APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 42
HCA/2022/187/XC

Lord Justice General
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

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

by

ANDREW GERALD LINGARD

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: McCall QC; John Pryde & Co SSC (for Russells Gibson McCaffrey, Glasgow)
Respondent: Goddard QC (sol adv), AD; the Crown Agent

3 August 2022

Introduction

[1] The appellant is charged with lewd, indecent and libidinous practices towards LY in 2005 when, in the August, she was under 12 and, from August to December, when she was over 12 but under 16. The charges ((4) and (5) on the indictment) libel touching and, on occasion, digitally penetrating the complainer's vagina.

[2] The appellant faces other charges involving the complainer's older sister LA, who was the appellant's then partner, notably (charges (1) to (3)) an indecent assault in 2005 and a number of rapes in 2007 and 2010. The final charge (charge (6)) libels lewd, indecent and libidinous practices towards LY's twin sister, namely LE, between 2006 and 2009, when she was over 12 but under 16.

[3] The appeal concerns the admissibility of evidence to prove an exchange of text messages between the appellant and LA in August 2013. The Crown wish to lead this evidence as amounting to an admission by the appellant that he engaged in the conduct libelled in charges (4) and (5). The appellant maintains that the evidence is irrelevant, and thus inadmissible, because his remarks were neither made after he had been confronted with the allegations nor did they contain sufficient detail to link the appellant with the charges. The appellant relies on *Gracie* v *HM Advocate* 2003 SCCR 105 and *G* v *HM Advocate* 2012 SLT 999. As such, the argument is similar to that presented recently in *CR* v *HM Advocate* [2022] HCJAC 25 and *WM* v *HM Advocate* [2022] HCJAC 28.

The Texts

[4] The exchange of texts occurred on 12 August 2013. At that time, LA had not reported any allegations about the appellant to the police or mentioned them to her family. She had first told her sisters, LY and LE, of her own allegations in July 2019 and reported them to the police in the following month. LE reported her allegations at about the same time.

[5] LY had told BW, a family friend, of her allegations sometime in the Summer, 2012. BW asked LA to come to his house where LY told LA that "Andy" had digitally penetrated her on more than one occasion when she was 11 or 12. LA texted the appellant in 2012 to the

effect that LY had "cut herself because of what you did to her, I know what you did to her". The appellant replied along the lines of "I'm so sorry I didn't know what I was doing. You have to speak to me".

[6] On 12 August 2013 the appellant texted LA that TW, who was living with LY at the time, had "contacted" him and called him a "p***k". The appellant did not know TW, but he did know that TW was friendly with LY. The appellant said that he knew "fine" that he was more than a "p***k". The only thing that was keeping him alive was that he did not want to embarrass his parents and the rest of the family. He felt sick, "disgusted and ridden of guilt" (*sic*). He faced losing "his job, … family, … friends and jail for years and years". He was "f******g s**t scared" not for himself but his parents and the "kids". He had already ruined his, that is also LA's, family. He had been "living with that guilt every day and [was] so sorry" even although the "full damage", in the form of the impact on his family, had not been experienced.

[7] LA replied that she had been trying to keep "it" from his family. She would try to persuade LY to get TW to back off because she did not "want that right now she wants to move on". LA's family were not aware of the situation. The appellant asked rhetorically whether "this" was "going to get a lot worse". If LA's family found out, the appellant said "they'll kill me, at least hospitalise me". He deserved all that he had coming but not that form of retaliation. He had hurt the people that he loved "in such a selfish way". He had not appreciated what he was doing. Revealing what he had done would now hurt others "for my mistakes". He apologised once again, having mentioned the prospect of "court cases, papers, jail".

[8] LA responded that it was a bit late to be sorry. She and LY had agreed that LA's family would not find out, because they would kill the appellant. The appellant said that he

was suicidal and continued: "God I just want to sit [LY] down and talk because I am so so so sorry and worry every day about what I've done…"

[9] The appellant returned to the theme of the effect that "it" would have on members of his family. They would have to move town and lose their friends. He accepted that "this" was all his fault. He sought LA's help and asked if she and her family wanted revenge by going to the police. LA said that she would not go to the police because she did not want LY "going through that" nor did she want to put the appellant in hospital. The exchanges continued along the lines of the appellant seeking LA's help, but fearing that he would end up in the jail or dead.

[10] LA testified that the text exchange related to the appellant's treatment of her and to his "sexual abuse and grooming of" LY. There was nothing else to which the texts might have related. The appellant had been seeking her assurance that "they" would not go to the police.

The Decision at First Instance

[11] The submission at first instance was that, although the texts were capable of being construed as an admission to some form of wrongdoing, they were not made in response to any specific allegation about the charges libelled. They were therefore irrelevant and inadmissible. The case law determined that, unless the appellant had been confronted with an allegation in sufficient detail to permit the conclusion that his response was an admission of the particular offence with which he was charged, the statements were irrelevant.

