APPEAL COURT, HIGH COURT OF JUSTICIARY

[2026] HCJAC 25
HCA/2025/000449/XC

Lord Justice Clerk
Lord Matthews
Lord Armstrong

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

JH

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg (Sol Adv); Paterson Bell Solicitors (for Bruce Short Solicitors, Dundee)
Respondent: Harvey AD; the Crown Agent

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7 July 2026

Introduction

[1] The appellant was convicted by a jury at the High Court of Justiciary at Edinburgh of two sexual offences against two complainers including rape and sexual assault of a young child by penetration. The trial judge imposed an extended sentence comprising a custodial

term of 5 years and an extension period of 3 years together with a non-harassment order of 25 years for both complainers.

[2] The appellant challenges his conviction on the ground that the preliminary hearing judge erred by refusing to admit certain evidence under the Criminal Procedure (Scotland) Act 1995 section 275 which he maintains would have supported his defence. In particular, he argues that evidence of messages exchanged with the complainers demonstrated a prior agreement to meet for sexual activity and ought to have been admitted for the purposes of challenging the credibility of their evidence and, in the case of BB, as bearing on consent.

[3] Unlike other recent cases heard by this court following the UK Supreme Court's judgement in *Daly & Keir* v *HM Advocate* [2025] UKSC 38, 2025 SLT 1253, the appellant has not raised a compatibility issue within the meaning of section 288ZB of the 1995 Act. The appellant does not, therefore, complain of an unfair trial within the meaning of Article 6 of the European Convention on Human Rights and Fundamental Freedoms. While acknowledging the court's duty under section 6 of the Human Rights Act 1998 to act in a Convention compatible manner, it follows that the question for the court is whether the omission of the evidence in question resulted in a miscarriage of justice under the principles of Scots law. To determine that question, we require to consider the evidence led at trial together with the speeches advanced to the jury and the trial judge's directions.

The charges

[4] The charges are reproduced below. The phrase "utter a sexually explicit remark to her" was deleted from charge 1 on Crown motion at the close of the evidence. The jury deleted the italicised text in square brackets in convicting the appellant unanimously of charge 1. Some of those deletions were invited by counsel for the appellant who also invited

the jury to delete the underlined phrases that the jury's verdict retained. In effect the appellant invited conviction of sexual assault by touching AA's hips, buttocks, breasts and her vagina with his fingers under section 20 of the Sexual Offences (Scotland) Act 2009.

> "(001) on 10 February 2023 at a wooded area near to East Scotscraig Lane, Dundee you … did assault [AA] …being a child who had not attained the age of 13 years, and did approach her, seize her by the arm, push and pull her by the body, touch her hips, buttocks and breasts, pull down her lower clothing, sexually penetrate her vagina with your fingers, (*utter a sexually explicit remark to her)*
> [*seize her by the head and body, force her to the ground, seize her by the neck and hair and penetrate her mouth with your penis and you did thus rape her*],
> to her injury: CONTRARY to Section[*s*] [*18 and*] 19 of the Sexual Offences (Scotland) Act 2009;
>
> (002) on 10 February 2023 at a wooded area near to East Scotscraig Lane, Dundee you … did assault [BB], [aged 13] … and did approach her, seize her by the body, pull down her lower clothing, touch her breasts and vagina, push her on the body and penetrate her vagina with your penis, and you did thus rape her, to her injury: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009."

[5] There was a third, evidential, charge alleging that the appellant had on 11 February 2023 attempted to defeat the ends of justice by hiding and concealing a backpack containing certain items of his clothing and his mobile telephone, seeking to wash his hands whilst in police custody and then asking for a drink and using it to attempt to wash his hands. The charge was withdrawn on Crown motion at the end of the evidence.

Joint investigative interview of AA 11 February 2023

[6] DC Jaclyn Czyba and Elaine Parker, social worker, interviewed AA on 11 February 2023. AA described being out with BB, and another friend in the late afternoon of 10 February 2023 in Broughty Ferry. They were drinking alcohol together, but she was not drunk. They were together in various parts of Dundee that evening before AA and BB went to BB's house at about 2200 hours. Shortly after, AA and BB went out again to buy a pizza. She described walking through a school complex before heading onto a stone path through a

wooded area. They took this route because she and BB wanted a long walk. They were familiar with the route, and they knew others who had walked the same route shortly before them.

[7] When AA was asked whether she knew the appellant she said she had seen photographs of him and that he followed her on social media. She knew his name and she could describe his appearance, although she denied ever having met or spoken to him. She said she had sent him a message on Snapchat the night before the incident although she had sent the same message to all her connections on Snapchat for the purposes of maintaining her "streak" (a run of consecutive days of communication on Snapchat). The appellant had replied to photographs of her on Instagram with "heart eyes". She explained that she had made her location available on Snapchat since her cousin and sister wanted to know where she was when she was drinking.

[8] AA said that as she and BB were walking through the woods, the appellant approached from behind and grabbed her left arm with one hand and BB's wrist with the other. He was wearing a red coat with burgundy or red joggers, black shoes and a grey or black jumper. He asked them, "who's first?" AA managed to free herself, but the appellant still had a grip of BB. She tried to help BB, which led the appellant to let go of BB and grab AA instead. He took her to an overgrown bush and began touching her on her hips, bottom and breasts. She was wearing a vest-top underneath a puffer jacket, and he touched her both over and under her clothing. She was wearing a clear belt which he unbuckled before opening her jeans and pulling them down together with her underwear. She tried to push him off and pull them back up, but he persisted. The appellant then inserted three or four fingers into her vagina while he held her bottom with his other hand. He moved his fingers in and out of her vagina, which was painful. She was trying to stop the appellant

throughout, tried to remove his hand from her vagina and struggled with him. The appellant then asked her to perform oral sex on him. She looked at him in a way that made clear that she did not want to, but he pulled his trousers and underwear down. He pushed her down to her knees and took hold of her hair and neck before putting his penis into her mouth and forcing her head back and forth. This continued for what seemed about five minutes. She felt dirty and that she was going to be sick. It stopped when she fell backwards, got up and moved back.

