APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 21
HCA/2019/546/XC

Lord Justice General
Lord Turnbull
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

GAVIN WATSON MACDONALD

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: I Paterson (sol adv); Paterson Bell
Respondent: Farquharson QC AD; the Crown Agent

26 May 2020

Introduction

[1] On 5 September 2019, at the Sheriff Court in Livingston, the appellant, who was aged 52 at the material time, was convicted of a charge which, following the jury's verdict, was in the following terms:

> "on 28 August 2017 at ... Bathgate you did sexually assault [SD],… did lock a door to prevent her from leaving the room, place your hand under her clothing and touch

> her breasts, make comments of a sexual nature towards her, bite her on the body, seize her by the hair and pull her backwards onto a bed, lean on top of her, straddle her and pin her to the bed, put your fingers in her mouth and push her head to the side, attempt to kiss her on the mouth, pull her towards you, rub your body and penis against her body and sexually penetrate her vagina with your fingers to her injury; CONTRARY to sections 2 and 3 of the Sexual Offences (Scotland) Act 2009".

The jury deleted a part of the libel which alleged that the assault had been carried out with intent to rape. On 26 September 2019, the appellant was sentenced to 27 months imprisonment.

[2] Leave to appeal has been granted only in respect of one ground of appeal; whether the sheriff's references to the complainer as a "victim" at certain parts of his charge were such as to constitute a miscarriage of justice. However, the case raises a number of issues in relation to the conduct of sexual offences trials in general. In particular, first, it highlights deficiencies in the procedure for the determination of applications under section 275 of the Criminal Procedure (Scotland) Act 1995. Secondly, it focuses sharply questions of what may be put to a complainer in cross-examination. Thirdly, once again, it concerns what may be said in a defence jury speech in relation to an accused's "position" when no evidence has been led to demonstrate what that position might be. Fourthly, the appeal concerns the duties of the presiding judge or sheriff in controlling the proceedings, especially in relation to unwarranted attacks upon the character of a complainer, and in formulating the charge to the jury relative to the live issues at trial. It must be said *in limine* that the manner in which this trial proceeded gives rise to real causes of concern.

Pre-trial procedure

[3] The case was a straightforward one involving a single accused and one charge of a single sexual assault with attempt to rape. There were 14 witnesses listed; three civilian, two

forensic scientists, a Forensic Medical Examiner and eight police officers. Notwithstanding the nature of the case, the First Diet was "adjourned" on three occasions. The reasons for the repeated adjournments are difficult to fathom in context of the duty to fix a trial diet. The first FD was on 4 March 2019. This was adjourned on 25 March "to allow disclosure to take place". The new FD was adjourned until 21 May because the defence required to precognosce the FME and to instruct an expert. The relative minute records that "a section 275 Application may be lodged also". This FD was adjourned until 17 June "to allow the Crown to consider the previously lodged section 275 application". Eventually, at the fourth FD a trial diet was fixed for 2 September. The minute records that the court "allowed an amended section 275 application to be lodged and noted the application as being unopposed by the crown".

[4] The section 275 application, which is dated 16 May, stated that the defence wanted to adduce evidence that, *inter alia*: (a) at some time in the weeks preceding the date libelled, the complainer was injured as a result of climbing out of a window at her flat whilst heavily intoxicated and falling from a roof; (b) on another occasion during these weeks, the complainer had been involved in a physical altercation with her boyfriend, namely PW, which "could have resulted in her sustaining injuries"; and (c) at the time of the alleged sexual assault, the complainer and the appellant had consumed cocaine together".

[5] There is no record of the section 275 application having been judicially considered or determined. At the trial the parties, and the sheriff, appear to have proceeded on the basis that it had been granted.

[6] In terms of a joint minute it was agreed that, on the date libelled, the appellant had "sexually digitally penetrated the vagina of" the complainer at the address libelled. Swabs

of the appellant's hands had revealed the presence of the complainer's DNA. The appellant lodged a special defence of consent.

The trial

The evidence

[7] At the trial, there were only five witnesses: the complainer, two of her female friends, the FME and a police officer.

[8] The complainer was 24 years old. She was employed as an administrative assistant. She was in a relationship with PW and had been since May 2016. PW lived on the top floor of the house forming the *locus*. The appellant also lived in one of the rooms on the top floor. The complainer stayed with PW intermittently, and used his room sometimes when he was away working. She did not know the appellant well.

