APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 42
HCA/2022/296/XC

Lord Justice General
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL UNDER SECTIONS 107B AND 110(1)(e) OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

HER MAJESTY'S ADVOCATE

Appellant

against

BRIAN JOHN LOUGHLIN

Respondent

Appellant: Edwards QC AD; the Crown Agent
Respondent: Graham QC, Morgan; Westcourts

21 July 2022

Introduction

[1] The respondent faces a number of charges involving different ex-partners as complainers. These include three assaults on, and/or rapes of, MM on three occasions between August and September 2017. In order to provide corroboration of these offences, the appellant has included the following in a docket:

> "on various occasions between … 1998 and … 2001, … at … Oxford and … Littlemore, you … did penetrate the vagina and anus of [NA], your partner, … with your penis, and, whilst having consensual sexual intercourse wearing a condom, you did remove [the] condom and continue to have sexual intercourse with her without her consent".

[2] The appellant's intention, when framing the docket, was to provide a basis for leading evidence from NA along the lines of her police statement, which had been disclosed to the defence. This was to the effect that she had been subjected to several vaginal and anal rapes by the respondent over the period in the docket. These included: intercourse in a hospital room, where NA was recovering from an assault by the respondent; other incidents at the complainer's mother's flat; and a single occasion when, after NA had consented to intercourse with a condom, the respondent had removed the condom and continued without her consent.

[3] When NA was about to be asked about the events which were referred to in her statement, other than the removal of the condom incident, the respondent objected that the only libel of non-consensual sexual activity concerned the continuation of sexual intercourse after the removal of a condom. There had been no application under section 275 of the 1995 Act to lead evidence of consensual acts. The Advocate depute submitted that the terms of the docket were sufficient to cover all the non-consensual behaviour which had been set out in NA's police statement. There was no lack of fair notice because the statement had been disclosed.

[4] The objection was sustained. The trial judge reasoned that all non-consensual acts required to be specified either in the indictment or a docket. In terms of the docket, the only non-consensual episode which could be proved was one involving the removal of a condom. It had been obvious to the Crown that NA was in a position to speak to the events which

were described in her police statement. The judge was at a loss to understand why the docket had not been drafted in a manner which made it clear that the Crown intended to prove all of these events. The Crown had failed to give fair notice of what they intended to prove. The purpose of the libel, including the docket, was to provide fair notice of the evidence to be led (*Lauchlan & O'Neill* v *HM Advocate* 2015 JC 75 at paras [27] and [29]). It was not the disclosure of NA's statement which notified an accused of what evidence was to be led.

[5] After the objection had been sustained, the Advocate depute moved to amend the indictment to add the word "all" before the words "without her consent". This was opposed and refused on the basis it would change the character of the offence.

[6] The appellant submitted that the trial judge erred in sustaining the objection. The docket required to be interpreted against the background of the disclosed police statement. It had been clear that the testimony of NA was intended to cover several incidents of non-consensual vaginal and anal penetration. In her statement, the complainer had only given one example of penetration after the removal of the condom. The docket specified that non-consensual sexual activity had occurred on various occasions, at several locations, over an extended period of time. Fair notice of the evidence sought to be elicited from NA had been provided. It was not said that any prejudice would occur if the appellant's interpretation were correct. If required, the docket ought to be amended to make clear that all the conduct referred to in the docket was non-consensual, although the appeal was taken against the decision to sustain the objection rather than the refusal of the amendment.

[7] The respondent reiterated his position at first instance. The Crown had deliberately libelled the events to be proved in a particular way in the docket. That libel would have been reviewed by qualified legal staff on at least five occasions. It was the libel which

provided fair notice. It could not be said that the trial judge had erred in his decision to sustain the objection and to refuse to allow the amendment.

