

SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT PERTH

[2018] SC PER 44

JUDGMENT OF SHERIFF JAMES MACDONALD, ADVOCATE

In the case of

PROCURATOR FISCAL, PERTH

against

GM

Accused

Solicitor for Accused: Mr D Holmes
Procurator Fiscal Depute: Mrs C Whyte

Perth; 27 April 2017

Decision

Having heard Mr Holmes in support of the Application under section 275(1) of the Criminal Procedure (Scotland) Act 1995 (“the Act”), and the Procurator Fiscal Depute in opposition thereto, I allow admission of the proposed evidence set out in paragraph 3A(i)(a) and (b) of the Application. *Quoad ultra*, the Application is refused.

Background

The proceedings

[1] GM has been charged on summary complaint *inter alia* with multiple contraventions of section 7(1) of the Sexual Offences (Scotland) Act 2009. The Application forming the subject matter of this judgment pertains to charges 1 and 3 on the complaint. These charges allege as follows:

“1 Between 1 March 2014 and 31 March 2014 at ... Bridge of Earn you ... did intentionally direct a verbal sexual communication at AM c/o Police Service of Scotland, in that you did make offensive or inappropriate sexual comments to her; CONTRARY to section 7(1) of the Sexual Offences (Scotland) Act 2009; and

3 On various occasions between 1 December 2010 and 16 November 2014, both dates inclusive, at ... Bridge of Earn or elsewhere to the prosecutor unknown you ... did intentionally direct [a] verbal sexual communications at MM c/o Police Service of Scotland, in that you did make offensive or inappropriate sexual comments to her; CONTRARY to section 7(1) of the Sexual Offences (Scotland) Act 2009.”

[2] GM maintains not guilty pleas on all charges on the complaint. A trial diet has been appointed to 15 May 2017 at Perth Sheriff Court. GM has lodged a notice of defence of consent and the reasonable belief in consent in relation *inter alia* to charges 1 and 3.

The Application

[3] The Application seeks permission to elicit evidence pertaining to the following issues which I summarise thus:

Paragraph 3A

- i) That the accused attended a bikers’ festival in or about 20 September 2013, where the following took place:
 - a) On one occasion the complainer AM (“the first complainer”) instructed the accused to kiss her passionately with a view to causing offence to an individual with whom she had previously been involved in a liaison;
 - b) Conversations of a light hearted nature including sexual comments passed between the complainer and the accused at the festival.
- ii) That from at least 2007 onwards, the complainer MM (“the third complainer”) made regular references to matters of a sexual nature and in particular on

15 December 2007 at a public house in Bridge of Earn, made reference to being involved in a three way sexual encounter with a man and woman from Alness. These remarks were made in the presence of the accused and his partner, LG. The third complainer again made reference to this incident in early 2008 at her house and again in April 2008 and on a number of occasions thereafter both to the accused and LG.

- iii) That in or around April 2014 at the locus in charge 1, the third complainer made reference to using sexual favours to encourage a third party promoter to engage the band managed by the third complainer in which the accused was a leading performer. This conversation took place in the presence of the first complainer who made light hearted comments indicating that she wished to become involved in a sexual relationship of this nature if one was available.
- iv) That in early 2014 at the locus in charge 1, the third complainer on two specific incidents approximately three or four weeks apart, attempted to encourage the accused to become involved in a relationship with the first complainer, and in particular to meet the first complainer for a sexual liaison at the end of a train journey from Inverness to Perth.
- v) That in late 2006 at a public house in Perth, at their first meeting, the third complainer engaged in light hearted sexual discussion with the accused and in particular that she presented her bare breast to the accused and others to display a tattoo.

[4] The Application narrates at paragraph 3D that the above evidence is considered relevant for the following reasons:

“The Accused’s position is that he had regularly engaged in dialogue involving sexual references in the past. The Accused denies any offensive sexual comments but maintains that any sexual comments which may have been made were [appropriate] given the nature of the previous relationships between the parties.”

Submissions

For the accused

[5] It was submitted in support of the Application by Mr Holmes that the chapters of evidence were necessary in order to fully enable the accused’s instructed line of defence, namely consent, to be put before the Court. Further, the proposed chapters of evidence provided, put short, essential context to the remarks allegedly made by the accused and forming the subject matter of the charges.