[9] According to the complainer, on the evening of 28 August, she had been out socially with a female friend, DR, who seems to have also stayed in another room in the house along with a male friend. The complainer and DR consumed several glasses of vodka, tequila shots and prosecco. They returned to PW's room, where they changed into nightwear. The complainer was wearing a T-shirt and pants. They sat down in the room which DR occupied. The complainer described herself as just "happy". The company ran out of cigarettes. The complainer was aware that the appellant had cigarettes. She went to his room to see if she could borrow any. She was invited in by the appellant. She sat on the edge of his bed and had a cigarette with him. There was some friendly conversation and talk about a potential operation which the complainer might need. At one point she lifted up her T-shirt and showed the appellant certain surgical scars on her abdomen.

[10] The appellant got up and locked the door. He then attacked the complainer as libelled. She had been saying "No". He pulled her hair and bit her on the back. She ended up lying on the bed. He inserted his fingers into her vagina. The complainer was pushing his legs in an effort to get away, but the appellant kept going. When he stopped, the appellant said to her, "Whatever happens in this room, stays in this room". She said to him, "Please don't tell" PW, "because she felt so ashamed". She had not consented to anything which the appellant had done. She had been crying.

[11] The complainer returned to PW's room and then went back down to the room where DR and her friend were. She could not tell them what had happened to her until DR took her back up to PW's room. The complainer broke down and told DR that the appellant had touched her when she had not wanted him to do so. She had previously tried to phone PW. She had sent him a text which said that something "really bad" had happened. She then texted some of her female friends saying, "Please someone help". She felt sick and was in a panic. She ran outside to PW's car. She phoned another friend, namely EV. She drove to EV's house. The complainer was upset and crying. She stayed with EV for a couple of hours and told her what had happened. She then got back into the car and went to the police station to report the incident.

[12] The complainer was medically examined. She described herself as having bruises on her legs, arms, thighs and knees. They had occurred during the incident. She had a bruise to her inner thigh, which had been caused when the appellant was trying to force her legs apart and insert his fingers into her vagina. She had a mark where she had been bitten. Since the incident she had been suffering from anxiety and panic attacks.

[13] In cross-examination, it was put to the complainer that she had consented to the sexual activity. It was put to her that she had initiated it. After she had returned to the

house, she and DR had showered together. There was questioning about whether the complainer had been wearing only a thong and a crop-top. The complainer said that her T-shirt was of a normal length. It was put to her that she had consumed cocaine with the appellant, It was alleged that she had brought the cocaine with her. It was she who had locked the door when she entered the appellant's room. This was all denied by the complainer. It was suggested to her that the appellant had said, "You'd better go now before we do something we will regret". This too was denied. It was put to the complainer that she had told DR that she had kissed someone and had some "lines" with him. This was suggested repeatedly and denied throughout. It was put to her that there had been an incident in the week before the incident, during which she had to be restrained after having tried to hit PW with a mobile phone. She denied that and tried to explain that there had been an incident of a different nature, but she was not permitted to give an account of that episode. Throughout her cross-examination, the complainer was upset and frequently crying. She was particularly distressed at the suggestions involving cocaine.

[14] There was reference to the complainer and the appellant having discussed an incident, which had occurred some months previously, when the complainer had jumped out of a window following an altercation with PW. Yet another line was about a comment in the complainer's Facebook profile, where she had stated "I don't know how I always wake up with random bruises". She said that she was accident prone, but that the bruises were not strange because their causes were known.

[15] EV gave evidence about the complainer's distress and her account of the incident afterwards. This had started when she had been woken up by text messages, one of which said "Help" and had a crying emoji. This was at about 3.00am. At about 4.50am, the complainer had called her and asked if she could come round. She did so. She was in "quite

a state". Her hair was dishevelled. She was wearing a T-shirt and Adidas shorts of knee length. She had no shoes. She was pale and shaking. The account given to EV was in line with the complainer's testimony.

[16] DR described herself and the complainer as "pretty drunk". The complainer had been wearing a T-shirt and Adidas shorts. DR had fallen asleep. She was woken later by the complainer banging on her door. She described the complainer as seeming "ok". The complainer was on her phone for a while. They had gone up to PW's room, because the complainer had said that she wanted to speak to her privately. The complainer's body was shaking. She told DR that she needed to get out of the house. She was agitated and frantic. The complainer did not tell her what was wrong. On the way back downstairs, the complainer had stopped her and said, "He raped me". She had not been agitated before speaking to PW on the phone. The complainer had told her that she had gone for a "fag and some lines".

