APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 2
HCA/2020/000254/XC

Lord Malcolm
Lord Turnbull
Lord Pentland

OPINION OF LORD MALCOLM

in

Appeal

by

XY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: K Johnston, sol adv; Martin Johnston and Socha
Respondent: A Prentice, QC, sol adv AD; Crown Agent

12 January 2021

[1] I am grateful to Lord Pentland for setting out the background and the circumstances of this appeal. However I regret I am unable to adhere to the view of your Lordships that it should be refused.

[2] The appeal raises a stark issue not addressed in the many recent cases concerning applications under section 275 of the Criminal Procedure (Scotland) Act 1995. It can be expressed as follows – if an accused person accepts that sexual activity as described in an

indictment occurred but at a later date when the complainer was of age, is such a line of defence to be allowed?

[3] The point can be illustrated by a hypothetical example. Mr A is charged with having had unlawful sex with a child. This is said to have occurred in 1983 when the complainer was 15 years of age. Mr A's position is that he did have sex with the complainer but in 1984 when she could consent. When this scenario was put to the advocate depute he submitted that any questioning or evidence in support of this defence would be inadmissible at common law as being irrelevant or as raising a collateral issue.

[4] It is true that the circumstances of this case are more complicated than the hypothesis. For example charge 2 is one of rape, though it can be noted that before the preliminary hearing judge the Crown indicated that in the light of the complainer's account it is likely that it will be relying on the alternative verdict of unlawful intercourse with a child. And there are some parts of the libel which are denied outright – hence the amendment to the application to insert the necessary specification. It follows that the timing point applies to only some of the specific allegations made by this complainer, albeit the most serious. Furthermore there are other charges involving different complainers which are not the subject of this application. Nevertheless none of the specific facts of this case detract from the crisp issue raised by Ms Johnston's submissions. She contends that the appellant should be allowed to present the defence case on the particular allegations in full. She will not be able to indicate that sexual intercourse did not occur. If the application is refused the defence will not be able to suggest it happened at a later date. The complainer will be able to speak to it happening, the accused will not. It could be put to the complainer that it did not happen when she says, but this invites the question – well when does he say it occurred? If the complainer gives supportive detail which is consistent with the event, for example as

to personal private details, or in respect of specific locations, he will not be able to give an explanation consistent with his innocence, The questioning of the complainer will be artificially restricted in a manner likely to threaten the fairness of the proceedings. The same would apply if the appellant gives evidence.

[5] Given both parties accounts as relayed to the court, this application does not concern two or more unrelated events. There is a dispute as to when certain events took place. Unlike many of the recent cases, it is not a matter of whether something happening before or after the date of a libel casts light on the events that day. The application does not involve the defence trying to establish a connection between two or more occurrences. It is of course true that sexual activity when someone is of age does not exclude such behaviour at an earlier period, but the touchstone is whether the proposed line has a reasonably direct bearing on a fact in issue at the trial. Where the date of an alleged offence is critical to criminality, evidence directed at that issue is admissible.

[6] To return to the hypothesis mentioned earlier, I would be concerned if the response of the advocate depute is an accurate reflection of the law. I am of the view that Mr A should be allowed to present his defence as stated. However the refusal of this appeal suggests that I am mistaken.

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Lord Malcolm
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OPINION OF LORD TURNBULL

in

APPEAL UNDER SECTION 74

by

XY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: K Johnston, sol adv; Martin Johnston and Socha
Respondent: A Prentice, QC, sol adv AD; Crown Agent

12 January 2021

[7] I am also grateful to Lord Pentland for setting out the background to this appeal and the circumstances in which it was presented. In my opinion, the argument presented on the appellant's behalf is misconceived and ought to be rejected. I agree with Lord Pentland that the preliminary hearing judge was right to refuse the application made on the ground that the evidence sought to be elicited was irrelevant at common law. Since there is a division of

opinion amongst the members of the court I would wish to say a little more about why I have arrived at my own view.