[6] In support of the Application, Mr Holmes reminded me that an earlier application under section 275 had been refused on 4 March 2017. The present application had been prepared in light of certain observations made by the Court in refusing the earlier one, particularly in relation to the level of specification of the proposed evidence.

[7] Mr Holmes told me that the complainers in charges 1 and 3 knew each other and also knew the accused. The accused was and is a musician and played in a band. The complainer in charge 3 was the band’s business manager. She had also, Mr Holmes submitted, been involved romantically with the accused in the past.

[8] It was Mr Holmes’ submission that the proposed evidence – in its entirety – was essential to place the alleged words used by the accused towards the respective complainers in their appropriate context. The accused’s position at trial is to be that both complainers consented to same and actively participated in conversation with the accused of a sexual nature, albeit that same may be classed as light hearted in nature.

[9] Mr Holmes accepted that each chapter of evidence was prohibited by the terms of section 274 of the Act. He accepted that the proposed evidence could only be permitted by virtue of section 275(1) of the Act.

[10] Mr Holmes submitted that I should take a different approach to a case involving an allegation of a contravention of section 7 of the 2009 Act. There was, he submitted, a material distinction between where, as here, the words were the essence of the charge, and where words may have been used as an antecedent to a contact sexual offence.

[11] With regard to the specific chapters of proposed evidence, he submitted that none was collateral at common law.

[12] Mr Holmes submitted further that the test under section 275(1) of the Act had been met. The chapters of evidence each met the requisite requirements of specification, and were pertinent to the proof of guilt of the accused. Admission of the proposed evidence was necessary in order that the accused could fairly put his instructed defence before the Court. He emphasised that his argument pertained specifically to a charge where the use of words per se were the issue.

[13] Mr Holmes acknowledged that I was either bound by the decision of a full bench in *CJM v HM Advocate 2013 SCCR 215*, or at the very least was required to place significant weight to the issues of principle set out by the majority of the Court.

For the Crown

[14] The Procurator Fiscal Depute, Mrs Whyte, opposed the Application. She submitted that I am bound to apply the decision in *CJM*.

[15] In the first place, she submitted that the proposed evidence was collateral at common law and accordingly could not be permitted to be led at any subsequent trial diet.

[16] Secondly, Mrs Whyte submitted that the test under section 275(1) of the Act had not in any event been met. This was so because, she submitted, none of the proposed evidence is relevant to proof of guilt. She commented specifically upon each proposed chapter in turn:

- a. Paragraph 3(a)(i)(a) – this evidence is of a different character to those averred in charge 1.
- b. 3(a)(i)(b) – this evidence is neither related in time to those averred in charge 1 nor in circumstances or place.
- c. 3(a)(ii) – this evidence is not related in time, circumstances or place to those averred in charge 3
- d. 3(a)(iii) – whilst closer in time to the events libelled, this evidence still did not have a sufficient nexus in time to the events libelled, nor was there a connection in circumstances.
- e. 3(a)(iv) – this evidence is not related in time or circumstances to the events libelled.
- f. 3(a)(v) – this evidence is not related to the matter charged either in time or character. The time lapse is particularly significant in relation to this chapter. Mrs Whyte further informed me in any event that the complainer does not accept the proposed evidence to be true.

[17] Mrs Whyte reminded me that I should have regard to the protection of the dignity and privacy of the complainers as part of the test to be applied under section 275(1).

[18] In addition to the case of CJM, Mrs Whyte referred me to the case of *Wright v HM Advocate 2005 SCCR 780* as an example of a case where the Court had held there to have been too great a lapse in time between the proposed evidence of prior conduct and the events libelled to render same relevant to proof of guilt. In addition she referred me to the case of

Moir v HM Advocate 2007 JC 131 as an example where the Court, in upholding a decision to refuse a section 275 Application at first instance, held the proposed evidence to have been irrelevant at common law as well as not meeting the second leg of the test under section 275.

[19] Mrs Whyte added that, in some circumstances, the use of words of themselves by a complainer fall out with the scope of sections 274 and 275. She did not go as far as to submit that the Application in the present was unnecessary, however. Indeed, she generally accepted that the Application was competent.

