APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 41
HCA/2020/321/XC

Lord Justice Clerk
Lord Turnbull
Lord Pentland

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

Appeal under Section 74 of the Criminal Procedure (Scotland) Act 1995

by

JW

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: McSporran QC (sol adv); Tod & Mitchell, Solicitors
Respondent: A Prentice QC (sol adv), AD; Crown Agent

12 February 2021

Overview

[1] This is an appeal against the decision of the trial judge on 27 October 2020 to review under section 275(9) of the Criminal Procedure (Scotland) Act 1995, and effectively revoke, previous orders made on 17 June 2019 to allow certain evidence to be led in four separate

applications made by the appellant under section 275 of the Criminal Procedure (Scotland) Act 1995.

Background

[2] The appellant has been indicted on a total of 19 charges against six complainers, including ten charges of rape, as well as charges of lewd, indecent and libidinous practices and behaviour, and contraventions of section 5 of the Sexual Offences (Scotland) Act 1976. All but three of the charges allege behaviour having taken place on "various occasions" and the timespan of the charges in total is from 1976 to 1997.

[3] The section 275 applications with which this appeal is concerned, relate to four of those complainers, A (charges 1-6), B (charges 7-10), C (charges 11-15), and D (charge 19). A special defence of consent has been lodged in respect of charges 6, rape of complainer A on an occasion between 1989 and 1990, and 10, rape of complainer B on various occasions between 1989 and 1996.

[4] In summary the evidence sought to be elicited alleged in each case casual consensual intercourse between each complainer and the appellant over lengthy periods. In the case of A this was a 2 year period within the period over which the libel extends; for complainer B a 14 year period, the first 6 years of which spanned the period over which the libel extends; for complainer C, a 2 year period commencing at the conclusion of the period over which the libel extends; and for complainer D a period of a year after the conclusion of the period over which the libel extends. In three cases these allegations were denied.

[5] On 19 June 2019 a preliminary hearing judge allowed the applications in part, on the grounds that the evidence was relevant to the credibility and reliability of each complainer. The Crown had not opposed the leading of evidence relating to those paragraphs at the

time. A continued preliminary hearing, to consider a Crown motion that the grant of the applications should be reviewed and disallowed in terms of section 275(9) of the 1995 Act, was fixed for the first day of the trial, 27 October 2019. The trial judge acceded to that motion.

The applications as originally allowed

A

[6] That on various occasions for a period of several months between 19 December 1988 and 18 December 1990, other than the occasion libelled in charge 6, there was a casual consensual relationship during which the appellant and the witness met up to have consensual intercourse. This was said to be relevant to the issue of consent on charge 6, although in what way is not specified. It is said also to show that she was well disposed towards the appellant during the stated period, thus undermining her account that she was sexually abused and raped by the applicant between 1976 and 1985. The inference to be drawn was that the complainer is not credible or reliable in relation to charges 1-6.

B

[7] That on various occasions between 13 March 1990 and 1 January 2004, other than the occasions libelled in charge 10, there was a casual consensual relationship during which the appellant and the witness met up to have consensual sexual intercourse. This was said to be relevant to the issue of consent on charge 10, although in what way is not specified. It is said also to show that she was well disposed towards the appellant during the stated period, thus undermining her account that she was sexually abused and raped by the applicant between 1976 and 1985. The inference to be drawn was that the complainer is not credible or reliable in relation to charges 7-10.

C

[8] That on various occasions between 9 July 1991 and 8 July 1993, there was a casual consensual relationship during which the appellant and the witness met up to have consensual sexual intercourse in his car at various locations in Renfrewshire. This evidence was said to show that the complainer remained well disposed towards the applicant after 8 July 1991, thus undermining her account that she was repeatedly sexually abused and raped by the applicant between 1 June 1986 and 8 July 1991, and supporting his contention that the allegations are false. The inference to be drawn was that the complainer is not credible or reliable in relation to charges 11-15.

D

[9] That on various occasions between 4 October 1997 and 3 October 1998, there was a casual consensual relationship during which the appellant and the witness met up to have consensual sexual intercourse at an address in Johnstone and within his car at various locations in Renfrewshire. The evidence was said to show that the complainer remained well disposed towards the applicant after 10 February 1997, thus undermining her account that she was repeatedly sexually assaulted and raped by the applicant between 4 October 1994 and 10 February 1997. The inference to be drawn was that she is not a credible or reliable witness in relation to charge 19.

