APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 93
HCA/2019/227/XC and
HCA/2019/228/XC

Lord Menzies
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD MENZIES

in

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

by

KEVIN OLIVER

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: K Stewart QC; Paterson Bell (for McLennan Adam Davis, Ayr)
Respondent: Harper AD; the Crown Agent

12 July 2019

[1] The appellant faces an indictment containing six charges involving two complainers. Briefly, charge 1 is a contravention of section 2 of the Sexual Offences (Scotland) Act 2009 and sexual assault against the complainer KK on 3 September 2017; charge 2 is a charge of

assault involving the same complainer on 4 September 2017. Charges 3 to 6 each concern the complainer AB. Charge 3 alleges contravention of section 39(1) of the Criminal Justice and Licensing (Scotland) Act 2010 between 1 October 2017 and 2 June 2018 and between 4 September 2018 and 27 October 2018 by sending abusive and threatening messages and indecent images to her via text and social media, posting intimate photographs of her on Facebook, sending messages to her children, taking her mobile telephone and examining it, hiding her keys, locking her out of her house, attending at her house uninvited, pressing her door buzzer, shouting at her, throwing stones at the window of her house and maliciously damaging her car. Charge 4 is a charge of assault against the same complainer between the same dates and contains allegations including calling her abusive names, threatening to strip her naked and put her outside, recording the appellant's behaviour on a mobile telephone, pinning her to the floor, seizing her by the neck and pinning her against a wall, kicking her, pushing her downstairs, slapping her, spitting on her and head-butting her, all to her injury. Charge 5 is a charge of assault, rape and attempted murder against the same complainer on 28 October 2018. It contains a detailed narrative of violent, demeaning and sexual acts by the appellant against the complainer. Charge 6 is another charge of contravention of section 39(1) of the Criminal Justice and Licensing (Scotland) Act 2010 against the same complainer between 29 October and 4 December 2018 by sending letters to her and telephoning her. We do not consider that it is appropriate or necessary to set out further in this opinion the details of the charges.

[2] The appellant's position with regard to the first complainer KK and to charges 1 and 2 is that these events did not happen. With regard to charges 3 and 5 the appellant has lodged a special defence of consent. With regard to charges 4 and 5 he has lodged a special defence of self-defence. In general his position with regard to the allegations involving the

complainer AB is that the complainer and he were engaged throughout the relevant period in a sexual relationship which involved what might be described as extreme forms of sadomasochistic behaviour in the course of which they engaged consensually in acts of violence, abuse and demeaning behaviour towards each other, and that to the extent that the acts libelled in the indictment occurred, they all occurred with the complainer's full consent.

[3] The appellant lodged two applications (one in respect of each complainer) in terms of section 275 of the 1995 Act, seeking that certain evidence be admitted or elicited. These applications were heard at a preliminary hearing on 11 April 2019, and on 12 April 2019 the preliminary hearing judge granted parts of each application, refused other parts, and restricted some parts. Senior counsel sought leave to appeal her decision to refuse and restrict the applications, and leave to appeal was granted. The appeal was heard by this court on 28 June 2019. A dedicated floating trial has been appointed for 9 September 2019 at the High Court of Justiciary at Glasgow as an 8 day diet of trial.

[4] We heard submissions from senior counsel for the appellant and from the advocate depute for the Crown. Before dealing with the detail of each application, we observe that before considering the statutory tests in section 275 of the 1995 Act, the court requires to be satisfied that the evidence sought to be led meets the common law test for relevancy. Material which is collateral to the issues at trial, which does not have a direct bearing on those issues and which is not readily ascertainable will not generally be regarded as relevant or admissible – *CJM* v *HM Advocate* 2013 SCCR 215, per the Lord Justice Clerk (Carloway) at para 28, and Lord Menzies at paras 55/56. If material is held to be irrelevant, it will usually not be necessary to go on to consider the statutory test in section 275.

[5] We deal with each application in turn.

The application in respect of the complainer KK (charges 1 and 2)

[6] There were three paragraphs to this application. The preliminary hearing judge granted paragraph 1(a) in restricted terms, deleting the words "during which time they repeatedly engaged in consensual vaginal sexual intercourse". She granted paragraph 1(b) in full, and she refused paragraph 1(c) in its entirety.