[9] The appellant then turned to BB who had been nearby, watching and telling the appellant to stop what he was doing to AA which he had ignored. He then grabbed BB by the waist and pulled down her trousers and underwear. He pushed her so that she was bent over a log and put his penis into her vagina. AA saw the appellant grab BB by the waist and start to move backwards and forwards. When he stopped, he walked away towards the end of the woods.

Joint investigative interview of BB 11 February 2023

[10] DC Tessa Robertson and Ms Parker jointly interviewed BB on 11 February 2023. BB first explained that AA was due to stay over at her house on the evening of 10 February 2023. They were in the house watching TikTok videos until about 2200 hours, when they decided to go to the Shaandar takeaway on Macalpine Road. They walked a route that took them through a wooded area next to a nursery and a grass pitch. AA had been sending Snapchat photograph messages to people to maintain her "streak". The photographs had been of the ground, and it wouldn't have been possible for someone to know her location from the photographs. She thought AA had sent a Snapchat message to the appellant. AA had told her a few days ago that the appellant had kept sending her Snapchat messages.

[11] BB described them being on a trail path about half-way through the woods when she saw the appellant walking towards them. He was wearing a red puffer jacket, red joggers and a grey or black jumper. As the appellant walked past, he grabbed her on her arm and waist. He started to touch her breasts underneath her top and she told him to get off. He pulled her off the trail towards a big log and he pushed her over. She was wearing jeans and she could not remember what happened to them. She described the appellant putting his penis into her vagina while he was standing behind her. She said it lasted for five or ten minutes, during which she was telling him to stop and to get off. He only stopped when AA managed to push him away. The appellant then ran away. BB felt scared and did not know what to do. Both she and AA were crying after the attack, and they ran out of the woods towards home. She was scared to tell anyone, although did tell her dad that evening. She indicated that she thought the appellant had grabbed AA at some point but she did not know what happened to her after that.

Preliminary hearing of 24 October 2024 and section 275 applications

[12] Counsel for the appellant tendered a plea of guilty to charge 1 of sexual assault of a young child (section 20 of the 2009 Act) on the basis that the appellant touched AA's buttocks and hips over her clothing and touched her vagina. The prosecution did not accept it.

[13] There were three applications under section 275 of the 1995 Act made in advance of the PH on 24 October 2024 (eight months prior to trial).

Crown

[14] In its application, the Crown sought to adduce evidence that the complainers had been consuming alcohol in Broughty Ferry before returning to the Alder area of Dundee by bus at about 1800 hours on 10 February 2023. It was not opposed and was granted at the PH.

Appellant

[15] The appellant lodged two applications both containing a preamble to similar effect; that the appellant maintained that there was prior contact with and arrangements to meet both complainers on 10 February 2023 to engage in sexual activity.

AA

[16] The application under section 275 concerning AA sought to elicit the following evidence:

- That AA and the appellant arranged by exchange of messages on social media to meet at the locus;
- That the purpose of their meeting was to engage in sexual activity as discussed *via* social media;
- That in discussions between AA and the appellant she had told the appellant she was 15;
- That when they met at the locus, about 20 minutes after their messaging, they kissed each other and whilst the applicant was touching her hips and buttocks over her clothing she lowered her trousers.

These were said to be the circumstances in which he had touched AA on the vagina and engaged in those parts of the alleged sexual touching that he agreed had occurred. He wished to undermine the credibility of what she had said in the JII, comprising her evidence in chief under section 271M of the 1995 Act, to the effect that she had not arranged to meet

him. He wished to question AA and BB and give evidence about these facts and that, had he known AA's age (12), he would not have agreed to meet her.

BB

[17] In the application concerning BB, the appellant sought to elicit the following evidence:

- That BB and the appellant arranged by exchange of messages on social media to meet at the locus;
- That the purpose of their meeting was to engage in sexual activity;
- That when they met at the locus, about 20 minutes after their messaging, they kissed each other and, whilst the applicant was touching her on the breasts and vagina, she lowered her trousers;
- That shortly after consensual sexual intercourse, BB ran towards the appellant and kissed him before departing.

These were said to be the circumstances in which the sexual activity with BB as libelled had occurred. He wished to undermine the credibility of what she had said in the JII, comprising her evidence in chief, to the effect that she had not arranged to meet him. He wished to elicit these facts as they were relevant to his defence of consent and would undermine the credibility and reliability of her evidence. He wished to question BB and AA and give evidence about these facts. On the third point, he averred that the complainer consented to him penetrating her vagina with his penis and he knew that she consented because they had engaged in kissing and he had touched her breasts and vagina. By lowering her trousers and indicating that she wanted to have sexual intercourse, the complainer provided a basis for the appellant's defence of consent. Her conduct after sexual intercourse showed that she was not distressed at that time.

Consideration of the section 275 applications

[18] The Advocate Depute advised the PH judge that both complainers had been interviewed about the applications. They said they had never met the appellant in person, had no personal relationship with him and had never previously engaged in sexual activity with him. The judge reports that the appellant accepted that this was correct. The complainers accepted that there had been some inconsequential social media contact between the appellant and AA, comprising streaks on Snapchat with mutual exchanges of non-sexual photographs of random items, before they met him.

[19] Counsel for the appellant could provide no further detail of what sexual activity was said to have been discussed in messages. The defence did not have any document setting out the messages. Counsel accepted that the substance of the defence would be able to be put if the parts of the applications that the judge ultimately allowed were permitted. Namely, that there had been contact and an arranged meeting as opposed to a random stranger attack. The PH predated the decision in *Daly & Keir* and the judge proceeded under the law as it was understood in Scotland at the time of the PH.