[8] In the application which is the subject of this appeal, the appellant seeks authority to elicit evidence that he and the complainer AA engaged in sexual behaviour, on an unspecified number of occasions, in a seven month period commencing a year after the last date in either of the relevant charges, at a time when she was 17 years old. He asserts that this evidence will address the issue of the complainer's credibility and reliability and will permit the drawing of two inferences. First, that the complainer is an incredible and unreliable witness, and, second, that he did not have sex with her when she was under 16 years of age. The complainer denies having any form of sexual relationship with the appellant when she was 17 and claims to have been in a relationship with a particular boyfriend at that time, whom she has named.

[9] On the face of matters the evidence which the appellant seeks to elicit has all of the hallmarks of collateral and irrelevant evidence. It is argued that it should not be so classed as it does not seek to address the issue of consent but will address what is said to be the only issue in dispute, namely when sexual behaviour between the appellant and the complainer took place.

[10] It is, I think, helpful to put the appellant's arguments in context. He is 72 years old. He faces an indictment containing eight charges libelling sexual offences committed against five different female complainers over a period of around eighteen years in the 1980s and 1990s. The locations at which the offences are said to have taken place include three different schools.

[11] Charges 1 and 2, concerning the complainer AA, are said to have occurred between April 1981 and April 1984, when she was aged between 13 and 15 years old and the appellant was aged between 33 and 36.

[12] Charges 3 and 4, concerning the complainer CM, are said to have occurred between November 1986 and November 1991, when she was aged between 13 and 17 years old and the appellant was aged between 38 and 43.

[13] Charge 5, concerning the complainer MMcC, was said to have occurred on a single occasion between December 1988 and December 1989, when she was aged 17 and the appellant was aged 40 or 41.

[14] Charges 6 and 7, concerning the complainer LM, are said to have occurred between August 1989 and August 1993, when she was aged between 13 and 16 years old and the appellant was aged between 41 and 45.

[15] Charge 8, concerning the adult complainer JB, is said to have occurred on a single occasion between October 1997 and October 1999, when the appellant was aged between 49 and 51.

[16] The charges which the appellant faces range from minor sexual assaults, involving kissing the complainers in charges 5 and 8, through to significant allegations of indecent assault involving various forms of touching, removal of clothing, digital penetration and inducing the complainers to masturbate him to ejaculation in charges 3, 4 and 7. Charges 1 and 2 contain the most serious allegations, involving conduct of various different sorts constituting lewd, indecent and libidinous practices and behaviour and rape.

[17] The appellant has tendered pleas of not guilty to all charges. There are no special defences lodged and his application under section 275 of the 1995 Act only relates to the

complainer AA. I infer that the appellant denies any sexual contact of any sort with the remaining complainers during the periods specified.

The application

[18] The application made on the appellant's behalf, as amended, seeks to elicit evidence that specific occurrences of sexual behaviour took place between AA and the appellant, namely penetration of her vagina by his penis, touching her vagina by him and digital penetration of her vagina by him in the period of around seven months between 14 April and 30 November 1985 when she was 17 years old. The appellant denies the other acts of sexual activity specified in charge 1.

The submissions in support of the application

[19] In the written submissions lodged on behalf of the appellant in advance of the hearing it is explained that the purpose of the application is to:

> "allow the defence to put to the complainer that the incidents of sex spoken to by her in her statement… occurred at a later time when she and the appellant were in a legitimate sexual relationship."

[20] It is argued that the evidence is not collateral as it is verifiable. In addition, it is submitted that:

> "The jury will simply be asked to consider whether the evidence spoken to by the complainer occurred when she was 13 to 16 or when she was 17. This is an 'either or' situation, not an 'in addition' proposal."

[21] At a later stage it is explained that:

> "The appellant contends, as does the complainer that the sexual activity libelled did take place, it just didn't take place during the period of the libel."

[22] These propositions were reflected in the oral submissions advanced by Ms Johnston, which were broadly designed to present the dispute between the complainer and the appellant as being nothing more than temporal. The central feature of the argument was that "the issue in dispute at trial will be how old was the complainer at the time".