[10] In each case the court agreed with the submission for the appellant that there was no need for any details of these assertions to be put or led, simply the allegations that this happened, as being relevant to the credibility and reliability of the complainers.

The continued preliminary hearing

[11] Section 275(9) of the Criminal Procedure (Scotland) Act 1995 is in the following terms:

> "(9) Where evidence is admitted or questioning allowed under this section, the court at any time may—
>
> (a) as it thinks fit; and
>
> (b) notwithstanding the terms of its decision under subsection (1) above or any condition under subsection (6) above, limit the extent of evidence to be admitted or questioning to be allowed."

[12] The Crown submitted that the applications should be reconsidered in light of recent decisions, and disallowed. The defence acknowledged that reconsideration was competent. Senior counsel for the appellant argued that it was not appropriate to do so in the absence of a change in facts or law, and having regard to the fact that the applications had been unopposed. Otherwise, he declined to address the merits of the applications.

[13] The trial judge concluded that the terms of the section were wide enough to permit the reconsideration by a later court of an earlier grant in circumstances where the law has been authoritatively restated in such a way as to put the outcome of the earlier grant at odds with the law as so clarified. This had been the effect of *CH* v *HM Advocate* [2020] HCJAC 43. In relation to A and B the permitted evidence was irrelevant to whether they consented to conduct covered by charges 6 or 10. There were no averments demonstrating the close connection between the consensual sexual relationships averred and charges 6 and 10 to make evidence of the one potentially relevant to the other. In relation to all complainers, the averments were not relevant to consideration of their credibility and reliability in respect of the charges alleged. To the extent that the relationships were denied, the evidence would in any event be collateral (*CH* v *HM Advocate, at* [*71*]). The evidence would not now pass the

statutory tests for relevance, specificity and probative value prescribed by section 275, and in respect of all four complainers the applications were disallowed.

Submissions for the appellant

[14] Whilst the court had power, under section 275(9), to limit the extent of the evidence to be admitted or questioning allowed it had not been appropriate to do so in this case. Neither the factual underpinning of the case nor the law had changed. The section had to be interpreted in the context of the normal rules of evidence and procedure, and the availability of an unlimited right of appeal. A single judge should not overturn the decision of another, without knowing the basis upon which that judge had proceeded to grant the applications. The appeal provisions provided a mechanism for that basis to be set out in a way an interlocutor might not fully reveal. Where questions of admissibility had been judicially determined they should not be overturned other than in circumstances where the facts or law have changed.

[15] The Crown had neither opposed nor appealed the applications as granted, and in submissions at the continued preliminary hearing had submitted that in the original hearing "the law was correctly applied .. as it was then understood in June 2019". The law had not changed since then. The facts underpinning the applications had not changed. An accused person was entitled to have certainty in advance of his trial as to the evidence which may, and may not, be admitted.

[16] It was accepted that it had been competent for the trial judge to make the decision which he did. It was accepted that had the application been considered for the first time as at the date of the trial, it would have been refused. The appellant did not seek to address the merits of the applications. On the face of it however, one judge would be able to overturn

the decision of another judge simply because he disagreed with it; he could even do so, it would seem, where the decision had been made on an appeal under section 74. The increasing prevalence of this kind of application calls for guidance on the issues raised in this appeal, and the circumstances in which the power under section 275(9) should be exercised.

Submissions for the Crown

[17] The written submissions for the Crown asserted that the original applications had not been opposed on the Crown's then understanding of the correct interpretation of the statutory provisions, but that by the time of the continued preliminary hearing it was clear from *CH* v *Her Majesty's Advocate* that the evidence sought to be elicited was in fact irrelevant. In oral submission however the Advocate Depute acknowledged that the application should have been opposed, and, had it been granted in the same terms, an appeal should have been marked.

[18] The Advocate Depute submitted that there were no limits on the court's ability to review a decision under section 275(9), a power which enabled the court to exercise its duty to ensure the fairness of proceedings (*Moir* v *HM Advocate* 2005 1 JC 102). Had the Crown failed to seek review of the grant, then the trial judge, in light of *MacDonald* v *HM Advocate* [2020] HCJAC 21 at [47], would have been under a continuing duty to ensure that irrelevant evidence was not admitted, even if that irrelevance only became clear during the trial.

