HIGH COURT OF JUSTICIARY

[2022] HCJ 1
IND2018-2693

OPINION OF SHERIFF S G COLLINS QC

(Sitting as a Temporary Judge)

in causa

HER MAJESTY'S ADVOCATE

against

KB

Accused

Crown: Goddard, QC, AD; Crown Agent
Accused: Keegan, QC; Bruce the Lawyers

30 October 2020

Introduction

[1] The Crown has raised by minute a preliminary issue under section 79 Criminal Procedure (Scotland) Act 1995. It objects on various grounds to the admissibility of certain passages in defence production 1, a psychological report by Professor Gary MacPherson dated 21 December 2018. I was asked to exclude these passages. At a hearing on 28 October 2020 I heard oral evidence from Professor MacPherson and submissions from counsel, and reserved my decision until 30 October 2020.

Background

[2] The accused is indicted on charge one of the indictment of using lewd, indecent and libidinous practices and behaviour towards his daughter NA (now 28 years of age, hereinafter referred to as "the first complainer") on various occasions between 20 April 1996 and 19 March 2004 both dates inclusive, and on charge two of the indictment, of raping her on an occasion between 20 April 1996 and 19 April 2000 both dates inclusive. He is also indicted on charge three of the indictment, of using lewd, indecent and libidinous practices and behaviour towards his daughter LA (now 33 years of age, hereinafter referred to as "the second complainer") on various occasions between 31 May 2000 and 30 May 2003, both dates inclusive, on charge four of the indictment, of indecently assaulting her on various occasions between 31 May 2003 and 19 March 2004, and on charge five of the indictment of attempting to rape her on various occasions between 1 January 2003 and 19 March 2004 both dates inclusive.

[3] The background to these charges is that the second complainer, then 17 years old, first made allegations of abuse against the accused in 2004. Police and social work became involved. In the course of their inquiries, the police also interviewed the first complainer, then 12 years old. She denied that there had been any inappropriate conduct towards her by the accused. No further action was taken against the accused at that time, presumably in the absence of evidence to corroborate that of the second complainer.

[4] In September 2017 the first complainer, by then 25 years old, alleged to police for the first time, that the accused had abused her. Statements were taken from her on 25 September 2017, 7 November 2017, 6 September 2018 and 2 February 2019. In summary, the first complainer told the police that from June 2017 she had begun to have "flashbacks"

of specific instances of abuse perpetrated by the accused. She described particular incidents: namely:

a. of when she was four or five, and was lying in bed, with the accused picking at his nail with one hand and touching her nipples with the other;

b. of the accused "shunting" up and down on top of her, with his penis in her vagina, causing her lots of pain and tightness. She could not remember the beginning or the end of the event, but felt disgust in waiting for it to end;

c. when she was in a barn, aged almost 6 years old, of leaning back on the hay. She described seeing the sky, being aware of green grass, haystacks to her left, animals to the front and left which she could smell and hear, brick walls, metal gates, and of a tap leaking into a silver feeding bucket. She described the accused being to her right, his hands down her pants, with his middle finger (with a jaggy nail at the skin) touching her vagina, and then of him putting his finger into her vagina, which was painful, nipped and stung;

d. when she was about 3 or 4 years old, of lying on the living room floor, and the accused had just changed her nappy. She described lying on her back, and the accused touching her vagina with his right hand, and how she had tried to crawl away but to then feeling burning pain as he touched her, as if she had wet herself and that she had then blacked out. She said, that she could remember that the accused was wearing grey joggers with cuffs on the bottom, a cotton, white coloured tee shirt and white sports socks;

e. of when the accused raped her whilst her mother YA was on her left. She said that she could hear her mother saying "why don't you kiss him; if you kiss him it will help you relax and it won't be so sore."

Accordingly the first complainer described in detail incidents of abuse which she said occurred around 20 years before, including one said to have occurred when she was as young as 3 or 4 years of age.

[5] The accused had initially been detained and interviewed by police in 2004 after the second complainer's allegations. He was further detained and interviewed by police in November 2017 after the first complainer's allegations. He was then in due course indicted to a preliminary hearing on 12 September 2018. This hearing was then twice postponed by way of section 75A minutes, in order that the Crown could obtain psychological reports in respect of both of the complainers, including the report by Professor MacPherson on the first complainer. He was instructed to "offer a view on the issue of childhood memory and also delayed disclosure of child sexual abuse" and was provided with the petition, a summary of evidence, and copies of the first complainer's police statements. His report was duly produced and later disclosed to the defence. The accused has now lodged it, with the intention of calling Professor MacPherson as a witness to speak to it at trial.

