**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**[2018] HCJAC 1**
**HCA/2017/000202/XC**

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

KW

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

**Appellant: L Kennedy; Capital Defence Lawyers, Edinburgh for E Thornton & Co, Oban**
**Respondent: McSporran, QC, Sol Adv, AD; Crown Agent**

9 January 2018

[1] The appellant appeared on an indictment which alleged that whilst aged between 12 and 15 he engaged in sexual abuse, of various forms, against 3 other young males and supplied them with cannabis and other stimulants. The charge in relation to one of the complainers (JG) was withdrawn at the end of the Crown case.

[2] It is asserted in the grounds of appeal that the reason for this was that the evidence of this complainer related to conduct occurring before the appellant reached the age of 12. The grounds of appeal maintain that the advocate depute in his speech specifically told the jury that the evidence of JR remained available to the jury in considering the application of the *Moorov* doctrine; that this was contradicted during the defence speech; and that the trial judge in his charge did not correct the point made by the depute. It is contended that the evidence was not available since the charge was withdrawn for reasons which had rendered it fundamentally null. The trial judge's directions were not sufficient to cure the crown misstatement on a central aspect of the case. Further, it is maintained that a compatibility issue arises, on the basis that it was contrary to Article 6 for the Crown to continue to maintain that the appellant was factually guilty of a charge which had been withdrawn.

**Evidence of JG**

[3] JG gave evidence of three instances of sexual behaviour between himself and the appellant when they were children. He had great difficulty in remembering detail. He did however repeatedly state that the first incident (of three) occurred when he was 11 or 12-ish. The appellant is eight and a half months older than JG so would have been approaching 12 or 13 at the time. JG was cross-examined in respect of police statements which were alleged to be inconsistent with his evidence in court. This enabled the advocate depute to re-examine on another matter in the statement, namely the extent to which he had been bullied by the appellant.

[4] In the sift decision the court asked the Crown whether it would be willing to disclose the advocate depute's reasons for withdrawing the charge. The explanation is that JG did

not speak with sufficient clarity about the items in the libel, his evidence being "extremely vague". The charge was not withdrawn for the reason contended for by the appellant.

**Advocate Depute's speech**

[5] In the first 15 pages of this speech, the advocate depute made no mention of JG, and concentrated on the evidence of the two remaining complainers. At page 16 he mentioned JG's evidence of having been bullied by the appellant, as supportive of his contention, derived from the evidence of the remaining two complainers, that the appellant had been a dominant figure amongst the children at the time. It was in that context that he made the remark that the evidence of JG was available for them "for whatever use you want to make of it". Later he made two further references to JG. The first, in the context of a submission that memory can be selective, referred to JG's recollection of seeing graffiti in a disused building. The second was in relation to the names of the children who had been friendly together in the village at the time. He made no other reference to JG, and in particular at no stage in his speech did the advocate depute refer to any of the evidence which JG gave about sexual matters.

[6] The advocate depute proceeded to address the issue of mutual corroboration at pages 25-30. It is clear that he did so entirely on the basis that mutual corroboration could be applied as between the evidence of the two remaining complainers. He did not suggest that the evidence of JG could be used in this way.

**Defence speech**

[7] At the outset of his speech, counsel said that he wished to adopt a large part of what the advocate depute had said. Apart from the obvious fact of seeking an acquittal, he did not take issue with anything which the advocate depute had said. He did point out to the

jury that the evidence of JG could not be used for mutual corroboration in respect of the charges remaining before the jury, but the advocate depute had not suggested otherwise and counsel did not assert that he had done.

**Trial Judge**

[8] In his report the trial judge states that at the conclusion of the crown case, the advocate depute sought to withdraw the charges from the indictment for his own purposes and did not indicate what they were in court. In his speech the advocate depute made reference to all the evidence, and to the potential for mutual corroboration in respect of the evidence relating to charges 1 and 2. Defence counsel did not suggest any impropriety in the crown speech, or assert that the law had been misstated.

[9] In due course, the trial judge gave the jury directions that matters of law were entirely matters for him, and that they required to take their directions in law from him and no-one else. He indicated to the jury that they would have to convict on both charges or acquit on both charges, adding:

> "So it would not be open to you as a jury to convict, as I say I am just giving you an illustration here, on charge 1 and not guilty on charge 2. You would have to find that both of these witnesses credible and reliable and capable of corroborating each other. If they cannot corroborate each other, then the Crown has not been able to make this case out to you. So as I said to you, I am putting it quite clearly to you, ladies and gentlemen, this is an all or nothing situation. You either convict on both charges or acquit on both charges."

**Analysis and decision**

[10] The grounds of appeal make several assertions of fact. These are:

(i) that the advocate depute "specifically told the jury that they could take into account of the evidence of JG – and that it was available for the purposes of corroborating the evidence of GR and SR.",

(ii) that this was "directly contradicted" by defence counsel,

(iii) that the trial judge misdirected the jury because he failed to resolve this inconsistency,

(iv) that the charge relating to JG was withdrawn because the evidence related only to a period when the appellant was below the age of 12, and thus exempt from prosecution, and

(v) that the Crown "continued to maintain – without judicial demur – that the appellant was factually guilty" of the charge relating to JG.