[7] Senior counsel for the appellant submitted that the credibility of the complainer KK was the central issue in relation to charges 1 and 2. At the time specified she was described as the appellant's partner. The material which was sought to be admitted or elicited in paragraph 1(a) was that she chose to stay with the appellant in his flat in the period immediately following the events libelled, between 3 and 5 September 2017, and that during this time they engaged in sexual intercourse. He submitted that the complainer's actions in staying with the appellant and engaging in consensual sexual intercourse with him in this period cast serious doubt on her credibility, and that it was unlikely that she would have agreed to do this in the immediate aftermath of a sexual assault by the appellant on her on 3 September, and a separate assault by him on her on 4 September. This material was essential to enable the appellant to challenge the complainer's credibility.

[8] The advocate depute submitted that the fact that the complainer continued to stay with the appellant and had sexual intercourse with him after these events had to be seen in the context of the material referred to in the docket. It was the Crown's position that the appellant had used violence towards the complainer before, during and after the events alleged in charge 1, and that the complainer's actions in the aftermath of charge 1, in the days following it, did not necessarily reflect adversely on her credibility. The matter was more nuanced than first appeared, and the probative value of this material was not as weighty as might first be thought.

[9] In general terms, the fact that a complainer has consented to sexual activity on previous occasions does not make it more or less likely that he/she will consent to sexual activity on a subsequent occasion. It follows, we think, that it will rarely be relevant to lead evidence that a complainer has consented to sexual activity on an occasion sometime before the events libelled. However, it appears to us that the situation may be different in relation to material concerning actions by a complainer in the immediate aftermath of an alleged event. We emphasise the words "immediate aftermath"; we have in mind a period of hours, or perhaps a day or two, following an alleged event. It appears to us that there is some force in the submission for the appellant that a jury may find assistance, when assessing the credibility of a complainer, from evidence as to his/her behaviour in the immediate aftermath of events which are alleged to have occurred. They might take the view that, even in a situation where the appellant and the complainer are partners, the complainer's decision to continue to reside in the same house with him and to engage in consensual sexual relations with him over the following day or two undermine the complainer's credibility. Of course, they might not take this view, and there might be circumstances to explain the complainer's behaviour. Juries are frequently asked to consider the behaviour of a complainer in the immediate aftermath of an event – for example, when considering the evidential value of distress in supporting lack of consent.

[10] We consider that, provided that questioning seeking to elicit this material is confined to the immediate aftermath, this does not amount to collateral material, and meets the test of relevancy. We also consider that 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 (as that term is defined in section 275(2)) arising from its being

admitted or elicited. We consider that this material meets the tests contained in section 275(1).

[11] Senior counsel for the appellant accepted that paragraph 1(a) of this application was concerned only with the period of time after the events libelled in charge 1. The phrasing of the paragraph might perhaps permit questioning about events that occurred on 3 September 2017 before the events libelled. We would not be prepared to permit this, and in order to make this clear, in place of the words deleted by the preliminary hearing judge we shall substitute the following:

> "and engaged in consensual vaginal sexual intercourse after the events alleged to have taken place in charge 1 of the indictment."

[12] The preliminary hearing judge granted paragraph 1(b) in full, and we say no more about this.

[13] The preliminary hearing judge refused paragraph 1(c) in its entirety. Senior counsel for the appellant submitted that she was in error in doing so. Essentially his submission amounted to the same as that made in respect of paragraph 1(a), namely that for the complainer to choose to stay with the appellant at his home address for a number of days during the course of which they engaged in consensual sexual intercourse and she allowed him to photograph him in a sexually suggestive pose cast doubt on the credibility of the complainer regarding the events in charges 1 and 2. The advocate depute submitted that this material was not relevant, because it had no direct bearing on the facts libelled. It occurred between 8 and 16 weeks after the events which were libelled in charges 1 and 2, and any links with those events were too remote. This material was not relevant and the preliminary hearing judge was correct to refuse this paragraph.

[14] We agree with the Crown's position on paragraph 1(c). The material referred to in this paragraph relates to a period at least 8 weeks after the events libelled, and possibly as long as 16 weeks after them. This is collateral material. We do not consider that it meets the test of relevancy. Even if it did, we do not consider that this paragraph meets any of the tests contained in section 275(1). We consider that the preliminary hearing judge was correct to refuse this paragraph.

[15] In conclusion in relation to the KK application, we shall adhere to the preliminary hearing judge's interlocutor, subject to the allowance of the amended wording of paragraph 1(a) referred to above.

