APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 43
HCA/2018/000237/XC

Lord Justice Clerk
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

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

by

HER MAJESTY'S ADVOCATE

Appellant

against

SEAN MOYNIHAN

Appellant: Lord Advocate, P Kearney; Crown Agent
Respondent: K Stewart, QC, C Findlater; McCusker, McElroy & Galloway, Johnstone

8 August 2018

[1] The respondent is indicted on a charge alleging the attempted rape of a 15 year old girl in Paisley in May 2008. Attached to the indictment is a docket indicating an intention to lead evidence of an act amounting to rape of a 16 year old girl in Paisley in May 2008, a crime of which the respondent was convicted following trial in 2009. At a preliminary hearing a minute objecting to the admissibility of the evidence referred to in the docket was

sustained. The trial judge concluded that (a) section 288BA of the Criminal Procedure (Scotland) Act 1995 ("the Act") does not permit the leading of evidence relating to charge in respect of which an accused had already been convicted; and (b) that the leading of such evidence would constitute a breach of section 101(1) of the Act.

The Legislation

[2] Section 101 of the Act provides:

> "(1) Previous convictions against the accused shall not, subject to subsection (2) below and section 275A(2) of this Act, be laid before the jury, nor shall reference be made to them in presence of the jury before the verdict is returned.
>
> (2) Nothing in subsection (1) above shall prevent the prosecutor—
>
> (a) asking the accused questions tending to show that he has been convicted of an offence other than that with which he is charged, where he is entitled to do so under section 266 of this Act; or
>
> (b) leading evidence of previous convictions where it is competent to do so under section 270 of this Act,
>
> and nothing in this section or in section 69 of this Act shall prevent evidence of previous convictions being led in any case where such evidence is competent in support of a substantive charge.
>
> (3) Previous convictions shall not, subject to section 275A(1) of this Act, be laid before the presiding judge until the prosecutor moves—
>
> (a) for sentence, and in that event the prosecutor shall lay before the judge a copy of the notice referred to in subsection (2) or (4) of section 69 of this Act; or
>
> (b) for a risk assessment order (or the court at its own instance proposes to make such an order)."

Section 288BA(1) provides:

> "(1) An indictment or a complaint may include a docket which specifies any act or omission that is connected with a sexual offence charged in the indictment or complaint.
>
> (2) Here, an act or omission is connected with such an offence charged if it—

(a) is specifiable by way of reference to a sexual offence, and

(b) relates to—

(i) the same event as the offence charged, or

(ii) a series of events of which that offence is also part.

(3) The docket is to be in the form of a note apart from the offence charged.

(4) It does not matter whether the act or omission, if it were instead charged as an offence, could not competently be dealt with by the court (including as particularly constituted) in which the indictment or complaint is proceeding.

(5) Where under subsection (1) a docket is included in an indictment or a complaint, it is to be presumed that—

(a) the accused person has been given fair notice of the prosecutor's intention to lead evidence of the act or omission specified in the docket, and

(b) evidence of the act or omission is admissible as relevant.

(6) The references in this section to a sexual offence are to—

(a) an offence under the Sexual Offences (Scotland) Act 2009,

(b) any other offence involving a significant sexual element."

The judge's decision

[3] The preliminary hearing judge identified a number of evidential problems which would arise should the evidence be admitted. The witness to whom the docket relates would not enjoy the protection of section 274, not being a complainer within the terms of that section; and for the same reason no special defence of consent would require to be lodged, although this had been done. Despite her evidence having been accepted by a prior jury, she would be cross-examined to suggest that she had consented to the act in question. The trial judge would not be able to say that the accused enjoyed the presumption of innocence in relation to the docket, and would not be able to explain why the matter

appeared in the docket and not as a charge. It would not be possible to prevent corrosive speculation. The jury may require to be satisfied beyond reasonable doubt that the act occurred at the hands of the respondent, but the burden of proof, in the absence of a presumption of innocence, could not be said to be the same. In *Fraser* v *HMA* 2014 JC 115 the court required to consider what it termed "a simple narrative" describing an assault of which the appellant had already been convicted but the language used was tentative and the court did not require to reach a concluded view on the matter.