[17] The FME spoke to various injuries. She said that the alleged bite mark was not typical of a bite mark, but more like a graze, although teeth could have caused that injury. The bruises were difficult to age, but were recent, having been caused within one or two, or possibly three, days. There was fingertip bruising to the inner aspect of the complainer's thigh, consistent with someone gripping that part of the body and attempting to keep the complainer's legs open.

Defence speech

[18] The appellant's law agent began by asserting to the jury that the complainer had panicked when she thought that what she had done would be found out. She had therefore lied about what had happened. He explained that the appellant had agreed in the joint

minute that there had been digital penetration, which was in line with his special defence. He then continued:

> "We know she was lying and we know why. She was so worried that her boyfriend would find out what she had done that she sought to defend herself by saying that what did happen was without consent, the truth being she had gone to [the appellant's] room where she had consensual sexual contact which he had brought to an end and she was worried that he would tell people so she made this allegation".

[19] At other stages, the law agent repeated his assertion that the complainer had engaged in consensual sexual behaviour and had been concerned about being found out by her boyfriend, hence her distress. He asserted that what had happened was what she had wanted to happen. He reminded the jury that she had not screamed, shouted or scratched his eyes out. He then posed the question:

> "Does this fit more with him saying you better go before we do something we regret?"

[20] The law agent addressed what he suggested was the true reason for the complainer's distress by posing another question:

> "Was she upset because she had been sexually assaulted or because through a cocaine fuelled fog she realised that through her actions she would lose the boyfriend she loved?"

He referred to the complainer arriving at her friend's house in a distressed condition and posed a further question:

> "Is she upset by what has happened or whilst heavily intoxicated through drink and drugs? Does she fear the perceived repercussions of her consensual actions?"

Under a chapter of his speech which he entitled "Drugs", the agent said the following:

> "Whilst no one will condone the use of drugs ... it pales into insignificance alongside the serious allegations being made by [the complainer]. Some of you may have thought during the trial 'Well, so what if they took cocaine' and that may be right but it represents another example of [the complainer's] lies. If she is prepared to lie about that how can we trust what she says to convict beyond reasonable doubt? And

> did the use of cocaine badly impair her judgment in the aftermath of what happened?"

Charge to the jury

[21] In a detailed charge to the jury, the sheriff said that it was important that the jury should understand what was evidence and what was not. Questions or suggestions which were made to witnesses were not evidence, no matter how forcefully or how often they are put. What was said in the speeches was not evidence either. The sheriff directed the jury that (*the Crown*) had to prove not only a lack of consent on the part of the complainer, but also that there was an absence of belief on the part of the appellant that she consented. All of those elements required to be proved by corroborated evidence.

[22] The sheriff explained that the special defence of consent had, as its only purpose, the giving of notice to the Crown that a particular line of defence could be adopted. It did not take away from the appellant's "stance" that he was not guilty. The Crown had to prove the case beyond reasonable doubt. The defence did not require to lead evidence in support of the defence. If the jury considered that any evidence relating to the special defence raised a reasonable doubt, an acquittal had to follow. He continued:

> "And in this case, the [appellant's] position is that, at the time of this incident, there was accepted to be some limited sexual contact between ... those concerned and that the complainer was a willing participant in everything which went on. In other words, she consented, which is an absolute defence to the charge".

The sheriff explained that his use of the word complainer was to the person who was alleged to be the victim in the case and who had made a complaint that certain things had happened. It was for the Crown to satisfy the jury beyond reasonable doubt that the special defence should be rejected.

[23] The sheriff stated that he wanted to say something "about consent and reasonable belief and consent". He defined consent in terms of the statute, before continuing:

> "Now, what about reasonable belief of consent? Well I have to direct you that it is a defence to the charge obviously that the complainer consented, but it's also a defence to the charge that even if you were satisfied that the complainer did not consent, it would still be a defence if the accused nevertheless genuinely had a reasonable belief that she was consenting – in other words, a belief he honestly held which was based on some reason."