[11] These assertions of fact are repeated in similarly strong terms in the case and argument and constitute the entire basis for the appeal. In the case and argument, it is stated that the advocate depute's speech contained a "blatant and material… misstatement on an issue which had a critical bearing on the jury's operation of the *Moorov* doctrine". There is absolutely no foundation in fact for any of these assertions. It is a matter of grave concern to the court that such statements should have been made. In our view, it was abundantly clear that the advocate depute did not suggest to the jury that the evidence of JG was available to corroborate the evidence of the remaining complainers, and it is a complete misrepresentation of his speech as a whole to suggest otherwise. It is equally clear that his evidence remained available to the jury in respect of any other relevant issue arising in the trial. Defence counsel in his speech did not "directly contradict" anything said by the advocate depute. There was no "inconsistency" for the trial judge to resolve. The evidence of JG did not suggest that the appellant must have been under the age of 12 at the time of all the events to which he spoke; he was not challenged on this, the only challenge being to suggest that none of what he said had in fact happened. There was no basis at all for asserting that the charge had been withdrawn for the reasons suggested in the grounds of

appeal (leaving aside entirely the question of whether there was any validity in the argument on the merits associated with this point, which we need not address but which appeared to turn on an alleged difference evidentially between an acquittal for "technical" reasons and one for "substantive" reasons).

[12] After leave to appeal had been refused at first sift, counsel submitted an opinion in support of a grant of leave at second sift, in which the factual assertions were repeated. They were again repeated in the case and argument. In each of these documents, it was stated that defence counsel "specifically put this prosecutorial misstatement in issue in his speech to the jury". Reference is made to the judge's report, with the assertion that the judge has failed entirely to recognise or grapple with the clear contradiction between the Crown and defence speech, with the words "the trial judge is hardly behaving professionally - seemingly ignoring this thorny issue altogether – as if it might go away". In respect of the trial judge's remark that the advocate depute did not state his reasons for withdrawing the charge concerning JG, it was asserted that the reasons were "palpably obvious" and asked, in respect of the judge, "why did he not see what everyone else saw? He heard the same evidence from JG." It was stated that "It should have been clear to him that the… withdrawal of charge (3) was on fundamental grounds". It is added that the trial judge's observation that the defence made no reference to any improper remarks is "classically, an attempt at deflection or projection of blame onto the defence".

[13] Leave was granted at second sift, and, as a consequence of the robust assertions made at this stage, transcripts of the evidence of JG and of both speeches were ordered. Neither of these should have been necessary, and were only required because of the unfounded allegations so strongly asserted by counsel for the appellant.

[14] It is a considerable irony in this case that the case and argument contains the statement "Reviewing and discussing the law and suggesting to the jury how it applies to the facts in a case is sometimes unavoidable …but in doing so lawyers must be accurate". The requirement for accuracy applies equally in presenting an appeal, yet appears to have been ignored by counsel. In presenting grounds of appeal for the consideration of the court counsel have a responsibility not to make assertions of fact which cannot be supported or justified. This appeal proceeds on allegations of (a) impropriety against the advocate depute; and (b) failure of the trial judge to provide directions necessary to a fair trial. These are serious allegations to make and should not be advanced on such a fanciful basis as in the present case. That is all the more so when the criticism of the judge had been expressed in such vehement, not to say florid, terms as here. In *HMA* v *Bagan,* unreported 6 June 1996, grounds 1(a) and (b) were based on allegations of incorrect and improper statements in the Crown speech on matters upon which the advocate depute had not cross examined the appellant, and for which there was thus no evidence. These arguments were not supported at the appeal, it being clear that the advocate depute was fully entitled to say what he did. In dealing with this matter, the Lord Justice Clerk (Ross) expressed surprise and concern at the fact that these grounds remained live until the hearing of the appeal, despite the fact that it must have been known long beforehand that they were based on incorrect assertions of fact. Since counsel in the appeal had also appeared at the trial (as in the present case)

> "he must have known that the advocate depute had put but both these matters to the appellant in cross examination, and it is accordingly surprising that ground of appeal 1 in both its branches was ever put forward at all."

[15] The court referred to *McAvoy* v *HMA* 1982 SCCR 263 where the court made certain observations regarding the professional responsibility of practitioners in relation to grounds of appeal containing criticisms of a judge's charge, namely that:

> "...practitioners have a professional responsibility to see that criticisms of a judge's Charge can be read out of the charge and do not stem from recollections which can be imperfect and unjustified. Whatever advantages unchecked and erroneous criticisms of a judge's Charge may have for the defence, they constitute an unwarranted public criticism of the judge's professional competence and result in a waste of time and money".

The court added that

> "these observations also apply to grounds of appeal which turn out to contain erroneous criticisms of the conduct of the prosecutor… it appears plain to us that these grounds of appeal should never have been put forward in the first place… As in *McAvoy* v *HM Advocate* there has been a waste of time and money because unchecked and erroneous criticism was made of the advocate depute's address to the jury. It should not have been necessary, so far as ground 1 of appeal 1 is concerned, for the transcript of the advocate depute's address to the jury to be produced. Those who draft or support grounds of appeal have a professional responsibility to ensure that grounds of appeal are not formulated which have no sound basis in fact."

Exactly the same can be said in the present case. It should never have been necessary to have the Crown and defence speeches, or the evidence of JG, extended in this case. In fact, the matter is worse than *Bagan* where there remained a ground of appeal for consideration. In the present case, the whole factual basis for the appeal is unfounded, and the appeal should never have been stated in these terms in the first place. Counsel for the appellant should have known that the grounds of appeal either substantially misrepresented the factual situation, or were plainly incorrect. The appeal will be refused.