HIGH COURT OF JUSTICIARY

[2024] HCJ 3
2024/001610

OPINION OF LORD FAIRLEY

in causa

HIS MAJESTY'S ADVOCATE

against

MJ

Applicant

Crown: Mackay, AD; the Crown Agent
Applicant: Lenehan, KC; Robert Kerr Partnership

11 September 2024

[1] At a preliminary hearing on 5 September 2024, I refused paragraph 1 a) of an application made on behalf of the applicant under section 275 of the Criminal Procedure (Scotland) Act 1995. This opinion sets out my reasons for that decision.

[2] The indictment contains fifteen charges of alleged sexual offending. It is not necessary to specify the details of those charges other than to note that they are offences to which section 288C of the Criminal Procedure (Scotland) Act 1995 applies. As such, they engage the provisions of section 274 of that Act.

[3] Paragraph 1 a) of the application sought permission to admit the following evidence: "That during the period of the libel in charge 11, immediately preceding the parties' marriage, the accused and [the complainer] were in a sexual relationship."

[4] Charge 11 contains allegations of sexual offending said to have occurred on two occasions during a time ambit of almost 6 years. The applicant has lodged a special defence of consent. The charge refers to the complainer as the applicant's wife. I was told, however, that the complainer has stated at precognition that some or all of the behaviour referred to in the charge may have occurred before the parties were married.

[5] The application did not explain why the evidence referred to in paragraph 1 a) would engage the provisions of section 274. I noted, however, a suggestion in chapter 9 of the Preliminary Hearing Bench Book (at paragraph 9.11.1) that practitioners would be well advised to seek permission under section 275 if they wish to lead any evidence that a relationship was affectionate, intimate or sexual in nature. That advice appears to be based upon a hypothesis that any evidence - even in the most general terms - as to relationship status may tend to show that a complainer has engaged in sexual behavior not forming part of the subject matter of the charge. It also appears to be based upon what is described in the Bench Book as a "passing" comment in *AW* v *HMA* 2022 JC 164 at paragraph 35 and upon a comment by the Lord Justice Clerk (Gill) in *Moir* v *HMA* 2005 JC 1 at paragraph 35. The terms of the Bench Book may, therefore, explain why applications similar to that made in this case are now commonplace in the preliminary hearing court.

[6] I refused paragraph 1 a) of the application on the basis that the evidence sought to be elicited did not engage the provisions of section 274.

Sections 274 and 275

[7] Section 274, which sets out restrictions on questioning in cases involving sexual offences, is in the following terms:

> **"274 Restrictions on evidence relating to sexual offences**
>
> (1) In the trial of a person charged with an offence to which section 288C of this Act applies, the court shall not admit, or allow questioning designed to elicit, evidence which shows or tends to show that the complainer—
>
> (a) is not of good character (whether in relation to sexual matters or otherwise);
>
> (b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge;
>
> (c) has, at any time (other than shortly before, at the same time as or shortly after the acts which form part of the subject matter of the charge), engaged in such behaviour, not being sexual behaviour, as might found the inference that the complainer—
>
> (i) is likely to have consented to those acts; or
>
> (ii) is not a credible or reliable witness; or
>
> (d) has, at any time, been subject to any such condition or predisposition as might found the inference referred to in sub-paragraph (c) above.
>
> (2) In subsection (1) above, 'complainer' means the person against whom the offence referred to in that subsection is alleged to have been committed; and the reference to engaging in sexual behaviour includes a reference to undergoing or being made subject to any experience of a sexual nature."

[8] Section 275 provides a mechanism by which such questions may be asked, provided permission has been given by the court. It states *inter alia*:

> **"275 Exception to restrictions under section 274**
>
> (1) The court may, on application made to it, admit such evidence or allow such questioning as is referred to in subsection (1) of section 274 of this Act if satisfied that—
>
> (a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating—
>
> (i) the complainer's character; or
>
> (ii) any condition or predisposition to which the complainer is or has been subject;
>
> (b) that occurrence or those occurrences of behaviour or facts are relevant to establishing whether the accused is guilty of the offence with which he is charged; and

> (c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited."

Analysis and reasons

[9] Many questions about relationship status might be said to show or tend to show, as a matter of inference, that a complainer has previously engaged in sexual conduct beyond the terms of the libel. These include questions such as "did you live together?" or "were you in a relationship?" Although applications under section 275 for permission to ask questions of that kind are now regularly made, such evidence is not struck at by section 274 (see *Moir* v *HMA* 2005 JC 102 and *DS* v *HMA* 2007 SC (PC) 1 at paras [46] and [71]).

[10] As Lord Rodger of Earlsferry noted in *DS*, at para [75], that conclusion can be tested relatively simply by attempting to apply section 275(1)(a). Section 275(1)(a) permits applications to be made to the court to admit questions about sexual behaviour if - and only if - they relate "to a specific occurrence or occurrences of sexual behaviour". An interpretation of section 274 which excluded general questions about relationship status such as "did you live together?" would have the effect that such questions could never be asked. That is because although they would be excluded by section 274, they could never be admitted under section 275 because they would not be questions which related to "a specific occurrence or occurrences of sexual behaviour". That result cannot have been what Parliament intended. The same can be said of questions like "were you married?" It seems equally unlikely that Parliament ever intended the question, "do you have children?" to be struck at by section 274, albeit that such a question might be said to be circumstantial evidence of prior sexual behaviour.