Analysis

[23] I do not accept that the submissions advanced on the appellant's behalf properly identify the relevant issues. Nor do they accurately reflect the dispute between the crown and the appellant. There is far more in dispute between the complainer and the appellant than is suggested in the argument presented on his behalf. It is simply incorrect to suggest that the jury will be asked to consider whether the evidence spoken to by the complainer occurred when she was 13 to 16 or when she was 17. Not only does the appellant deny that significant aspects of what the appellant is expected to say are true, he also denies, as I will come to discuss, the whole underlying basis of the crown case. It is equally incorrect to suggest that the complainer and the appellant both contend that the sexual activity libelled did take place. The appellant's position is that the complainer is mistaken or lying when, for example, claiming that the appellant inserted a banana into her vagina.

[24] In considering the nature of the evidence which the appellant wishes to elicit it is, as Lord Pentland has observed, plainly incorrect to state that the evidence is verifiable. In addition, the three passages taken from the appellant's written submissions, which I have set out above, serve to illustrate the gloss which is put on the issue which the evidence is said to address. The appellant's position is not just that the complainer has got her dates confused, by a number of years, it is that significant aspects of her account are false.

[25] To properly identify the issues at trial it is, in my opinion, necessary to begin by identifying the nature of the case brought against the appellant. The case is of a type with which the court is familiar. It alleges sexual abuse of young girls by a much older man who was in a position of authority or responsibility. The appellant was AA's athletics coach. In common with the charges concerning the complainers CM and LS, the charges concerning AA set out repeated conduct over lengthy periods of time of an apparently escalating nature. In so far as AA is concerned the sexual intercourse alleged in charge 2 is said to have begun a full year after the commencement of the various other sexual acts specified in charge 1. The case against the appellant, whilst having other elements as set out in charges 5 and 8, appears to be in large part a classic case of grooming.

[26] In addition to denying a number of the aspects of sexual abuse described by AA, it would appear to follow that the appellant denies grooming her. He certainly denies doing so by engaging in any form of sexual contact with her when she was between the ages of 13 and 16. It is argued that he was later in a "legitimate relationship" with her during the course of which they engaged in what he will term consensual sexual intercourse. There is though no narrative of how this consensual sexual relationship between a 17 year old girl and her 37 year old athletics coach is said to have come about. It is thus plain that the eliciting of the evidence identified does not just involve suggesting to the complainer that she is wrong about her dates.

[27] The appellant characterises the evidence which he wishes to elicit as setting out his defence. If the appellant is to give evidence of a defence that he was having intercourse with a 17 year old, rather than with a 14 or 15 year old, he will have to explain how this came to happen. On any view that must involve a narrative different from that given by the complainer, which is of grooming from aged 13 with escalating sexual contact. The

appellant will then be subject to cross-examination designed to challenge his account. This appears to me to demonstrate that it is an illusion to suggest that the issue at trial will be the complainer's age. The issue at trial ought to be the appellant's conduct towards the complainer over the three year period specified in charges 1 and 2 during which, as a matter of undisputed fact, she was aged between 13 and 15 years old.

[28] To allow a contested examination of what the appellant says he and she engaged in when she was aged 17 appears to me to be precisely what would fall to be classed as a collateral issue. In addition to that, such an enquiry would cast no light on the question of whether the appellant repeatedly massaged the complainer's legs and body, touched her vagina, shaved her pubic area, took a photograph of her whilst she was naked, showed her pornographic material and penetrated her vagina with his fingers and a banana, all whilst she was aged between 13 and 15 years old. Apart from touching her vagina and inserting his fingers in it, the appellant denies that any of this conduct ever took place at any time. Nor, in my opinion, would the resolution of a contested dispute about whether the appellant had sexual intercourse with the complainer when she was aged 17 cast any light at all on the question of whether he was having sexual intercourse with her when she was aged between 14 and 15.

[29] In the course of the debate the advocate depute was asked to comment on whether an accused person would be permitted to lead evidence of having had sexual intercourse with a complainer when she was 16, rather than when she was 15, if that was the charge against him. The advocate depute's position was that he would not, as such evidence would be irrelevant.

[30] I recognise that if a male and a female, of generally comparable ages, and absent any complicating features of vulnerability or abuse of power, were to describe a single act of

sexual intercourse, taking place in the same circumstances and in the same place, but each differed by a few months as to the date of the act, then such circumstances might show that evidence of both accounts could be relevant and admissible. I would prefer to reserve my opinion until such an issue arises. In my opinion that is not the issue raised in the present case. For the reasons which I have sought to set out above, and for the reasons given by Lord Pentland, I consider the present case to be very far indeed from the hypothetical situation raised with the advocate depute.