Basis of decision

Whether words fall within the prohibition under section 274

[20] In the course of submissions, the Crown touched upon whether the proposed evidence in the present case took the form of words alone. In *HM Advocate v DS 2007 SCCR 222*, the advice of the Judicial Committee of the Privy Council was *inter alia* that words used by a complainer to a third party on an earlier occasion may bear upon the reliability or credibility of the complainer. In short, those were prior inconsistent statements.

[21] By contrast, a prior allegedly false allegation of rape made by a complainer about another individual was held to constitute “behaviour” and so within the ambit of the section 274 prohibition in *CJM*. I discuss *CJM* further in another context below.

[22] In my judgment, the chapters of evidence sought to be introduced in the present case do not readily fall to be classified as of the type referred to in either *DS* or *CJM*. Further, it seems to me that the words in the present case in any event are sought to be construed as manifestations of a generally consensual and receptive demeanour on the part of the respective complainers towards the accused. In *Moir*, Lord Johnston observed at paragraph 19 of his Opinion that the statutory definition of “behaviour” within section 274

should be afforded a wide definition, and further at paragraph 22 that it could extend to the making of statements by a complainer. In the *Moir* case, the complainer had approached the Crown seeking discontinuation of proceedings. This statement was held to fall within the scope of section 274.

[23] In my judgment there is a material distinction between statements that amount to prior inconsistent statements and those that bear upon substantive issues. The present case is in my view an example of the latter.

[24] I accordingly conclude that the proposed evidence in the present case amounts to “behaviour” for the purposes of sections 274 and 275.

Whether a different approach should be adopted where the charges do not involve an allegation of a contact sexual offence

[25] It was submitted to me that I should adopt a different approach to cases such as the present where there is no suggestion of the accused having physical sexual contact with the complainers. In my judgment, it is clear from the terms of section 274 that Parliament intended that a uniform approach be adopted with regard to the criteria to determine whether evidence of a complainer’s character should be admitted. Section 7(1) of the 2009 Act is one of the offences listed under section 288C of the Act and so falls within the ambit of sections 274 and 275.

[26] It is however undoubtedly the case that each case must turn on its own merits. What is relevant, and so what meets the test under section 275, will vary from case to case. What is essential is that the proposed evidence meets the cumulative test set out in section 275(1), and having regard to the interpretation of that test and guidance issued by the Court.

Underlying principles relating to the admission of character evidence in sexual cases

[27] Section 274 prohibits the leading of evidence of a complainer's character in any case involving a charge of a sexual nature. That prohibition may only be excepted where the proposed evidence meets the test set out in section 275(1). That test is cumulative. If any part of the test is not satisfied, the evidence cannot be admitted.

[28] Both Crown and Defence accepted – and I agree – that I should apply the guidance set out by the full bench in *CJM*. In my judgment the following principles may be taken from the Opinion of the Court in *CJM*:

- i. That section 275 of the Act cannot render relevant any evidence that would not be relevant at common law.
- ii. That proposed evidence may be relevant if it has a connection to the matter libelled in time, circumstances or place.
- iii. That use of the phrase “administration of justice” is not equiparable with the concept of fairness. The statutory test imposes on the Court a duty when exercising its discretion to permit evidence to be led, to take account of both substantive and practical issues. The latter includes the anticipated extension of time that the leading of the proposed evidence may have upon the trial.
- iv. That the purpose behind sections 274 and 275 are to protect the dignity and privacy of complainers from unwarranted attacks on character.

[29] At common law, evidence that a party or witness did a similar act or said similar words on an occasion other than the one libelled is, in the generality collateral and so is irrelevant (Walker and Walker *“The Law of Evidence in Scotland”* (fourth edition), paragraphs 7.1.1 and 7.2.1. Prior to the inception of what is now sections 274 and 275 of the Act, evidence to the effect that the complainer had previously had intercourse with the

accused was permissible in a case of rape without notice (see Dickson, *Evidence* paragraph 7); *Dickie HM Advocate (1897) 24 R. (J) 82*.