The first objection: qualification as an expert witness

[6] There are three grounds of objection to the admissibility of Professor Macpherson's report raised by the Crown in its minute. The first is that Professor MacPherson is not qualified to give expert evidence on the subject of memory. In essence this objection is based on the submission that he does not fall within the "guiding principles" for determining who is a "memory expert witness" which are set out in two bullet points at paragraph 2.vi on page 8 of the British Psychological Society's 2008 *Guidelines on Memory and the Law*. It was submitted that he therefore lacked the necessary knowledge and expertise to

be regarded as an expert witness: Davidson, *Evidence*, paragraph 11.13; *Hainey* v *HMA* 2013 SCCR 309 per Lord Clarke at paragraph 46.

[7] It is true, as he accepted, that Professor MacPherson does not neatly fall within the categories of persons specified in paragraph 2.vi. But to exclude him as an expert witness on this basis would be, in my view, to take too narrow a view of both the subject matter on which he has reported, and the qualifications sufficient to give an expert view on it. I would characterise those aspects of the report which have been objected to as concerned not simply with memory, in some pure and abstract sense, but with assessment of memory of childhood trauma in a forensic setting. This is considered in Professor MacPherson's report both as a matter of generality, and in its application to the particular statements made by the first complainer.

[8] I consider that Professor MacPherson is sufficiently well qualified to give an expert opinion on these issues. He is a highly qualified consultant forensic clinical psychologist, with nearly 30 years' experience, and with many professional accolades, appointments and publications to his name. During his career he has provided numerous reports for the court and given evidence on a range of matters which in my view are sufficiently related to the present subject matter as to give him expertise in it. Even if he does not fall neatly within the categories of "memory expert" set out in the British Psychological Society's *Guidelines*, he is, as he said, an expert in assisting the court in matters often closely related to memory of childhood trauma, including in particular, delayed disclosure of sexual abuse.

[9] As Professor MacPherson also said, the British Psychological Society's *Guidelines* in relation to who may be regarded as a memory expert are currently being revised, in part because they are felt to be too narrow. I accept that it is a measure of the peer recognition of

his expertise in this and related areas that he is one of only six out of 60,000 members of the society who has been invited to assist with this revision.

[10] But as the *Guidelines* themselves state, it is ultimately the function of the judge to decide who is and is not a memory expert, and the bullet pointed "guiding principles" for identifying experts stated therein are expressly recognised to be merely ones which "could be used" in so doing. In other words they are not exhaustive of the persons who can be expert witnesses in relation to memory, nor are they intended to be.

[11] I consider that it is necessary to take a broader view of the subject matter of Professor Macpherson's report, and a broader view of his expertise, than the Crown argument would allow. This is not a case where a psychologist is being asked to provide an opinion outwith the bounds of their professional discipline, such as a psychiatric opinion (*R* v *MacKenney* (1983) 76 Cr App Rep 271 at 275) or an opinion on psycholinguistics (*Murphy* v *R* (1989) 167 CLR 94), to take a couple of examples from the reported authorities. It is a case where an experienced and eminent psychologist is being asked to give an opinion on a sub-speciality from within the field of psychology, and where, even if the precise focus of his experience and expertise does not fall four square within that sub-speciality, it is sufficiently closely related to it to entitle him to express an opinion on it to the court.

[12] Having heard from Professor MacPherson, and considered the terms of his report, I am satisfied that he has demonstrated that he has the relevant knowledge and expertise to give evidence on the matters contained in it. And insofar as there are matters not directly within the precise field of his greatest expertise, he is entitled to draw on the body of knowledge and understanding of other fields within psychology, that is, to base his opinion at least in part on study rather than personal experience: *Kennedy* v *Cordia Services*

LLP [2016] UKSC 6 paragraph 50; Davidson, *Evidence*, paragraph 11.20. I therefore reject the Crown's first ground of objection.