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Introduction

[31] This is another appeal raising issues about the application of sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). The appellant, who was born on 12 January 1948, has been indicted in the High Court on eight charges alleging serious sexual offences committed against a number of children and young persons in the 1980s and 1990s. In all there are five female complainers, each of whom the appellant is alleged to

have sexually abused over a period of some 18 years when he was aged between 33 and 51 years old.

[32] Charges 1 and 2, with which the present appeal is concerned, are in the following terms:

> "(001) on various occasions between 14 April 1981 and 13 April 1984, both dates inclusive, at (specified addresses) and elsewhere in Scotland to the Prosecutor unknown, you XY did use lewd, indecent and libidinous practices and behaviour towards (AA), born 14 April 1968, c/o Police Service of Scotland, Kirkcaldy, a girl then of or above the age of 12 years and under the age of 16 years, and did repeatedly massage her legs and body, touch her vagina, shave her pubic area, take a photograph of her whilst she was naked, show her pornographic material and penetrate her vagina with your fingers and a banana: CONTRARY to the Sexual Offences (Scotland) Act 1976, Section 5;
>
> (002) on various occasions between 14 April 1982 and 13 April 1984, both dates inclusive, at (specified addresses), you XY did assault (AA), born 14 April 1968, c/o Police Service of Scotland, Kirkcaldy and did penetrate her vagina with your penis and did thus rape her, to her injury"

It can thus be seen that the offences are alleged to have been committed against AA over a period during which she was between the age of 13 and the day before her 16th birthday.

The continued preliminary hearing

[33] At a continued preliminary hearing on 3 August 2020 the appellant made an application in terms of section 275 of the 1995 Act for permission to ask questions and lead evidence to show that he was in a consensual sexual relationship with AA between 14 April 1985 and 30 November 1985 when she was 17. The broad basis for the application was that such evidence was said to be relevant to the reliability and credibility of the complainer's evidence and to the appellant's defence.

[34] The reason tendered in the application for the relevance of the evidence sought to be introduced was the appellant's stance that no sexual conduct occurred between him and the

complainer during the time covered by the libel; he accepted, however, that consensual sexual intercourse did occur when the complainer was 17. This was alleged to be relevant:

(i) To account for the complainer having sexual knowledge about the appellant and to allow her to give an honest account of having sex with him. Her sexual knowledge of him might lend her evidence an impression of credibility and reliability on the contested subject matter of the charges.

(ii) It was said to be necessary to put to the complainer that she was in a sexual relationship with the appellant at a later time from that libelled.

(iii) It was asserted that in the absence of such questioning the appellant could not properly defend the allegations against him and would not receive a fair trial and

(iv) Finally, it was submitted that the probative value of the evidence for which permission was sought would be significant and would outweigh the risk of prejudice to the proper administration of justice.

[35] The preliminary hearing judge refused the appellant's application. He took the view that the evidence sought to be elicited was irrelevant under the common law. Accordingly, the statutory scheme set out in sections 274 and 275 of the 1995 Act was not engaged.

[36] The judge considered that the appellant would not be prevented in any way from presenting his defence that the sexual activity alleged in the charges had not taken place. He could give evidence to that effect.

[37] The preliminary hearing judge referred to the decisions in *Oliver* v *HM Advocate* 2020 JC 119, *Thomson* v *HM Advocate* (PH Bench Book paragraph 9.7.3 at page 119) and *JW* v *HM Advocate* 2020 SCCR 174. He observed that the court had repeatedly stressed the importance of the issue of relevance as a criterion of admissibility in this context. He

referred to what had been said by the Lord Justice Clerk (Dorrian) in giving the opinion of the court in *Kerseboom* v *HM Advocate* 2017 JC 47 at paragraph 10:

> "…it is not every matter which by any conceivable margin may bear on credibility which is relevant for this purpose. Evidence which is remote or collateral is not relevant to establishing whether the accused was guilty of the offence with which he is charged…"

[38] He referred also to the well-known statement made by Lord Sands in *Moorov* v *HM Advocate* 1930 JC 68, 87 which had been endorsed in the full bench decision of *CJM* v *HM Advocate* 2013 SCCR 215.