The defence agent had said that the evidence pointed to consent to the limited sexual activity which the appellant had admitted but, even if the complainer had not consented, the Crown had failed to demonstrate that the appellant had no reasonable belief that she consented. It was for the Crown to show that the appellant had no reasonable belief that she had consented.

[24] It was at this part of the charge that the sheriff altered his description of the complainer to that of "victim", by saying:

> "Of course, if you accepted, from the evidence, that he actually knew the victim didn't consent to what took place, then it follows that he must have had no reasonable belief that she had consented. But simply having an honest belief that the victim consented wouldn't be enough; it must also be held on reasonable grounds. How do you judge that? Well you look objectively at what the proven facts tell you about the interaction between the victim and the other party and their mutual or what understanding they would have had on that understanding about what was happening and to decide if the accused's belief that the victim was consenting was reasonable, you can have regard to whether he took any steps to find out if she was consenting and what steps these might have been".

The sheriff then returned to describing the complainer as such or by name.

[25] Having dealt with the Crown case, the sheriff turned to the defence in saying the following:

> "And the defence position is that there was a limited sexual contact, which is admitted, but that was ... freely consented to, if not initiated, by [the complainer] and [the appellant] should be acquitted because any sexual activity that took place was not a crime because of the essential element of lack of consent doesn't feature."

The sheriff continued:

> "And the crux of things, in the defence view, is ... the complainer's relationship with her boyfriend, [PW].
>
> And the defence suggest to you that they do have another explanation for her distress and that she had ... was worried about what her boyfriend would say if he found out that she had initiated something sexual with [the appellant] and she was lying to cover herself."

This matter was expanded upon before other matters which the defence had raised were repeated, including the suggestion that the complainer had admitted to DR that she had been using cocaine. This indicated that the complainer had been caught out lying.

The court's questions

[26] In advance of the hearing of the appeal, a number of questions were posed by the court. These sought the parties' views on the bases upon which the appellant's law agent had been entitled: (i) to examine the complainer on things which she had said to DR; (ii) to elicit hearsay evidence from DR as to what the complainer had said to her; (iii) to cross examine the complainer about cocaine use and the altercation between her and her boyfriend; (iv) to suggest to the jury that the complainer had lied about incident; (v) to assert to the jury that the episode had been consensual; (vi) to suggest to the jury that the complainer had taken cocaine, was in a drug fuelled fog and that the use of cocaine had impaired her judgment; and (vii) to suggest to the jury that her conduct fitted more with the appellant saying you better go before we do something they would regret. The court also enquired whether the sheriff ought to have given a direction under section 288DB(2) of the 1995 Act in light of the eliciting of evidence that the complainer did not fight the accused off and the comments made about this in the speech.

Submissions

Appellant

[27] In addressing the ground of appeal, the appellant contended that the references to the complainer as a victim were crucial directions which were prejudicial to the appellant and had caused a miscarriage of justice. It had been entirely inappropriate to refer to the complainer as a victim. The appellant had admitted sexual conduct in terms of the joint minute. The issue at trial was whether or not the complainer had consented or if the appellant had had a reasonable belief that she had been consenting. In *Wishart* v *HM Advocate* 2014 SCCR 130 (at para [7]) the court had stated that it was not appropriate to refer to the complainer as a victim, citing *Hogan* v *HM Advocate* 2012 SCCR 404.

[28] In answer to the questions, which had been raised by the court, the purpose of questioning DR, about what the complainer had said to her, was to demonstrate an inconsistency between the complainer's evidence and what she had said to DR (1995 Act, s 263(4); *Ahmed* v *HM Advocate* 2009 SCCR 861). The cross-examination about the cocaine and the previous episode of aggression between the complainer and her boyfriend, followed upon a successful 275 application. Although it was initially maintained that the statement which the complainer was alleged to have made to DR was evidence that demonstrated cocaine use, it was ultimately accepted that this was hearsay and there was no evidence of such use. There was no basis for the agent saying to the jury that the appellant had said "you'd better go" to the complainer. There was no basis upon which the defence agent had been entitled to suggest to the jury that the complainer had consented. Notwithstanding the terms of the written Case and Argument, which stated that the issues at trial were whether or not the complainer had consented and whether the appellant had had a reasonable belief that she had been consenting, it was accepted that the special defence ought to have been

withdrawn and the issue confined to one of whether the Crown had proved the case (*Bakhjam* v *HM Advocate* 2018 JC 127). No issue of reasonable belief arose (*Maqsood* v *HM Advocate* 2019 SCCR 59 at para [16], citing *Graham* v *HM Advocate* 2017 SCCR 497 at para [23]). The sheriff ought to have given a direction in terms of section 288DB(2) of the 1995 Act.