[30] The case of *Wright* is an example of a refusal by a trial judge to admit evidence of previous amorous advances by a complainer towards the accused that occurred between 9 months and two years prior to the date libelled in a charge of rape. In refusing an application under section 275, the trial judge had regard to the time lapse and also the differences in character between the matter charged and the previous episodes of behaviour. The Appeal Court was not persuaded that the trial judge had erred in the application of his discretion in doing so.

Attitude of the complainer to the evidence

[31] It was submitted for the Crown that the third complainer did not accept some of the proposed evidence to be factually true. In my judgment, no weight can be attached to this factor. Whether an issue is accepted by a complainer as true, or whether it is in fact true, is a matter for the trial diet, provided that the evidence meets the test for admissibility.

Application of principles to the proposed evidence

[32] I now deal with the chapters of proposed evidence *seriatim*:

Paragraph 3A i)

[33] I consider that this chapter meets the cumulative test under section 275(1). It relates to a specific incident which is said to have occurred some six months prior to the commencement of the period on the libel. Further, it is in my judgment relevant to the proof of guilt on charge 1 in that it is related in time and circumstances to the events libelled. I

consider that this evidence bears upon the attitude and demeanour of the complainer towards the accused during a period close to that libelled. This chapter is capable of supporting the accused's line of defence, namely consent or his reasonable belief in the consent of the first complainer and so has a substantial probative value.

[34] I do not consider that it is necessary for there to be prolonged questioning of the witness as to the purported motivation of the complainer towards a third party. It would however be contrary to the administration of justice to exclude this last issue from enquiry as it may provide essential context to the matters in the chapter of evidence.

Paragraph 3A ii)

[35] This chapter falls to be regarded differently. This proposed evidence pertains to discussions pertaining to sexual activity the complainer may have had with third parties, and which appear to have been discussed during December 2007, albeit that it is suggested that discussions continued from 2007 onwards.

[36] This proposed evidence cannot in my view be in any way construed as a prior inconsistent statement, nor has it any bearing upon the matters charged on the complaint. What the accused seeks to introduce is evidence of things said by a witness on an occasion other than the one libelled pertaining to matters wholly unconnected to the facts in issue. This would be hearsay evidence as to the truth of its content and so is inadmissible at common law.

[37] In any event I further hold the proposed evidence to be collateral. I do not see how it can bear upon the accused's guilt in relation to sexual comments directed by him to the complainer. Further, it seems to me that the purpose of sections 274 and 275 is to protect complainers from enquiries into aspects of their private lives of this nature. It would

accordingly be irrelevant at common law and separately would fail the test under section 275(1)(b) and (c).

Paragraph 3A iii)

[38] The nature of this proposed chapter of evidence is that it seeks to introduce evidence of the sexual intentions of both named complainers towards a third party. In my judgment, this chapter is wholly collateral and irrelevant at common law. Further, it would in my judgment fail the test under section 275(1)(b) and (c).

Paragraph 3A iv)

[39] In my judgment, this chapter cannot bear upon the guilt or innocence of the accused in relation to either charge 1 or 3. Whilst perhaps more pertinent to charge 1, if admitted it would shed no light upon the attitude of the first complainer towards the accused. I consider that this evidence is collateral at common law and also fails the test under section 275(1)(b) and (c).

Paragraph 3A v)

[40] I consider that the proposed evidence in this chapter would be irrelevant at common law and separately under section 275(1)(b) and (c) on the basis that it occurred some three and a half years prior to the commencement of the time frame of the libel. It lacks a connection in time, circumstances or place to the events libelled in charge 3.

Further issues

[41] I should add for the sake of completeness that in my view section 274 would not prevent the accused leading evidence to the effect that he and the third complainer had previously been romantically involved. Support for that proposition is to be found in the advice of the JCPC in *DS* (supra) which was to the effect that evidence of a period of prior cohabitation *per se* between the Appellant and complainer was not prohibited by section 274 and so no permission under section 275 was required.

[42] I further quite appreciate that the accused may have been on friendly terms with the first and third complainers for a significant time prior to the period libelled in charge 1, and further that both first and third complainers were on friendly terms with one another during that period. The accused is quite entitled in my judgment to lead evidence and question both complainers to that effect without falling foul of the prohibition under section 274. This would provide essential context to any interaction between either of the complainers and the accused.