[4] The court had already decided that acts which were time barred or which took place elsewhere were specifiable. In *HMA* v *D* 2018 SLT 101 the former were described in as "alleged criminal conduct" (paras 30 and 31); in *Lauchlan and O'Neill* v *HMA (No 2)* 2015 JC 75 the court envisaged the latter as being capable of trial in another jurisdiction, and not already the subject of a conviction. See also *Kerr (Alan) v HMA* 2016 JC 32. An act was specifiable if, for example, it could be used by the jury to assist in proof of the offence or allow a witness to give a full account of events. However, section 288BA dealt only with sexual offences – to allow sexual crimes to be made the subject of a docket would run the risk that juries formed an impression that the accused had been convicted of the act, and applying the stigma of being a sexual offender to their consideration.

[5] Not only did section 288BA not extend to convictions, to allow the evidence would constitute a breach of section 101. The test was whether there was a possibility that some members of the jury would conclude or form the impression that the respondent had been convicted of the act: *Lewry* v *HMA* 2013 SCCR 396 (para 14); *Fraser* v *HMA* (para 52). Where directions required to differentiate between the offence and the act, the forming of such an impression was probable. An implied or indirect disclosure due to a procedure deliberately adopted by the Crown would constitute a breach of section 101.

Submissions for the appellant

[6] For the Crown, it was submitted that on the plain terms of the statute the evidence was admissible. The preliminary hearing judge had erred in conflating the issue of statutory interpretation with the test to be applied where a risk of prejudice arises. As to the former, the intention of Parliament was to be divined from the ordinary and natural meaning of the words used in the context in which they occurred. The practical considerations raised by the preliminary hearing judge were illusory, or at worst could easily be surmounted. Whilst great care would be required in leading the evidence of the witness in question this was not uncommon where there existed a potential risk of disclosure of prejudicial or inadmissible material.

[7] As to section 101, the appellant did not seek to lead evidence that the respondent was convicted; rather the intention was to lead evidence of the act referred to in the docket as supporting the conclusion that the respondent was guilty of the charge libelled. In any event, breach of section 101 did not necessarily result in a miscarriage of justice and the preliminary hearing judge's decision that the evidence was inadmissible because such a breach would occur was premature.

Submissions for the respondent

[8] It was conceded that the evidence in question was relevant, that fair notice had been given and that leading of the evidence was not expressly prohibited by the terms of the statute. However, it was submitted that such a prohibition should be read into section 288BA, particularly when read along with section 101. In failing to contain any express approval of the leading of such evidence the terms of the section were ambiguous. It was to be presumed that Parliament did not intend to innovate upon long standing common law

principles, in this case the prohibition on placing previous convictions before a jury. The issue in the docket had been the subject of a judicial determination, rendering it inappropriate for the leading of evidence, and creating substantial practical difficulties of the kind identified by the preliminary hearing judge. Allowing the jury to assess the evidence of the witness on the docket offended against the principle of finality.

Analysis and decision

[9] There are several circumstances in which it may be competent for the Crown to aver the guilt of an accused in respect of criminal conduct which could not competently be included as a specific charge on the indictment, but where nevertheless the assertion of having committed that criminal conduct may be included in the indictment by way of narrative, or more commonly in modern practice, by way of a docket attached to the indictment. Examples include where the matter could not be included as a charge on the indictment because prosecution of it was time-barred (*HM Advocate* v *D* 2018 SLT 101), a case in which other examples were cited at para 25. Were the matter included in a docket it would also be possible to lead evidence where the acts, taking place outwith the jurisdiction, could not competently be prosecuted in Scotland (*Lauchlan and O'Neill (No 2)* v *HM Advocate*) or where the Crown, having renounced the right to prosecute, is personally barred from proceeding with a charge (*McIntosh* v *HM Advocate* 1986 JC 169). In all of these circumstances it has been held competent for the material in question to be placed before the court in order that evidence may be led in respect thereof, so long as such evidence is relative to proof of a charge libelled on the indictment. Even where there has been an acquittal on a charge the evidence may remain available to be prayed-in-aid in respect of other charges libelled which

remain available for determination by the jury (*Lauchlan and O'Neill*; *Cannell* v *HM Advocate* 2009 SCCR 207).