Respondent

[29] The advocate depute submitted that, although it was common to refer to the alleged victim of a sexual assault as a complainer, the proper legal term, where such a person had given evidence, was simply "witness". The term "complainer", as referring to a witness as distinct from the procurator fiscal, had found its way into sections 274 and 275 of the 1995 Act. It was not a word which should be used prior to a conviction. As a generality, the sheriff used the term complainer considerably more than he had mentioned the word victim. He also referred to the complainer by name on a number of occasions. The references to victim were temporary slips. Looking at the charge as a whole however, the use of victim is not capable of being interpreted as indicating how the sheriff perceived the complainer's evidence to be. Using the term did not automatically mean that there had been a misdirection (*Hogan* v *HM Advocate* (*supra*) at para [34] and *Wishart* v *HM Advocate* (*supra*) at para [7]). The sheriff's directions did not amount to him impressing his own views of the evidence unduly upon the jury. The term victim had been used at a point in the charge which had dealt with a defence for which there was no evidence. The sheriff did fall into error when dealing with the defence of consent in that he said that the appellant had a position whereby the complainer had consented. That error was favourable to the appellant.

[30] It was accepted that the section 275 application should have been opposed and refused. There had been no evidence of cocaine use. The purpose of adducing the hearsay of DR had not, contrary to the Practice Note (No 2 of 2017), been stated at the time.

[31] It had not been open to the appellant to ask the jury to conclude that a complainer had consented when there was no evidence from either the appellant or any other source to that effect. The defence should be restricted to asking the jury to consider whether the Crown had proved its case (*Bakhjam* v *HM Advocate* (*supra*) at paras [33]-[35]). The trial judge ought to have withdrawn the defence of consent, whilst making it clear that the jury still had to be satisfied beyond reasonable doubt that the Crown had proved what had occurred had been without that consent. A section 288DB(2) direction should have been given.

Decision

"Victim"

[32] The sheriff's charge spans 45 pages of transcript. When referring to the complainer, the sheriff used that term 29 times. On another 11 occasions he used the complainer's full name. He twice referred to an "alleged victim". It is unfortunate that on page 28 he began to refer to the victim, although that was in a general context and not specific to the complainer. However, on several occasions on page 31 (*supra*) he does refer to the complainer as the victim. This should not have occurred, as the sheriff has recognised in his report, for the reasons stated in *Hogan* v *HM Advocate* 2012 SCCR 404 (LJG (Hamilton), at para [34]) and *Wishart* v *HM Advocate* 2014 SCCR 130 (Lord Eassie, delivering the opinion of the court, at para [7]). As in both of these cases, the court is not satisfied that this has led to any miscarriage of justice. The sheriff did not use the word in a manner which would have

suggested that the crimes libelled had been committed or that the complainer was in fact a victim. It is clear from the context in which the words appear that the references to a "victim" were *lapsus linguae*. It would have been clear to the jury that the task which they had to undertake was a determination of whether the events had occurred as described by the complainer. The appeal is accordingly refused.

Section 275 and the cross examination

[33] The court has made repeated efforts to ensure that the "rape shield" provisions of sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 are properly adhered to by trial courts. It has explained the import of these sections in clear terms (see eg *CJM* v *HM Advocate* 2013 SCCR 215; *HM Advocate* v *CJW* 2017 SCCR 84). 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 *Dreghorn* v *HM Advocate* 2015 SCCR 349, *Donegan* v *HM Advocate* 2019 JC 81). The importance of this to the proper administration of justice cannot be underestimated. The problem is well understood and was outlined two decades ago in the Scottish Executive's paper "Redressing the Balance: Cross-examination in rape and sexual offence trials" which prompted the changes to sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 in section 7 of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. Despite this, and the clear import of these sections, the courts have continued to be criticised for failing to provide complainers in sexual offence prosecutions with adequate protection from irrelevant, and often distressing, questioning. This case is a further illustration of a trial court's failure in this regard.