[11] Any hypothesis that such questions, though excluded by section 274, could competently be admitted under section 275 as "specific facts demonstrating the complainer's character" does not bear close scrutiny. The status of being married, of living together or of having children are not things that bear upon character. In any event, it is clear that the use of the word "character" in section 275(1)(a)(i), is intended to relate back to the reference in section 274(1)(a) to "evidence which shows or tends to show that the complainer is not of good character". It would require a very strained interpretation of the Act to require that the status of being married, of living together or of having children should be characterised as evidence of bad character in order to establish a route to the admissibility of that evidence under section 275(1)(a)(i).

[12] These same considerations apply with equal force to questions about the status of any relationship which may have existed between a complainer and an accused and, more particularly, to questions about whether any such relationship was, as a generality, sexual or merely platonic. Such questions, provided that they remain general and do not encroach upon specific episodes or instances of sexual behaviour, cannot have been intended to engage section 274 for the same reason as was identified in *DS*. The only limit upon their admissibility is, therefore, that of common law relevance.

[13] In coming to that view, I recognise that it might be said to be at odds with what the Bench Book describes as a "passing" comment in *AW* at paragraph 35. That case, however concerned an application to lead very detailed evidence of specific acts of sexual behaviour. The use of the expression "sexual relationship" within the application was merely a preamble to that. It was also the case in *AW* that the sexual behaviour was removed in time from the offences libelled, and was thus irrelevant. It does not seem, therefore, that there was any need to consider how an application under section 275 could competently have

been framed to lead evidence restricted to the generality of a relationship being sexual rather than platonic. So far as *Moir* is concerned, the comment by the Lord Justice Clerk at paragraph 35 seems, on careful examination, to have been a reference only to common law relevance. When read with paragraph 27 it is clearly a recognition of what was said by Lord Steyn in *R* v *A (No 2)* [2002] 1 AC 45 at paragraphs 32 and 45, that a comparison can be made between the potential relevance of evidence of an ongoing relationship on the one hand and the likely irrelevance of evidence of an isolated episode in the past on the other.

[14] On the issue of common law relevance, I respectfully agree with and adopt what was said by Lord Turnbull in *HMA* v *NB* [2020] HCJ (unreported). It is, of course, very important that complainers are not exposed to irrelevant questioning and that the decision-making process of the jury is not clouded by irrelevant considerations. General questions about relationship status can, however, be admissible at common law where their purpose and effect is simply to establish how the accused and the complainer knew each other or came to be in the situation where the offence was allegedly committed. Not to permit that would leave what Lord Turnbull described in *NB* as "an inappropriate evidential vacuum".

[15] Experience suggests that it is both normal and inevitable in most sexual offences trials that a complainer who gives evidence of a sexual assault will also wish to give general evidence of the existence and nature of any underlying relationship with the accused in order properly to explain how the crime came to be committed. Similar considerations may, in appropriate circumstances, apply to an accused person. It must also be remembered that the standard jury directions make clear that the existence of a prior sexual relationship is irrelevant to the issue of consent on the occasion to which the charge relates. It does not follow, however, that juries should be placed in an evidential vacuum by being deprived of such evidence. Provided that any evidence of relationship status is limited to explaining

why the parties were in each other's company at the time and in the circumstances of the event charged, and provided also that questioning does not encroach into specific episodes or details of previous sexual conduct, it ought generally to be admissible. That scenario is very different from an attempt to lead evidence of specific sexual interactions remote from the subject matter of the libel as was the case in *AW*. Such matters are likely to be irrelevant and / or collateral at common law and thus inadmissible.

[16] The application made in this case did not seek to elicit any evidence of specific episodes of sexual conduct. It was confined to the period of the libel and sought only to lead evidence that the status of the pre-marital relationship between the applicant and the complainer at the material time was, as a generality, sexual rather than merely platonic. Evidence of that kind does not, in my view, engage section 274. That conclusion was sufficient to determine the issue before me at the preliminary hearing and was the reason for my refusal of that section of the application as being unnecessary.

[17] Returning to the issue of relevance, unnecessary applications under section 275 are not an appropriate vehicle to secure rulings on common law admissibility (see *P(M)* v *HMA* 2022 SCCR 1 at paragraph 15), and the court must do what it can to discourage such an approach. In this case, however, and without expressing a concluded view, I would have thought that a general question as to the status of the relationship between the applicant and the complainer would be likely to be relevant and admissible to explain how the parties came to be in a situation where sexual conduct happened at the times and places specified on the occasions to which charge 11 relates. If I am wrong about that, other procedures are available before and at the trial diet further to examine that issue and thus to prevent any irrelevant questioning.