> "A certain alleged fact may be relevant insofar that, if established, it might help a fair mind to come to a certain conclusion. Nevertheless, it may fall to be excluded if its ascertainment raises a separate issue from that which is being tried. The alleged fact if put in cross and admitted may be relevant, but nevertheless it may be of a kind which cannot otherwise be proved, for, if it is disputed it would require to be tried as carefully as the issue before the court, and the allowance of such collateral inquiries would make proofs endless."

[39] The preliminary hearing judge considered it to be of fundamental importance to keep in view that if the Crown could not persuade the jury that the conduct took place between the dates specified in the libel then the appellant would be acquitted. He was not persuaded that the appellant's desire to augment his denial by putting to the complainer, and potentially giving evidence himself, that he did have sexual relations with her when she was 17 was relevant at common law. His denial that sexual activity occurred within the times specified in the libel was a complete defence to the charges. Even if the appellant could establish that intercourse was occurring when the complainer was 17, this would not of itself demonstrate that it was not happening when she was 14 and 15. The judge also considered that a dispute about whether sexual intercourse was happening between the parties more than a year after the libel would involve "something of a collateral inquiry".

The appeal

[40] When the appeal came before this court we allowed the appellant to amend his section 275 application by adding the following at the end of paragraph 1:

> "That occurrences of sexual behaviour between AA and the applicant, specifically of penetration of AA's vagina by the accused's penis, touching her vagina by him, and of digital penetration of her vagina by him, took place as alleged in charges 1 and 2, at (certain of the addresses referred to in charges 1 and 2) and elsewhere in Scotland to the prosecutor unknown, not between 14 April 1981 and 13 April 1984, but rather between 14 April and 30 November 1985".

[41] In support of the appeal, Ms Johnston submitted that the preliminary hearing judge had erred in regarding the evidence sought to be led as irrelevant at common law. She stressed that the purpose of the evidence was to allow the appellant's defence to be fully presented. The evidence was not collateral because the appellant accepted having had consensual sexual relations with the complainer, but at a time when she was over 16 and accordingly no longer underage. If he was not allowed to lead the evidence, the appellant would only be able to present what Ms Johnston said amounted to merely half of his defence to the charges. Proof of the dates between which sexual relations took place was of critical importance in the circumstances of the present case. The jury would never be satisfied that sexual activity had not taken place when the complainer was between the ages of 13 and 15 if the appellant was not permitted to lead evidence that such activity had occurred at a later date. This would allow him to explain, for example, how she knew that the appellant had had a vasectomy. The fact that the complainer, when precognosced by the Crown in response to the section 275 application, had denied having a consensual sexual relationship with the appellant when she was 17 added further strength to the application. Her stance would have the effect of bringing into sharp focus at the trial the issue of when sexual activity occurred between the complainer and the appellant.

[42] For these reasons Ms Johnston submitted that the evidence was relevant and should be admitted in terms of sections 274 and 275 because to do so would not undermine the complainer's dignity and privacy and would be in the interests of justice in ensuring that the appellant received a fair trial.

[43] In replying to Ms Johnston, the advocate depute submitted that the preliminary hearing judge had been well-founded in regarding the evidence sought to be elicited as irrelevant. The facts at issue in the case were whether the sexual offences alleged in charges 1 and 2 occurred during the dates libelled when the complainer was between the ages of 13 and 16. Whether or not she had had consensual sex with the appellant more than a year after the libel, when she was 17, was irrelevant. Any attempts to elicit evidence of an alleged consensual sexual relationship between the appellant and the complainer when she was 17 would risk the jury focusing on whether that relationship took place at that time. It would be a line of inquiry liable to derail a jury onto side issues. It had no bearing on whether the complainer was subject to the unlawful sexual acts alleged in charges 1 and 2, spanning a libel which ended over a year before the alleged consensual sexual relationship took place. Even if the evidence could be regarded as relevant, any probative value it might have was wholly outweighed by the risk of prejudice to the proper administration of justice, specifically the invasion of the complainer's dignity and privacy.