[10] Section 288BA is framed in the widest possible terms. It provides that an indictment may include a docket which specifies "any act or omission" that is connected with a sexual offence charged in the indictment. The act or omission, to be connected with the offence charged, must relate to the same event, or series of events, as the offence charged. It must also be "specifiable by way of reference to a sexual offence". This does not require it to be capable of being included on an indictment as a criminal charge. In fact, subsection (4) provides that an act may be specifiable notwithstanding that were it instead charged as an offence it could not competently be dealt with by the court. We reject entirely the submission for the appellant that there exists any ambiguity in the terms of the section.

[11] It is important to bear in mind that what is to be led before the jury is not evidence of a conviction, but evidence which formed only part of the basis for a conviction. It is not intended that the fact of conviction should be made known to the jury. In *Moorov* v *HMA* 1930 JC 68 the nature of the prohibition was discussed by Lord Sands, p87:

> "Certain evidence is excluded from consideration because it is deemed to be highly prejudicial. The typical case is evidence of previous convictions. There may be cases in which such evidence might quite reasonably aid in coming to a certain conclusion. For example, there is the case of a man who specialises in a peculiar and rare form of crime, such as the man whose case attracted attention some years ago, whose invariable offence was breaking into a church. Or there might be the case of a man who had perpetrated some novel and ingenious form of fraud. It cannot, I think, be suggested that the evidence of a witness who detailed an elaborate story told by a party accused of fraud would not be corroborated by evidence that the same man had on another occasion told the same story to somebody else. But this evidence is excluded, <u>at all events where it has led to a conviction and this had to be brought out</u>." [emphasis added]

[12] Whilst the issue arising in this appeal has not been directly addressed in the authorities, it did feature in the court's analysis of an issue relating to evidence of a crime

not charged in the case of *Fraser* v *HM Advocate*. The crime – a prior assault on the deceased – could not competently have been libelled in that case since the accused had already been convicted of it. The court referred, on the one hand to the fact that evidence of the matter in question would have been relevant evidence on the murder charge, as being capable of adding significantly to the circumstantial case against the appellant, but on the other hand, to the facts that (a) evidence of a crime not charged is generally inadmissible for lack of notice; and (b) there is a statutory rule against disclosure of previous convictions. The court considered that prohibition (a) could have been circumvented by "a simple narrative, rather than a charge, appended to the indictment" and prohibition (b) could have been avoided by not mentioning the fact of conviction. The preliminary hearing judge described the court in *Fraser* as being "tentative" on these matters. However the point was one which did not directly arise for decision in that case, and the court possibly had not had full argument on the matter, so the point was not developed any further. The remarks are thus *obiter*, but clearly it was the court's preliminary view that these options would have been available to the Crown.

[13] Evidence of a prior conviction may be led where it is required to established proof of a subsequent charge, for example in a case of driving whilst disqualified or of prison breaking. Otherwise, as is noted in Renton and Brown *Criminal Procedure 6th Edition*, para 18-67: "The ordinary rules of evidence apply, and the evidence may be led if it is otherwise competent and relevant". Section 101(2) makes it clear that evidence of previous convictions remains available to the prosecutor where it is competent in support of a substantive charge.

[14] We see no logical basis for treating evidence which relates to a matter which could not competently be formulated as a charge, being already the subject of a conviction, differently from circumstances where a charge would be incompetent for other reasons.

There is no logical basis for allowing evidence of an act which, by virtue of being time barred, can never amount to more than an allegation, yet refusing to admit evidence of an act which has been established by corroborated evidence.

[15] The preliminary hearing judge concluded that the section as a whole was concerned only with "sexual offences" and did not extend to "what are proved sexual crimes", largely on the basis that to allow evidence of the latter to be led "would run the risk of juries concluding or 'forming an impression' that the accused had been convicted of the act and applying the stigma of being a sexual offender". This is not in our view a tenable approach. It appears to assume that the jury would be made aware that the acts specified in the docket had been the subject of a conviction. We see no reason why that should be the case. As the Lord Advocate submitted, the Crown is not seeking to prove, or to rely upon, the fact of conviction. The Crown seeks instead to rely on the evidence of the complainer in respect of the acts referred to in the docket in support of the substantive charges libelled. The preliminary hearing judge took the view that it would be a problem that the trial judge could not explain why the acts referred to appeared in the docket rather than the indictment, but we can see no basis upon which it is necessary to give the jury any such explanation. It would be a matter for the trial judge in each case to determine whether any explanation need be given, but as a generality we would not have thought it desirable to explain, for example, that the matter in the docket is time barred, or that the Lord Advocate had renounced the right to prosecute in respect of it. All the jury need be told is that the docket is not a charge, that they need not return a verdict on it, that the purpose of it is to give notice that evidence of the matter there referred to may be led, with further directions as to the use they may make of it. Any danger of speculation about the reason for the matter appearing in the docket, whatever that reason might be, would be guarded against by giving