[20] The judge reasoned that counsel had accepted there was no evidential basis, beyond what the appellant would say if he gave evidence, and no message had been recovered to support the averment of an arrangement to meet for sexual activity or that AA had claimed to be 15. There was no specification of what sexual activity was contemplated or arranged. He noted that the offences libelled under charge 1 did not require an absence of consent, the complainer being 12.

[21] He allowed the first and fourth points in the application regarding AA as it allowed the substance of the defence to be put despite the absence of messages. This was necessary for the proper presentation of the defence. He considered the second and third points - that

the purpose of their meeting was to engage in sexual activity as discussed *via* social media and that AA had told the appellant she was 15 - to be irrelevant at common law and refused them.

[22] For BB, the judge was concerned at the lack of specification of what sexual activity was contemplated in point 2, assuming that it could be inferred that something sexual was intended. No message had been produced which might elucidate further. The appellant would be able to present his defence of consent. The part of the application that maintained there was an agreement by messaging to engage in sexual activity was denied by the complainer. The judge considered it irrelevant at common law, collateral and lacking an evidential basis. He refused that part of the application. He allowed the remaining parts as they were necessary for the proper presentation of the appellant's defence. Defence counsel had agreed that a partial grant to this extent was sufficient to allow the substance of the appellant's defence to be advanced.

[23] The argument in the note of appeal insofar as based on *DS* v *HMA* [2007] UKPC D1, 2007 SC (PC) 1 was not advanced at the PH. On the contrary, counsel had maintained that the application was necessary but made no reference to any caselaw. The PH judge did not consider that the evidence about the message fell within Lord Hope's and Lord Rodger's examples of statements that would not be caught by section 274. Rather, they concerned words intrinsically linked to actions.

Defence production 1 - telephone analysis report

[24] Robert Steer of Amber Forensics Limited provides services including specialist examination and reporting of digital devices and was instructed to recover material from a mobile phone belonging to the appellant: specifically, communications between the

appellant, AA and BB together with a record of any phone activity between 2200 and 2359 hours on 10 February 2023. Whilst we have not been advised of the date when the appellant received this report, it was not available at the PH but must have been available by 18 November 2024 when BB gave evidence on commission. Extracts from the report were put to BB in cross-examination, as occurred also during the cross-examination of AA on 31 March 2025. The appellant had lodged it by the time of the trial.

[25] Mr Steer found system activity that denoted the sending of Snapchat messages between an account potentially attributable to AA and the appellant between 16 January 2023 and 10 February 2023. Similarly, system activity denoted the sending of Instagram videos between an account potentially attributable to AA and the appellant between 14 January 2023 and 4 February 2023. During some of these communications, live videos were sent, while an account potentially attributable to BB also joined in with the live video sessions. It was not possible to recover the contents of either the messages sent on Snapchat or the videos sent on Instagram.

[26] A chat session had been recovered between the appellant and an account potentially attributable to AA on Instagram. The chat session was timestamped between 22:08:20 and 23:44:33 on 10 February 2023. The following exchange was recovered:

Timestamp	**Sender**	**Message**
22:08:20	Appellant	Why u block
22:08:31	AA	what
22:08:41	Appellant	U blocked me
22:08:48	AA	did i
22:08:53	Appellant	Yeah

22:09:31	Appellant	I did
22:09:47	AA	no
22:09:55	Appellant	Yeah
22:10:09	AA	i'm so drunk i'm sorry
23:10:30	Appellant	There
23:44:20	Appellant	How did I rape u [laughing face image]
23:44:33	Appellant	So much lies u Ken that urself llf

[27] Between 15 January 2023 and 8 February 2023, a series of Snapchat messages were sent between the appellant's device and an account potentially attributable to BB. One image recovered contained a photograph of a young female's face. Another image showed a female exposing her underwear with the caption "snap me" containing a love heart image. A third image showed a young female in her bra and leggings. In addition, a chat session had been recovered between the appellant and a second account potentially attributable to BB. The chat session was timestamped between 22:17:03 and 23:33:34 on 10 February 2023. The following exchange was recovered:

Timestamp	**Sender**	**Message**
22:17:03	Appellant	Are u coming yeh
22:17:15	BB	Yeah man
22:17:23	Appellant	U wanting it after or?
22:17:35	BB	Idm
22:17:42	Appellant	I'm gem
22:17:48	BB	Okay

22:18:03	Appellant	When use leaving
22:18:24	BB	Soon
22:18:53	Appellant	Okay try be quick
22:19:01	BB	Okay
23:33:34	Appellant	Why is [AA] saying I raped her llf

[28] Despite procuring this real evidence beyond that which was available before the PH judge, the appellant made no fresh section 275 application and nor did he seek to revisit the decisions taken at PH on his existing applications.

Evidence on commission

AA

[29] AA's commission was recorded on 31 March 2025. The Advocate Depute did not examine AA further, leaving only cross-examination.

[30] AA repeated her account that on the evening of 10 February 2023 she and BB took a route through the woods to get some food. When she was asked if she had arranged to meet the appellant there, she replied "not that I can remember" but then agreed with the proposition that she had not arranged to meet him. She accepted that the appellant was a contact of hers on Snapchat, but she denied contacting him on Snapchat that day. She had no exchange of messages with him although she did send a few "snaps" here and there to him to maintain her "streak".