[34] Section 275 applications must be properly administered and determined. Once made, they ought to be carefully considered by the Crown. If they seek the admission of

evidence which is inadmissible at common law or under section 274, they ought normally to be opposed. Without such opposition, 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. There was no opposition in this case and, as the Advocate Depute correctly accepted, there should have been.

[35] Especially when a section 275 application is made at a First Diet (1995 Act, s 71(2A)), as it was in this case (cf the time limit of 14 days before the trial in section 275B(1)(b), it ought to be considered at that diet and properly determined by the court. That means that the court must decide, first, whether the evidence sought to be admitted is admissible as relevant at common law. Secondly, if it is admissible, the court must determine whether it is struck at by section 274 (an attack on character, engaged in unrelated sexual or other behaviour). Thirdly, if it is struck at, the court must consider whether it meets the test for admission under section 275(1)(a) (specific occurrence of sexual or other behaviour or specific facts demonstrating character or condition/predisposition) and 275(1)(b) (relevance to proof of guilt). Fourthly, the court must make a decision on whether the probative value of the evidence is significant and outweighs any risk of prejudice to the proper administration of justice (s 275(1)(c)), including the protection of the complainer's dignity and privacy.

[36] The court is obliged, if it is admitting any evidence in terms of section 275, to state its reasons for doing so (s 275(6)). These reasons ought to be recorded. This means that they ought to be minuted so that the parties, and any subsequent judge or sheriff involved in the case, can know precisely what the decision has been. There is no record of any of this having been done in this case. That is a serious deficiency.

[37] The section 275 application, in so far as relating to events prior to the incident libelled in the charge, ought to have been refused. The first matter sought to be admitted related to an allegation that the complainer had at some unspecified date fallen off a roof in a state of intoxication. The latter part of the allegation was a gratuitous attack on the pursuer's character. The fall was irrelevant, since any injuries sustained as a result could not have been classified as occurring within the unchallenged one or three days before the event spoken to by the Forensic Medical Examiner. Any evidence of this nature would have been inadmissible at common law. It ought to have been excluded on that basis. Allowing evidence of this irrelevant and insulting nature into a trial of a sexual offence is a serious failure in the administration of justice.

[38] The same considerations apply to the second matter which was sought to be introduced. This related an altercation between the complainer and her boyfriend which "could have resulted in her sustaining injuries". This is vague as well as irrelevant. If this type of allegation is to be made, there must be evidence to support a contention that the injuries which both the complainer and the FME spoke to could have been caused in an incident of this nature. There was no such evidence. This ought to have been objected to and excluded.

[39] The final matter concerns the allegation that the complainer had taken cocaine together with the appellant. It is possible that this might have been admitted if a proper reason were given for its admission, but none is apparent from the section 275 application. The reason given is that it is relevant to "the special defence of consent, *mens rea* and credibility of the complainer". It is said that the evidence was relevant "as it represents the true reason for there being contact between [the appellant] and the complainer". None of

this, especially the reference to "*mens rea*" makes any sense. How the consumption of cocaine together could have a bearing on any of these issues remains a mystery.

[40] Matters do not stop there. What was put to the complainer was that she had taken the cocaine with her to the appellant's flat (ie supplied illegal drugs to him). This was not even in the section 275 application. Similar considerations apply to various other irrelevancies adduced at the trial, such as the complainer throwing a mobile phone at her boyfriend and the complainer showering with DR. All of this evidence ought to have been objected to and excluded. It is most unfortunate that a complainer in a sexual offences trial should have been subject to such questioning. It is not at all surprising that she was distressed as a result.

The Special Defence and Consent

[41] There was no evidence in support of the special defence of consent. In these circumstances the appellant's law agent ought, in accordance with the normal and accepted practice, to have withdrawn the plea in advance of addressing the jury (*Lucas* v *HM Advocate* 2009 SCCR 892, Lord Carloway, delivering the opinion of the court, at para [12]). The agent should at least have made the position clear in his speech to the jury (*ibid*). He did not. On the contrary, he maintained that the incident had involved consensual sex in the absence of any evidence for that line. He was, of course, entitled to address the jury on the basis that the Crown had not proved the case beyond reasonable doubt. He was free to make submissions on credibility and reliability. He was not entitled to suggest to the jury that a positive case of consent had been made out in the absence of any evidence to support that case. It was improper to do so.