The second objection: necessity

[13] The second ground of objection relates to the question of necessity. The Crown rightly submits, under reference to clear and recent authority, that the subject matter must be necessary for the proper resolution of the dispute, and be such that the jury without proper instruction or advice in the particular area of knowledge or experience would be unable to reach a sound conclusion without the help of a witness who had such specialised knowledge or experience. That will be the case only if there are special features pertaining to a witness or to his evidence that are likely to be outwith the jury's knowledge or experience. It is not enough that the expert's evidence might be useful to the jury if it is not necessary in this sense: *Wilson* v *HMA* 2009 JC 336 at paragraph 58; *Gage* v *HMA* 2012 SCCR 161 at paragraph 22.

[14] Now all the members of the jury will of course be adults, who were once children. They will therefore all have memories of their childhoods, and knowledge and experience of how far back those memories go, and the detail with which they can be remembered. In principle therefore a jury does not need an expert to enable it to assess the credibility and reliability of the evidence of a witness claiming to remember events from their early childhood. That will be a matter properly within their own knowledge and experience. However, exceptionally, the evidence of such a witness may have features which take it outwith the sort of normal knowledge and experience of childhood memory to be expected of jurors. In my view, an accumulation of such features is present in this case.

[15] The first feature is that the first complainer will not merely be giving evidence of childhood memories, but of memories of traumatic sexual abuse in childhood. It is certainly to be hoped - and expected - that such memories and the ability to recall them (or otherwise) will be matters outwith the jury's knowledge and experience.

[16] The second feature is that the first complainer has not only given accounts of sexual abuse in childhood, but has claimed to have remembered such abuse back to very young ages - 3 or 4 years old. As Professor MacPherson accepted, the jury might well be aware that, in general, traumatic memories are more likely to be remembered than forgotten. But whether traumatic memories of sexual abuse are more likely than not to be remembered by a 25 year old, from when she was 3 or 4 years of age, is again a matter on which a jury is unlikely to have knowledge or experience.

[17] The third feature is the extraordinary level of detail in the first complainer's statements to the police regarding the incidents of abuse, including those which occurred when she was as young as three or four. As noted above, these include detailed descriptions not only of the nature of the abuse, but extraneous details of the locations where it took place, what the accused was wearing at the time, whether he was to her right or left, what was said, etc. I think it unlikely that a jury would have within its own knowledge or experience whether that level of detail could be expected from an adult recalling childhood sexual abuse.

[18] The fourth feature is the way that the first complainer has described her memories of abuse. Importantly, it is apparent that she was first subject to joint investigative interview in 2004, at age 12, and denied any knowledge of abuse at the hands of the accused. In 2017, however, she said that she started having "flashbacks" about the accused. As to what she meant by "flashbacks", she said of her recollections that "they are almost like a dream, but [I

am] awake when I have them". She further described them "as more of a flashback than a memory – a flashback I would describe as actually living it there and then and it felt as if I was a child again." In short, her position was that although she had no memories of the abuse when questioned about it in 2004, she was now re-experiencing the abuse, in flashback, in some instances more than 20 years later.

[19] In my view this too gives rise to matters outwith the knowledge and experience to be expected of the jury. It will have to decide whether it finds credible and reliable the first complainer's account of the manner in which she has come to remember the abuse. In doing so it will have to consider whether it is likely that a person could have no memory of abuse at age 12, but then start experiencing it in flashbacks in the way described more than 13 years later. In order to properly do so, and not merely draw on popular misconceptions of "flashbacks" as often used as dramatic devices in film and television, expert evidence is necessary.

[20] This is highlighted by the observations at page 17 of Professor MacPherson's report that the complainer's description of her flashbacks so many years after the event, with no antecedent or trigger, is not in line with clinical understanding of memory as he goes on to describe it. As senior counsel for the accused submitted, these observations are not ones which he could properly repeat to a jury in submission without evidence to support it. That is precisely because they could not be matters which the jury could be expected to have within their own knowledge and experience. Yet they will need to know them, in order to properly assess and decide on the critical issue of the credibility and reliability of the first complainer's account. Whether they then choose to accept them, of course, will be a matter entirely for them.