[31] When AA was asked if she had sent some messages to the appellant from January 2023, she said that she could not remember as it was so long ago and she did not remember doing so on 10 February 2023. Defence counsel then presented the defence phone report to

her. She did not recognise the account names apparently stored on the appellant's phone (each including her own real name) said to be attributable to her for Snapchat and Instagram. She knew nothing of an exchange of messages with the appellant on 11 January 2023. On being shown entries between 16 January and 10 February 2023 relating to Snapchat, she appears to have said that she did send a few "snaps" to the appellant but could not remember the times and it was not just him she had sent them to. When asked if she remembered that she had contact with him on Instagram between 14 January and 4 February 2023, she said she did not. She recalled that she had been on a "lives" with BB but did not recall the appellant being involved. When the messages in the table at para [26] above were put to her, she said she did not recall having that conversation. As it said in the messages, she was drunk. She did not remember sending or receiving any of the messages in the report.

[32] Thereafter, it was put to AA again that she and BB had arranged to meet the appellant in the woods. She accepted that she had left BB's house at about 2210 hours but said that she could not remember anything from that night and that she did not know if she had a conversation with the appellant that night. When it was put to her that she had arranged to meet the appellant in the woods, she replied: "I can't remember anything that night, so I don't know."

[33] She was also shown production 31, a report of an examination of the appellant's phone on behalf of the Crown. She confirmed that screenshots showed that she was a contact in a chat list on 27 December 2022 and 10 February 2023. She remembered being in a group Snapchat.

[34] AA confirmed that the appellant had put his penis into her mouth, that he had put his fingers into her vagina and refuted that he had only touched her vagina. She confirmed

that she saw what happened to BB, who had told the appellant to stop. She disagreed with counsel's suggestion that what she saw occurring between the appellant and BB was consensual. There was no re-examination.

BB

[35] BB's commission was recorded on 18 November 2024. In a short examination-in-chief, she said that she had not consented to have sex with the appellant. She was adamant that she had never met him before, nor had she had any communication with him *via* social media before.

[36] In cross-examination, she denied having arranged to meet the appellant in the woods. She denied having Snapchat contact with the appellant that night, denied that he was a contact of hers on social media and denied sending him a photograph of her.

[37] Counsel put to her the messages set out at para [27] above. She denied that the accounts referenced in the report belonged to her and she denied sending the messages in the report.

[38] She denied agreeing to have sexual activity with the appellant and said that she did not know whether AA had any contact with the appellant on social media on 10 February 2023. She denied that she had run over to the appellant afterwards and kissed him. She was not happy when she left the woods and ran home crying. She agreed, with reference to what she had told the police, that AA had been active on Snapchat as they had walked through the woods before their encounter with the appellant.

[39] After the event, she was really scared, told her dad and he called the police. She was able to tell the police the appellant's name as she recognised him from school. When asked if she had seen anything sexual happening to AA, she said she had not really taken in her surroundings, she had just wanted to get away from the situation.

Further evidence at trial

Agreed facts

[40] It was agreed by joint minute that AA and BB had been referring to the appellant in their evidence. It was also established that both AA and BB underwent a physical medical examination on 11 February 2023 by the same two doctors, a Consultant Paediatrician and a Forensic Physician.

[41] AA was seen to have erythema in the vestibule of her genitalia which was consistent with, but not conclusive of, sexual abuse.

[42] BB was found to have sustained certain injuries:

(i) a laceration of the hymen (noted at 6 o'clock) and measuring 0.5 cm

(ii) erythema at 3 o'clock in the vestibule of her genitalia and measuring 0.2 cm x 0.2 cm

(iii) a bruise to the left side of her neck measuring 3.5 cm x 1.4 cm

(iv) a bruise to the left shin measuring 2 cm x 1 cm

(v) a bruise to the left shin measuring 0.5 cm x 0.5 cm.

These injuries were consistent with, but not conclusive of, sexual assault.

[43] Forensic findings were also agreed. AA's thong bore the appellant's DNA. Semen from the appellant was found on intimate swabs taken from BB, whose DNA was found on his hands.

Further witnesses

[44] BB's father spoke to receiving a phone call from her after the events in the woods. She was distraught and upset. He went to meet her at his mother's house and found both

BB and AA to be in a distressed state. BB said she had been raped and named the appellant. AA had said that "the guy" had held her by the throat, put his hands down her trousers and she just froze. BB also said she just froze.

[45] AA's mother said that AA, on returning home, was very upset, saying someone had put his penis in AA's mouth and raped BB. AA's mother said her daughter had been crying.

[46] A senior forensic scientist explained that the findings from AA's underwear could be explained if the appellant had contact with or handled her underwear, or could be explained if the appellant had pulled down her underwear and digitally penetrated her vagina. Further, the appellant's semen being recovered from BB's vaginal swabs could be explained by the appellant having had sexual intercourse with her.

[47] Two police officers spoke of their interactions with the appellant. He had attended voluntarily at a police station in Dundee on the morning of 11 February 2023 as he knew the police wished to speak to him. The appellant asked to wash his hands but was told that he was not allowed to do so because he was seen to have blood on his hands. Within the cell area, he asked several times if he could have water to clean his hands and was repeatedly told that that was not possible. When he was then given water to drink, the appellant tried to pour it on his hands to attempt to clean them, causing an officer to intervene and remove the cup from the appellant. The appellant told the officer that he was trying to wash blood from his hands resulting from a nosebleed caused by sneezing the previous night. The appellant denied in evidence that this had happened. The appellant also said that he had been with his girlfriend the evening before.

Evidence of the appellant

[48] The appellant was now 17 years old. He knew the two complainers having seen them, together, at a bus stop when he did not speak to them, about two months before the events charged. On that occasion he was with his cousin, who knew both girls. He spoke to receiving a message from AA on 11 January 2023 about a photograph he had posted of himself with his nephew.