[19] The law was clearly stated in *CH* and the duty of the court was to apply the law. To do otherwise would result in unfairness, would not meet the policy behind the rape shield legislation and would be against the interests of justice.

Analysis and decision

[20] The terms of section 275(9) are clear and unambiguous. The result is that where evidence is admitted or questioning allowed in respect of an application under section 275 the court retains the power to limit the extent of evidence to be admitted or questioning to be allowed. It may do so partially, in respect only of certain paragraphs of an application, or it may do so by disallowing the entirety of the questioning which had previously been allowed. The court may do so at any time, even at or during the trial at which the evidence is to be determined. The submission that the issue of admissibility essentially had to be certain prior to the trial is not supported by the terms of the legislation. Obviously it is desirable at trial that what will or will not be admissible has already been determined and known, but absolute certainty is not required. As the court pointed out in *Moir* v *HMA* 2005 1 JC 102 (paragraph 43), in the light of the evidence led, the trial judge will always have the final say as to the admission or exclusion of questioning or evidence under section 275, by limiting a grant already made (sec 275(9)) or by allowing a fresh application. The reference in that paragraph to extending the grant is clearly incorrect, standing the terms of the section. It is a factor not without significance that the power conferred is a power to <u>limit</u> the extent of evidence to be admitted or questioning allowed.

[21] The submission that the power should be exercised only on a change of circumstances, such as a change in the underlying facts or law, does not gain support from the plain terms of the section, which not only allows the court to exercise the power "as it thinks fit", but enables it to do so "notwithstanding the terms of its decision under subsection (1) above" or any condition attached to the grant.

[22] Evidence should be admitted under section 275 only where it is relevant, and thus admissible at common law, and where it meets the statutory test. The object of the

legislation it to provide complainers in sexual offence prosecutions with adequate protection from irrelevant, and often distressing, questioning, and the court has a duty to ensure that the legislation is applied: *MacDonald* v *HMA*, para 33. In that paragraph the court stated:

> "The court has made repeated efforts to ensure that the 'rape shield' provisions of secs 274 and 275 of the 1995 Act are properly adhered to by trial courts. It has explained the import of these sections in clear terms (see, eg *M* v *HM Advocate (No 2)*; *HM Advocate* v *CJW*). It has also given definitive guidance on the duties of a judge to control the tone and content of cross-examination, especially in sexual offences cases (eg *Begg* v *HM Advocate*; *Donegan* v *HM Advocate*). The importance of this to the proper administration of justice cannot be underestimated."

[23] Although lack of opposition does not remove the court's obligation to apply the legislation, the court noted (para 35) that an absence of opposition by the Crown may be significant, as otherwise, as no doubt occurred here,

> "in the context of an adversarial system, the court may find it difficult to exclude the proposed evidence, which is outlined in the application, when it is relatively ignorant, at the stage of determining the application, of the totality of evidence which is to be adduced by the Crown at the subsequent trial."

[24] There are two circumstances in which consideration of section 275(9) may arise. First, the judge may do so *ex proprio motu*. This may happen at a subsequent preliminary hearing, or more probably at trial. There may arise circumstances, such as the present case, where it is obvious that an unopposed application has resulted in the prospective admission of evidence which would be wholly irrelevant to the issues at trial. The reasons why a limitation on the grant may be appropriate may be more nuanced, resulting from developments at trial or the way certain evidence has emerged. Whether to invoke the power in section 275(9) will be a decision for the individual judge in these circumstances. If there are sound reasons for believing that the effect of the approved application would be to admit evidence which was in reality inadmissible according to law, and in breach of the

protections offered by the statutory regime, judges are obliged to review the matter under section 275(9).