[21] The fifth and final feature is the manner in which Professor MacPherson's report came into existence. Senior counsel for the accused asserted in his written submission - and it was not disputed by the advocate depute before me - that it was instructed by the Crown because of "concerns" about the first complainer's evidence. Further it is said that once the report was received the defence was advised by an advocate depute that the case would be referred to the law officers recommending no proceedings. Now if that was done the recommendation was obviously not accepted, and that is entirely a matter for the law officers. But we now have the oddity (to put the matter neutrally) that the Crown is seeking to deny the jury the expert evidence which it instructed, and which appears to have given it at least concerns as to whether the complainer's evidence was so lacking in credibility or reliability that the prosecution should or should not proceed. But if, as it seems, it was necessary for the Crown to have Professor MacPherson's expert evidence in order to assist it reach a view on this matter, it sits somewhat ill in its mouth to now suggest that it is not necessary for the jury to have sight of it also.

[22] In all the circumstances, therefore, I am satisfied that those passages of Professor MacPherson's report which were objected to on grounds of necessity should be admitted. I will reject the Crown's second ground of objection. In reaching this decision I emphasise that I see this as a highly exceptional case where, cumulatively, the various features which I have mentioned make necessary, in the sense stated in the authorities, the hearing of this evidence by the jury.

[23] I say this conscious that no Scottish authority on the admission of psychological evidence in relation to childhood memory has been put before me, and that the Court of Appeal of England and Wales has set its face against doing so in recent years: *R* v *Jonathan CWS* [2006] EWCA Crim 1404 at paragraphs 31-45; *R* v *H* [2011] EWCA Crim 2344

paragraph 41; *R* v *Stephen Anderson* [2012] EWCA Crim 1785 at paragraph 9. On the other hand, while clearly seeking to discourage the use of such evidence, the Court of Appeal has not shut the door on it completely, acknowledging that exceptional cases may still arise where its use may be appropriate *R* v *E* [2009] EWCA Crim 1370 at paragraph 42. I repeat that I view this as such a case, and note also that the facts of it do have some similarities with the one English case cited to me in which such expert evidence was admitted (in particular, the very young age of the complainer at the time and the profusion of detail of the abuse and its surrounding circumstances): *R v H (JR) (Childhood Amnesia)* [2006] 1 Cr App Rep 195 at paragraphs 7–15, 36.

The third objection: reliability

[24] The Crown's third ground of objection relates to questions of reliability. Again, the law is clear in relation to this matter. The subject matter in question must be part of a recognised body of science or experience which is suitably acknowledged as being useful or reliable, and properly capable of reaching and justifying opinions offered. Academic research which is still in infancy, whose methodology is unsound, or which is not yet sufficiently tested, will not possess the necessary qualities to make it admissible in court: *Wilson*, *op cit*, paragraph 58; *Young* v *HMA* 2014 SCCR 78 at paragraphs 56–59.

[25] On this basis objection was taken to three passages in Professor MacPherson's report. The first, at page 9 paragraph 2, refers to "emerging research" in relation to what is called "memory trace", and into recall of the "gist" of an early childhood event when this has been discussed previously by a parent. However, as Professor MacPherson accepts, these are areas "not yet widely accepted in the memory scientific community".

[26] The second passage starts midway through paragraph 2 on page 17 at the sentence beginning with the words "Third, the complainer mentions …", and runs through to sentence later in the same paragraph ending with the words "… more may come back to me in the future." This passage relates to the complainer's reported involvement in two sexual survivors' groups. The concern is raised that "her involvement in these groups may not be helpful in the absence of any stable memories", with the inference being that her reports of abuse may somehow have been caused by such involvement. It was not suggested that there was a recognised body of science underpinning this statement.

[27] The third passage runs from the last sentence on page 17 through to the end of paragraph 3 on page 18. It concerns the issue of "false memory syndrome" and whether the first complainer's statements might fall into this category. But as Professor MacPherson squarely acknowledges, "false memory syndrome" remains only a hypothesis, without extensive support from research or formal recognition. It remains only "an informed clinical guess" and therefore not "sufficiently evidence based to meet the requirement for expert evidence before the courts."

[28] In my view it is clear that each of the three passages objected to is inadmissible on grounds of unreliability. Indeed both Professor MacPherson and senior counsel for the accused accepted as much. Professor MacPherson said that he felt professionally bound to at least mention these matters in his report given the terms of his instruction, but it is apparent that they all relate to matters for which there is no established and recognised body of knowledge of learning with the qualities necessary to render it admissible.

[29] I will therefore sustain the Crown's minute to this extent. If Professor Macpherson's report is put in evidence at trial, the three passages just mentioned must be redacted and no reference made to them or their contents.