[49] On the evening of 10 February 2023, he had been in contact with them by messaging. He was shown the defence phone report and confirmed that he had messaged BB at 2217 hours to ask if she was coming to which she had replied, "yeah man" a few seconds later. She messaged shortly afterwards saying, "Okay." He messaged BB at 2218 to ask when they were leaving to which BB had replied, "soon." He confirmed that a photograph of the face of a girl sent to him prior to 16 January 2023 was BB.

[50] The appellant said that, following his messaging with BB, he left his grandmother's home and went to the woods to meet them, which he did at about 2245 or 2250 hours. The girls were already there, and they spoke for about 5 minutes. He was then touching AA, moving his hands under her clothes on her breasts and underneath her jeans after she opened them. Nothing was said and his hand made contact with her vagina, on the outside, and this lasted about five minutes. When he asked her if sex was going to happen, she had asked if BB could go first and AA said no to sex. AA said nothing before that and had not told him to stop, he did not grab her wrist, and she had not tried to push him away. His fingers did not penetrate her vagina, and he did not penetrate her mouth with his penis.

[51] He was then touching BB sexually in the same way as he had touched AA, but he also had consensual vaginal sex with BB for 5-10 minutes. She was bent over and he was behind her. It was interrupted when AA was crying, prompting BB to check on her before

returning to him and they resumed. Nothing was said between the appellant and BB. She did not say no. He was not gripping her as she had said, his hands were on her waist and he used no force. It came to an end because AA kept crying and he told BB to take her home. He denied BB's account that AA had pulled him off BB. As he started to walk home, BB shouted his name, ran after him and kissed him and then ran away again.

[52] He then received unspecified messages on social media prompting him to message BB, "Why is AA saying I raped her?" Whilst he had gone to the police station the next day, what the police had said about him washing his hands with a cup of water they had given him to drink was not true.

[53] In cross-examination the appellant confirmed that he had never spoken to either of the complainers in person before meeting them in the woods. Having confirmed with the appellant that he had penetrated BB's vagina from behind with her being bent over, the Advocate Depute asked:

Q How did you satisfy yourself that she was consenting to that?

The appellant replied:

A Because it was confirmed over the text message that haven't been recovered.

The appellant confirmed that although it would be confirmed by text messages, it was not recovered.

[54] The questioning continued:

Q Right, okay. You would agree with me that's unfortunate.

A That's correct, yes.

Q Yes. So your position is that somewhere out there, out in the ether there's a text message where [BB] is issuing some form of consent?

A That's correct, yes.

Q How did you satisfy yourself she was consenting whilst you were in this wooded area?

A Because she never said no and she never said stop.

[55] The appellant maintained that although he had seen a message accusing him of raping AA, it had not occurred to him that the police wanted to speak to him about his encounter with AA and BB. He said he had not sought to wash his hands as police officers had testified. The police must have made this up. He accepted that he had told the police that he had been with his girlfriend on the evening of the incident in the woods and he accepted that, in saying girlfriend, he had not meant AA and BB. He had been with his girlfriend until about 2000 hours and when the police asked him where he had been it did not occur to him that it was connected to what had happened in the woods.

Speeches

Crown

[56] It is important to note that in his speech, the Advocate Depute said of the apparent exchanges of messages about meeting:

> "As far as the text messages, the Snaps, as far as these are concerned, a potential exchange of messages between parties, well, I say "so what", because whatever contact there may or may not have been between parties, I invite you to the view that neither girl were (*sic*) willing participants in the events in that wood at 10.30pm on 10th February 2023."

Accordingly, the Crown did not contest that there had been arrangements to meet by messaging.

Defence

[57] The two complainers had plainly lied about the messages and that cast doubt on any other evidence they gave. The appellant accepted touching AA's vagina and, since she was 12, she could not consent. The jury should find him guilty of charge 1 leaving an averment of touching her hips, buttocks, breasts and vagina and deletion of all other sexual conduct.

[58] So far as BB was concerned, the appellant had said there was a plan to meet up and that was supported by messaging. The appellant had said there were further messages about consent that had not been produced.

Directions

[59] The judge directed the jury that the appellant was presumed to be innocent; the burden of proof was on the prosecution, who must meet the standard of proof of beyond reasonable doubt. The prosecution case must be proved on corroborated evidence. There was no burden of proof on the appellant, who had nothing to prove. The court was not concerned with morals, and the jury must reach their verdict only on the evidence and any reasonable inferences from it. If the jury accepted the evidence of the appellant, or any evidence that showed he was not guilty on a charge, the jury must acquit.

[60] The judge reminded the jury that they had heard about messages, and seen the content of some of the messages, between the appellant and BB.

[61] The judge explained that the absence of consent was not an issue in charge 1 because AA was a child under 13. For charge 2, the Crown must prove the absence of consent but there was no live issue of reasonable belief for them to consider. He directed them:

> "As far as consent is concerned, "consent" means "free agreement": it is free agreement at the time of the sexual act that matters. Whether or not there is free agreement is for you to determine, having regard to what the parties did and said to

> each other and the evidence as a whole. Did the complainer freely agree, or was her freedom restricted in some way?
>
> There must be consent that's specific to the occasion on which the sexual activity took place. You'll understand that there's no activity which is more person- and situation-specific than sexual relations: a person doesn't consent to sex in general, but consents to this act of sex, with this person, at this time, and at this place. It is free agreement at the time of the sexual act that matters. Any person has the freedom of choice whether or not to do so."

The defence position was that the complainer had freely agreed to sex.

[62] On each charge, it was open to the jury to convict on the basis of a corroborated case comprising the evidence of the complainer, the evidence of the other complainer and circumstantial evidence about DNA, injuries, the distressed condition of each complainer as observed by another witness after the events in the woods, and what each of them said about it shortly afterwards. It was also open to the jury to convict on each charge by mutual corroboration.

[63] On charge 1, the appellant was, on his own account in evidence, guilty of sexual assault against a young child and the appellant's lawyer had invited the jury to find the appellant guilty of charge 1 to that extent: namely a sexual assault by touching.