Application in relation to the complainer AB

[16] This application contains seven paragraphs containing very detailed and specific evidence which the appellant seeks to be admitted or elicited about the sexual relationship between him and the complainer. The preliminary hearing judge refused paragraph 1(c) *in hoc statu*, pending the recovery of the text messages referred to therein. This is a matter which will require to be considered at a future preliminary hearing. We were not addressed on it, and we say nothing more about it. The preliminary hearing judge granted paragraphs 1(f) and (g), and we need not deal with these.

[17] With regard to the other paragraphs, the preliminary hearing judge allowed some matters to be elicited in evidence, but excluded large parts of the material. Senior counsel for the appellant submitted that she was in error in doing so, and that all those passages which had been refused, deleted or amended by the preliminary hearing judge ought to be allowed, because they were both relevant and met the tests in section 275(1) of the 1995 Act.

The advocate depute opposed this and maintained that the preliminary hearing judge had not erred in any respect. We deal with each paragraph in turn.

Paragraph 1(a)

[18] The preliminary hearing judge allowed the first sentence of this paragraph (as amended), to the effect that the complainer and the appellant were involved in a sexual relationship between September 2017 and 28 June 2018. She also allowed the sentence "that between March 2018 and 28 October 2018 the complainer visited the applicant at his home and invited the applicant to stay with her in her home in order to pursue their relationship." In her report to this court she stated that she considered that it could be relevant for the jury to hear evidence of the parties being in a relationship, but that the detail as to how the complainer conducted a clandestine relationship with the appellant was irrelevant and would not assist the jury in their determination of the allegations. Moreover, *esto* there was any relevance to this line, it could only be very limited and, on balance, did not outweigh the protection of the dignity and privacy of the complainer. To be questioned on marital infidelity in such detail would be likely to be embarrassing and possibly upsetting for the complainer.

[19] Senior counsel for the appellant maintained that all the material deleted was capable of undermining the complainer's account. It was the existence of the complainer maintaining her marital relationship simultaneously with her clandestine affair with the appellant which was of significance. His concern was that the Crown might seek to suggest to the jury that the appellant had groomed the complainer, and "brainwashed" her into accepting activities which she would not otherwise have accepted. The point was that if the complainer had suffered assaults, or anything which caused her discomfort, she could have

ended her relationship with the appellant at any time and continued to live with her husband and family. Had the acts libelled not been consensual, she could have brought her relationship with the appellant to a close immediately.

[20] The advocate depute submitted that many of the sentences in paragraph 1(a) which were refused by the preliminary hearing judge amounted to an attempt to set up the bad character of the complainer. Moreover, most of them failed to meet the test of relevancy, and (eg the complainer's invitation to the appellant to have Christmas dinner with her and her children) were entirely collateral to the issues which the jury would have to decide.

[21] We agree with the Crown that many of the matters about which evidence is sought to be elicited are of dubious relevancy, and are moreover of little probative value. They have the capacity to embarrass the complainer and amount to an intrusion of her privacy. We consider that the preliminary hearing judge was correct to restrict this paragraph in the way she did. However, the point made by senior counsel for the appellant that the complainer remained married to her husband and if the acts were non-consensual could have returned to her relationship with him is, we think, a fair one. We shall allow the insertion of a sentence in the following terms:

> "The complainer was married and lived with her husband until the end of March 2018."

Paragraph 1(b)

[22] This paragraph seeks permission to elicit detailed evidence of precisely what sexual activities the appellant and the complainer engaged in. The preliminary hearing judge allowed questioning as to the parties having engaged in sadomasochism and bondage, and the complainer having acquired a number of items for use during her engagement in such activity with the appellant. She refused a number of matters which covered, in considerable

detail, consensual sexual activities on prior occasions. She took the view that the detail set out was of limited probative value given that it related to prior occasions; she also sought to protect the dignity and privacy of the complainer by refusing questioning about very personal and intimate acts.

[23] Senior counsel submitted that the preliminary hearing judge erred in this regard, and in the absence of questioning about the deleted items there was a risk that the jury would regard the terms of charge 5 as so shocking or bizarre as to be beyond anything to which the complainer might consent. It was therefore necessary to supply a context for the events on 28 October 2018.

