APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 36
HCA/2020/000015/XC

Lord Justice General
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by LORD MALCOLM

in

Appeal against Conviction

by

MICHAEL WHORLTON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Duguid QC; Adams Whyte
Respondent: Farquharson QC; Crown Agent

1 September 2020

[1] This is an appeal against a conviction in respect of a charge of rape (charge 22 on the indictment). Objections were taken to the Crown leading evidence from two witnesses about the complainer telling them what had happened. The objections were repelled and the evidence was given. In the note of appeal, and in the case and argument for the appellant, it is contended that, as the matter was not *de recenti* (soon after the event), the evidence should have been excluded as inadmissible hearsay, and that its allowance created

a miscarriage of justice. At the oral hearing this position was supplemented by a submission that the judge's decision was based on a misunderstanding of the nature and extent of the cross-examination of the complainer.

[2] The background is that evidence was led as to the police taking a first statement from the complainer in 2018, almost four years after the incident. Initially she indicated that there had been no sexual misconduct on the part of the appellant, but later in the statement she mentioned, amongst other things, the rape in 2014. In his report the trial judge explains that he repelled the objection on the ground that the evidence was designed to rebut a line taken by the defence in cross examination of the complainer. He refers to questioning which established that she did not speak to the police about the rape until 2018. The passage concluded "… you didn't even go to the police in 2018. They came to see you." (transcript at pages 54/55). Fairness required that the Crown be allowed to lead the evidence. Reference is also made to section 288DA of the Criminal Procedure (Scotland) Act 1995, which deals with jury directions on delayed disclosure.

[3] In his charge the judge told the jury that the witnesses' evidence, if accepted, might tend to negate any notion that the complainer first made an allegation when speaking to the police in 2018, but it could not go towards proof of the events spoken to by the complainer.

[4] Counsel submitted that his questioning of the complainer was limited to an exploration of the terms of the first police statement, and in particular the inconsistency mentioned earlier. While it is true that much of the examination in respect of charge 22 focussed on the terms of the statement, the questions quoted by the judge show that counsel also raised the more general issue of delayed disclosure, presumably with the intention of further undermining the complainer's credibility and reliability. The judge's description of this as a "main line of attack" may be an exaggeration, at least in so far as emerges from a

reading of the complainer's evidence; but it is clear that there is no merit in the submission that the defence did not open up the line which the judge considered justified rebuttal evidence from the two witnesses.

[5] This leaves the proposition that, not being concerned with *de recenti* statements, the evidence was inadmissible hearsay. While there are exceptions, the general rule is that hearsay evidence is prohibited when its purpose is to prove the truth of something said or asserted in a statement made outside the witness box, sometimes called "secondary hearsay". By contrast, where the objective is simply to establish that something was said, irrespective of its truth or falsehood, and if the fact that it was said is relevant to an issue in the case, the evidence of someone who heard it being said becomes admissible direct evidence, sometimes called "primary hearsay." The evidence which was the subject of objection fell into the second category. It was led to show that the complainer had made earlier reports of the rape, not that the reports were true. This was relevant to the defence line mentioned above. (The limited use to which the evidence could be put was reflected in the judge's directions to the jury.) It follows that the judge did not err when repelling the objections.

[6] For these reasons the appeal is refused.