[12] The judge reasoned that an extra judicial statement was a piece of circumstantial evidence which was as cogent as blood on clothing or finding stolen goods on a person (Hume *Commentaries* II 333). It was not only "clear and unequivocal admissions that had

evidential value" (*Greenshields* v *HM Advocate* 1989 SCCR 637 at 642). The question for the jury would be whether the texts constituted an admission at all and, if so, an admission of what (*ibid*). Whether a statement was an admission to a particular crime depended upon what a reasonable jury, with knowledge of all the facts, would be entitled to make of it (*Khan* v *HM Advocate* 1992 SCCR 146; *HM Advocate* v *Auld* 2016 SCCR 159 at para [58]). *Gracie* and *G* had been instances in which the appellate court had been looking at matters post-conviction and decided that a reasonable jury could not have regarded the statements as admissions to the crimes charged. If what was said could reasonably be construed as an admission to specific criminality, the question of whether it did so was one for the jury. A prior accusation was not a precondition to relevancy. A statement which was spontaneously made could be admissible.

[13] The context of the text exchange had been the communication from TW. On realising that there was a connection between TW and LY, the appellant had contacted LA. The conversation which then occurred went on for several hours. From it, a jury could infer that: the appellant was discussing things that he had previously done to LY. Those things made him feel guilty, disgusted and suicidal. They could lead to the loss of his job, friends and family and to retaliation. The appellant knew that what he had done was criminal. The police could become involved and he might be given a long prison sentence. LA was unable to think of anything else to which the conversation might have related. The evidence was relevant and admissible.

Submissions

[14] The ground of appeal was that *Gracie* and *G* were binding on the judge and he ought therefore to have excluded evidence of the text exchange. The appellant had never been

confronted with the allegations forming charges (4) and (5); only what had been said in a text which had been sent 12 months previously. The judge erred in his reliance on *Greenshields*, in which specific allegations had been put to the accused. He erred in distinguishing *Gracie* and *G*, which were directly analogous. He erred in holding that a spontaneous extra-judicial statement was admissible in the absence of a confrontation with a specific allegation and where there was no detail of criminal conduct in the statement itself. There was no link between what the appellant had been talking about and what was libelled.

[15] The first question was whether what was said could be construed as an admission. The second was, an admission of what? An admission could not be relevant without evidence of the allegation which prompted it (*G* v *HM Advocate* at para [21]). The jury could not be left to speculate (*Stirling* v *McFadyen* 2000 SCCR 239 at 242; *Gracie* at paras [8] and [9]; *G* v *HM Advocate* at paras [21] – [24]). They could not be required to ask themselves what other conduct towards LY might have been involved. Context was vital (*Auld* at para [57]). *CR* v *HM Advocate* and *WM* v *HM Advocate* were distinguishable. They had not overruled either *Gracie* or *G*.

[16] The Crown responded that, in the whole circumstances, it could be inferred that the messages amounted to an admission of sexual assault of LY. No confrontation was required (*HM Advocate* v *Auld* at para [57]) provided that there was evidence about the detail of the allegation to which the accused was speaking (*Greenshields* v *HM Advocate*). The overriding objective was to avoid the need for the jury to speculate about what an accused was admitting (cf *Gracie*). The texts provided support for LY's account of the events libelled in charges (4) and (5). As such they were corroborative of that account and hence relevant (*CR*

v *HM Advocate* at para [19]; *WM* v *HM Advocate* at para [12]). The issue was highly fact specific.

Decision

[17] In *CR* v *HM Advocate* [2022] HCJAC 25 it was said (LJC (Lady Dorrian), delivering the opinion of the court, at para [15]) that:

> "Whether, and to what extent, a comment or reply made by an accused person may properly be regarded as an admission is a fact specific question, the answer to which depends on the nature and content of the comment and the circumstances in which it was made. The contextual situation is important."

The court in *CR* "readily distinguished" both *Gracie* v *HM Advocate* and *G* v *HM Advocate* because in these cases, "rightly or wrongly", there was insufficient means by which to identify the nature of the conduct to which the accused's comments were related. In *CR*, the context was "clearly an allegation of having sexually abused" the complainer. The court was at pains to point out that, if *Gracie* or *G* had given the impression that only unequivocal admissions in the clearest terms could provide corroboration, that was not consistent with authority. It was sufficient if the admission was capable of providing support for, or confirmation of, or fitted with, the principal source of evidence (*Fox* v *HM Advocate* 1998 JC 94). It was not only clear and unequivocal admissions which had evidential value (*Greenshields* v *HM Advocate* 1989 SCCR 637). *CR* v *HM Advocate* has been followed in *WM* v *HM Advocate* [2022] HCJAC 28.

[18] The court agrees with the rationale in *CR* v *HM Advocate* and is unable to identify any reason to distinguish it from the present case. The issue is essentially one of the admissibility of circumstantial evidence. It is thus quintessentially a fact- sensitive question. The context is TW's accusation that the appellant was a "p***k"; TW being a friend (and, as

it turned out, the partner) of LY. The appellant had phoned LA; throwing himself at her mercy in the knowledge that he had done something to LY that made him feel sick and disgusted. The only thing, that the evidence discloses, which the appellant had done to LY is that contained in the narrative of charges (4) and (5); that is to say the lewd, indecent and libidinous behaviour and practices. That being so, the jury would be entitled, although not bound, to hold that what the appellant said in the texts amounted to an admission that he had conducted himself as libelled.

[19] The reasoning of the judge at first instance is sound. The appeal is refused.