[24] We consider that the preliminary hearing judge was generally correct to make the deletions from this paragraph which she did. The subject-matter of the deleted passages relates to sexual behaviour on prior occasions. They are of doubtful relevance. No specification is given as to the specific dates on which they occurred, and they concern very detailed allegations about personal and intimate acts alleged to have been performed by or with the complainer. We are unable to hold that the preliminary hearing judge has erred in the carrying out of the balancing exercise which she required to perform. We consider that the concerns of senior counsel for the appellant can properly be met by the reinstatement of the words "which involved whipping, slapping, choking and referring to her in insulting and demeaning terms", which were amongst the passages deleted or refused by the preliminary hearing judge.

Paragraph 1(d)

[25] This relates to what the appellant alleges were consensual sexual activities engaged in by him and the complainer on the day before the events of charge 5, ie 27 October 2018.

The preliminary hearing judge made some deletions, refusing to allow some very specific detailed allegations of the particular activities undertaken on that occasion. However, she allowed questioning that as a consequence of engaging in consensual sexual activity the complainer was left with bruising to her buttocks, her neck, legs and shoulders which she covered up with makeup. She states in her report to this court that she allowed this to enable the defence to lead evidence of possible alternative explanations for injuries to the complainer and the finding of her saliva on the boxer shorts of the appellant. She was not satisfied that the detail of previous sexual activity was of sufficient probative value to be likely to outweigh protection of the privacy and dignity of the complainer.

[26] Senior counsel submitted that the evidence sought to be led in this paragraph indicated the extreme character of the behaviour in which the appellant and the complainer consensually engaged, and that exclusion of this material would prevent the appellant from advancing this defence. The advocate depute submitted that the preliminary hearing judge had not erred, and that it was not necessary to investigate the events of the preceding day in such detail.

[27] We agree with the preliminary hearing judge. We do not consider that the details which have been excluded are necessary to achieve a fair trial. They relate to an occasion prior to that libelled in charge 5. We do not consider that the probative value of the evidence sought to be admitted or elicited is likely to outweigh any risk of prejudice to the proper administration of justice. We adhere to the preliminary hearing judge's decision with regard to this paragraph.

Paragraph 1(e)

[28] This relates to what the complainer is alleged to have said to the appellant in the

course of a train journey on 27 October 2018, ie the day before the events libelled in charge 5. The preliminary hearing judge refused the first sentence of the paragraph because it would be collateral to the issue before the jury, not being touched on either by the libel in charge 5 or in the special defence of consent. She refused the application as regards much of what the complainer is alleged to have said in the course of the train journey on 27 October 2018 because this was collateral, and would have little or no bearing on the issues before the jury. Had she decided that this material was relevant, she would have taken the view that any probative value was limited and did not outweigh protection of the complainer's dignity and privacy. She did allow some questioning on statements said to have been made by the complainer to the appellant during the train journey to the effect that she wanted to engage in sexual activity with the appellant at his own address. In this regard she amended the second sentence of the paragraph; as framed, this stated that "... the complainer told the applicant that ... she wanted to engage in anal intercourse with him outside later on that evening"; the preliminary hearing judge amended this to read "... the complainer told the applicant that ... she wanted to engage in sexual activity with him at his house on that date."

[29] Senior counsel for the appellant submitted that the amendments and deletions to this paragraph would strip out the context of the appellant's position, and would result in the jury getting an incomplete account of matters, and hence a misleading picture. The complainer had told the police that she was embarrassed and upset by the appellant repeatedly mentioning anal sex and touching her on this train journey; the appellant's position was that the complainer had mentioned anal sex repeatedly during the course of the journey.

[30] Moreover, senior counsel informed the court that he understood that the allegation that the complainer indicated to the appellant that she wanted to engage in anal intercourse

with him outside later that evening was supported by text messages which were being recovered. Not to include this would give a misleading picture to the jury.

[31] The advocate depute submitted that the preliminary hearing judge had made no error with regard to this paragraph, and that the reasoning set out in paragraph [27] of her report to this court was sound.

[32] We agree with the reasoning of the preliminary hearing judge. We consider that those passages which have been excluded or refused were properly refused (a) because they were collateral and accordingly not relevant and (b) because in any event their probative value was limited and would not outweigh the protection of the complainer's dignity and privacy. However, with regard to the second sentence of the paragraph, which the preliminary hearing judge allowed subject to amendment, we consider that this is a matter which may fall to be reconsidered (with a view to allowing the original formulation rather than the amended formulation) if the text messages which are to be recovered provides support for the appellant's position.

[33] In conclusion, the application in relation to the complainer AB may require further consideration at another preliminary hearing in respect of paragraph 1(c) and the second sentence of 1(e), depending on the terms of text messages to be recovered.