Analysis and decision

[44] In the recent five judge decision of this court in *CH* v *HMA* [2020] HCJAC 43 the court reiterated that the touchstone for consideration of an application under section 275 is that the evidence sought to be elicited is admissible at common law (Lord Justice Clerk (Dorrian) at para [34]). The question of admissibility is not simply a matter of the exercise of

a general discretion in the interests of fairness. Evidence must have a reasonably direct bearing on the subject matter of the prosecution; it follows that collateral evidence is excluded. The prohibition against the admission of irrelevant and collateral evidence exists for pragmatic reasons, which promote the fair and efficient administration of justice. The only exception is where the collateral issue can be established "more or less instantly and cannot be challenged" (*CJM* v *HN Advocate* 2013 SCCR 215 para 32).

[45] In her written case and argument Ms Johnston asserted that the evidence sought to be elicited was verifiable. That is plainly incorrect. The complainer disputes that she was in a consensual sexual relationship with the appellant when she was 17. If the evidence is admitted this will inevitably open up a discrete chapter at the trial, focussed on whether the complainer or the appellant is to be believed on this aspect of the case. Such an inquiry would clearly be collateral to the question of whether the Crown is able to prove that the conduct alleged in charges 1 and 2 occurred. That is the real issue in the prosecution. There would be a serious danger that the attention of the jury would be deflected from the real issue onto the contentious side issue of what happened or did not happen when the complainer was 17. In my opinion, the evidence sought to be led about what allegedly happened consensually when the complainer was 17 has no meaningful (ie relevant) connection with whether the Crown can establish that the appellant sexually abused the complainer when she was still a child between the ages of 13 and 16. Such evidence would cast no light on the real issue. It tells one nothing about whether the appellant abused the complainer as alleged in charges 1 and 2.

[46] I am not persuaded that the refusal to admit the evidence will in any way impair the appellant's ability to present a properly focussed and fair defence to charges 1 and 2. He will be able to challenge all the evidence, including the complainer's testimony, relied on by

the Crown in support of those charges. If he elects to do so, he will be able to testify that no such conduct occurred. He will be able to explain what he says was the true nature of this relationship with the complainer at the time of the charges. What he will not, however, be permitted to do is to divert the focus of the trial onto a disputed side issue about whether or not the parties had a consensual sexual relationship 4 years after the child sexual abuse is alleged to have begun and by which time the complainer was no longer a child. I do not consider that it would be in the interests of justice to allow the trial to be side tracked in this way.

[47] The present case does not merely involve deciding whether sexual intercourse or some other sexual activity took place either (a) before or (b) after the complainer became of age. The case is more nuanced and complex than that. It is important to recall that the nature and extent of the sexually abusive conduct alleged in charges 1 and 2 goes significantly beyond the nature and extent of the consensual sexual activity described in the appellant's amended application under section 275. It is also important to appreciate that the Crown alleges that the complainer was the victim of child sexual abuse of a more extensive and perverted nature than the types of conduct which the appellant says took place consensually when the complainer was no longer a child. In particular, charge 1 alleges, amongst other types of conduct, that the appellant repeatedly massaged the complainer's legs and body, shaved her pubic area, took a photograph of her whilst she was naked, showed her pornographic material and penetrated her vagina with a banana. The appellant does not contend that any of these things happened during the consensual sexual activity which he says occurred when the complainer was 17. So the issue is not simply whether sexual conduct of an undisputed nature happened either when the complainer was underage or alternatively when she was of age. The case in respect of charges 1 and 2 does

not involve a simple binary choice of that type. Properly characterised, the issue arising in respect of charges 1 and 2 is whether the Crown can prove that the appellant sexually abused the complainer in the various ways alleged, during the period covered by the libel when she was a child. There is a good deal more to the case than the question of merely identifying the time something of an agreed nature took place.

[48] For these reasons I conclude that the preliminary hearing judge was right to refuse the section 275 application on the ground that the evidence sought to be elicited was irrelevant under the common law. It follows that the provisions in sections 274 and 275 are not engaged. Since preparing an initial draft of this opinion, I have had the advantage of reading Lord Turnbull's judgment. I fully agree with it. I would move your Lordships to refuse the appeal.