[25] The second situation is where a motion seeking to invoke the section is made by one of the parties, as occurred in the present case. This is likely to be the Crown: it is difficult to envisage circumstances where an accused may seek to limit the grant, although it is conceivable that a co-accused may wish to do so. Although the section does not make specific provision for such an application to be made, we think it is implicit that a motion asking the court to exercise its power must be competent. The question arises, however, of the circumstances which would merit such an application. The fact that such a wide discretion is conferred on the court "as it thinks fit", and may be exercised broadly by the court *ex proprio motu,* does not confer on parties a right to make a motion for the exercise of such power simply at their pleasure. This is not an opportunity to obtain a general reconsideration of an application, or a "second opinion". To justify the making of a motion the party concerned must be able to identify a sound basis for the proposed limitation, such as the prospect of the admission of clearly irrelevant and inadmissible evidence or some other material factor which is likely adversely to affect the fairness of the trial.

[26] We agree with senior counsel for the appellant that the law in this area has not changed since June 2019. Quite apart from the common law foundations against which the test must be applied, the key concepts and issues which require to be addressed can be found in the combination of *CJM* v *HMA* 2013 SCCR 215; *LL* v *HMA* 2018 JC 182; and *GW* v *HMA* 2019 JC 109 (decided November 2018). Nevertheless, it has become clear, as Lord Turnbull noted in *CH* para 109:

> "It is also fair to recognise that the past and present legislative provisions have consistently posed challenges, to both practitioners and judges alike, in determining their proper scope and application."

This was also noted by the Lord Justice General in *CH* (para 5) repeating what he had said in *CJM*, in *RN* v *HMA* 2020 JC 132 (para 22), and *MacDonald* (para 33). Of a series of cases in which the issues surrounding the rape shield legislation have been aired, these three cases, all decided in 2020, are the most significant, each setting out as clearly and plainly as possible the correct approach to be taken to the framing of section 275 applications, and the principles to be reflected in their consideration. Whilst not a restatement of the law, there is no doubt that these cases, in particular the full bench decision of *CH*, have led, within the profession in particular, to an enhanced, if belated, appreciation of the full significance of the legislation and how it should operate, and on the part of the Crown to a more discriminating approach to whether applications should be opposed. This is in our view sufficient reason to justify the motion being made by the Crown, notwithstanding the earlier failure to oppose the application or appeal the decision. Had the Crown not done so the trial judge would have been likely to do so *ex proprio motu* faced with such a clear case of circumstances where on the face of it the decision at the original hearing was one which was entirely inconsistent with *CH, MacDonald*, and *RN*.

[27] We do not accept the submission that a judge exercising the power under section 275(9) would be at a disadvantage in doing so in the absence of a report from the original judge as would be prepared in an appeal. The combination of the application itself and the interlocutor setting out the reasons for the decision in accordance with sections 275(6) and (7) should ensure that this not the case. The interplay of the various parts of section 275, and how one relates to another, has been discussed in several recent cases, notably in *RN* and *CH*. The importance of sections 275(6) and (7) in particular was addressed by the court in *Selfridge* v *HMA* [2021] HCJAC 2, paragraph 43:

> "Compliance with section 275(3) in all its aspects is a necessary pre-requisite to the determination which the preliminary hearing judge must make under section 275(6) and (7). The fulfilling by the preliminary hearing judge of the obligation placed on him by section 275(7) is critical for the benefit of the trial judge, who must have a clear understanding of the extent to which questioning has been authorised."

[28] Given that the merits of the decision made by the trial judge are not attacked, the basis for his conclusions that the applications granted in respect of A, B, C and D should be disallowed, does not arise for consideration. *Quantum valeat* however, we consider that his decision was correct and entirely in accordance with the applicable legal principles examined in *CH*. Apart from the fact that any subsequent behaviour, even if consensual, could cast no light on whether there had been consent on the occasions libelled in charges 6 and 10, the evidence relied upon is entirely collateral. The preliminary hearing judge's acceptance of the submission for the appellant that the "details" of the assertions need not be put, highlights the problem. The sole reason advanced for admitting the evidence is that it is submitted that it reflects on the credibility and reliability of the witnesses in respect of their allegations of abuse at the hands of the appellant when they were children. The applications are in the vaguest of terms, and do not meet the statutory requirements addressed in *HMA* v *MA* 2008 SCCR 84 , *LL*, *RN*, and *HMA* v *G(J)* 2019 HCJ 71. They do not meet the requirements of reflecting only specific occurrences of behaviour. To seek to use the material as the appellant wishes would require a consideration of specifics and details which would wholly derail the trial and take the jury's focus from the true issues in the case. In short, the appeal must be refused.