standard directions that jurors must not indulge in speculation, supplemented by any additional directions which the trial judge might think necessary. There are many circumstances in which a Trial Judge feels it necessary to warn the jury strongly against speculation of any kind.

[16] The presumption of innocence has no bearing on any matter contained in a docket, whether relating to a conviction or otherwise. The presumption of innocence applies to the Crown's obligation to prove the charges on the indictment. It applies to proof of a charge, not to individual elements of evidence. What the jury require to be satisfied of in respect of evidence led in respect of a docket is that the witness speaking thereto can be treated as credible and reliable. There is no "burden of proof" in relation to the docket, in the sense envisaged by the preliminary hearing judge.

[17] We do not accept that the leading of this evidence would "offend against the principle of finality", or that it would undermine the conviction which followed in the previous trial. As the court observed in *D*, para 30:

> "We do not accept that leading the evidence of PC on the basis of conduct described in the docket amounts to trying the respondent on indictment for the alleged offences referred to in the docket, or proceeding against him as respects the alleged offences. The respondent is not being "tried on indictment" or proceeded against on indictment for those matters: he is being tried on indictment and proceeded against on indictment for the matters involving [the charges]".

[18] The appellant's counsel will be able to cross examine the witness in question but there will be no determination in respect of the acts to which she speaks such as might involve a collateral undermining of the conviction, even if the jury conclude that they do not accept the evidence or find that they cannot use it for corroborative purposes. The conviction in respect of the witness's evidence occurred in a trial in respect of which it necessarily formed only part of the evidence. The surrounding evidence would not only

have provided the corroboration, but may be thought to have lent support to the credibility and reliability of the complainer which would have been assessed against the background of that evidence. The surrounding evidence would certainly have formed the context against which the evidence of the witness would have been assessed. The fact that her evidence, in a different trial, on different evidence, might not be found to be persuasive would be of no significance to the original conviction.

[19] The preliminary hearing judge considered that an act is specifiable if it can be used to assist in proof of an offence libelled, or would allow a witness to give a full account of a matter which cannot be contained in a charge. In fact, these are matters of relevance which may require to be addressed in relation to the second part of the test under section 288BA(2): whether the act is connected with a charge on the indictment. The question of "specifiability" is referred to only in the first part of the test and is limited to the question whether the act may be "specifiable by way of reference to a sexual offence". We consider that the Lord Advocate was correct to submit that all this requires is that the act is one which can properly be described as a sexual offence.

[20] As to section 101, we have already explained that there is no reason for the jury (or indeed the judge) to be made aware or have reason to suspect that the accused had already been convicted of the charge. There is always a degree to which directions will require to differentiate between a charge on an indictment and a matter contained in a docket, since the jury require to return a verdict only on the former. There is no reason to think that this would lead the jury to suspect that the appellant had already been convicted of the docket matter. Should the matter somehow emerge at trial, it would be for the trial judge to determine what the consequence should be. It is not automatic that any breach of

section 101 must result in desertion, or amounts to a miscarriage of justice, and we agree that it was premature for the preliminary hearing judge so to hold.

[21] We do not see that there should be any difficulty for the trial judge in formulating appropriate directions suitable to the circumstances. That, after all, is the task of the trial judge in any case. Effective jury directions must engage with the specifics of the particular trial and the particular issues that arise for decision (*DM* v *HMA* [2017] SCCR 235 (para 16)). As was noted in *McGartland* v *HMA* 2015 SCCR 192, para 31: the trial judge has a duty "…to tailor the charge to the specific circumstances of the case, all with a view to giving proper and clear directions to the jury… every charge is unique".

[22] For these reasons we are satisfied that the preliminary hearing judge erred in concluding that the evidence which the Crown seek to lead in respect of the docket would be inadmissible, and the appeal must succeed.