Trial judge's report

[64] The judge explained that it was very clear, from messages adduced in the evidence, that the complainers, were not truthful in saying there was no contact between them and the appellant before the encounter in the woods.

Note of Appeal

[65] The appellant advances a single ground of appeal comprising three parts. In ground 1(a), he maintains that the PH judge erred in refusing to allow evidence that BB had agreed

to meet the appellant at the locus to engage in sexual activity. The appellant maintained that he had arranged with the complainer to meet for "sexual activity". Messages later recovered supported this. That there had been an arrangement to meet for the purpose of sexual activity must be relevant. It bore on the credibility of the evidence of BB and the issue of consent. It was relevant to whether he was guilty of the crime. It was plainly of significant probative value outweighing any risk of prejudice to the proper administration of justice and should have been admitted under section 275. Had the application been granted at the PH, the appellant would have been able to adduce evidence from the defence report as supporting his account that there was a prior arrangement to meet to engage in "sexual activity." The judge was also wrong to think that a section 275 application was required. What the complainer had communicated in her messages should be viewed simply as a statement and not behaviour: *DS* v *HM Advocate*.

[66] Ground 1(b) - the judge had erred in refusing to allow the appellant to adduce evidence that he and AA had agreed to meet to engage in "sexual activity." For the same reasons as in ground 1(a), the judge had erred.

[67] Ground 1(c) – the judge erred in disallowing the appellant from asking AA about her telling him in messages (unrecovered) immediately prior to the incident that she was 15 on the basis that this was irrelevant at common law and did not inform consent at the time of the commission of the offence. In reality, it was relevant to the appellant's belief and to the credibility and reliability of AA. The judge was wrong to consider that a section 275 application was required as the communication was to be regarded as a statement and therefore admissible.

Submissions in the appeal

Appellant

[68] No application under section 275 was necessary. The communications in messages were merely statements to the effect that the complainers were meeting the appellant to engage in sexual activity as demonstrated by certain examples identified by Lord Rodger, with whom Lord Hope agreed, in *DS*. Such statements did not constitute behaviour struck at by section 274. The judge erred in his reliance on *HM Advocate* v *JW* [2020] HCJ 11, 2020 SCCR 174 as the court was not invited to view the messages in that case as mere statements.

[69] Insofar as the judge relied on the common law as understood at the time of the trial, he should be seen to have erred: *Daly & Keir*. Further, at [132] – [138], the Supreme Court rejected the reasoning of the first instance judge (affirmed on appeal) in *JW*. It was significant that the PH judge had reported that, had he decided the case seized of the actual content of BB's messages and after *Daly & Keir* was decided, he might not have refused point 2 in the application concerning BB.

[70] That the complainers were meeting the appellant "to have sex" was relevant to the question of consent and the credibility and reliability of the evidence of both complainers. If section 274 was engaged, the provisions of section 275 were met.

[71] Whilst, by the time of the commission hearing, messages between BB and the appellant had been recovered from his phone, given the PH judge's decision there was no point in a further application under section 275. In his report, the PH judge acknowledged that the messages could be construed as an arrangement to meet for sexual purposes.

[72] Although no messages were recovered, the appellant should have been allowed to adduce evidence of his memory of his exchange with AA, also to the effect that they were meeting for sexual purposes. The PH judge had erred in refusing to admit his evidence that

she had falsely messaged him that she was 15 years old as it was relevant to the credibility and reliability of her evidence generally and of significant probative value. In any event, it was truly a statement, and no section 275 application was necessary.

[73] In all the circumstances, there had been a miscarriage of justice. The appellant had been prevented from presenting a full answer and defence to the charges against him. He was unable to lead evidence necessary to support his defence of consent and to undermine the credibility of the complainers. Since consent was a critical issue at trial, an essential question was the complainers' states of mind at the time of the events in question. To challenge their accounts, the appellant ought to have been able to challenge the complainers' states of mind under reference to their behaviour shortly before the incident. Had the jury been given the opportunity to consider evidence of the prior arrangement to meet for sexual activity, it would have had a significant impact on their deliberations.

[74] In the hearing, the solicitor advocate for the appellant explained that the appellant's position was that no particular sexual activity was specified, and she maintained that the appellant was not required to provide further details. Even though the jury heard evidence from the appellant that there was an arrangement to meet for sex, it was a miscarriage of justice that the jury did not see BB's messages.

[75] She submitted that the Advocate Depute, knowing the content of defence production 1, was unfair in challenging the appellant in cross-examination (see paras [53] and [54] above) about his knowledge from a message that BB was consenting when the Depute knew the content of defence production 1.

[76] It had to be accepted that, since AA was 12 and the absence of consent was not an ingredient of the offences under sections 18, 19 (and 20) of the 2009 Act, the appellant should have been convicted on charge 1. Given the appellant's admissions in evidence, and the

invitation by his solicitor advocate that the jury should convict of charge 1, subject to deletions, should the appeal succeed, the court should substitute a conviction under section 20, limited to the sexual touching admitted by the appellant.

The Crown

[77] The Advocate Depute in written submissions provided a summary of the evidence that the solicitor advocate for the appellant accepted was accurate (paras [40] to [47] above). He founded on the examples given by Lord Rodger in his opinion in *DS* at [76] and [77]. His Lordship was only giving examples. He was not setting out the only situations where making statements would constitute behaviour for the purposes of section 274. The PH judge had plainly understood this. Sending such messages, even if construed as making statements, was sexual behaviour under section 274(1)(b).