[8] A core feature of criminal procedure is the need to provide an accused with fair notice of the charges against him and the evidence which the Crown seek to adduce in order to prove the crime or crimes charged. The charge must be set out in the indictment, with the degree of specification described in the relevant provisions of the Criminal Procedure (Scotland) Act 1995 (s 64(2) and schedule 2). Notice of the evidence to be led is traditionally provided by the lists of witnesses, labels and productions (*ibid* ss 66(4)). It may well be that an accused will be able to gather further information about the nature and extent of that evidence from the disclosure regime (Criminal Justice and Licensing (Scotland) Act 2010, s 117(2) and 118(2)), but the intention of that regime is to provide details of all the information that may be relevant to the case; not to indicate what facts the Crown intend to prove, nor with what evidence.

[9] Although there is no requirement for the Crown to provide a narrative of the evidence which they intend to lead, it is not generally permissible to lead evidence intended to prove that the accused has committed a crime which is not libelled and of which, by reason of that omission, the accused has had no fair notice (*Nelson* v *HM Advocate* 1994 JC 94, LJG (Hope), delivering the opinion of the Full Bench, at 100). Errors can occur in the drafting of charges. Amendment is permissible (1995 Act, s 96(2)) to cure any error, or to meet any objection to the libel or to remedy any discrepancy between the indictment and the evidence, provided that the amendment does not change the character of the offence (*ibid* s 96(3)). Where the narrative in the libel is incomplete or otherwise defective, amendment may be allowed. The purpose of allowing an amendment is to ensure that the ends of justice are not defeated by any discrepancy or variance between the libel and the evidence (*ibid*

s 96(1)); that is to say, the test of whether to allow an amendment is whether it is in the interests of justice to do so. That involves not only consideration of any material prejudice to an accused, and the degree to which the Crown may have been at fault, but also the interests of a complainer, and the wider public, in seeing that justice is done, and seen to be done, in the particular case.

[10] In cases in which the Crown seek to rely on mutual corroboration, but cannot libel the corroborating material in the form of a charge, they may wish to give the accused fair notice of their intention to lead the relevant evidence by the use of a docket (1995 Act, s 288BA). The docket forms part of the indictment (*ibid*). It may be amended in a manner which mirrors the provisions in relation to the charge itself. The test will remain what is in the interests of justice.

[11] Had the court been considering the meaning of the libel in the docket, it would have concluded, as the trial judge did, that it failed to give fair notice that the Crown intended to lead evidence of a series of rapes other than those involving continuing sexual intercourse after the removal of a condom (an activity referred to by the parties as "stealthing"). The fact that the defence were aware that NA could give evidence of the other rapes is not strictly relevant to the issue of fair notice since it depends on the terms of the libel and cannot be provided by material outside the four corners of the libel, such as police statements. The libel is determinative of whether fair notice has been given. If the Crown do not libel crimes, which they might be able to prove or about which they intend to lead evidence, that is, subject to the power of amendment, an end of the matter. These principles apply just as much to dockets as they do to the substantive charges.

[12] In the present case, and despite the Crown's protestations to the contrary, the libel in the docket is defective in that it does not cover, and thus give fair notice of, the testimony

which the Crown seek to adduce relative to the non-consensual sexual activity involving NA, other than any "stealthing" episodes. That material cannot be adduced unless the libel in the docket is amended. If it is not amended, what are very serious substantive charges, which involve the complainer MM, will not be capable of proof. It is not suggested that the respondent will suffer any prejudice, beyond that consequence. It is on that basis that the court considers that the trial judge erred. It is in the interests of justice that the amendment should be allowed. The trial judge ought, although he was not initially asked to do so, to have allowed amendment and consequently repelled the objection.

[13] The court will accordingly: allow the appeal; allow the docket to be amended by inserting the word "all" between "with her" and "without her consent", thus making it clear that NA's testimony of the various rapes referred to in her police statement is competent and admissible; and repel the objection to that testimony. That having been done, the case will be remitted to the trial judge to proceed as accords.