[42] In these circumstances, it was for the sheriff to make the position clear to the jury; ie that there was no evidence that the pursuer had consented to any sexual activity but that they still required to consider: whether they accepted the complainer's testimony as credible and reliable; and whether her account was adequately corroborated. The sheriff's direction to the jury, that they required to acquit if they considered that any evidence relating to the defence raised a reasonable doubt, was misplaced. There was no such evidence. Equally, the sheriff's statement that the appellant's "position" was that "the complainer was a willing participant in everything which went on" is a misdirection. The appellant had no "position" (*Bakhjam* v *HM Advocate* 2018 JC 127, LJG (Carloway), delivering the opinion of the court, at para [35]) beyond the terms of the joint minute, that he had digitally penetrated the complainer, and the fact of his not guilty plea.

[43] This matter was compounded by the sheriff directing the jury to consider whether, even if they were satisfied that the complainer did not consent, the appellant had a reasonable belief that she had consented. There was no evidence upon which the jury could find that there was any belief in consent, far less a reasonable one. The directions, which required the jury to consider reasonable belief, ought not to have been given (*Maqsood* v *HM Advocate* 2019 SCCR 59, LJG (Carloway), delivering the opinion of the court, at paras [16], citing *Graham* v *HM Advocate* 2017 SCCR 497 at para [23]) and [17]). This was compounded further by the erroneous direction that there required to be corroboration of a lack of reasonable belief (*ibid*).

Hearsay

[44] The evidence of what the complainer said to DR in the aftermath of the incident was hearsay. It may have been admissible for a number of purposes, including its use as a *de*

recenti statement to bolster the credibility of the complainer or as a prior inconsistent statement designed to achieve the opposite result (1995 Act s 263(4)). If it was the latter, in terms of the Practice Note (No 2 of 2017) *Prior Statements* (para 4) it would have been of assistance if the sheriff had clarified what the purpose of the questioning was. What is clear, in any event, is that what DR maintained the complainer had said to her could not become evidence of fact. There was accordingly no proper basis upon which the appellant's agent could have addressed the jury to the effect that the complainer was engulfed in a "cocaine fuelled fog" or "heavily intoxicated… through drugs". There was no basis for suggesting to the jury that "Some of you may have thought during the trial 'Well, so what if they took cocaine'" or that the use of cocaine had badly impaired the complainer's judgment. In that state of affairs, not only should the defence agent have refrained from making these baseless allegations but also the sheriff should have either stopped the agent from doing so, preferably in the course of his jury speech, or at least made the matter clear in his charge to the jury; *viz*. that there was no evidence that the pursuer had taken any cocaine. Not only did he not do so, he provided legitimacy for the allegation by repeating it as something for the jury to consider when he gave them directions on the evidence.

[45] The defence law agent's reference in his speech to the alleged remark "you better go before we do something we regret" is in an even worse position. It was not even hearsay. It was no more than something which was put to, and denied, by the complainer. It was not evidence and ought not to have been used at all in the speech. It was improper to do so. Although the sheriff did tell the jury in general terms, that suggestions made to witnesses and the content of a jury speech did not constitute evidence, he ought specifically to have directed the jury to ignore that part of the speech and to have explained why; *viz*. that there was no evidence that such a remark had been made.

Section 288DB

[46] Sub-sections 288DB(1) and (2) of the 1995 Act provide that, in sexual offence trials, where evidence is given or a question asked which suggests that the sexual activity took place without physical resistance, the judge must advise the jury that there can be good reasons why a complainer might not resist and that an absence of resistance does not necessarily indicate that the allegation was false. In this case evidence was elicited that the complainer had not screamed, shouted or scratched the appellant's eyes out. In these circumstances the direction ought to have been given.

Conclusion

[47] This trial was conducted in a manner which flew in the face of basic rules of evidence and procedure, not only the rape shield provisions but also the common law. It ignored a number of principles which have been laid down and emphasised in several recent decisions of this court. If justice is to prevail in the prosecution of sexual offences, it is imperative that those representing parties abide by these basic rules. If they do not do so, the judge or sheriff must intervene to remedy the matter. During her cross-examination, this complainer was subjected to repetitive and at times irrelevant questioning. She became extremely distressed and rightly so. The court did nothing to intervene. Were this to be repeated, the situation in sexual offences trials would be unsustainable.