[78] Since there was nothing in the note of appeal suggesting that the PH judge's decision was incompatible with Article 6, that issue was not properly before the court. Where a compatibility issue is raised for the first time on appeal, it must be stated in a note of appeal unless the court, on cause shown, otherwise directs: Act of Adjournal (Criminal Procedure Rules) 1996 Rule 40.2(4) and Rule 40.6(1). The note of appeal did not raise a compatibility issue. It was not sufficient to show that the PH judge erred, the appellant must show that there had been a miscarriage of justice. Whilst any such error may raise a risk of a miscarriage of justice (or unfair trial), the proceedings must be considered as a whole in making the necessary evaluation. The question for the court was whether there had been a miscarriage of justice.

[79] On charge 1, the live issue now was whether the appellant had penetrated AA's vagina with his fingers or merely touched it. Any arrangement to meet for any purpose

could have no bearing on that issue and no probative value. Even if AA had said she was 15, it would have had no bearing on the issues on charge 1. The appellant had been permitted to say that she had arranged to meet him at the locus and to articulate his partial defence on charge 1. Since the appellant had challenged AA's credibility by putting to her messages apt to show that they had arranged to meet, there could be no miscarriage of justice.

[80] On charge 2, the judge had been correct to refuse the application as there was no foundation for the application in the absence of recovered messages, and the appellant did not specify the sexual activity that he maintained was arranged or even that it was sexual activity that was being arranged. Consent could not be given in advance and, even post *Daly & Keir*, there was no connection between the message and the activity that followed. This was different to the position in *JW* on which the Supreme Court made adverse comment.

[81] In evaluating whether there was a miscarriage of justice, it was important to note that messages were put to BB at her commission supporting the appellant's position that they had met by arrangement. This constituted a strong attack on the credibility of her evidence. It was important to note that the appellant gave evidence denying charge 2 and that he had testified that he knew BB was consenting because, "that was confirmed over messages that haven't been recovered."

[82] There was considerable strength in the evidence against the appellant coming from multiple sources. The appellant had been able to cross-examine the complainers and lead exculpatory evidence. The trial process protected his right to challenge the complainers' evidence effectively: *Daly & Keir* at [185] and [191].

Decision

[83] So far as AA is concerned, since consent was not a defence to charge 1, evidence from the appellant that there was an arrangement to meet for sexual activity lacked cogency on the question of what sexual activity occurred. It was relevant to the credibility of her account, and that of the appellant, if there was an arrangement between them to meet and the PH judge allowed those parts of the section 275 application. Since she was 12 years old and a young child under the 2009 Act, evidence to the effect that she had told the appellant that she was 15 was of very limited probative value. It would sidetrack the jury onto consideration of a peripheral issue and would properly be refused under section 275(1)(b) and (c).

[84] The dispute involving AA was relatively narrow in scope. There was no issue of consent or its absence on charge 1. The appellant accepted some criminal responsibility for sexually touching her and invited conviction on that limited basis. AA maintained that the appellant digitally penetrated her vagina and orally raped her. The jury convicted him of sexual touching and penetration but acquitted him of rape.

[85] We deduce that the jury concluded that AA was not truthful in suggesting that her encounter with the appellant arose by chance and that they were therefore cautious in accepting her evidence unless specifically supported by another source of evidence they were prepared to accept for the purpose. The erythema to her vagina and DNA findings in her underwear could support penetration of her vagina, but the appellant's account of mere touching would be unlikely to account for the injury to her vagina. There was no DNA or evidence of injury to support penile penetration of her mouth, BB did not speak to it, and the jury deleted it from their guilty verdict.

[86] In light of the whole evidence, including that of the appellant, and where the narrow issue before the jury related only to the extent of his admittedly criminal conduct, and the jury found in his favour on the most serious part of charge 1, we are not persuaded that there was a miscarriage of justice on charge 1 (or that the trial was unfair.)

[87] Turning to charge 2 and BB, we note that section 263 of the 1995 Act provides:

> "(4) In a trial, a witness may be examined as to whether he has on any specified occasion made a statement on any matter pertinent to the issue at the trial different from the evidence given by him in the trial; and evidence may be led in the trial to prove that the witness made the different statement on the occasion specified."

[88] If the purpose of adducing evidence is that a witness such as BB made a statement different to her evidence and pertinent to an issue in the case, it is permitted under the 1995 Act section 263(4) and section 274 would not prevent its use for that purpose. It could properly be put in cross-examination and a witness, in this case the appellant, could give evidence that the statement was made. It may constitute an effective challenge to the credibility and/or reliability of the witness's testimony. This can be seen in Lord Hope's example at [46] in *DS*.

[89] Beyond that, as Lord Rodger recognised in *DS*, statements made by a complainer at a time separate from the event giving rise to the charge may constitute behaviour for the purposes of section 274. He gave the following examples at [77]:

> "This is not, of course, to say that making a statement can never form part of some relevant sexual or other behaviour by a complainer which would be covered by sec 274(1)(b) or (c). Lord Marnoch gave the example of a complainer making a statement in a bout of shouting or screaming or in the course of verbal abuse of one sort or another. Again, it takes no great powers of imagination to conjure up statements which a complainer might make in the course of flirtatious or seductive conduct and which would constitute, or form part of, some 'sexual behaviour' in terms of sec 274(1)(b). Equally, making a statement in order to make someone jealous could constitute 'other behaviour' in terms of sec 274(1)."

[90] If, as the appellant contends, in responding to his message, "U wanting it after or?", the complainer's response, "Idm," and the following exchange of messages that the appellant was "game" and the complainer responded "Okay", mean that she was signalling that she would consent to some form of sexual activity with him on their meeting, it constitutes sexual behaviour. The PH judge was correct about that, and we reject counsel's argument to the contrary. It was not the subject matter of the charge which related to events in the woods.

