the solicitor-advocate for the first appellant. Furthermore, these improper remarks having been made, the trial judge should have clarified and corrected the position in his charge. He should have been alerted to the issue by the speech of the Advocate Depute which twice referred to the fact that there was no evidence of consent, and that there could be no basis for a reasonable belief in consent; and to the tenor of the speech by counsel for the second appellant, but he did nothing to correct the speech for the first appellant. He should have done so: *MacDonald,* para 42:

> "In these circumstances, it was for the sheriff to make the position clear to the jury; ie that there was no evidence that the complainer had consented to any sexual activity but that they still required to consider: whether they accepted the complainer's testimony as credible and reliable; and whether her account was adequately corroborated. The sheriff's direction to the jury, that they required to acquit if they considered that any evidence relating to the defence raised a reasonable doubt, was misplaced. There was no such evidence. Equally, the sheriff's statement that the appellant's 'position' was that 'the complainer was a willing participant in everything which went on' is a misdirection. The appellant had no 'position' (*Bakhjam* v *HM Advocate*, Lord Justice General (Carloway), delivering the opinion of the court, para 35) beyond the terms of the joint minute, that he had digitally penetrated the complainer, and the fact of his not guilty plea."

Rather than do this the judge asserted a "position" on behalf of the appellants which the evidence did not justify. *McDonald* did not alter the law; that action of the kind subsequently referred to in that case was necessary in the present case should have been abundantly clear to the trial judge. It does not assist the Crown that these directions were favourable to the appellants. Whilst the impression given by a misdirection may be tempered in its

consequences by directions elsewhere which correct that impression, or provide a bare sufficiency of information to prevent a miscarriage of justice resulting, there can in general be no "balancing" of favourable versus unfavourable misdirections.

[41] There is a further aspect of the speech for the first appellant which calls for comment. We accept that those acting for the appellants were entitled to proceed at trial, in the absence of any ruling by the trial judge under section 275(9), on the basis that the evidence referred to in the section 275 applications was admissible (even though it was not – see below). As noted above, counsel for the second appellant used this material to support her argument that there were good reasons to have doubts about the credibility and reliability of the complainer, referring, for example, to instances when she had been shown to lie in relation to matters relevant to the alleged incident. The solicitor-advocate for the first appellant however, chose to use the material to launch an undiscriminating and degrading attack on the general character of the complainer, asking the jury "What kind of person do you consider [the complainer] to be in terms of her honesty? What do you know about her?" This and other parts of the speech constitute a general attack on the character of the complainer. It is one thing to refer to lies which the complainer has been shown to have told on matters relevant to the libel: it is quite another thing to attack her general character for honesty. This was in our view an impermissible attack on character (*CJM* v *HMA* 2013 SCCR 215). The trial judge should have made this clear to the jury.

[42] The result is that the appeals against conviction must succeed.

Postscript: The section 275 applications

[43] In light of the jurisprudence on this issue over several years, it is mystifying that the bulk of the applications in this case were granted. There is no part of the first application for

the first appellant which should have been granted. Paragraph (a) related to events around the time of the first charge, the alleged unlawful intercourse when the complainer was 14, and 5 years prior to the rape charge. It could have no possible relevance to the latter, and although the Crown appeared to concede that the first sentence might not have been struck at as being part of the subject matter of the first charge, we disagree because of the use in the relevant paragraph of the phrase "sexual relationship". In any event, it was not being advanced as relevant for the first charge, but as relevant to the question of consent on the rape charge, 5 years later. Paragraphs (b) and (f) should have been refused as not being struck at by section 274. Paragraph (c) should have been refused as irrelevant. It would in any event be impossible for any of these pieces of evidence to bear the inferences which the appellant sought to draw. The second application for the first appellant falls into the same category. As to the application for the second appellant, the final paragraph was admissible, because although struck at by section 274(1)(b) in not forming part of the subject matter of the charge, it related to the same incident as the subject matter of the charge, and is relevant thereto. Otherwise, nothing in that application was admissible. The result of the allowance of impermissible evidence was that the complainer was subjected to the most egregious intrusion into her personal life.