[91] If the PH judge proceeded on the basis that there was no evidential foundation for there having been an arrangement to meet for some form of sexual activity, then he erred. Even in the absence of messages having been recovered, the appellant was able to supply an evidential basis to back up the proposed line of questioning: *Falconer* v *Brown* 1893 21 R (J) 1, the Lord Justice Clerk (Macdonald), at page 4; *RN* v *HM Advocate* [2020] HCJAC 3, 2020 JC 132 [21].

[92] The PH judge considered, based on the decision in *JW*, that since valid consent to sexual activity cannot be given materially in advance of its occurrence, such evidence was irrelevant at common law, as explained by the majority in *CJM* v *HM Advocate* [2013] HCJAC 22, 2013 SLT 380. In *Daly & Keir* the court doubted the soundness of decisions to that effect in *JW* and *Thomson* v *HM Advocate*, unreported, 13 December 2019. In *JW*, the complainer had messaged the appellant some days in advance of their encounter, in which she maintained she was anally raped, to the effect that she had a high sex drive and enjoyed anal sex. In *Thomson*, the complainer had expressed her willingness to have anal sex with the appellant 24 hours before she said he anally raped her.

[93] Given the communication in this case was said to have been made about 20 minutes prior to the act of penetration founding the allegation of rape in charge 2, and also where he

accepted that it was a relevant question whether parties had met by arrangement or otherwise, we consider that the judge erred in declining to admit the second part of the section 275 application for BB on the law as it was understood at the time of the PH. It was relevant and it had some probative value that was not outweighed by "proper administration of justice" considerations. The position is no less clear following *Daly & Keir*. The questioning and evidence should have been allowed under section 275.

[94] The question then arises what effect it had when considered in light of the totality of the evidence and the whole circumstances of the trial. The messages, if they could be interpreted as an indication of future agreement to some sexual activity, could relate to any sexual activity. This was a girl of 13 who may have had some romantic interest in the appellant, but it would be something of a leap to conclude that she had in mind what actually happened to her. On her account, which the jury accepted, he seized her by the body, pulled down her lower clothing, pushed her on the body and penetrated her vagina with his penis from behind. The forensic findings showed that he ejaculated internally, suggesting he wore no protection.

[95] It is plain that the defence had the extract of the message by the time of the commission hearing but there was no further section 275 application. This is not a case where the appellant's advisers had considered the law was against him such that there was no point in making a section 275 application. He had made one in respect of BB and the judge allowed most of it, as he did with the appellant's application concerning AA.

[96] It is clear from the approach taken by the Advocate Depute in his speech, and from the trial judge's reporting, that the jury plainly knew that the meeting was arranged in advance, that the jury accepted the appellant's evidence to that effect and rejected evidence to contrary effect from the complainers. The crucial messages may have suggested that BB

had expressed willingness to engage in some sexual activity, but they did not clarify what it was. The only person who could do that was the appellant. Whilst the solicitor advocate for the appellant told us in the appeal that the appellant did not know what precisely he and the complainer had "agreed" to, we note that, despite the PH judge's decision on the section 275 application, the appellant testified that he knew from unrecovered messages that the complainer was consenting to sexual intercourse.

[97] Exercising what may be seen, in light of *Daly & Keir*, to have been a wise discretion, the trial judge did not direct the jury to ignore that comment. He did not add to his directions on consent by pointing out that consent cannot be given materially in advance: *GW* v *HM Advocate* [2019] HCJAC 23, 2019 JC 109. He simply left the appellant's comments before the jury. They sat alongside:

- his written direction at the start of the trial that if the jury believed any evidence that exculpated the appellant they must acquit;

and his closing directions that:

- if the special defence of consent was believed or left the jury in reasonable doubt of the appellant's guilt, they must acquit him; and
- "if you accept any piece of evidence, from wherever it comes, that shows the accused is not guilty, then you would acquit on that charge; even if you do not fully accept that evidence but it raises a reasonable doubt in relation to that charge, you would acquit."

Had the content of the messages featured in the trial, the position for the appellant would have been weaker than his own evidence.

[98] Whilst the submission for the appellant we have summarised at para [75] above did not feature in the note of appeal or written argument, we have considered it in evaluating whether there was a miscarriage of justice (or unfair trial.) Although at the appeal the solicitor advocate for the appellant, who did not conduct the trial, maintained that the

appellant had been referring in evidence to the recovered messages in the report, we are unconvinced that she is correct. We note that the appellant's evidence was that it was unrecovered messages (plural) that would demonstrate that he knew that BB was consenting to sexual intercourse with him in the circumstances in which it transpired in the woods. We consider that both the appellant and Advocate Depute understood that he was not speaking about the exchange of four messages in the defence report. He was articulating his position that there had been other messages between him and BB that were not recovered. We are not persuaded that there was any unfairness in that regard. Further, the jury heard the appellant's evidence without any adverse direction from the judge as to its status. As we have noted above, his evidence was substantially stronger than the content of the recovered messages exchanged between him and BB.

[99] In considering whether there has been a miscarriage of justice, we note also that both complainers disclosed shortly afterwards to other witnesses what had happened and both were observed to be in a distressed condition. There was forensic evidence supporting parts of both AA's and BB's account and some evidence of injury on both of them. The appellant had lied by telling the police he had had been with his girlfriend at the material time. His attempts to wipe and wash blood from his hands in police custody, and his accusation that the police officers who spoke to his actions were lying, were materially incriminating items of evidence. Each complainer gave at least some direct evidence supporting the account of the other. It was also open to the jury to find mutual corroboration.

[100] Accordingly, there was no miscarriage of justice and the appeal is refused.

[101] Had the issue of Article 6 fairness been properly before us, we would have rejected any proposition that the trial was unfair. We do not consider that, had the PH judge allowed evidence of the exchange of text messages between the appellant and BB there would, in the

circumstances of the trial as they unfolded, have been a real possibility that the jury would have arrived at a different verdict.